STATE OF MADRAS

v.

A. HABIBUR REHMAN SONS

(With Connected Appeals)

August 30, 1967

[K. N. WANCHOO, C.J., R. S. BACHAWAT, V. RAMASWAMI, [G. K. MITTER AND K. S. HEGDE, JJ.]

Constitution of India, 1950, *Art.* 286(1)(*a*), *Explanation, before amendment by the Constitution (Sixth Amendment) Act*, 1956; *Madras General Sales Tax Act* (9 *of* 1939) *s.* 2(*h*),*Explanation* (2); *and Sales Tax Laws Validation Act* (7 *of* 1956), *s.* 2—*Ban on taxation of inter-State Sales lifted—Outside sales, if could be taxed.*

Under Explanation (2) to s. 2(h) of the Madras General Sales Tax Act, 1939, a sale is deemed to have taken place in that State, wherever the contract of sale might have been made, if the goods were actually in the State at the time when the contract in respect thereof was made. The Constitution, by Art. 286 as it was originally enacted, imposed four bans upon the legislative power of the States to impose sales tax. Clause (1)(a) prohibited every State from imposing or authorising the imposition of, a tax on *outside sales*. An *outside sale* was defined by defining an inside sale in the Explanation to the clause, as a sale which shall be deemd to have taken place in the State in which the goods have actually been delivered as a direct result of such sale for the purpose of consumption in that State notwithstanding the fact that under the general law relating to sale of goods the property in the goods has by reason of such sale passed in another State. Clause (1)(b) prohibited the imposition of tax on sales in the course of import into or export out of, the territory of India. Clause (2) prohibited the imposition of tax on the sale of goods where such sale took place in the course of inter-State trade or commerce unless Parliament otherwise provided. Clause (3) prohibited the State from imposing or authorising the imposition of a tax on the sale of any goods declared by Parliament by law to be essential for the life of the community, unless the legislation was reserved for the consideration of the President and had received his assent. This Court, in its judgment in *the Bengal Immunity Co. Ltd. Case*, [1955] 2 S.C.R. 603 delivered on September 6, 1955, held that because of Art. 286(2), the State legislature could not impose sales-tax on inter-State sales until Parliament provided otherwise. By the Sales Tax Laws Validation Act, 1956, Parliament removed the ban contained in Art. 286(2) retrospectively, during the period between April 1, 1951, and September 6, 1955, with the result that, transactions of sale, even though they were inter-State sales, could, for that period be lawfully charged to tax. [386C—E; 387D, F—H; 388A—D]

The respondent was a beedi manufacturer in the appellant-State. Beedies, which were within the territory of the appellant-State at the time the contract of sale in respect of them was made were sold to non-resident buyers. On the question whether the sales during the period from April 1, 1955 to September 5, 1955 were taxable by virtue of Explanation 2 to s. 2(h) of the Madras General Sales Tax Act, 1939, in view of the lifting of the ban on the levy of tax on inter-State sales by the Sales Tax Laws Validation Act. the High Court relying on additional affidavits filed before it, held

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that the sales were *outside sales* and that the State had no jurisdiction to impose sales tax. A

In appeal by the State;

Held: (1) The restrictions imposed by the several clauses of Art. 286 as it stood were cumulative, and the legislative power of the State to tax sale or purchase transactions could be exercised only if it was not hit by any of those limitations. The Validation Act merely lifted the ban under Art. 286(2) but the ban imposed by Art. 286(1)(a) was still effective, and could not be removed by any legislation of Parliament. Thus, even if the ban under Art. 286 (2) was removed by the Validation Act, no State could tax an inter-State sale or purchase which took place *outside* its territorial limits. The sales falling within the Explanation to Art. 286(1)(a) were fictionally to be regarded as inside the State in which the goods were actually delivered for consumption and so within the taxing power of that State and as being outside all other States and so, exempt from sales-tax by those other States. Therefore, in the present case, even though the sales fell within Explanation (2) to s. 2(h) of the Madras General Sales Tax Act, it was beyond the competence of the Madras State to tax them as the assessee had delivered the goods for consumption outside the State and were thus *outside sales* covered by the ban imposed by Art. 286(1)(a). [390E—H] B C

Observations at p. 1082 in *State of Bombay* v. *United Motors, (India) Ltd.*, [1953] S.C.R. 1069, *The Bengal Immunity Co. Ltd.* v. *State of Bihar and Ors.*, [1955] 2 S.C.R. 603, *Shree Bajrang Jute Mills* v. *State of Andhra Pradesh*, [1964] 6 S.C.R. 691 and *Singareni Collieries Co. Ltd.* v. *State of Andhra Pradesh*, [1966] 2 S.C.R. 190, followed. D

Messrs. Ashok Leyland Co. Ltd. v. *The State of Madras* [1962] 1 S.C.R. 607, explained.

(2) The appellant-State, not having raised any objection before the High Court that the High Court, in exercising the revisional powers under s. 38 of the Madras General Sales Tax Act could not take the affidavits in evidence could not urge in this Court that the High Court acted illegaly in taking them in evidence. [392E] E

CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 495, 539 and 540, 684, 694, 717 and 857 of 1966.

Appeals by special leave from the judgment and orders dated September 23, 1963, April 29, 1963, July 29, 1964, March 13, 1964, June 22, 1964 and June 24, 1964 of the Madras High Court in Tax Cases Nos. 246 of 1962 (Revision No. 96) 202 and 203 of 1961, 67 of 1963 (Appeal No. 6), 43 of 1964 (Revision No. 17), 12 of 1963 (Appeal No. 2) and 112 of 1964 (Revision No. 64) respectively. F

G. Ramanujam and *A. V. Rangam*, for the appellants (in all the appeals). G

T. A. Ramachandran, for respondent (in C.A. No. 495 of 1966).

M. S. K. Sastri and *M. S. Narasimhan*, for respondent (in C. As. Nos. 539 and 540 of 1966). H

A. N. Sinha, and *D. N. Gupta*, for respondent (in C. A. No. 684 of 1966).

A *Kartar Singh Suri* and *E. C. Agrawala*, for the respondent (in C.A. No. 694 of 1966).

Avad Behari, for respondent (in C.A. No. 717 of 1966).

G. N. Dikshit, for respondent (in C.A. No. 857 of 1966).

Civil Appeal No. 495 *of* 1966

B The Judgment of the Court was delivered by

Ramaswami, J. This appeal is brought, by special leave, from the judgment of the Madras High Court dated September 23, 1963, in Tax Case No. 246 of 1962.

The respondent who was a Beedi manufacturer in Gudiyattam, Madras State was assessed to sales tax on a taxable turnover of Rs. 1,73,502/11/10 for the assessment year 1955-56 by C the Deputy Commercial Tax Officer. Against this order of assessment dated February 15, 1957 the respondent appealed to the Appellate Assistant Commissioner of Commercial Taxes, Salem disputing the inclusion of a sum of Rs. 1,11,299/- and odd on the ground that the said amount represented either second purchases or purchases made outside the State of Madras. Pending the appeal the Madras General Sales Tax Act, 1959 was passed and the D earlier Act of 1939 was repealed and by force of the provisions in the 1959 Act, the appeal was finally disposed of by the Appellate Assistant Commissioner of Commercial Taxes, Salem. By his order dated July 2, 1960, the Appellate Assistant Commissioner held that the excise duty paid by the respondent could not form part of his purchase turnover but in purported exercise of his powers under the new Act enhanced the assessment of the turnover by E including a sum of Rs. 1,15,406/14/9 as inter-State purchases from April 1, 1955 to September 5, 1955. The respondent took the matter in further appeal to the Sales Tax Appellate Tribunal. The appellant also filed petitions before the Tribunal for enhancement of the assessment by Rs. 3,66,213/12/- on the ground that the amount represented sales of manufactured beedies to non-resident buyers during the period May 12, 1955 to September 5, 1955 and F that the goods in question were within the territory of the State at the time the contract of sale in respect thereof was made. It was contended on behalf of the appellant that the sales were taxable by virtue of Explanation (2) to s. 2(h) of the Madras General Sales Tax Act, 1939 in view of the lifting of the ban on the levy of tax on inter-State sales by the Sales Tax Laws Validation Act, 1956 (Central Act VII of 1956), here- G inafter called the 'Validation Act', and that it was wrongly excluded from the taxable turnover by the taxing authorities. By its order dated July 13, 1962 the Appellate Tribunal allowed the petition for enhancement and rejected the contention of the respondent that the sales were agency sales through Commission Agents. As regards the alleged second purchases or outside purchases H of raw tobacco, the Appellate Tribunal remanded the case to the Appellate Assistant Commissioner. Against the order of the Appellate Tribunal the respondent filed a petition in the High Court of

Madras under s. 38 of the Madras General Sales Tax Act, 1959. By its order dated September 23, 1963 the High Court held: (1) that the inclusion of the inter-State purchases from April 1, 1955 to September 5, 1955 of Rs. 1,15,406/14/9 was bad as the Appellate Assistant Commissioner had no jurisdiction to include that turnover; (2) that the turnover of Rs. 3,66,213/12/- included by the Appellate Tribunal could not be brought to tax as the beedies, which were the subject of the relevant sales, were delivered outside the State for purposes of consumption and as the sales therefore constituted Explanation sales under Art. 286(1) of the Constitution as it stood prior to the Sixth Amendment and consequently the Madras State had no jurisdiction to tax the said sales. Being aggrieved by that part of the decision of the Madras High Court on the question of taxability of the said transactions of inter-State sales effected prior to September 6, 1955, the State of Madras has brought the present appeal.

The question presented for consideration in this appeal is whether the Madras State had jurisdiction to levy sales tax on the alleged "Explanation sales" by the respondent during the period between April 1, 1955 to September 5, 1955 by virtue of Explanation (2) to s. 2(h) of the Madras General Sales Tax Act, 1939.

Section 2(h) of the Madras General Sales Tax Act, 1939 states:

> "2. In this Act, unless there is anything repugnant in the subject or context—
> (h) 'sale' with all its grammatical variations and cognate expressions means every transfer of the 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 inolved in the execution of a works contract, and in the supply or distribution of goods by a co-operative society, club, firm or any association to its members for cash or for deferred payment or other valuable consideration but does not include a mortgage, hypothecation, charge or pledge;
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> . . . . . .
>
> *Explanation* (2)—The sale or purchase of any goods shall be deemed, for the purposes of this Act, to have taken place in this State, wherever the contract of sale or purchase might have been made—
> (a) if the goods were actually in this State at the time when the contract of sale or purchase in respect thereof was made, or
> (b) in case the contract was for the sale or purchase of future goods by description, then, if the goods are actually produced in this State at any time after the contract of sale or purchase in respect thereof was made.
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> . . . . . .

A Section 3 which is the charging section provides as follows:

"Subject to the provisions of this Act,—

(a) every dealer shall pay for each year a tax on his total turnover for such year; and

B (b) the tax shall be calculated at the rate of three pies for every rupee in such turnover:

Provided that if and to the extent to which such turnover relates to articles of food or drink or both sold in a hotel, boarding house, restaurant, stall or any other place, the tax shall be calculated at the rate of four and a half pies for every rupee, if the turnover relating to those articles is not less than twenty-five thousand rupees.".

Under the Government of India Act, 1935, it was open to every Provincial Legislature to enact legislation authorising the levy of tax on sale of goods in respect of transactions whether within or outside the Province, provided the Province had a territorial D nexus with one or more elements constituting the sale. This resulted in levy of sales tax by many Provinces in respect of the same transaction—each Province fixing upon one or more elements constituting the sale with which it had a territorial nexus. The Constitution with a view to prevent imposition of manifold taxes on the same transaction of sale, imposed by Art. 286 restrictions on the levy of sale and purchase taxes on certain classes of transactions. E Article 286, as it was originally enacted, read as follows:

"(1) No law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place—

(a) outside the State; or

F (b) in the course of the import of the goods into, or export of the goods out of, the territory of India.

Explanation.—For the purposes of sub-clause (a), a sale or purchase shall be deemed to have taken place in the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose G of consumption in that State, notwithstanding the fact that under the general law relating to sale of goods the property in the goods has by reason of such sale or purchase passed in another State.

(2) Except in so far as Parliament may by law otherwise provide, no law of a State shall impose, or authorise H the imposition of, a tax on the sale or purchase of any goods where such sale or purchase takes place in the course of inter-State trade or commerce:

Provided that the President may by order direct that any tax on the sale or purchase of goods which was being lawfully levied by the Government of any State immediately before the commencement of this Constitution shall, notwithstanding that the imposition of such tax is contrary to the provisions of this clause, continue to be levied until the thirty-first day of March, 1951.

(3) No law made by the Legislature of a State imposing, or authorising the imposition of, a tax on the sale or purchase of any such goods as have been declared by Parliament by law to be essential for the life of the community shall have effect unless it has been reserved for the consideration of the President and has received his assent.".

Article 286 thus imposed four bans upon legislative power of the States. Clause (1) prohibited every State from imposing or authorising the imposition of, a tax on outside sales and on sales in the course of import into or export outside the territory of India. By cl. (2) the State was prohibited from imposing tax on the sale of goods where such sale took place in the course of inter-State trade or commerce. But the ban could be removed by the legislation made by the Parliament. By cl. (3) the Legislature of a State was incompetent to impose or authorise imposition of a tax on the sale or purchase of any goods declared by the Parliament by law to be essential for the life of the community, unless the legislation was reserved for the consideration of the President and had received his assent.

In *The Bengal Immunity Co. Ltd.*, v. *The State of Bihar and Others*(1), it was held by this Court that the operative provisions of the several parts of Art. 286, namely cl. (1)(a), cl. (1)(b), cl. (2) and cl. (3), are intended to deal with different topics and one cannot be projected or read into another, and therefore the Explanation in cl. (1)(a) cannot legitimately be extended to cl. (2) either as an exception or as a proviso thereto or read as curtailing or limiting the ambit of cl. (2). It was further held that until the Parliament by law made in exercise of the powers vested in it by cl. (2) of Art. 286 provides otherwise, no State may impose or authorise the imposition of any tax on sales or purchases of goods when such sales or purchases take place in the course of inter-State trade or commerce, and therefore the State Legislature could not charge inter-State sales or purchases until the Parliament had otherwise provided. The judgment of this Court in *The Bengal Immunity Company's*(1) case was delivered on September 6, 1955. The President then issued the Sales Tax Laws Validation Ordinance, 1956, on January 30, 1956, the provisions of which were later embodied in the Sales Tax Laws Validation Act, 1956. Section 2 of this Act provided:

(1) [1955] 2 S.C.R. 603.

A "Validation of State laws imposing, or authorising the imposition of, taxes on sale or purchase of goods in the course of inter-State trade or commerce.—Nothwithstanding any judgment, decree or order of any Court, no law of a State imposing, or authorising the imposition of, a tax on the sale or purchase of any goods where such sale or
B purchase took place in the course of inter-State trade or commerce during the period between the 1st day of April 1951, and the 6th day of September, 1955, shall be deemed to be invalid or ever to have been invalid merely by reason of the fact that such sale or purchase took place in the course of inter-State trade or commerce; and all such taxes levied or collected or purport-
C ing to have been levied or collected during the aforesaid period shall be deemed always to have been validly levied or collected in accordance with law .....".

By this Act therefore the Parliament removed the ban contained in Art. 286(2) of the Constitution retrospectively but limited only to the period between April 1, 1951 and September 6, 1955. All
D transactions of sale, even though they were inter-State sales could for that period be lawfully charged to tax.

On behalf of the appellant the argument was put forward that the Validation Act having lifted the ban on taxation of inter-State sales, the transactions of the respondent for the period from April 1, 1955 to September 5, 1955 were assessable to tax under
E the provisions of the Madras General Sales Tax Act, 1939 operating on its own terms. Counsel for the appellant particularly based his argument on the second Explanation to s.2(h) of that Act and the decision of this Court in *Messrs Ashok Leyland Ltd.* v. *The State of Madras*(1). In our opinion, the argument put forward on behalf of the appellant is not warranted. The decision of this Court in *Ashok Leyland's*(1) case has no bearing on the question
F presented for determination in this case. The reason is that in that case the deliveries of motor vehicles were inside the Madras State and the inter-State sales in question were not "Explanation Sales" falling within Art. 286(1)(a). It is a well-settled proposition that the operative provisions of the several parts of Art. 286. namely cl. 1(a), cl. 1(b), cl. (2) and cl. (3), are intended to deal with different topics and one cannot be projected or read into
G another, and therefore the Explanation in cl. (1)(a) cannot legitimately be extended to cl. (2) either as an exception or as a proviso thereto or read as curtailing or limiting the ambit of cl. (2). In other words, the legislative authority of the States to impose taxes on sales and purchases was restricted by four limitations—in respect of sales or purchases outside the State, in respect of sales or
H purchases in the course of imports into or exports out of India, in respect of sales or purchases which take place in the course of

(1) [1962] 1 S.C.R. 607.

inter-State trade or commerce and in respect of sales and purchases of goods declared by Parliament to be essential for the life of the community. These limitations overlap to some extent, but the legislative power of the State to tax sale or purchase transactions may be exercised only if it is not hit by any of the limitations. The restrictions imposed by Art. 286 are cumulative. It follows therefore that even if the ban under Art. 286(2) is lifted by Parliament by the enactment of the Validation Act, the Madras State cannot still tax inter-State sales or purchases which take place outside its territorial limits because of the ban under Art. 286(1)(a) of the Constitution. What is an "outside sale" is defined by the Constitution by the explanation to Art. 286(1) which states what should be deemed to be an 'inside sale'. As provided by the Explanation to Art. 286(1), a sale or purchase shall be deemed to have taken place in the State in which the goods have actually been delivered as a direct result of the sale notwithstanding the fact that under the general law relating to sale of goods the property in the goods has, by reason of such sale or purchase, passed in another State. The legal position was stated by this Court in *The State of Bombay* v. *The United Motors (India) Ltd.*(1) as follows:

> "It provides by means of a legal fiction that the State in which the goods sold or purchased are actually delivered for consumption therein is the State in which the sale or purchase is to be considered to have taken place, notwithstanding the property in such goods passed in another State. Why an 'outside' sale or purchase is explained by defining what is an inside sale, and why actual delivery and consumption in the State are made the determining factors in locating a sale or purchase will presently appear. The test of sufficient territorial nexus was thus replaced by a simpler and more easily workable test: Are the goods actually delivered in the taxing State, as a direct result of a sale or purchase, for the purpose of consumption therein? Then, such sale or purchase shall be deemed to have taken place in that State and outside all other States. The latter States are prohibited from taxing the sale or purchase; the former alone is left free to do so. Multiple taxation of the same transaction by different States is also thus avoided."

This observation was not in any way dissented from by the judgment of this Court in the later case—*The Bengal Immunity Company's*(2) case. The result therefore is that if the terms of the Explanation are satisfied such sales are by a fiction deemed to be 'inside' the State of delivery-*cum*-consumption and therefore 'outside' all other States. In such cases therefore only the State 'inside' which the sale is deemed to take place by virtue of the

(1) [1953] S.C.R. 1069, 1082. (2) [1955] 2 S.C.R. 603.

A Explanation is exempt from the ban imposed by Art. 286(1)(a); all other States would be subject to that ban in respect of such sales. This principle underlies the decision of this Court in *Shree Bajrang Jute Mills Ltd.* v. *State of Andhra Pradesh*(1). In that case, the appellant, carrying on business as a manufacturer of jute goods with its factory at Guntur, used to send jute bags by railway to B the cement factories of the A.C.C. outside the State of Andhra. For securing a regular supply of jute bags, the A.C.C. entered into a contract with the appellant and under the despatch instructions from that company, the appellant loaded the goods in the railway wagons, obtained railway receipts in the name of the A.C.C. as consignee and against payment of the price, delivered the receipts to the Krishna Cement Works, Tadepalli, which was for C the purpose of receiving the railway receipt and making payment, the agent of the A.C.C. From the amounts shown as gross turnover in the return for the assessment year 1954-55, the appellant claimed reduction of certain amounts in respect of the goods supplied by rail to the A.C.C. outside the State of Andhra Pradesh under its despatch instructions. The Commercial Tax Officer and the Deputy Commissioner of Commercial Taxes disallowed the D claim and held that as the railway receipts were delivered to the agent of the buyer within the State of Andhra, and price was also realized from the agent of the buyer within the State, goods must be deemed to have been delivered to the buyer in the State of Andhra Pradesh, and the appellant was liable to pay tax on the sales. The question for determination in this Court was whether the sales by the appellant to the A.C.C. may be regarded as 'non-E Explanation sales', *i.e.*, falling outside the Explanation to Art. 286(1). It was held by this Court that if the goods were delivered pursuant to the contracts of sale outside the State of Andhra for the purpose of consumption in the State into which the goods were delivered, the State of Andhra could have no right to tax those sales by virtue of the restriction imposed by Art. 286(1)(a) read with the Explanation. To attract the Explanation, the goods F had to be actually delivered as a direct result of the sale, for the purpose of consumption in the State in which they were delivered. The expression 'actually delivered' in the context in which it occurs, can only mean physical delivery of the goods, or such action as puts the goods in the possession of the purchaser and it does not contemplate mere symbolical or notional delivery. It was accordingly held that the State of Andhra had no authority to levy tax G in respect of these sale transactions in which the goods were sent under railway receipts to places outside the State of Andhra and actually delivered for the purpose of consumption in those States. The same view was reiterated by this Court in *Singareni Collieries Co. Ltd.* v. *State of Andhra Pradesh*(2). In that case, the appellant company carried on the business of mining coal from its collieries H and supplying it to consumers both within and outside the State.

(1) [1964] 6 S.C.R. 691. (2) [1966] 2 S.C.R. 190.

In proceedings for assessment to Sales tax, the company claimed that it was not liable to pay sales tax under the Hyderabad General Sales Tax Act, 1950, on the price of coal supplied to allottees outside the taxing State pursuant to the directions of the Coal Commissioner issued under the Colliery Control Order, 1945. This claim was rejected by the Sales Tax Officer on the ground that the coal in question was sold F.O.R. colliery siding and was actually delivered to the consumers within the State when it was loaded on their account in railway wagons at the colliery siding. The appeals against that decision to the appellate authorities as well as to the High Court were dismissed. It was decided by this Court that so far as the period between April 1, 1954 and September 6, 1955 was concerned, sales of coal for delivery to consumers outside the State could not be taxed under the Hyderabad Act because they were covered by the explanation to Art. 286(1)(a) as it stood before amendment. It was held that the Explanation defines the State in which the goods have actually been delivered for consumption, as the State in which for the purpose of cl.(1)(a) of Art. 286 the sale shall be deemed to have taken place, and that State alone in which the sale is deemed to take place has the power to tax the sale, and for this purpose it is immaterial that property in the goods has under the general law relating to sale of goods passed in another State in which the allottee resided or carried on business.

The legal position therefore is that the Validation Act merely lifted the ban under Art. 286(2) of the Constitution on the State's power to legislate but the ban imposed by Art. 286(1)(a) of the Constitution was still effective and could not be removed by legislation of Parliament. In other words, even if the ban under Art. 286(2) is removed by the Validation Act, no State can tax an inter-State sale or purchase which takes place outside its territorial limits. What is an "outside sale" is defined by the Constitution as Explanation to Art. 286(1) which states what should be deemed to be an "inside sale". It is well-settled that by Art. 286(1) (as it stood before the Sixth Amendment) sales as a direct result of which goods were delivered in a State for consumption in such State, *i.e.*, the sales falling within the Explanation to Art. 286(1) were fictionally to be regarded as inside that State for the purpose of cl. (1)(a) and so within the taxing power of the State in which such delivery took place and being outside all other States exempt from sales-tax by those other States. As we have already said, the Validation Act has lifted the ban under Art. 286(2) alone but did not remove the ban under Art. 286(1) which continued to apply without being affected by the Validation Act. Therefore, even if a sale fell within the Explanation under s. 2(h) of the Madras General Sales Tax Act, 1939 it was beyond the competence of the Madras State to tax if the assessee had delivered the goods outside the State for consumption therein. It follows therefore in the present case that the goods sold and delivered outside

A the State during the period from April, 1955 to September, 1955 were not liable to tax under the Madras General Sales Tax Act, 1939 and the taxing authorities had no jurisdiction to include Rs. 3,66,213/12/- in the turnover of the respondent.

We proceed to consider the next question raised in this case, B *viz.*, that the High Court acted illegally in entertaining and relying upon the affidavits filed by the respondent while exercising its revisional powers under s. 38 of the Madras General Sales Tax Act, 1959 (Madras Act 1 of 1959). It was contended for the appellant that the High Court could not itself record a finding of fact after taking additional evidence and there was no express power conferred by s. 38 upon the High Court for taking additional evi- C dence. Section 38 of the Madras General Sales Tax Act, 1959 states:

"38. (1) Within ninety days from the date on which a copy of the order under sub-section (3) of section 36 is served in the manner prescribed, any person who objects to such order or the Deputy Commissioner may prefer D a petition to the High Court on the ground that the Appellate Tribunal has either decided erroneously or failed to decide any question of law:

Provided that the High Court may admit a petition preferred after the period of ninety days aforesaid if it is satisfied that the petitioner had sufficient cause for not E preferring the petition within the said period.

. . . . . .

(4)(a) If the High Court does not dismiss the petition summarily, it shall, after giving both the parties to the petition a reasonable opportunity of being heard, determine the question of law raised and either reverse, F affirm or amend the order against which the petition was preferred or remit the matter to the Appellate Tribunal, with the opinion of the High Court on the question of law raised or pass such order in relation to the matter as the High Court thinks fit.

(b) Where the High Court remits the matter under clause (a) with its opinion on the question of law raised, the Ap- G pellate Tribunal shall amend the order passed by it in conformity with such opinion.

(5) Before passing an order under sub-section (4), the High Court may, if it considers it necessary so to do, remit the petition to the Appellate Tribunal, and direct it to H return the petition with its finding on any specific question or issue.

. . . . . .

(8) (a) The petitioner or the respondent may apply for review of any order passed by the High Court under clause (a) of sub-section (4) on the basis of the discovery of new and important facts which after the exercise of due diligence were not within his knowledge or could not be produced by him when the order was made.

(b) The application for review shall be preferred within such time, and in such manner as may be prescribed, and shall where it is preferred by any party other than the Deputy Commissioner be accompanied by a fee of one hundred rupees.

* * * * * *

It was argued for the appellant that under s. 38 the High Court was empowered to interfere with the order of the Appellate Tribunal only if it had either decided a question of law erroneously or had failed to decide any question of law. It was said that in any case the High Court should have remitted the matter to the Appellate Tribunal if it considered it necessary for the proper disposal of the case to take in evidence any additional facts under s. 38(5) of the Act before passing an order under sub-s. (4) remitting the matter to the Appellate Tribunal on any specific question or issue. In our opinion there is considerable force in the argument put forward on behalf of the appellant. But we do not wish to express any concluded opinion on this point in the present case. It appears that the appellant did not raise any objection before the High Court when the affidavits were taken into evidence. Having preferred no objection before the High Court it is not now open to the appellant to say that the High Court acted illegally in taking those affidavits in evidence. It was submitted for the respondent that the transactions themselves took place in 1955, nearly 12 years back and ordinarily accounts of dealings would not be retained beyond five years. Counsel for the respondent referred in this connection to a rule framed under the Madras General Sales Tax Act. In these circumstances it was hardly worthwhile for the High Court to remand the case for a fresh investigation. We therefore reject the argument of the appellant on this aspect of the case.

For the reasons assigned we hold that this appeal has no merit and must be dismissed. In the circumstances of the case we do not propose to make any order as to costs.

Civil Appeals Nos. 539 & 540 *of* 1966, 717 *of* 1966, 684 *of* 1966, 694 *of* 1966 *and* 857 *of* 1966.

The main question to be considered in these appeals is whether, after the enactment of the Validation Act, Madras State had the constitutional power to tax "Explanation sales" falling under Art. 286(1)(a) of the Constitution *i.e.*, where goods were delivered for consumption outside the State and whether the ban under Art. 286(1)(a) was an independent ban and whether it could be removed by Parliamentary legislation under Art. 286(2). This question

A has been the subject-matter of consideration in Civil Appeal No. 495 of 1966, and for the reasons given in that case, we hold that the Madras State had no authority to levy sales tax on such transactions of sale and the High Court was right in holding that the constitutional bar under Art. 286(1)(a) was not lifted by the Validation Act.

B In Civil appeals Nos. 539 and 540 of 1966 Counsel for the appellant took an additional point that the High Court ought not to have called for an affidavit from the respondent "regarding the mode of sale of wool to the Bangalore merchants". It was also said that the High Court had no power to take that affidavit into evidence and come to a finding that the sales were "Explanation sales" within the meaning of Art. 286(1)(a) of the Constitution. It, C however, appears that the appellant did not object to the production of the affidavit in the High Court. It must be taken that the objection was waived and it is not now open to the appellant to argue that the High Court had no power to take the affidavit into evidence. We accordingly reject the argument of the appellant on this point.

In Civil Appeal No. 717 of 1966 it was argued for the appel- D lant that the High Court erred in assuming that in the transactions in question the goods were delivered for consumption outside the Madras State. It was said that the case should have been remanded by the High Court to the Appellate Tribunal for a fresh finding on the point. The High Court has, however, taken the view that the transactions took place in 1955-56 and ordinarily accounts of dealings would not be retained by the assessee beyond five years. E The High Court has observed that apart from this the transactions were very large in number, about 4000 and odd and most of them were for a comparatively small value. Some of the invoices referred in the assessment order show that they were for small amounts in regard to articles like paint, aluminium, tar and other articles. In these circumstances the High Court came to the conclusion that the goods were delivered to places outside the Madras F State for the purpose of consumption in the delivery States. The High Court added that it was hardly worthwhile in these circumstances to direct a remand of the case to the Appellate Tribunal for a fresh enquiry. It is manifest that the finding of the High Court on this point is a finding on a question of fact and as there is proper material to support the finding of the High Court it is not possible to accept the contention of the appellant that the find- G ing is in any way defective in law. We accordingly reject the argument of the appellant on this point.

For the reasons expressed we hold that these appeals have no merit and they are accordingly dismissed. In the circumstances of the case we do not propose to make any order as to costs except in C.A. 717 of 1966. In that appeal, the respondent will be entitl- H ed to costs as already ordered on 29th July 1965.

V.P.S. *Appeals dismissed.*