REPORTABLE

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IN THE SUPREME COURT OF INDIA
CIVIL APPELLATTE JURISDICTION

CIVIL APPEAL NO. 3910 OF 2016

STATE OF UTTAR PRADESH & ORS. ...APPELLANTS

VERSUS

RELIANCE INDUSTRIES LIMITED & ORS. ...RESPONDENTS

WITH

CIVIL APPEAL NO. 3913 of 2016

STATE OF UTTAR PRADESH & ORS. ...APPELLANTS

VERSUS

M/s. TATA CHEMICALS LTD. & ORS. ...RESPONDENTS

WITH

CIVIL APPEAL NO. 3914 of 2016

STATE OF UTTAR PRADESH & ORS. ...APPELLANTS

VERSUS

M/S. KRIBHCO SHYAM FERTILIZERS LTD. & ORS. ...RESPONDENTS

CIVIL APPEAL NO. 3915 of 2016

STATE OF UTTAR PRADESH & ORS. ...APPELLANTS

VERSUS

INDIAN FARMERS FERTILIZERS COOPERATIVE LTD. & ORS. ...RESPONDENTS

J U D G M E N T

J.K. MAHESHWARI, J.

CIVIL APPEAL NO. 3910 OF 2016

1. India is a Union of States. Reality is that all States are not endowed equally. There is stark disparity in the economic scenario among various States in India. Each State has its unique contributions and products. It is the free flow of trade and commerce that seeks to nullify some effects of inequality with just exceptions. But for the Union, generally it is observed that federating units would want to cut corners by instituting protectionist measures to augment their resources over others. It

is in this context that the framers of the Constitution have laid down a road map to ensure that the Union Government takes over fiscal policies touching upon inter-state or international trade and commerce. This avowed purpose, we are here to secure.

2. On the same lines, Alexander Hamilton, one of the founding fathers of the United States of America, in his Federalist Paper No. 11 (1787), recounts the benefits of free trade:

> *"An unrestrained intercourse between the States themselves will advance the trade of each by an interchange of their respective productions, not only for the supply of reciprocal wants at home, but for exportation to foreign markets. The veins of commerce in every part will be replenished, and will acquire additional motion and vigor from a free circulation of the commodities of every part. Commercial enterprise will have much greater scope, from the diversity in the productions of different States. When the staple of one fails from a bad harvest or unproductive crop, it can call to its aid the staple of another. The variety, not less than the value, of products for exportation contributes to the activity of foreign commerce. It can be conducted upon much better terms with a large number of materials of a given value than with a small number of materials of the same value; arising from the competitions of trade and from the fluctuations of markets. Particular articles may be in great demand at certain periods, and unsalable at others; but if there be a variety of articles, it can scarcely happen that they should all be at one time in the latter predicament, and on this account the operations of the merchant would be less liable to any considerable obstruction or stagnation. The speculative trader will at once perceive the force of these observations, and will acknowledge that the aggregate balance of the commerce of the United States would bid fair to be much more favorable than that of the thirteen States without union or with partial unions.*

> *It may perhaps be replied to this, that whether the States are united or disunited, there would still be an intimate intercourse between them which would answer the same ends; but this intercourse would be fettered, interrupted, and narrowed by a multiplicity of causes, which in the course of these papers have been amply detailed. A unity of commercial, as well as political, interests, can only result from a unity of government."*

3. This Appeal is filed against the impugned order dated 07.09.2012 passed by the Division Bench of Allahabad High Court (Lucknow Bench) in Writ Petition No. 6281 of 2010 and other connected cases, wherein the High Court allowed the writ petition preferred by the Respondent No. 1 herein and quashed the order of assessment dated 11.06.2010 passed by the Additional Commissioner Grade-II, Commercial Tax Lucknow along with all consequential orders/notices passed by the State of Uttar Pradesh. The High Court further directed the State Government to refund to the assesses the tax realised in pursuance to order dated 11.06.2010.

I. FACTS

4. At the outset, it is necessary to discuss the facts in brief. Respondent No. 1 herein is a company engaged in the business of extracting and refining Petroleum and Petro-chemical products.

5. In the year 1999, the Government of India announced a New Exploration and Licensing Policy (hereinafter referred as "**NELP**") wherein it was provided that various petroleum blocks were awarded to private players for exploration, development and production of Petroleum, etc. This policy initiative was in line with the opening of markets by Indian Government to attract and felicitate technology transfer, increase in foreign investment, etc.

6. The Respondent No.1 herein (Reliance Industries Limited) formed an international consortium (hereinafter referred as "**International Consortium**") with Niko Limited, a company organised and existed under laws of Cayman Islands. This International Consortium/Contractor was the successful bidder for block KGDDWN-98-3 (hereinafter referred as "**KG-D6**"). In 2010, another international company, BP Exploration (Alpha) Limited, a company registered under Laws of England and Wales, became a member of this International Consortium as the aforesaid company invested in the consortium by purchasing participating interest during the currency of Britain-India Business Investment Treaty, 1994.

7. The KG-D6 is situated off-shore to the coast of Andhra Pradesh in the Indian Ocean. This block is a deep-water

exploration block. It is in this context that such exploration required highly skilled, experienced technicians, and expensive machinery and know-how. In order to attract private players and international investors that the government came up with the above liberalized policy.

8. A Production Sharing Contract (hereinafter referred as "**PSC**") was entered into between the Government of India and the International Consortium on 12.04.2000. It is relevant to refer to the judgment passed by the three-judge bench of this Court *in* ***Reliance Natural Resources Ltd. v. Reliance Industries Ltd.***[1], wherein the salient features of the PSC were expounded as under:

> ***"74.*** *Some of the salient features of the PSC are as follows:*
>
> *(i) Clause 6 of the preamble makes it clear that discovery and exploitation will be in the overall interest of India.*
>
> *(ii) Article 8.3(k) makes (sic it clear that) the contractor is to be mindful of the rights and interest of the people of India in the conduct of petroleum operations.*
>
> *(iii) Under Article 10.7(c)(iii) the contractor is duty-bound to ensure that the production area does not suffer any excessive rate of decline of production or an excessive loss of reservoir pressure.*
>
> *(iv) Article 32.2 makes it clear that the contractor is not entitled to exercise the rights, privileges and duties within the contract in a manner which contravenes the laws of India.*

[1] (2010) 7 SCC 1

> *(v) Article 21(1) mandates that the discovery and production of natural gas shall be in the context of the Government's policy for the utilisation of natural gas. The above clauses in the form of articles make it clear that PSC is subject to the Constitution of India; the Oilfields (Regulation and Development) Act, 1948; the Petroleum and Natural Gas Rules, 1959; the Territorial Waters, the Continental Shelf and Exclusive Economic Zone and Other Maritime Zones Act, 1976 and also the gas utilisation policy.*
>
> ***(vi) Article 27(1) deals with title to petroleum under the contract areas as well as natural gas produced and saved from the contract area vests with the Government unless such title has passed in terms of PSC. As per Clause (2), title remains with the Government till the time the natural gas reaches the delivery point as defined in the PSC."***
>
> *(Emphasis supplied)*

9. Further the nature and operation of this PSC as an international commercial contract is adumbrated in detail by this Court in the case of ***Reliance Industries Ltd. v. Union of India***[2], which is applicable herein is as under:

> ***"2.*** *Petitioner 1 is a company incorporated and registered under the provisions of the Companies Act, 1956; Petitioner 2 is a company incorporated in Cayman Islands, British Virgin Islands; Petitioner 3 is a company incorporated according to the laws of England and Wales. The respondent herein is the Union of India (hereinafter referred to as "the UoI"), represented by the Joint Secretary, Ministry of Petroleum and Natural Gas.*
>
> ***3.*** *Briefly stated, the relevant facts are as under : In 1999, the UoI announced a policy New Exploration and Licensing Policy (hereinafter referred to as "NELP"). Under NELP, certain blocks of hydrocarbon reserves were offered for exploration, development and production to*

[2] (2014) 11 SCC 576

private contractors under the agreements which were in the nature of production sharing contract. One of the said blocks was Block KG-DWN-98/3 (Block KG-D6). The joint bid made by Petitioners 1 and 2 for Block KG-D6 was accepted by the UoI. Thereafter on 12-4-2000, production sharing contract (hereinafter referred to as "PSC") was executed between Petitioners 1 and 2 as contractor on one side and the UoI on the other.

*** *** ***

56. *In my opinion, the submission is misconceived and proceeds on a misunderstanding of PSC. RIL, Niko and BP are all parties to PSC. They are all contractors under PSC. PSC recognises that the operator would act on behalf of the contractor. All investments are funded by not just Petitioner 1 but also by the other parties, and they are equally entitled to the costs recovered and the profits earned. For the sake of operational efficiency, the operator acts for and on behalf of the other parties. Therefore, I find substance in the submission of Mr Salve that the disputes have been raised in the correspondence addressed by Petitioner 1 not just on its own behalf but on behalf of all the parties. During the course of his submissions, Mr Anil Divan had, in fact, submitted that Niko and BP will be affected by the arbitral award and it would be binding upon them too. Therefore, if Petitioner 1 was to succeed in the arbitration, the award would enure not only to the benefit of Petitioner 1 but to all the parties to PSC. Conversely, if the Government of India were to succeed before the Tribunal, again the award would have to be enforced against all the parties. In other words, each of the contractors would have to perform the obligations cast upon them. In that view of the matter, it is not possible to accept the submission of Mr Divan that the arbitration in the present case is not an international arbitration.*

57. *It is equally not possible to accept the contention of Mr Divan that Niko and BP have not raised any arbitrable dispute with the Union of India. A perusal of some of the provisions of PSC would make it clear that all three entities are parties to PSC. All three entities have rights and obligations under PSC [see Article 28.1(a)], including with respect to the cost petroleum, profit petroleum and contract costs (see Article 2.2), all of which are fundamental issues*

> *in the underlying dispute. Where RIL acts under PSC, including by commencing arbitration, it does so not only on behalf of itself, but also "on behalf of all constituents of the contractors" including Niko and BP. I am inclined to accept the submission of Mr Salve that there is a significant and broad-ranging dispute between RIL, Niko and BP on the one hand and the UoI on the other hand, that goes to the heart of the main contractual rights and obligations under PSC. Furthermore, it is a matter of record that in the correspondence leading to the filing of the earlier petition being AP No. 8 of 2012, no such objection about Niko and BP not being a party to the dispute had been taken. In fact, the petition was disposed of on a joint request made by the parties that two arbitrators having been nominated, no further orders were required. Therefore, there seems to be substance in the submission of Mr Salve that all these objections about Niko and BP not being the parties are an afterthought. Such objections, at this stage, cannot be countenanced as the commencement of arbitration has already been much delayed."*

From the above, it is clear that the above PSC had consortium of three independent companies as Contractor namely RIL, Niko (Cayman Islands company) and BP Alpha (English Company) who had authorised Respondent No.1 herein, as Operator, to carry out daily operations in this regard. Therefore, when the transactions involve foreign investments and international element, there is an inherent expectation of stability in the rule of law. Laws including fiscal laws being an important aspect for ease of doing business should also reflect stability and uniformity.

10. Under the terms and conditions of the licence, consortium led by Respondent No. 1 has been permitted to extract petroleum

and natural gas from KG Basin and sell it to the different customers (buyers). Once the RIL (Respondent No. 1) recovers the investment made by it through extraction process, then a part of the product is to be given to the Government of India free of cost and the remaining quantity of petroleum and natural gas may be sold by RIL (Respondent No. 1) to its customers subject to allocation of product in their favour by the Government of India.

11. Subject to above conditions, RIL (Respondent No. 1) entered into Gas Sales and Purchase Agreement (hereinafter referred as "**GSPA**") with its customers in various States, including the State of U.P. (Appellant No. 1), to whom the gas was allotted by the Government under the Gas Utilization Policy (hereinafter referred as "**GUP**"). In reference to the present appeal, the Respondent No. 1 entered into GSPA with Respondent No. 2 to Respondent No. 8, hereinafter collectively referred to as buyers. Under GSPA, the buyers enter into a sale agreement for purchase of gas with the Respondent No. 1 herein. Following clauses of GSPA are relevant:

> ***"Clause 2 – "Delivery Point"*** *means the outlet flange of Sellers' delivery facilities located at the onshore processing terminal of the Gas Fields at Gadimoga near Kakinada, Andhra Pradesh, at which point Sellers' Facilities are interconnected to the Gas transportation facilities of RGTIL."*
>
> ***Clause 5 – Sale and Purchase of Gas***

(a) Scope of Sellers' Obligations: Sellers shall sell and deliver Gas from the Gas Fields at the Delivery Point on an as-available basis, at the Sales Price and subject to the terms and conditions set forth herein. Sellers shall deliver the Gas to Buyer or Buyer's designee for onward transmission to Buyer's Facilities.

Clause 6 – Sales Price

(a) The price of Gas at the Delivery Point ("Sales Price") shall be the sum of the Gas Price in US$/MMBtu (NHV) and the Marketing Margin in US$/MMBtu (NHV) as set out in Exhibit 2. "Gas Price" means the price in US$/MMBtu (NHV) determined in accordance with the formula set out in Exhibit 2.

(b) Sales Price shall be exclusive of Taxes for which Buyer is responsible under Clause 22.

(c) SI Sellers shall bear any royalty on Gas sold to Buyer under this Agreement.

Clause 7 – Transfer of Property and Transfer of Risk

(a) Sellers shall make all Gas supplied hereunder available for delivery at the Delivery Point, in accordance with and subject to the terms and conditions of this Agreement. Buyer shall ensure receipt, offtake and transportation of the Gas from the Delivery Point to Buyer's Facilities.

(b) Property (title) in and risk of loss of the Gas delivered hereunder shall pass from Sellers to Buyer at the Delivery Point upon delivery of the Gas to Buyer (or Buyer's designee) at such point.

Clause 8 – Conditions Precedent

(a) The obligations of the Parties under this Agreement to purchase or sell Gas, as applicable, are subject to the execution of (and further the satisfaction or waiver of all conditions precedent under) any and all Gas transportation agreement(s) that are required to transport the Gas from Delivery Point to the inlet of Buyer's Facilities.

Clause 12 – Sellers' Supply Obligations

(a) For any Contract Month, Sellers shall be deemed to have fulfilled their Gas supply obligations under this Agreement for such Contract Month to the extent Sellers made available for delivery to Buyer the applicable Adjusted Monthly Supply Quantity at the Delivery Point in accordance with the

terms and conditions hereof, irrespective of whether Buyer offtakes such quantities of Gas at the Delivery Point.

Clause 14 Measurement and Quality

(a) Measurement:

(i) Gas shall be sold on the basis of the Measured Quantity and the quality determined using Sellers' meter at the Delivery Point. The quantity sold to Buyer is the Allocated Quantity as set out in Exhibit 4.

Clause 22 – Taxes and Duties

(a) Buyer shall assume frill and exclusive liability for payment of all Taxes to Sellers, imposed in connection with the "purchase of Gas under this Agreement and any payments made under this Agreement. For the avoidance of any doubt the liability for payment of Taxe's shall include any Taxes that are paid or accrued and payable or assessed or imposed pursuant to any interim order, provisional assessment, revisional assessment or final assessment or any other order made by any Relevant Authority. Buyer shall be liable for fines, penalties or interest on Taxes which are required to be paid by Sellers under order made by Relevant Authority.

Clause 26 – Miscellaneous

(e) Laws and Approvals

*(ii) The Parties acknowledge and agree that Sellers are - selling Gas to Buyer under this Agreement in their capacity as Contractors under the PSC and subject to the terms thereof. The obligations Of Sellers under this Agreement are subject to the receipt and continued .effectiveness of all requisite approvals required under laws and regulations and the PSC and approvals of the Gas Price formula in Exhibit 2 as the Gas price formula to be used for cost recovery, profit sharing, and all other purposes under the PSC in respect of Gas sold under this Agreement.***"**

12. Pursuant to the GSPA, various customers in the State of U.P. entered into separate Gas Transportation Agreement (hereinafter referred as "**GTA**") with Reliance Gas Transportation Infrastructure Ltd. (hereinafter referred as "**RGTIL**") and Gas

Authority of India Limited (hereinafter referred as "**GAIL**") for transportation of gas from delivery point to their respective plants.

13. It is relevant to mention here that, the gas is extracted off shore and brought to Gadimoga in the State of Andhra Pradesh. At Gadimoga, RIL (Respondent No. 1) delivers the natural gas to its customers through a meter installed there to measure the quality and quantity of the gas supplied to the buyers. The gas is thereafter transported from Gadimoga (Andhra Pradesh) to Hajira in Gujarat through pipeline operated by RGTIL, and further transported from Hajira (Gujarat) to Auraiya District in Uttar Pradesh through pipelines of GAIL. From Auraiya, in terms of the agreement, the required quantity of gas is taken by the purchasers to their respective plants or factories where they manufacture fertilizers, chemicals, and other products.

14. The Respondent No. 1 was handed down an *ex-parte* provisional Assessment Order on 25.01.2010, passed under Section 25 of Uttar Pradesh Value Added Tax Act, 2008 (in short **'VAT Act'**), fixing liability with regard to Value Added Tax for the period between April 2009 to November 2009.

15. Thereafter, the appeal preferred by the Respondent No. 1 before the Additional Commissioner, Grade – 2, Range – 3, Lucknow was dismissed on 07.05.2010.

16. Aggrieved, Respondent No. 1 preferred a second appeal before the Trade Tax Tribunal, Lucknow which was allowed on 13.05.2010. The Tribunal remanded the matter to the Assessing Authority to pass fresh orders after providing due opportunity of hearing to the Respondent No. 1.

17. Upon remand, the matter was heard on 08.06.2010 and a fresh assessment order was passed on 11.06.2010 again fixing liability on Respondent No. 1 at the rate of 21 percent. Aggrieved thereby, Respondent No. 1 preferred Writ Petition No. 6281 of 2010 before the Allahabad High Court (Lucknow Bench).

18. The Writ Petition came to be allowed by the Impugned Order as passed by the High Court, thereby quashing the assessment order dated 11.06.2010 along with all consequential orders/notices passed by the State of Uttar Pradesh. The High Court observed as under:

i. State Legislature, under Entry 54 read with Article 366(29-A)(b) of the Constitution of India, is not competent to impose a tax on deemed sales if such

transactions constitute inter-State sales, sales outside the State, or sales in the course of import/export.

ii. Sections 3, 4, 5, 14 and 15 of the Central Sales Tax Act, 1956 (in short **'CST Act'**) apply equally to transfers of property in goods under works contracts covered by Article 366(29-A)(b) of the Constitution of India.

iii. While defining "sale" in sales tax laws, States may fix the situs of a deemed sale resulting from a transfer falling within the ambit of Article 366(29-A)(b) of the Constitution of India, but cannot extend the definition to bring within its ambit inter-State, outside-State, or import/export sales.

iv. The inter-State sale is governed by Section 3 of the CST Act: under clause (a), where the sale occasions the movement of goods from one State to another; or under clause (b), where the transfer of documents of title occurs after such movement has commenced but before delivery. In either case, the transaction must qualify as a "sale" within Section 2(g) of the Act, taking place in the course of inter-State trade or commerce.

v. Where no statutory fiction fixes situs, the location of sale is where property in goods passes.

vi. In inter-State sales, movement of goods arises from the contract of sale or is incidental thereto. Prior agreement is not essential precedent for movement of goods.

vii. In view of Explanation 2 of Section 3 of CST Act, a sale is intra-State only if movement commences and terminates within the same State; if it terminates in another State, it is inter-State.

viii. Sub-Section (2) of Section 4 has no bearing on intra-state sale. Under the garb of sub-section (2) of Section 4, State has got no right to impose VAT. Question with regard to inter-state sale should be decided independently by the construction of Section 3 of the Act.

ix. In the present case, admittedly, natural gas is delivered to the transporter at Gadimoga, Andhra Pradesh in terms of the agreement and it reaches the State of U.P.; such movement is itself indicative of the sale being an inter-State sale.

x. Minor variations in quantity do not empower the State of U.P. to levy VAT. The State of Andhra Pradesh remains the beneficiary under Section 9(3) of the CST Act. Further, in absence of any supporting material, the processing at GAIL's plant could not be said to have altered the inter-State character of the sale or purchase to the extent it relates to the petitioner and respondents.

xi. Under the 2008 Regulations read with 2006 Guidelines, delivery of lean gas is deemed to be made at Gadimoga and not in Auraiya, in terms of GSPA and GTA.

xii. No evidence exists of sale consideration linked to processing in Gujarat or variation at Auraiya. GSPA and GTA, executed under statutory provisions, are valid and not illegal. The assessing authority ignored constitutional and CST provisions, rendering its order perverse, arbitrary, and is an instance of non-application of mind to the statutory provision.

xiii. The GSPA and GTA, executed pursuant to statutory provisions and the PSA, cannot be disregarded in adjudicating the present controversy unless found to be sham. Their genuineness being undisputed, the

transaction must be treated as an inter-State sale. As GSPA is a concluded agreement and not merely an agreement to sell, the Assessing Authority erred in ignoring its terms and failed to exercise jurisdiction vested in it.

xiv. Neither there is any material on record nor there is any substance in the argument advanced on behalf of the State of U.P. that they have jurisdiction or statutory right to impose VAT ignoring statutory mandate of CST Act, 1956 read with constitutional provisions and 2008 Regulation.

19. Lastly, the High Court concluded as thus:

> ***"294.*** *In view of above, writ petition deserves to be allowed. Accordingly, a writ in the nature of certiorari is issued quashing the impugned order dated 11.6.2010 passed by Additional Commissioner Grade II, Commercial Tax Lucknow as contained in Annexure-5 to the writ petition with all consequential benefits. All consequential orders passed or notices issued by the respondents State of U.P. on account of order dated 11.6.2010 are also set aside.*
>
> *A writ in the nature of mandamus is issued directing the State; Government to refund the tax realised in pursuance to order dated 11.6.2010 forthwith to the assesses expeditiously.*
>
> *Writ petition is allowed accordingly. No order as to costs.***"**

20. Aggrieved by the aforesaid Order, appellants have filed this civil appeal.

II. ARGUMENTS

21. Before us, the learned Senior Counsel appearing for the Appellants, Dr. Dinesh Dwivedi, submitted that:

a. RIL extracts natural gas from the KG-D6 basin situated in the State of Andhra Pradesh and effects delivery at the designated point at Gadimoga, Andhra Pradesh. From Gadimoga, the gas is transported to Hazira in the State of Gujarat through pipelines owned and operated by RGTIL. Thereafter, the gas is carried from Hazira to Pata, District Auraiya, Uttar Pradesh, through the pipeline network of GAIL. At Pata, the gas undergoes processing, whereby hydrocarbons are removed and the remaining product, being predominantly lean gas comprising about 90% methane, is channelled into different pipelines emanating from Auraiya. It was further urged that these pipelines at Auraiya belong to the respective purchasers or consumers, who individually convey the lean natural gas from Auraiya to their factories across Uttar Pradesh for consumption in their industrial operations. It was emphasised, in particular, that RIL acts as an agent of the Union of India while undertaking the extraction of gas

from the KG-D6 basin, and therefore the natural resources vests in the Union of India, which holds it in trust for the people of India.

b. The metering of gas is carried out at the premises of each purchaser in Uttar Pradesh, where the gas is received, and that an equivalent quantity is injected at Gadimoga is extracted by the buyers at their factories. It was urged that gas injected into the RGTIL pipeline cannot be individually identified qua purchaser or qua contract, and even in calorific terms the figures varied. Stress was laid on the fact that, owing to the Central Government's policy of transportation through a single common carrier pipeline, the gas moves in a co-mingled form and the gas admittedly being fungible good, it cannot be tangibly or individually identified until actual delivery at the consumer's premises.

c. The movement of natural gas as fungible goods are goods in unascertained form which cannot be identified qua purchaser. According to the State, such ascertainment occurs only at the purchasers' factories in Uttar Pradesh, where the gas is received and appropriated, and it is at

that stage that the transaction of sale takes place. On this basis, the assessing authority in Uttar Pradesh levied tax, treating the sale as intra-State.

d. Laying emphasis on the constitutional history of Article 286 of the Constitution of India and drawing our attention to the findings of the seven-judge bench of this Court in ***Bengal Immunity Co. Ltd. v. State of Bihar***[3], he submitted that the said judgment did not dispel the prevailing confusion regarding inter-State sales, as at the time there existed neither a statutory framework governing taxation of sales and purchase in the course of inter-State trade nor any statutory definition of an inter-State sale.

e. Relying on the Second Law Commission Report, it was submitted that the effect of the Sixth Constitutional Amendment was to confer upon Parliament exclusive authority to legislate on the imposition of tax on the sale or purchase of goods in the course of inter-State trade and commerce, and to empower it to prescribe the

[3] (1955) 1 SCC 763

principles determining when such transactions take place.

f. The GSPA between RIL and its buyers were executed even before the extraction of natural gas, when the goods were neither in existence nor in saleable form. Consequently, the GSPA was not a contract of sale of goods but merely an agreement for the sale of future and unascertained goods, enforceable only once the gas was extracted and Reliance acquired authority to sell.

g. The GSPA reflected only the intention of the parties to enter into a contract of sale and did not in itself evidence a completed sale of natural gas. Hence, the tax authorities were neither bound by nor estopped from examining the true nature of the transaction to determine the point at which the property in goods passed.

h. Further, under Article 265 of the Constitution of India, no tax can be levied except by the authority of law, and therefore the point of taxation must be determined strictly by statute, not by contractual stipulation. An agreement between parties declaring transfer at

Gadimoga cannot bind the tax authorities to treat the transaction as an inter-state sale.

i. Since the transaction did not fall within Section 3 of the CST Act, the tax authorities were required to examine it under Section 4 of the Act

22. Learned Senior Counsel appearing for the Respondent No. 1, Dr. Abhishek Manu Singhvi, submitted that:

a. The sales of natural gas by the Respondent No. 1 to its customers are in the course of inter-state sales under Section 3(a) of the CST Act. He placed heavy reliance on Explanation 3 of Section 3 of the CST Act. He further relied on Section 7 of the VAT Act to submit that the State of Uttar Pradesh has no jurisdiction to levy VAT on inter-State sales, as in the present case.

b. Explanation 3 to Section 3 of the CST Act was brought in *vide* an amendment to clarify the position of law out of abundant caution.

c. Section 4 of the CST Act is subject to Section 3 of the Act, and once the conditions of inter-State trade under

Section 3 of the said Act are satisfied, Section 4 of the Act has no application.

d. Under Section 3(a) of the CST Act, what is required is a contract of sale that occasions the movement of goods from one State to another, and not necessarily a concluded sale. He emphasized that it is immaterial in which State the property in goods passes; the decisive factor is whether the contract of sale itself results in inter-State movement. The inter-State movement must arise from a covenant, express or implied, or as an incident of the contract, while the mode of sale, storage, or delivery is irrelevant.

e. For a sale to be an inter-state, three essentials are to be satisfied: (i) existence of a sale, (ii) actual movement of goods from one State to another, and (iii) a direct nexus between the sale and such movement.

f. Reverting to facts of the instant case, he submitted that there existed a pre-existing contract, namely the GSPA, under which natural gas was moved from Andhra Pradesh to Uttar Pradesh. Pursuant to the GSPA, Respondent No. 1 was obliged to deliver the gas at the

"delivery point" at Gadimoga, Andhra Pradesh, where supply, delivery, transfer of possession, title, and risk to the buyer took place. The buyers, in turn, had entered into GTA with RGTIL and GAIL for carriage of the gas from Gadimoga to their facilities in Uttar Pradesh. The inter-State movement of gas was thus directly occasioned by the contract of sale between Respondent No. 1 and its buyers, thereby satisfying all the essential requirements of an inter-State sale. To support his contentions, the Learned Senior Counsel for the Respondent No. 1 relied on the judgements of this court in ***State of Andhra Pradesh v. NTPC***[4] and ***Hyderabad Engineering Industries v. State of A.P.***[5]

g. The learned Senior Counsel for Respondent No. 1 submitted that, in terms of Article 269 of the Constitution of India and Sections 9(1) and 9(3) of the CST Act, the Central Sales Tax is collected through the machinery of the State from which the movement of goods commences, with the proceeds assigned to that State.

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[4] (2002) 5 SCC 203

[5] (2011) 4 SCC 705

h. Respondent No. 1 is registered with the Andhra Pradesh authorities and has consistently deposited CST there, while under both the PSC and GSPA, the liability for sales tax rests with the buyers. Any attempt by Uttar Pradesh to levy VAT on these transactions would encroach upon Parliament's jurisdiction.

i. It is further submitted that even if during transportation, natural gas is co-mingled with supplies meant for other buyers, such co-mingling occurs only after identification and metering at Gadimoga, Andhra Pradesh, and does not affect the inter-State character of the transaction. He argued that the alleged re-metering at Auraiya in Uttar Pradesh is legally irrelevant, since the sale is concluded at Gadimoga and transportation follows thereafter. The subsequent inter-mingling of gas post-delivery does not constitute a sale and therefore cannot give rise to any liability for levy of Sales Tax or VAT in Uttar Pradesh.

j. Lastly, he also submitted that the State of U.P. already acknowledged the transaction in question as inter-state sale by issuing Form-C to the buyers in terms of Section 8(4) of CST Act read with Rule 12 of the Central Sales Tax

Rules, 1957 (in short **'CST Rules'**). Once that is done, the State now at this juncture cannot blow hot and cold by taking contrary stand.

23. Learned Senior Counsel Mr. Sunil Gupta, appearing for Respondents Nos. 4 and 5, along with the learned counsel for the remaining respondents, jointly submitted that they adopt the submissions advanced by the learned Senior Counsel for Respondent No. 1, hence are not reproduced for sake of brevity.

24. Having heard learned counsels appearing for parties and perusing the documents on record, it is imperative to first refer to the legal landscape and factual position herein.

25. At the outset, we may observe that the present matter transcends beyond a mere tax dispute. In the matters involving international consortiums, the rule of law demands existence of stable and ascertainable legal regime upon which parties may legitimately structure their affairs. Courts applying laws have to be strictly adherent to the rule of law and usher the stability as most of the international investments are protected under investment treaties which provide extra protection against expropriatory and discriminatory measures. Stable jurisprudence would attract

foreign investments and in turn help the country to progress towards economic development.

III. CONSTITUTIONAL UNDERCURRENT

26. At the outset, we need to state a few things about federalism under our Constitutional set-up. Article 1 of the Constitution of India stipulates that "India, that is Bharat, shall be a Union of States". The Constitution of India postulates a political union as well as economic union which was brought about by integration of erstwhile British India with erstwhile Princely States. The Union and States are co-equals in their respective fields under the Indian federal structure. Framers of our Constitution created a unique federal structure which cannot be abridged in a sentence or two. The nature of Indian federalism can only be ascertained from a study of various provisions of the Constitution of India. The confirmation of the Union and the States authority as co-equals can be found in the speeches of Hon'ble P.S. Deshmukh, Shri TT Krishnamachari and Hon'ble Dr. BR Ambedkar before the constituent assembly as follows:

> *"There is only one point of constitutional import to which I propose to make a reference. A serious complaint is made on the ground that there is too much of centralisation and that the States have been reduced to municipalities. It is clear that this view is not only an exaggeration, but is also*

> *founded on a misunderstanding of what exactly the Constitution contrives to do.* ***As to the relation between the Centre and the States, it is necessary to bear in mind the fundamental principle on which it rests. The basic principle of federalism is that the legislative and executive authority is partitioned between the Centre and the States not by any law to be made by the Centre but by the Constitution itself****. This is what the Constitution does. The States, under our Constitution, are in no way dependent upon the Centre for their legislative or executive authority. The Centre and the States are co-equal in this matter. It is difficult to see how such a Constitution can be called centralism. It may be that the Constitution assigns to the Centre too large a field for the operation of its legislative and executive authority than is to be found in any other federal Constitution. It may be that the residuary powers are given to the Centre and not to the States. But these features do not form the essence of federalism.* ***The chief mark of federalism, as I said, lies in the partition of the legislative and executive authority between the Centre and the Units by the Constitution. This is the principle embodied in our Constitution****."*
>
> *(emphasis supplied)*

27. The common thread, which runs along the Constitution of India is that a unique balance is maintained in the demarcation of the powers to preserve the federation. The Courts in India are given the responsibility to preserve this balance as envisaged by the framers of our Constitution. Any interference in balancing would be detrimental to the spirit of the Constitution of India.

28. It is not helpful to call India as quasi-federal as the features are unique and quite different from other countries like USA, UK,

etc. Members of the Constituent Assembly drew wisdom from the working experiences of various constitutions to weave a unique structure which can best be described as co-operative federalism.

29. The Constitution of India is unique as it contains an exhaustive enumeration and division of legislative powers of taxation between the Centre and the States. This separation is reflected under Article 246(1) of the Constitution of India. Adumbrating this principle of mutual exclusivity, H.M. Seervai in his celebrated book, Constitutional Law of India, (4th Edition) opined as under:

> ***"1A.25.*** *The innovation made for the distribution of taxing power may now be mentioned. In the United States the power of taxation is conferred on the Congress in wide general terms. But the power is not exclusive except as to the imposts or duties on import or export subject to a limited exception not here material. In Canada the power of taxation is conferred in the widest terms on the Dominion, and a power of direction taxation within the province to raise revenue for provincial purposes is conferred on the provinces. Thus the taxing powers are independent but as regards direct taxation they cover an overlapping field. In Australia "The Federal power over customs and excise duties is exclusive (s. 90), but as regards other taxation the Commonwealth and State Parliaments have separate rather than concurrent powers." 79 These overlapping powers of taxation covering the same field, for example, the power to impose an income tax, have given rise to much litigation and have raised the question whether the federal power can be so exercised as to nullify the State's power of taxation. The lists contained in the Sch. VII to the G.I. Act, 35, provided for distinct and separate fields of taxation, and it is not without significance that the concurrent legislative list contains no*

entry relating to taxation but provides only for "fees" in respect of matters contained in the list but not including fees taken in any court. List I and List II of Sch. 7 thus avoid overlapping powers of taxation and proceed on the basis of allocating adequate sources of taxation for the federation and the provinces, with the result that few problems of conflicting or competing taxing powers have arisen under the G.I. Act, 35. This scheme of the legislative lists as regards taxation has been taken over by the Constitution of India with like beneficial results."

30. This view has resonated across various judgements of this Court, especially in ***Hoechst Pharmaceuticals Ltd. v. State of Bihar***[6], wherein this Court observed as follows:

> ***"74."*** *It is equally well settled that the various entries in the three Lists are not 'powers' of legislation, but 'fields' of legislation. The power to legislate is given by Article 246 and other Articles of the Constitution. Taxation is considered to be a distinct matter for purposes of legislative competence. Hence, the power to tax cannot be deduced from a general legislative entry as an ancillary power. Further, the element of tax does not directly flow from the power to regulate trade or commerce in, and the production, supply and distribution of essential commodities under Entry 33 of List III, although the liability to pay tax may be a matter incidental to the Centre's power of price control.*
>
> ***75.*** *"Legislative relations between the Union and the States inter se with reference to the three Lists in Schedule VII cannot be understood fully without examining the general features disclosed by the entries contained in those Lists": Seervai in his Constitutional Law of India, 3rd Edn., Vol. 1 at pp. 81-82. A scrutiny of Lists I and II of the Seventh Schedule would show that there is no overlapping anywhere in the taxing power and the Constitution gives independent sources of taxation to the Union and the States. Following the scheme of the Government of India Act, 1935, the Constitution has made the taxing power of the Union*

[6] (1983) 4 SCC 45

and of the States mutually exclusive and thus avoided the difficulties which have arisen in some other Federal Constitutions from overlapping powers of taxation."

From the above, it is clear that the Constitution of India maintains principle of exclusivity in allocating various taxations to either the Parliament or to the State legislature. Corollary to aforesaid principle is that, the construction of the taxing entry which may lead to over-lapping must be eschewed. This Court has to give primacy to this about purpose and ensure that taxation do not overlap and thereby avoiding double taxation.

31. Under our Constitutional framework, the sovereign power to tax is limited by division of powers between the Centre and States. A Constitution Bench of this Court ***Synthetics and Chemicals Ltd. v. State of U.P.,***[7] recognized that under Indian federal setup, both Centre and State enjoy this sovereign power to tax only to the extent allowed by the Constitution. In this context, this Court held as under:

"56. *.....We would not like, however, to embark upon any theory of police power because the Indian Constitution does not recognise police power as such. But we must recognise the exercise of sovereign power which gives the States sufficient authority to enact any law subject to the limitations of the Constitution to discharge its functions. Hence, the Indian Constitution as a sovereign State has*

[7] (1990) 1 SCC 109

*power to legislate on all branches except to the limitation as to the division of powers between the Centre and the States and also subject to the fundamental rights guaranteed under the Constitution. The Indian State, between the Centre and the States, has sovereign power. The sovereign power is plenary and inherent in every sovereign State to do all things which promote the health, peace, morals, education and good order of the people. Sovereignty is difficult to define. This power of sovereignty is, however, subject to constitutional limitations. This power, according to some constitutional authorities, is to the public what necessity is to the individual. Right to tax or levy imposts must be in accordance with the provisions of the Constitution.***"***

32. In this context, the immediate question which arises is, what are those limitations?

33. In the field of taxation, the limitation prescribed and categorised under the Constitution are of three categories – (i) abstraction; (ii) eclipse and; (iii) division. This categorization must be noted as a convenient referencing point for understanding the nature of the constitutional restrictions.

34. When we talk of abstraction, we refer to entry 54 of State List as contained in Seventh Schedule of the Constitution of India as an illustration which provided for taxes on sale or purchase of goods other than newspapers. A further exception was carved out through entry 92-A of the Union List which was introduced by the Sixth Amendment to the Constitution in 1956 which provided for

taxes on sale or purchase of goods other than newspapers where such sale and purchase takes place in the course of inter-state trade and commerce. Under the pre-existing entry 54 of the State List, the State could have possessed an unfettered area of imposing taxes on sale and purchase of goods other than newspaper. Arguably, this could have extended to exercise of taxing powers on inter-state trade on the strength of explanation to Article 286 of the Constitution of India.

35. One more illustration of such abstraction is that the Parliament in exercise of power under Article 269(3) of the Constitution of India enacted CST Act. Section 14 and 15 of the CST Act provides for a list of goods of special importance, the manner of imposing taxes and the restrictions on the power of imposing taxes.

36. The second source of containment of legislative powers is the area of taxation which adumbrated from Article 245 to Article 253 of the Constitution of India. Hence, the legislative powers of the State including those relating to taxation can be eclipsed by the Parliament when the situation so arises.

37. Third source of restriction on legislative power of the State is in the form of limitation provided by Articles 286(3), 366(29-A) etc.

of the Constitution of India. Further, any law made by the Parliament or the State legislature is to be compliant with Part III as declared under Article 13 of the Constitution of India. There is no gainsaying, that the power to enact laws has been conferred upon the Parliament or the State legislature to the above constitutional limitation that levy of any tax ought not to fall foul of Part III as adumbrated in ***Jindal Stainless Limited and Another v. State of Haryana and Others***[8].

38. After alluding to certain first principles, it necessary to understand constitutional scheme. Under the federal scheme, Article 248 empowers the Parliament with residuary power to impose tax which is not otherwise provided in the concurrent, union or the state list. The power of State and Union to legislate on a particular taxation are clearly demarcated.

39. Article 249 of the Constitution of India empowers the Parliament to legislate on a matter in the State list for national interest provided the council of the State has passed a resolution supported by not less that 2/3rd of members present and voting that is necessary or expedient in the national interest to do so.

[8] (2017) 12 SCC 1

Similarly, Article 250 of the Constitution of India empowers the Parliament to legislate on any matter in the State list during proclamation of emergency. The Constitutional scheme also provides for the supremacy of law made by the Parliament when there is inconsistency between a State made law and a Parliament made law in terms of Articles 251 and 254 of the Constitution of India.

40. The power of the Parliament to legislate for two or more States by consent is provided under Article 252 of the Constitution of India. Article 253 of the Constitution of India is an exceptional article wherein wide amplitude of powers has been reserved for the Parliament to legislate on subject matters pertaining to implementation of international treaties and conventions.

41. Part XII of the Constitution of India deals with Finances and contains provisions from Article 264 to Article 300A of the Constitution of India. Part XIII consists of those provisions related to Trade, Commerce and Intercourse within the territory of India. Part XIII contains Article 301 to Article 307 of the Constitution of India.

42. Part XII doesn't restrict itself in distributing the taxing power between the Centre and the States but also creates a constitutional

machinery for distributing revenue. From the scheme of the Constitution there is no gainsaying that Parliament possess greater sovereign authority to impose taxes. However, States have been provided with larger responsibility to administrate its territories.

43. In this Context, Article 268 to Article 281 of the Constitution of India devise a mechanism through which revenues collected or levied by Union are shared with the States. This structure, which existed prior to introduction of 101st Constitutional Amendment Act has been completely reworked by introduction of Goods and Services Act, 2017, which may not be necessary to explain in detail here.

44. Article 265 of the Constitution of India is the first principle on which any taxing legislation is to be tested. Article 265 of the Constitution of India reads as under:

> *"**265. Taxes not to be imposed save by authority of law**.—No tax shall be levied or collected except by authority of law."*

This salutatory principle emanates from the time of Magna Carta as taxation was a major issue between then Steward Kings and the Parliament. Similarly, Article I, Section 8(1) of the Constitution of United States of America also echoes the same sentiments.

45. Explaining the fiscal federalism under the Indian Constitution, this Court by a 9-Judge Bench in ***Jindal*** (supra)**,** interpreted Article 265 of the Constitution of India as under –

> *"21. We shall presently turn to the constitutional limitations on the sovereign power to tax but before we do so we need to point out that while the power to levy taxes is an attribute of sovereignty, exercise of that power is controlled by the Constitution. This is evident from the provisions of Article 265 which forbids levy or recovery of any tax except by the authority of law.....The authority of law referred to above must be traceable to a provision in the Constitution especially where the legislative powers are shared by the Centre and the States as is the case with our Constitution which provides for what has been described as quasi-federal system of governance."*

46. Therefore, three things that are clear under Article 265 of the Constitution of India are as thus:

i. The levy and collection of the tax must be under the authority of law.

ii. The tax to be levied must be within the competence of the legislature imposing the tax and the validity of the tax has to be adjudged with reference to the competence of the legislature at the time of the statute authorising the tax was enacted.

iii. The law referred in the Article 265 refers to a statutory law or a law made by the legislature as against the executive order.

47. One of the important provisions of this fiscal federalism is Article 269 of the Constitution of India. Article 269 of the Constitution of India read as under:

> *"**269. Taxes levied and collected by the Union but assigned to the States.***
>
> *(1) Taxes on the sale or purchase of goods and taxes on the consignment of goods shall be levied and collected by the Government of India but shall be assigned and shall be deemed to have been assigned to the States on or after the 1st day of April, 1996 in the manner provided in clause (2)*
>
> *Explanation. For the purposes of this clause,-*
>
> *(a) the expression "taxes on the sale or purchase of goods" shall mean taxes on sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce;*
>
> *(b) the expression "taxes on the consignment of goods" shall mean taxes on the consignment of goods (whether the consignment is to the person making it or to any other person), where such consignment takes place in the course of inter-State trade or commerce.*
>
> *(2) The net proceeds in any financial year of any such tax, except in so far as those proceeds represent proceeds attributable to Union territories, shall not form part of the Consolidated Fund of India, but shall be assigned to the States within which that tax is leviable in that year, and shall be distributed among those States in accordance with such principles of distribution as may be formulated by Parliament by law.)*
>
> *(3) Parliament may by law formulate principles for determining when a sale or purchase of , or consignment of goods takes place in the course of inter-State trade or commerce.*

48. Article 269 of the Constitution of India specifies those taxes which are levied and collected by the Government of India but are assigned to State in the manner provided therein. The various types of taxes mentioned under Article 269 is provided in the explanation which includes sale and purchase of goods that takes place in the course of inter-state trade or commerce other than newspapers or taxes on consignment of goods which takes place in the course of inter-state trade or commerce.

49. It is pertinent to also note that the power of State legislature to levy sales tax under the constitutional scheme. In this context it is relevant to reproduce Article 286 of the Constitution of India (as it exists today) as below:

> ***"286. Restrictions as to imposition of tax on the sale or purchase of goods.*** *— (1) No law of a State shall impose, or authorise the imposition of, a tax on2 the supply of goods or of services or both, where such supply takes place—*
>
> *(a) outside the State; or*
>
> *(b) in the course of the import of the goods or services or both into, or export of the goods or services or both out of, the territory of India.*
>
> *(2) Parliament may by law formulate principles for determining when a supply of goods or of services or both in any of the ways mentioned in clause (1).**"***

50. Entry 54 of list II of Seventh Schedule to the Constitution of India as it existed on the date of enforcement of the Constitution of India is extracted below:

> *"54. Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of entry 92A of List I."*

51. After the commencement of the Constitution of India, a controversy arose regarding the competence of the State Legislature to levy sales tax on transactions of sale with reference to clauses (1) and (2) of Article 286 as it stood prior to the Sixth Amendment, which read as under:

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

such restrictions and conditions in regard to the system of levy, rates and other incidents of the tax as Parliament may by law specify."

52. The dispute emanated from the explanation appended to the definition of "sale" in the Bombay Sales Tax Act, 1952, which deemed that any goods delivered in the State of Bombay for consumption therein would be treated as a sale within the State, notwithstanding that property in the goods had passed in another State. The issue, therefore, was whether the State Legislature of Bombay could impose sales tax merely on the basis that goods were consumed within its territory, despite the prohibition under Article 286(2) of the Constitution of India. The Bombay High Court, in a petition under Article 226 of the Constitution of India, struck down the provision as repugnant to Article 286 of the Constitution of India. However, the said decision was reversed by this Court in ***State of Bombay v. United Motors (India) Ltd.***[9]

53. This Court in ***United Motors*** (supra), while examining whether the State of Bombay has enacted a law imposing, or authorising the imposition of, a tax on sales or purchases of goods

[9] (1953) 1 SCC 514.

in disregard of the constitutional limitations on its legislative competence, observed as under:

> ***"16.*** *We are therefore of opinion that Article 286(1)(a) read with the Explanation prohibits taxation of sales or purchases involving inter-State elements by all States except the State in which the goods are delivered for the purpose of consumption therein in the wider sense explained above. The latter State is left free to tax such sales or purchases, which power it derives not by virtue of the Explanation but under Article 246(3) read with entry 54 of List II.***"**

54. The correctness of the above ruling was subsequently doubted, and the matter was reconsidered by a Seven Judge Bench of this Court in ***Bengal Immunity*** (supra). The above case arose from the fact that Bihar Commercial Taxes Department issued a notice to a company based in West Bengal, raising a demand under West Bengal Sales Tax as the sale of products from other states were delivered in the State of Bihar. The challenge to the imposition of the Bihar Sales Tax landed up before this Court which was referred to a seven judge bench to consider the validity of such taxes. This Court formulated four questions is the following manner:

> **"*13.*** *Coming, then, to the merits of the petition, the principal question is whether the tax threatened to be levied on the sales made by the appellant Company and implemented by delivery in the circumstances and manner mentioned in its petition is leviable by the State of Bihar.*

The legal capacity of the State of Bihar to tax these sales is questioned on the following grounds, namely:

(A) *that the sales sought to be taxed having taken place in the course of inter-State trade or commerce and Parliament not having by law provided otherwise, all States are debarred from imposing tax on such sales by reason of Article 286(2);*

(B) *that even if the ban under Article 286(2) did not apply, the State of Bihar is not competent to impose tax on such sales on a correct reading of Article 246(3) read with Entry 54 of List II in the Seventh Schedule and Article 286(1);*

(C) *that the Bihar Sales Tax Act, 1947 can have no extra-territorial operation and cannot, therefore, impose tax on such sales by a non-resident seller;*

(D) *that on a true construction of the Act itself, it does not apply to the sales sought to be taxed."*

Regarding the first question, this court through majority observed as under:

*"**31.1.** It should be noted that these are four separate and independent restrictions placed upon the legislative competency of the States to make a law with respect to matters enumerated in Entry 54 of List II. In order to make the ban effective and to leave no loophole the Constitution makers have considered the different aspects of sales or purchases of goods and placed checks on the legislative power of the States at different angles. Thus in clause (1)(a) of Article 286 the question of the situs of a sale or purchase engaged their attention and they forged a fetter on the basis of such situs to cure the mischief of multiple taxation by the States on the basis of the nexus theory. In clause (1)(b) they considered sales or purchases from the point of view of our foreign trade and placed a ban on the States' taxing power in order to make our foreign trade free from any interference by the States by way of a tax impost. In clause (2) they looked at sales or purchases in their inter-State character and imposed another ban in the interest of the freedom of internal trade. Finally, in clause (3) the Constitution makers'*

attention was rivetted on the character and quality of the goods themselves and they placed a fourth restriction on the States' power of imposing tax on sales or purchases of goods declared to be essential for the life of the community. These several bans may overlap in some cases but in their respective scope and operation they are separate and independent. They deal with different phases of a sale or purchase but, nevertheless, they are distinct and one has nothing to do with and is not dependent on the other or others. The States' legislative power with respect to a sale or purchase may be hit by one or more of these bans. Thus, take the case of a sale of goods declared by Parliament as essential by a seller in West Bengal to a purchaser in Bihar in which goods are actually delivered as a direct result of such sale for consumption in the State of Bihar. A law made by West Bengal without the assent of the President taxing this sale will be unconstitutional because (1) it will offend Article 286(1)(a) as the sale has taken place outside the territory by virtue of the Explanation to clause (1)(a), ***(2) it will also offend Article 286(2) as the sale has taken place in the course of inter-State trade or commerce and (3) such law will also be contrary to Article 286(3) as the goods are essential commodities and the President's assent to the law was not obtained as required by clause (3) of Article 286. This appears to us to be the general scheme of that article****.*

32. *We come now to the particular bans. Although the legislatures of the States were empowered by Article 246(3) read with Entry 54 of List II to make a law with respect to taxes on sales or purchases of goods, the different State Legislatures, as already mentioned, considered themselves free to make a law imposing tax on sales or purchases of goods provided they had some territorial nexus with such sales or purchases e.g. that one or other of the ingredients or events which go to make up a sale or purchase was found to exist or had happened within their respective territories. Whether they were right or wrong in so acting is a question which has not been finally decided by the courts but the fact is that they did so. This resulted in multiple taxation which manifestly prejudiced the interests of the ultimate consumers and also hampered the free flow of inter-State trade or commerce. So the Constitution makers had to cure that mischief. The first thing that they did was to take away*

the States' taxing power with respect to sales or purchases which took place outside their respective territories. This they did by clause (1)(a). If the matter had been left there, the solution would have been imperfect, for then the question as to which sale or purchase takes place outside a State would yet have remained open. So the Constitution makers had to explain what an outside sale was and, this they did by the Explanation set forth in clause (1). The language employed in framing the Explanation, however, has given scope for argument to counsel and presented considerable difficulties to the court in ascertaining its purpose and intendment. If the Explanation simply said "For the purposes of sub-clause (a), a sale or purchase shall be deemed to have taken place outside a State when the goods have actually been delivered for the purpose of consumption in another State, notwithstanding the fact; etc. etc." then none of the difficulties would have arisen at all. But why, it is asked, did the Constitution makers seek to explain what was an outside sale or purchase by saying that a sale or purchase was to be deemed to take place inside the particular State mentioned in the Explanation? Was the purpose of the Explanation only to explain what was an outside sale or purchase or was it also its purpose to allot or assign a particular class of sales or purchases of the kind mentioned therein to a particular State so as to put the question of situs of the sales or purchases of that description beyond the pale of controversy? These are questions which arise and are raised because of the somewhat involved language of the Explanation…

*** *** ***

40. If, therefore, the Explanation cannot be read into clause (2) because of the express language of the Explanation and also because of the difference in the subject-matter of the operative provisions of the two clauses, then it must follow that, except insofar as Parliament may by law provide otherwise, no State law can impose or authorise the imposition of any tax on sales or purchases when such sales or purchases take place in the course of inter-State trade or commerce and irrespective of whether such sales or purchases do or do not fall within the Explanation. It is not necessary, for the purposes of this appeal, to

enter upon a discussion as to what is exactly meant by inter-State trade or commerce or by the phrase "in the course of", for it is common ground that the sales or purchases made by the appellant Company which are sought to be taxed by the State of Bihar actually took place in the course of inter-State trade or commerce. Parliament not having by law otherwise provided, no State law can, therefore, tax these sales or purchases, that is to say, Bihar cannot tax by reason of clause (2) although they fall within the Explanation and other States cannot tax by reason of both clause (1)(a) read with the Explanation and clause (2). This conclusion leads us now to consider the arguments by which the respondent State and the intervening States which support the respondent State seek to get over this position.

41. *In the forefront is placed the argument that found favour with the majority of the Bench which decided State of Bombay v. United Motors (India) Ltd. [State of Bombay v. United Motors (India) Ltd., (1953) 1 SCC 514 : 1953 SCR 1069] That argument is to be found in the majority judgment at SCC pp. 533-34 : SCR pp. 1085-86. Shortly put, the majority opinion was that the operation of clause (2) stood excluded as a result of the legal fiction enacted in the Explanation. In their view the effect of the Explanation in regard to inter-State dealings was to invest what, in truth, was an inter-State transaction with an intra-State character in relation to the State of delivery and clause (2) could, therefore, have no application. They recognised that the legal fiction was to operate "for the purposes of sub-clause (a) of clause (1)" and that that meant merely that the Explanation was designed to explain the meaning of the expression "Outside the State" in clause (1)(a). They, nevertheless, came to the conclusion that when once it was determined with the aid of the fictional test that a particular sale or purchase had taken place within the taxing State, it followed as a corollary, that the transaction lost its inter-State character and fell outside the purview of clause (2), not because the fiction created by the Explanation was used for the purpose of clause (2), but because such sale or purchase became, in the eye of the law, a purely local transaction. In his own inimitable language the learned Chief Justice, who wrote and delivered the majority*

judgment, concluded the discussion on this point by saying that the statutory fiction completely masked the inter-State character of the sale or purchase which, as a collateral result of such masking, fell outside the scope of clause (2). In spite of the great respect we always entertain for the opinions of the then learned Chief Justice and the other learned Judges who constituted the majority we are unable to accept the aforesaid arguments or the conclusions as correct for the reasons we now proceed to state.

42. *The situs of an intangible concept like a sale can only be fixed notionally by the application of artificial rules invented either by Judges as part of the Judge-made law of the land, or by some legislative authority. But as far as we know, no fixed rule of universal application has yet been definitely and finally evolved for determining this for all purposes. There are many conflicting theories : One, which is more popular and frequently put forward and is referred to and may, indeed, be urged to have been adopted by the Constitution in the non obstante clause of the Explanation, favours the place where the property in the goods passes, another which is said to be the American view and which was adopted in C. Govindarajulu Naidu & Co. v. State of Madras [C. Govindarajulu Naidu & Co. v. State of Madras, 1952 SCC OnLine Mad 229 : AIR 1953 Mad 116] fixes upon the place where the contract is concluded, a third which prevails in the continental countries of Europe prefers the place where the goods sold are actually delivered, a fourth points to the place where the essential ingredients which go to make up a sale are most densely grouped. In this situation if the Explanation were not there and the ban under clause (2) were to be raised unconditionally it would become necessary for the courts to reach a conclusion and choose between these conflicting views.*

42.1. *Article 286(1)(a), it should be noted, does not say that an inside sale may be taxed. It only says that no outside sale shall be taxed.* ***Now if a State claims that the sale is inside because part of its ingredients lies within its boundaries, by the same logic it is also an outside sale because the remaining parts are outside its territories and if it is an outside sale it cannot be taxed whether or not it can be deemed to be inside for some particular purpose. The prohibition of Article***

286(1)(a) is against taxing an outside sale and if the sale is outside even partially it may well be argued that no State Legislature can override the Constitution by deeming it to be an inside sale. Therefore, if the last of the aforesaid theories were to be adopted, then either no State would be able to tax, or all having the requisite nexus would be able to do so. But this, in our opinion, is the very mischief which the Constitution makers wished to avoid and that, as we understand the majority judgment in Bombay case [State of Bombay v. United Motors (India) Ltd., (1953) 1 SCC 514 : 1953 SCR 1069] , was their view also. So that view can be placed on one side*. On any one of the other views the situs would have to be fixed artificially in one place and then one would have to apply the logic of the majority decision and hold that as soon as the situs is determined to be in one place by judicial fiction i.e. a fiction enunciated by judicial decision, the inter-State character of the transaction must cease. The majority hold that this is the result when the situs is placed in only one State, namely, the delivery State, because of the fiction which the Explanation creates. The same result would have to follow logically if the situs were to be established by judicial fiction instead of by a constitutional one. The reasoning of the majority, pushed to its logical conclusion, will inevitably lead us to hold that all inter-State transactions must eventually be converted into intra-State transactions and, therefore, become amenable to the taxing power of the State within whose territories they are, by the constitutional or judicial fiction, to be deemed to take place. In this view there will remain no inter-State transaction on which clause (2) may possibly operate. The argument which leads to this astounding conclusion has only to be stated to be rejected. The truth is that what is an inter-State sale or purchase continues to be so irrespective of the State where the sale is to be located either under the general law when it is finally determined what the general law is or by the fiction created by the Explanation. The situs of a sale or purchase is wholly irrelevant as regards its inter-State character.*

42.2. *We find no cogent reason in support of the argument that a fiction created for certain definitely expressed purposes, namely, the purposes of clause (1)(a)*

can legitimately be used for the entirely foreign and collateral purpose of destroying the inter-State character of the transaction and converting it into an intra-State sale or purchase. Such metamorphosis appears to us to be beyond the purpose and purview of clause (1)(a) and the Explanation thereto. When we apply a fiction all we do is to assume that the situation created by the fiction is true. Therefore, the same consequences must flow from the fiction as would have flown had the facts supposed to be true been the actual facts from the start. Now, even when the situs of a sale or purchase is in fact inside a State, with no essential ingredient taking place outside, nevertheless, if it takes place in the course of inter-State trade or commerce, it will be hit by clause (2). If the sales or purchases are in the course of inter-State trade or commerce the stream of inter-State trade or commerce will catch up in its vortex all such sales or purchases which take place in its course wherever the situs of the sales or purchases may be. All that the Explanation does is to shift the situs from point A in the stream to point X also in the stream. It does not lift the sales or purchases out of the stream in those cases where they form part of the stream. The shifting of the situs of a sale or purchase from its actual situs under the general law to a fictional situs under the Explanation takes the sale or purchase out of the taxing power of all States other than the State where the situs is fictionally fixed. That is all that clause (1)(a) and the Explanation do. Whether the delivery State will be entitled to tax such a sale or purchase will depend on the other provisions of the Constitution.

42.3. *The assignment of a fictional situs to a sale or purchase has no bearing or effect on the other aspects of the sale or purchase e.g. its inter-State character or its export or import character which are entirely different topics. This fixing of a situs for a sale or purchase in any particular State either under the general law or under the fiction does not conclude the matter. It has yet to be ascertained whether that sale or purchase which by virtue of the Explanation has taken place in the delivery State was made in the course of inter-State trade or commerce. For this purpose the Explanation can have no relevancy or application at all.*

43. *Another argument adumbrated in the majority judgment in State of Bombay v. United Motors (India) Ltd. [State of Bombay v. United Motors (India) Ltd., (1953) 1 SCC 514 : 1953 SCR 1069] at SCC pp. 530-31 and 534-35 : SCR pp. 1081 and 1086-1087 and elaborated before us is that just as the freedom of trade referred to in Article 301 has been made to give way to the States' power of imposing non-discriminatory taxes by Article 304 so must Article 286(2) be regarded as subject to the States' taxing power, for the protection of Article 286(2) could not have been intended to be larger. This argument was refuted by the dissenting judgment in that Bombay case [State of Bombay v. United Motors (India) Ltd., (1953) 1 SCC 514 : 1953 SCR 1069] at SCC pp. 543-45 and 559-60 : SCR pp. 1102-1103 and 1127 and also by the dissenting judgment in State of Travancore-Cochin v. Shanmugha Vilas Cashewnut Factory [State of Travancore-Cochin v. Shanmugha Vilas Cashewnut Factory, (1953) 1 SCC 826 : 1954 SCR 53] at SCC pp. 861-62 : SCR p. 89. Nothing that we have heard on the present occasion induces us to depart from the views expressed on this subject in those dissenting judgments.*

*** *** ***

45. *The same argument is put in a slightly different way and in a more attractive form. It is said that we must construe Article 286 as a whole and give meaning to every part of it. Sales or purchases which fall within the Explanation to clause (1)(a) clearly partake of the character of inter-State transactions.* ***Therefore, if we construe clause (2) of Article 286 literally and strictly then the whole of clause (1)(a) and the Explanation will be redundant and useless and will have no immediate operation and will remain a dead letter, at any rate, until Parliament, in exercise of its powers under clause (2), lifts the ban****. We must, it is urged, make an attempt to avoid such a result and adopt such a construction as will not only give effect to each part of the article but also make each part applicable in praesenti. That, it is pointed out, can well be done if clause (2) is interpreted in a restricted manner. The argument runs — give full and immediate effect to the Explanation and then leave clause (2) to govern or operate on cases which do not fall within the*

Explanation. In effect this argument means that we must treat all transactions of sales or purchases falling within the Explanation as outside clause (2). Shorn of its thin veneer of disguise this argument is nothing more than the argument that the Explanation, in effect, operates as an exception to clause (2) and all the criticisms applicable to that construction will apply mutatis mutandis to the argument in the present form. Apart from that there are obvious fallacies which render the argument utterly unacceptable. We now proceed to deal with these fallacies seriatim.

46. No less than five reasons have been suggested in support of the argument that a restricted construction should be placed on clause (2) of Article 286. It will be convenient to deal with them at this stage one by one.

*** *** ***

48. *For all the foregoing reasons we are definitely of opinion that,* ***until Parliament by law made in exercise of the powers vested in it by clause (2) provides otherwise, no State can 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 the majority decision in State of Bombay v. United Motors (India) Ltd. [State of Bombay v. United Motors (India) Ltd., (1953) 1 SCC 514 : 1953 SCR 1069] insofar as it decides to the contrary cannot be accepted as well founded on principle or authority.****"***

(emphasis supplied)

55. After the said decision in ***Bengal Immunity*** (supra), the Taxation Enquiry Commission recommended certain constitutional amendments to clarify the scope of the State's power to levy sales tax. These recommendations were accepted, and Parliament accordingly enacted the Constitution (Sixth Amendment) Act, 1956, whereby Entry 92-A was inserted in List I of the Seventh Schedule, Entry 54 in List II was substituted, and

Sub-clause (*g*) was added to clause (1) and clause (3) was added to Article 269 of the Constitution of India.

56. By virtue of the amendment to Article 269 of the Constitution of India, Parliament was vested with the exclusive power to levy and collect tax on the sale or purchase of goods taking place in the course of inter-State trade or commerce, and to prescribe the principles for determining when such transactions assume an inter-State character. The Sixth Amendment simultaneously omitted the Explanation to clause (1)(a) of Article 286 of the Constitution of India and substituted clauses (2) and (3) thereof with two new clauses.

57. Consequent upon the Sixth Amendment to the Constitution of India, Parliament enacted the CST Act. The object of the said legislation was threefold: *first*, to lay down principles for determining when a sale or purchase of goods takes place in the course of inter-State trade or commerce, or outside a State, or in the course of import into or export from India; *second*, to provide for the levy, collection and distribution of taxes on sales effected in the course of inter-State trade or commerce; and *third*, to declare certain goods as being of special importance in inter-State trade or commerce and to prescribe restrictions and conditions subject to

which State laws could impose tax on such goods. With the enactment of the Central Sales Tax Act, the initial controversy stood resolved.

IV. STATUTORY INTERPLAY

58. Before we observe certain provisions of the CST Act, a word on interpretation is necessary. Interpretation of tax statute is to be done is an strict manner.[10] The words have to be given their natural meaning without expanding the ambit or reducing the same. A man sought to be taxed comes within the letter of law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the authorities seeking to recover the tax, cannot bring the subject within the letter of law, the subject is free, however apparently within the spirit of law the case might otherwise appear to be.

59. Moreover, we need to keep in mind that in the garb of interpretation, the judiciary cannot amend the provisions of the Constitution of India, which has been carefully drafted by the Union Parliament. This Court can only provide meaning and

[10] See, Commissioner of Customs (Import), Mumbai v. Dilip Kumar, (2018) 9 SCC 1

expound the avowed purpose of the law. Is ***Union of India v. Deoki Nandan Aggarwal,***[11] it was held as under**:**

> ***"14.*** *We are at a loss to understand the reasoning of the learned Judges in reading down the provisions in paragraph 2 in force prior to November 1, 1986 as "more than five years" and as "more than four years" in the same paragraph for the period subsequent to November 1, 1986. It is not the duty of the court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the courts. The court cannot add words to a statute or read words into it which are not there. Assuming there is a defect or an omission in the words used by the legislature the court could not go to its aid to correct or make up the deficiency. Courts shall decide what the law is and not what it should be. The court of course adopts a construction which will carry out the obvious intention of the legislature but could not legislate itself. But to invoke judicial activism to set at naught legislative judgment is subversive of the constitutional harmony and comity of instrumentalities…"***

60. Having alluded to the rules of interpretation, it is relevant to notice few provisions of the CST Act herein. The statutory regime has to be understood in the backdrop of the Constitutional scheme as discussed hereinabove which is applicable to the present dispute.

61. Section 3 of CST Act reads as under:

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[11] 1992 Supp (1) SCC 323

> ***"3. When is a sale or purchase of goods said to take place in the course of inter-State trade or commerce.***
>
> *A sale or purchase of goods shall be deemed to take place in the course of inter-State trade or commerce if the sale or purchase—*
>
> *(a) occasions the movement of goods from one State to another; or*
>
> *(b) is effected by a transfer of documents of title to the goods during their movement from one State to another.*
>
> ***Explanation 1** — Where goods are delivered to a carrier or other bailee for transmission, the movement of the goods shall, for the purposes of clause (b), be deemed to commence at the time of such delivery and terminate at the time when delivery is taken from such carrier or bailee.*
>
> ***Explanation 2** — Where the movement of goods commences and terminates in the same State it shall not be deemed to be a movement of goods from one State to another by reason merely of the fact that in the course of such movement the goods pass through the territory of any other State.**"***

In 2016, CST Act was amended by way of Act 28 of 2016[12], wherein Explanation 3 was added which reads as under:

> ***"Explanation 3** — Where the gas sold or purchased and transported through a common carrier pipeline or any other common transport or distribution system becomes co-mingled and fungible with other gas in the pipeline or system and such gas is introduced into the pipeline or system in one State and is taken out from the pipeline in another State, such sale or purchase of gas shall be deemed to be an movement of goods from one State to another.]**"*

[12] w.e.f. 14.05.2016.

From the above, it is clear that after coming into force of Finance Act, 2016 (Act No. 28 of 2016), it was made clear that sale of gas through common carrier pipeline from one State to another comes within the ambit of the CST Act, as it does not matter whether co-mingling took place with other gas introduced into the common pipeline. However, the question which arises herein is whether such explanation continues to clarifies the position as it stood earlier?

62. The learned senior counsel appearing for the Appellant State vehemently argued that the explanation is only applicable prospectively and does not cover the situation as it existed before 2016. On the contrary, the learned senior counsel for the Respondent No. 1 submitted that the explanation was added *ex abundunti catula* to explain what was the position earlier. We have given our consideration towards the explanation which necessarily points to a clarificatory attempt by the Union Parliament.

63. An explanation ordinarily cannot enlarge the scope of the section appended to it, but if it does, the effect must be to give legislative intent to the same.[13]

[13] Pioneer Urban Land and Infrastructure Limited v. Union of India, 2019 (8) SCC 416, at para 97

64. In this backdrop, it is essential to refer to the Office Memorandum dated 21.07.2015 of the Ministry of Finance in respect of Section 3 of CST Act, which reads as thus:

> ***"OFFICE MEMORANDUM***
>
> *Subject:- Clarification under section 3 of the Central Sales Tax Act 1956 – Reg.*
>
> *Pursuant to the decision of the Cabinet Committee on ; Economic Affairs (CCEA) in its meeting held on 25.03.2015, the following clarification is made with regard to section 3 of the Central Sales Tax Act, 1956:*
>
> *Where the gas sold or purchased is transported through a common transport/distribution system (such as a common carrier pipeline), wherein the gas may be co-mingled and fungible with the gas of other parties, so long as an equivalent quantity of the gas introduced into the system in one State is taken out of the system in other State (as evidenced through commercial documentation) such contractual movement of gas will be considered to be physical movement of goods from one State to another."*

Upon consideration of the above, it clear that the clarification with regard to Section 3 followed the decision of the Cabinet Committee on Economic Affairs (CCEA) in its meeting held on 25.03.2015. Such clarification was added as Explanation 3 to Section 3 of CST Act by way of abundant caution and as can be gathered, the legislative intent was not to alter the existing understanding of Section 3 of the CST Act with respect to transportation of gas through common carrier.

65. At this juncture, in order to understand the effect of such an explanation appended to a Section, whether clarificatory or explanatory in nature, it is apposite to refer to the judgment of this Court in ***Sedco Forex International Drill. Inc. and Ors. v. CIT, Dehradun & Another***[14], wherein this Court while dealing with the issue as to whether the salary of the employees of the appellant payable for field breaks outside India would be subjected to tax under Section 9(1)(ii) read with the Explanation thereto in the Income Tax Act, 1961 for Assessment Years 1992-93 and 1993-94, observed as thus:

> ***"17.*** *As was affirmed by this Court in Goslino Mario [(2000) 10 SCC 165 : (2000) 241 ITR 312] a cardinal principle of the tax law is that the law to be applied is that which is in force in the relevant assessment year unless otherwise provided expressly or by necessary implication. (See also Reliance Jute and Industries Ltd. v. CIT [(1980) 1 SCC 139)* ***An Explanation to a statutory provision may fulfil the purpose of clearing up an ambiguity in the main provision or an Explanation can add to and widen the scope of the main section*** *[See Sonia Bhatia v. State of U.P., (1981) 2 SCC 585, 598, para 24].* ***If it is in its nature clarificatory then the Explanation must be read into the main provision with effect from the time that the main provision came into force*** *[See Shyam Sunder v. Ram Kumar, (2001) 8 SCC 24 (para 44); Brij Mohan Das Laxman Das v. CIT, (1997) 1 SCC 352, 354; CIT v. Podar Cement (P) Ltd., (1997) 5 SCC 482, 506]. But if it changes the law it is not presumed to be retrospective, irrespective of the fact that the phrases used are "it is declared" or "for the removal of doubts."*

[14] (2005) 12 SCC 717

66. Likewise, this Court in ***Sree Sankaracharya University of Sanskrit & Ors. v. Dr. Manu & Another***[15], while determining the issue of two advance increments in favour of respondent was called upon to determine whether the order dated 29.03.2001 was a clarification of Clauses 6.16 to 6.19 of G.O. dated 21.12.1999 or whether it amended or modified the same. It observed as thus:

> *"31.* ***It is trite that any legislation or instrument having the force of law, which is clarificatory or explanatory in nature and purport and which seeks to clear doubts or correct an obvious omission in a statute, would generally be retrospective in operation****, vide Ramesh Prasad Verma [State of Bihar v. Ramesh Prasad Verma, (2017) 5 SCC 665] . Therefore, in order to determine whether the Government Order dated 29-3-2001 may be made applicable retrospectively, it is necessary to consider whether the said order was a clarification or a substantive amendment.*
>
> *32. In order to effectively deal with the aspect as to retrospective operation of the Government Order dated 29-3-2001 it may be useful to refer to the following extract from the treatise, Principles of Statutory Interpretation, 11th Edn. (2008) by Justice G.P. Singh on the sweep of a clarificatory/declaratory/explanatory provision:*
>
> > *"****The presumption against retrospective operation is not applicable to declaratory statutes****. As stated in Craies and approved by the Supreme Court : For modern purposes a declaratory Act may be defined as an Act to remove doubts existing as to the common law, or the meaning or effect of any statute. Such Acts are usually held to be retrospective.*
> >
> > *[…]* ***An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that if a statute is curative or merely***

[15] (2023) 19 SCC 30

declaratory of the previous law, retrospective operation is generally intended. *The language "shall be deemed always to have meant" or "shall be deemed never to have included" is declaratory and is in plain terms retrospective. In the absence of clear words indicating that the amending Act is declaratory, it would not be so construed when the amended provision was clear and unambiguous. An amending Act may be purely clarificatory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect and, therefore, if the principal Act was existing law when the Constitution came into force, the amending Act also will be part of the existing law."*

*** *** ***

38. From the aforesaid authorities, the following principles could be culled out:

38.1. ***If a statute is curative or merely clarificatory of the previous law, retrospective operation thereof may be permitted.***

38.2. ***In order for a subsequent order/provision/amendment to be considered as clarificatory of the previous law, the pre-amended law ought to have been vague or ambiguous. It is only when it would be impossible to reasonably interpret a provision unless an amendment is read into it, that the amendment is considered to be a clarification or a declaration of the previous law and therefore applied retrospectively****.*

38.3. An explanation/clarification may not expand or alter the scope of the original provision.

*38.4. Merely because a provision is described as a clarification/explanation, the Court is not bound by the said statement in the statute itself, but must proceed to analyse the nature of the amendment and then conclude whether it is in reality a clarificatory or declaratory provision or whether it is a substantive amendment which is intended to change the law and which would apply prospectively.****"***

Viewed from this perspective, it is luculent that the explanation to Section 3 of CST Act was added pursuant to the Cabinet Decision *vide* Act 28 of 2016 (w.e.f. 14.05.2016). The office memorandum dated 03.05.2015 in clear terms states that it was a clarification which was discussed by the Cabinet Committee and later incorporated as explanation in Section 3 of CST Act. The amendment to Section 3 of CST Act by way of Explanation 3 does not effectively alter its scope, rather simply reflects the statutory intent to clarify inter-state transactions. Furthermore, considering its clarificatory nature, unless expressly provided to be prospective in nature, it has to be read to effective from the date the main provision came into force. Therefore, in view of the above, in our considered opinion, the argument advanced by learned senior counsel for the Appellant that such explanation is applicable only prospectively is misplaced and repelled.

67. Now Section 4 of CST Act deals with sale or purchase of goods outside a State. The said Section is relevant and hence reproduced below as thus:

> ***"4. When is a sale or purchase of goods said to take place outside a State.—***
>
> *(1) Subject to the provisions contained in section 3, when a sale or purchase of goods is determined in accordance with sub-section (2) to take place inside a State,*

such sale or purchase shall be deemed to have taken place outside all other States.

(2) A sale or purchase of goods shall be deemed to take place inside a State, if the goods are within the State —

(a) in the case of specific or ascertained goods, at the time the contract of sale is made; and

(b) in the case of unascertained or future goods, at the time of their appropriation to the contract of sale by the seller or by the buyer, whether assent of the other party is prior or subsequent to such appropriation.

Explanation *— Where there is a single contract of sale or purchase of goods situated at more places than one, the provisions of this sub-section shall apply as if there were separate contracts in respect of the goods at each of such places.***"**

Section 4 of the CST Act is subject to the provisions of Section 3. It states that when a sale or purchase of goods is determined to take place inside a State, such sale or purchase shall be deemed to have taken place outside all other States. The statute determines that a sale or purchase is deemed to take place inside a State if the goods are within that State at the time the contract of sale is made, in the case of specific or ascertained goods; or, in the case of unascertained or future goods, at the time of their appropriation to the contract of sale by either the seller or the buyer, whether the assent of the other party is prior or subsequent to such appropriation.

68. It establishes a rule of mutual exclusivity and essentially pinpoints a sale's location to prevent double taxation. It dictates that once a sale legally occurs "inside" one State determined by where the goods are located when the contract is signed or when the goods are earmarked, it occurs "outside" all other States. Furthermore, being subject to Section 3, it provides that if the transaction causes goods to cross state borders, the host State cannot apply its own local taxes, but must instead levy the unified Central Sales Tax.

69. Now, adverting to the inter-play between Section 3 and Section 4 of CST Act. Before the CST Act, multiple States frequently claimed the right to tax a single transaction based on different territorial nexus. For example – one State used to claim jurisdiction to levy tax because the contract was signed there and another because the goods were manufactured there. The interplay of Sections 3 and 4 permanently resolves this.

70. Section 3 defines when a sale or purchase takes place in the course of inter-State trade or commerce. It focuses entirely on the movement of goods. If a sale occasions the movement of goods from one State to another, or if it is effected by a transfer of documents of title during such movement, Section 3 of CST Act colours the

transaction as an “inter-State sale”. On the other hand, Section 4 of CST Act provides that subject to Section 3, a sale determined to take place “inside” one State is deemed to occur “outside” all other States. Further, Section 4(2) stipulates artificial legal tests to fix the territorial situs (location) of a sale. Under Section 4(2), the situs is determined by where specific/ascertained goods rest at the time the contract of sale is made, or where unascertained/future goods are located at the time they are appropriated to the contract by the seller or the buyer.

71. On conjoint reading, it is seen that, even if a sale is technically deemed to have taken place “inside” a particular State under the situs tests of Section 4(2), if that sale simultaneously occasions the movement of goods across State borders, Section 3 takes precedence. The State cannot tax it as a purely local (intra-State) sale under its general sales tax laws. Section 3 creates the taxable event (the inter-State sale), but Section 3 itself does not tell the government which State is entitled to collect the Central Sales Tax. For that, the Act relies on Section 4. The State in which the sale is deemed to have taken place “inside” (via the situs tests in Section 4) becomes the “appropriate State” empowered to levy and collect the Central Sales Tax on behalf of the Union government.

72. While Sections 3 and 4 of the CST Act provide the foundational criteria for determining when a sale takes place in the course of inter-State trade or 'outside a State', Section 7 of VAT Act serves to operationalize these principles within the local framework. Section 7 of the VAT Act states as under:

> ***"Section 7. Tax not to be levied on certain sales and purchases.***
>
> *No tax under this Act shall be levied and paid on the turnover of-*
>
> *(a) sale or purchase where such sale or purchase takes place –*
>
> *(i) in the course of inter-state trade or commerce; or*
>
> *(ii) outside the State; or*
>
> *(iii) in the course of the export out of or in the course of the import into, the territory of India;*
>
> *b) sale or purchase of any goods named or described in column 2 of the Schedule I or;*
>
> *(c) such sale or purchase; or sale or purchase of such goods by such class of dealers, as may be specified in the notification issued by the State Government in this behalf:*
>
> *Provided that while issuing notification under clause (c), the State Government may impose such conditions and restrictions as may be specified.*
>
> *Explanation: For the purposes of this Act, sections 3, 4 and 5 of the Central Sales Tax Act, 1956, shall apply respectively for determining whether or not a particular sale or purchase of any goods falls under any of the sub-clauses (i), (ii) and (iii) of clause (a).*

A plain reading of the aforesaid provision makes it evident that the State legislature, in enacting Section 7 of the VAT Act, has done no more than to give statutory expression within the framework of the

enactment, to what the Constitution of India and the CST Act had already ordained. The exclusion of inter-State trade from the levy of State tax under Section 7 is, in substance, a legislative acknowledgment of the constitutional boundaries within which the State's power of taxation must necessarily operate. Section 7, in that view, is not the source of these limitations but a reflection of them.

73. At this juncture, we can profitably refer to judgment of this Court in ***State of Kerala v. Attesee***[16], wherein the issue was regarding the interconnection of the three Acts: the CST Act, the Additional Duties of Excise (Goods of Special Importance) Act, 1957 and the State Sales Tax Act. Paragraph 6 of the said decision reads as thus:

> ***"6.*** *Article 286 of the Constitution of India imposed certain restrictions on the legislative powers of the States in the matter of levy of sales tax on sales taking place outside the State, sales in the course of import or export, sales in the course of interstate trade or commerce and sales of declared goods. The Sales Tax Acts in force in several States were not in conformity with the provisions of the Constitution and attempts to bring those laws to be in conformity with these provisions gave rise to a lot of litigation. This led to an amendment of Article 286. Clause (2) of the article, as it stands, since 11-9-1956, authorised Parliament to formulate principles for determining when sale or purchase of goods can be said to take place in the course of import or*

[16] (1989) Supp. 1 SCC 733

*export or in the course of inter-State trade or commerce. Clause (3) was amended, in terms already set out, to restrict the powers of a State to impose sales or purchase tax on declared goods. The CST Act, 1956 which came into force on 5-1-1957 formulated the principles referred to in Article 286(2). As already mentioned, this Act was amended, inter alia, by Act 16 of 1957 w.e.f. 6-6-1957 and by Act 31 of 1958 w.e.f. 1-10-1958. Section 14 listed the goods which are considered to be of special importance in inter-State trade or commerce which included the six items set out earlier. Section 15 of the Act, as originally enacted, was brought into force only w.e.f. 1-10-1958. .....***"***

74. In another decision of this Court in ***State of Andhra Pradesh vs National Thermal Power Corporation***[17], the facts of the case were simple, the State of Andhra Pradesh had levied a duty on the electricity supplied to the State of Karnataka from its power station at Ramagundam (State of Andhra Pradesh). Aggrieved by such levy, NTPC had challenged before the Court on the ground that such levy was taxing inter-state sale of electricity as goods was prohibited by Article 286 of the Constitution of India. A Constitution Bench of this Court while dealing with inter-state sale held as under:

"What is inter-State sale?

24. *It is well settled by a catena of decisions of this Court that a sale in the course of inter-State trade has three essential ingredients : (i) there must be a contract of sale, incorporating a stipulation, express or implied, regarding inter-State movement of goods; (ii) the goods must actually move from one State to another, pursuant to such contract*

[17] (2002) 5 SCC 203

of sale, the sale being the proximate cause of movement; and (iii) such movement of goods must be from one State to another State where the sale concludes. It follows as a necessary corollary of these principles that a movement of goods which takes place independently of a contract of sale would not fall within the meaning of inter-State sale. In other words, if there is no contract of sale preceding the movement of goods, obviously the movement cannot be attributed to the contract of sale. Similarly, if the transaction of sale stands completed within the State and the movement of goods takes place thereafter, it would obviously be independently of the contract of sale and necessarily by or on behalf of the purchaser alone and, therefore, the transaction would not be having an inter-State element. Precedents are legion; we may briefly refer to some of them. In English Electric Co. of India Ltd. v. CTO [(1976) 4 SCC 460 : 1977 SCC (Tax) 23 : (1977) 1 SCR 631] this Court held that when the movement of the goods from one State to another is an incident of the contract, it is a sale in the course of inter-State sale and it does not matter which is the State in which the property passes. What is decisive is whether the sale is one which occasions the movement of goods from one State to another. In Union of India v. K.G. Khosla and Co. Ltd. [(1979) 2 SCC 242 : 1979 SCC (Tax) 101] it was observed that a sale would be an inter-State sale even if the contract of sale does not itself provide for the movement of goods from one State to another provided, however, that such movement was the result of a covenant in the contract of sale or was an incident of the contract. Similar view was expressed in Sahney Steel and Press Works Ltd. v. CTO [(1985) 4 SCC 173 : 1985 SCC (Tax) 644] . In Manganese Ore (India) Ltd. v. Regional Asstt. CST [(1976) 4 SCC 124 : 1976 SCC (Tax) 447] after referring to Balabhagas Hulaschand v. State of Orissa [(1976) 2 SCC 44 : 1976 SCC (Tax) 164] it was observed that so far as Section 3(a) of the CST Act is concerned, there is no distinction between unascertained or future goods and goods which are already in existence, if at the time when the sale takes place these goods have come into actual existence.

Effect of Entry 53 List II, having remained unamended

25. *Having seen the properties of electricity as goods and what is inter-State sale, let us examine the effect of Entry 53 List II, having been left unamended by the Sixth Amendment from another angle. The Sixth Amendment did not touch Entry 53 in List II and so the contents of Entry 53 were not expressly made subject to the provisions of Entry 92-A of List I and arguments were advanced, with emphasis, on behalf of the States of Andhra Pradesh and Madhya Pradesh contending that such omission was deliberate and therefore the restriction which has been placed only in Entry 54 by making it subject to the provisions of Entry 92-A of List I should not be read in Entry 53. It was submitted that so far as sale of electricity is concerned, even if such sale takes place in the course of inter-State trade or commerce the State can legislate to tax such sale if the sale can be held to have taken place within the territory of that State or if adequate territorial nexus is established between the transaction and State legislation. For the several reasons stated hereinafter, such a plea cannot be countenanced.*

26. *The prohibition which is imposed by Article 286(1) of the Constitution is independent of the legislative entries in the Seventh Schedule. After the decision of the larger Bench in Bengal Immunity Co. Ltd. [AIR 1955 SC 661 : (1955) 2 SCR 603] and the Constitution Bench decision in Ram Narain Sons Ltd. v. CST [AIR 1955 SC 765 : (1955) 2 SCR 483] there is no manner of doubt that the bans imposed by Articles 286 and 269 on the taxation powers of the State are independent and separate and must be got over before a State Legislature can impose tax on transactions of sale or purchase of goods. Needless to say, such ban would operate by its own force and irrespective of the language in which an entry in List II of the Seventh Schedule has been couched. The dimension given to the field of legislation by the language of an entry in List II of the Seventh Schedule shall always remain subject to the limits of constitutional empowerment to legislate and can never afford to spill over the barriers created by the Constitution. The power of the State Legislature to enact law to levy tax by reference to List II of the Seventh Schedule has two limitations : one, arising out of the entry itself, and the other, flowing from the restriction embodied in the Constitution. It was held in Tata Iron and Steel Co. Ltd. v. S.R. Sarkar [AIR 1961 SC 65 :*

(1961) 1 SCR 379] (SCR at pp. 387 and 388) that field of taxation on sale or purchase taking place in the course of inter-State trade or commerce has been excluded from the competence of the State Legislature. In 20th Century Finance Corpn. Ltd. [(2000) 6 SCC 12] the Constitution Bench (majority) made it clear that the situs of the sale or purchase is wholly immaterial as regards the inter-State trade or commerce. In view of Section 3 of the Central Sales Tax Act, 1956, all that has to be seen is whether the sale or purchase (a) occasions the movement of goods from one State to another; or (b) is effected by a transfer of documents of title to the goods during their movement from one State to another. If the transaction of sale satisfies any one of the two requirements, it shall be deemed to be a sale or purchase of goods in the course of inter-State trade or commerce and by virtue of Articles 269 and 286 of the Constitution the same shall be beyond the legislative competence of a State to tax without regard to the fact whether such a prohibition is spelled out by the description of a legislative entry in the Seventh Schedule or not.

27. *It is well settled, and hardly needs any authority to support the proposition, that several entries in the three lists of the Seventh Schedule are legislative heads or fields of legislation and not the source of legislative empowerment. (To wit, see Calcutta Gas Co. Ltd. v. State of W.B. [AIR 1962 SC 1044 : 1962 Supp (3) SCR 1]) Competence to legislate has to be traced to the Constitution. The division of powers between Parliament and the State Legislatures to legislate by reference to territorial limits is defined by Article 245. The subject-matters with respect to which those powers can be exercised are enumerated in the several entries divided into three groups as three lists of the Seventh Schedule. Residuary powers of legislation are also vested by Article 248 in Parliament with respect to any matter not enumerated in any of the lists in the Seventh Schedule. This residuary power finds reflected in Entry 97 of List I. If an entry does not spell out an exclusion from the field of legislation discernible on its apparent reading, the absence of exclusion cannot be read as enabling power to legislate in the field not specifically excluded, more so, when there is available a specific provision in the Constitution prohibiting such legislation.*

28. *It is by reference to the ambit or limits of territory by which the legislative powers vested in Parliament and the State Legislatures are divided in Article 245. Generally speaking, a legislation having extraterritorial operation can be enacted only by Parliament and not by any State Legislature; possibly the only exception being one where extraterritorial operation of a State legislation is sustainable on the ground of territorial nexus. Such territorial nexus, when pleaded, must be sufficient and real and not illusory. In Burmah Shell Oil Storage & Distributing Co. of India Ltd. [AIR 1963 SC 906 : 1963 Supp (2) SCR 216] which we have noticed, it was held that sale for use or consumption would mean the goods being brought inside the area for sale to an ultimate consumer i.e. the one who consumes. In Entry 53, "sale for consumption" (the meaning which we have placed on the word "sale") would mean a sale for consumption within the State so as to bring a State legislation within the field of Entry 53. If sale and consumption were to take place in different States, territorial nexus for the State, where the sale takes place, would be lost. We have already noticed that in case of electricity the events of sale and consumption are inseparable. Any State legislation levying duty on sale of electricity, by artificially or fictionally assuming that the events of sale and consumption have taken place in two States, would be vitiated because of extraterritorial operation of State legislation.*

29. *In 20th Century Finance Corpn. case [(2000) 6 SCC 12] the Constitution Bench by reference to the definition of "tax on the sale or purchase of goods" [which too has been inserted as clause (29-A) in Article 366 by the Sixth Amendment] opined that the situs of sale can be fixed either by the appropriate legislature or by Judge-made law and no settled principles for determining situs of sale can be laid down. Further, the State Legislature cannot by law, treat sales outside the State and sales in the course of import as "sales within the State" by fixing the situs of sales within its State in the definition of sale, as it is within the exclusive domain of the appropriate legislature i.e. Parliament to fix the location of sale by creating legal fiction or otherwise. The majority has clearly opined that the State where the goods are delivered in the transaction of inter-State sale, cannot levy a tax on the basis that one of the events in the chain has taken place within the State; so also where the goods*

are in existence and available for the transfer of right to use, there also that State cannot exercise power to tax merely because the goods are located in that State. Then it was observed that in case where goods are not in existence or where there is an oral or implied transfer of the right to use the goods, such transactions may be effected by the delivery of the goods in which case the taxable event would be on the delivery of goods. However, we are dealing with the case of electricity as goods, the property whereof, as we have already noted, is that the production (generation), transmission, delivery and consumption are simultaneous, almost instantaneous. Electricity as goods comes into existence and is consumed simultaneously; the event of sale in the sense of transferring property in the goods merely intervenes as a step between generation and consumption. In such a case when the generation takes place in one State wherefrom it is supplied and it is received in another State where it is consumed, the entire transaction is one and can be nothing else excepting an inter-State sale on account of instantaneous movement of goods from one State to another occasioned by the sale or purchase of goods, squarely covered by Section 3 of the CST Act.

Sale of electricity by NTPCL

30. *In both the cases before us, contracts have been entered into between parties to the transaction, that is, the sellers and the buyers (in other States) prior to the generation of electricity. NTPCL generates electricity and pursuant to these contracts, supplies the same from its power stations situated in the State of A.P. or M.P. to the buyers in other States where it is received and consumed. There is no hiatus between generation, sale, supply, transmission, delivery and consumption. The inter-State movement of electricity is pursuant to contracts of sale. Such sales can be held only as inter-State sales.*

31. *Though it may be permissible to fix the situs of sale either by appropriate State legislation or by Judge-made law as held by the majority opinion in 20th Century Finance Corpn. case [(2000) 6 SCC 12] we would like to clarify that none of the two can artificially appoint a situs of sale so as to create territorial nexus attracting applicability of tax legislation enacted by any State Legislature and tax an inter-State sale in breach of Section 3 of the CST Act read*

with Articles 286(2) and 269(1) and (3) of the Constitution. No State legislation, nor any stipulation in any contract, can fix the situs of sale within the State or artificially define the completion of sale in such a way as to convert an inter-State sale into an intra-State sale or create a territorial nexus to tax an inter-State sale unless permitted by an appropriate Central legislation. But this is exactly what the definition of "consumer" in Section 2(a) of the M.P. Electricity Duty Act, 1949 has done. The definition of consumer has been artificially extended to include any person who receives electrical energy (without regard to its consumption) and also to include a person who, receiving the electrical energy in bulk, forwards it onwards for distribution, (without regard to the fact whether it is transmitted outside the State and whether the electricity is or is not consumed within the State). The same definition has been adopted in the M.P. Upkar Adhiniyam, 1981. This definition of consumer shall have to be read down as including within it only such persons who receive the electricity for consumption or distribution for consumption within the State. Without such reading down, the definition of "consumer" would be rendered ultra vires of Articles 286 and 269 of the Constitution read with Section 3 of the Central Sales Tax Act, 1956.

Consequences on free flow of trade

32. *Yet another reason why we cannot accept the line of reasoning advanced on behalf of the States of Andhra Pradesh and Madhya Pradesh is that the same runs counter to the scheme of constitutional provisions and specially the Sixth Amendment. As has been found by the Division Bench of the Andhra Pradesh High Court in its impugned judgment, if the reasoning suggested on behalf of the State of A.P. was accepted, the State where the dealer supplying the electricity is located and the electricity originates for sale, as also the States in which the purchaser of electricity is located and it is delivered, shall both subject the electrical energy to taxation, by relying on the theory of territorial nexus. Such a situation would be the one which was obtaining in the country with respect to sales tax prior to coming into force of the Constitution and which led to complications and difficulties in administration of sales tax legislation and therefore, was taken care of by the Sixth*

Amendment. Such multiple taxation would result in hampering free movement of electricity between the States, and therefore, would be prejudicial to freedom of trade, commerce and intercourse throughout the territory of India, and for the unity and integrity of the country. That would give rise to the same situation which was sought to be remedied by the Constitution and the Sixth Amendment."

75. In ***Hyderabad Engineering Industries*** (supra), the question before this court was whether the turnover under dispute for Assessment year 1981-1982 is an "branch transfer" or an "inter-state sale" and thereby eligible to tax under the CST Act. This Court while dealing with the above question, interpreted the provisions of CST Act, concerning inter-state sale and observed as under:

"17. *To make a sale as one in the course of inter-State trade or commerce, there must be an obligation, whether of the seller or the buyer to transport the goods outside the State and it may arise by reason of statute, contract between the parties or from mutual understanding or agreement between them or even from the nature of the transaction which linked the sale to such transportation such an obligation may be imposed expressly under the contract itself or impliedly by a mutual understanding. It is not necessary that in cases, there must be pieces of direct evidence showing such obligation in a written contract or oral agreement. Such obligations are inferable from circumstantial evidence.*

*** *** ***

19. *Section 3 of the Act deals with inter-State sales and details the circumstances as to when a sale or purchase of goods can be said to take place in the course of inter-State trade or commerce. A perusal of Section 3 of the Central Act shows that it raises a presumption of law and that is, a sale or purchase of goods shall be deemed to take*

place in the course of inter-State trade or commerce, if the sale or purchase (a) occasions the movement of goods from one State to another, or (b) is effected by transfer of documents of title to the goods during their movement from one State to another. For purposes of clause (b) of Section 3, Explanation 1 says that where the goods are delivered to a carrier or other bailee for transmission, the movement of the goods shall be deemed to commence at the time of such delivery and terminate at the time when delivery is taken from such carrier or bailee. Explanation 2 clarifies that when the movement of goods commences and terminates in the same State, the movement of goods will not be deemed to be from one State to another merely because of the fact that in the course of such movement, the goods pass through the territory of any other State.

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39. *From the above decisions, the principle which emerges is—when the sale or agreement for sale causes or has the effect of occasioning the movement of goods from one State to another, irrespective of whether the movement of goods is provided for in the contract of sale or not, or when the order is placed with any branch office or the head office which resulted in the movement of goods, irrespective of whether the property in the goods passed in one State or the other, if the effect of such a sale is to have the movement of goods from one State to another, an inter-State sale would ensue and would result in exigibility (sic) of tax under Section 3(a) of the Central Act on the turnover of such transaction. It is only when the turnover relates to sale or purchase of goods during the course of inter-State trade or commerce that it would be taxable under the Central Act."*

76. From the above discussion, following aspects are clear:

(i.) As per Article 269(1) of the Constitution of India, the Union Government has the competence to levy and collect tax on sale and purchase of goods in the course of inter-State trade or commerce.

(ii.) Article 286(1) of the Constitution of India further clarifies the position that the State legislature cannot impose a tax on supply of goods or services where the supply takes place outside the State.

(iii.) The Constitution (Sixth Amendment) Act, 1956 clarified the scope and competence of State Legislature to impose tax under Entry 54 of List II, Seventh Schedule, which cannot include any tax in the course of inter-State trade and commerce or international trade or commerce.

(iv.) Consequently, clarificatory statutory provision was introduced in form of Central Sales Tax, 1956 in terms of Article 269(3) of the Constitution of India.

(v.) Section 3 of the CST Act integrates the constitutional intention to prohibit imposition of state sales tax in the course of inter-State trade.

(vi.) Section 3 of CST Act read with its Explanation 1 and 2 clearly mandates that wherever the moment of goods takes place from one state to another in the course of inter-State trade or commerce is in the

exclusive domain of Union Government to tax under CST.

(vii.) The 2016 amendment, which added Explanation 3 to Section 3 of the CST Act, is a clarificatory provision inserted as abundant caution to formalise the pre-existing situations. The aforesaid explanation did not create anything new except to explicitly state the pre-existing legal position.

(viii.) To the extent that a transaction falls within the purview of the CST Act, Section 7 of the VAT Act can have no independent operation as the boundaries of the State's jurisdiction in such matters have already been drawn by the Constitution and the CST Act.

V. FACTUAL ANALYSIS

77. We now turn to the facts of the present case. Following questions arise for our determination:

(i) Whether the subject transaction is in the nature of "inter-state sale" or "intra-state sale"?

(ii) Whether the State of Uttar Pradesh had jurisdiction or statutory right to impose VAT on the subject transaction?

78. There is no gainsaying that the natural gas first travels from the basin to Gadimoga in Andhra Pradesh. At this point, two separate agreements are in play, i.e., GSPA and GTA.

79. The High Court on a detailed examination of GSPA has observed as under:

> *"**130.** Exhibit 1 of the aforesaid contract contains proforma with regard to Daily Contract Quantity. Exhibit 2 relates to Sales Price and Exhibit 3 provides different conditions regulating Gas Quality Specifications. Nomination, Scheduling and Allocation Procedures have been provided under Ext. 4 of the agreement. Measurement is to be done an terms of provisions contained an Exhibit 5. Clause 1 of the Exhibit 5 provides that the seller shall provide and install, at their own expenses the measurement at delivery point, i.e., Gadimoga in the present case. The measured quantity shall be recorded an MMBtu at the delivery point. It shall be appropriate to reproduce relevant portion from Exhibit 5 which is as under:-*
>
> *** *** ***
>
> ***131.*** *From the aforesaid reading of contractual obligation an terms of 1 GSPA, there appears to be no reason to disagree with the petitioner's contention that the delivery point of the natural gas to the buyer is at Gadimoga. The quantity of gas delivered to the buyer is measured an accordance to MMBtu Scale at delivery point and according to GSPA, it is the buyer who owes responsibility with regard to damage or loss caused, if any. However, an case quantity of gas made available by the seller during contractual period is less than the adjusted monthly supply quantity, then it shall be shortfall quantity, which may be supplied by the seller. Supply of natural gas by the petitioner is subject to execution of gas transportation agreement requiring the transporter to transport gas from delivery point to the inlet of buyer. It is for the buyer to make necessary arrangement for supply of gas from delivery point to buyer's facility. Delivery of gas from one pipeline to other*

an the course of transportation of gas to buyer's facility according to GSPA is for the purpose of making integrated and continuous movement of gas from delivery point to buyer's facility.

132. *From the aforesaid reading of the contract, it appears that the petitioner or the seller is relieved from its liability immediately after delivery of possession of gas to the buyer at the sale point, i.e., Gadimoga an Andhra Pradesh. The seller or the petitioner shall be entitled for payment of cost of gas supplied at Gadimoga for the measured quantity. Virtually, the seller or the petitioner is absolved of the liability after delivery of gas at Gadimoga to the transporter, i.e. RGTIL and shall be entitled for payment of sale consideration on the basis of delivery made to RGTIL and not at Orai an the State of U.P.*

Accordingly, an view of the provisions contained an Section 3 of the CST Act readwith definition of sale given an the CST Act or the VAT Act or even Sales of Goods Act, sale takes place an Gadimoga itself so far as petitioner is concerned.

Delivery point being at Gadimoga, the sale consideration also co-relates to the delivery point and thereafter natural gas is transported to outside the State of Andhra Pradesh and comes to Uttar Pradesh via Gujrat, thus it appears to be inter-State sale."

80. Further on the interpretation of GTA and open access system, the High Court held as under:

"XIII- GAS TRANSMISSION AGREEMENT (GTA)

138. *Under the agreement, different issues have been dealt broadly but keeping an view the relevant conditions referred here-an-above, there appears to be no room of doubt that the liability of transporter, subject to conditions provided an the agreement, is to transport the gas to exit point to 1 the venue of downstream operator. It shall be obligation of shipper (buyer) to deliver gas to the transporter at entry point an terms of GSPA. Meaning thereby, the seller shall deliver the gas at delivery point, i.e., Gadimoga on behalf of buyer to the transporter an terms of GSPA. The*

transporter shall carry it to downstream exit point without any right or title with regard to gas.

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141. *An combined reading of all three agreements reveals that the petitioner provides gas at Gadimoga to the buyer and payment is made an terms of measurement done at the entry point situated at Gadimoga by the 4th day of receipt of invoice. The movement of goods, an the present case, is for outside the State of Andhra Pradesh but the sale an terms of Section 3 takes place an the State of Andhra Pradesh at Gadimoga an pursuance to the conditions contained an GSPA. An view of Section 7 of the VAT Act, the State Government may not impose tax to an sale or purchase taking place outside its territory.*

142. *The agreement with RGTIL which is an common format reveals that the RGTIL i.e. transporter operates gas pipeline system an India from Kakinada an the State of Andhra Pradesh to Bharuch (Gujarat), referred as East-West pipeline. The buyer, i.e., Shipper secured transportation services from transporter for transportation of natural gas through East-West pipeline from entry point to exit point for onward transportation an downstream pipeline to consumer's facilities. The Gas Transport Agreement (an short GTA) reveals that the Shipper or buyer has executed GSPA (supra) or shall execute GSPA (supra) and for downstream transportation, GTA was executed.*

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XIV – Common Carrier – OPEN ACCESS SYSTEM

154. *Accordingly, an terms of earlier Notification dated 20.12.2006 also, the RGTIL or GAIL both transported gas from one place to other not only to the respondents but so many buyers.*

An the present case, entire procedure adopted by the petitioner as well as Shipper or buyer seems to be an tune with 2008 Regulation.

155. *Shri J.N. Mathur, learned Senior Counsel appearing for the State vehemently argued that transportation of gas an common pipeline belongs to different buyers, hence it becomes unascertained goods and as such, sale shall be deemed to take place at Oral an the State of U.P. and not an Gadimoga of Andhra Pradesh.*

Relying upon the order passed by the assessing authority, he further submits that the gas of different buyers mixed with each other becomes unascertained goods, hence it cannot be an instance of inter-state sale. He further submits that the gas while moving an common pipeline is an commingled form hence it is not known as to which portion of gas belongs to whom, and thus it becomes ascertained goods only at Orai at the delivery point where appropriation takes place.

156. *An case argument advanced by the learned counsel for the State of U.P. is accepted, then the seller or buyer of natural gas, who does not possess his own pipeline shall be prevented to transport his gas and everyone will have to install his own pipeline, which shall not be feasible or practical. Transportation of natural gas cannot be compared with transportation of tangible goods. Mixture of natural gas of the common quality during the course of transportation shall not affect the right of the buyer. Every buyer or shipper may draw its natural gas from open access gas pipeline with due measurement at exit point.*

157. *It is not disputed that an large number of customers are being allotted gas by 'Gas Linkage Committee' and the price determined by the sale committee, the customers draw gas from the pipeline. 80% or more of gas is Methane and remaining are other natural gases. Basically, it is the Methane which is being utilized by the industrial units. While transporting the gas from Hajira to onward destination because of addition of natural gas of GAIL, it is subjected to processing and extracting of some molecules to make it suitable for the industrial consumption and then carry it through spur pipeline at the installation of the customers where again the processing or purification and removal of raw material is undertaken.*

158. *However, there appears to be no evidence on record, which may indicate that the petitioner or the seller is concerned as to where the re-processing of gas takes place. The payment to seller is made on the basis of measurement done at the delivery point an terms of GSPA. Under Section 3 of CST Act read with Section 7 of the VAT Act, natural gas is delivered at delivery point, i.e., Gadimoga and quantity is ascertained with due movement to forward destination situated outside the State, then it*

shall be inter-state sale or trade. An view of the statutory compulsion under the Regulation 2008 (supra) and the 2006 Notification (supra), the change of nature of gas during movement or by the processing to some extent that too outside the State of U.P. does not seem to change the nature of sale an pursuance to inter-state trade. Assessing authority seems to be mistaken while imposing VAT, that too without considering statutory obligations (supra).

159. *Accordingly, movement of gas or transportation of gas on the open access common carrier basis does not make any difference with regard to petitioner's claim for the benefit of Section 3 of CST Act read with Section 7 of the VAT Act even if it is carried forward an commingled form keeping an view the substance of agreement between the parties at three stages, i.e., GSPA to deal with transaction at Gadimoga and two gas transport agreements (GTA) to transport gas from Gadimogs to Hajira (Gujrat) and from Hajira to Orai an State of U.P."*

81. The High Court, on a detailed examination of the GSPA and the GTA, returned clear findings on each of the contentions now urged before this Court by the State of Uttar Pradesh. It held that the delivery point of natural gas to the buyer is unambiguously at Gadimoga in the State of Andhra Pradesh, where measurement is carried out, and that the seller stands absolved of all liability immediately upon delivery at that point, the sale consideration correlating exclusively to the measured quantity at Gadimoga. It further held that the transporter carries the gas from the delivery point to the exit point without acquiring any right or title in the gas, and that the GTA is an agreement solely for carriage and not for sale. On the specific argument, now reiterated before this

Court, that the co-mingling of gas in the common carrier pipeline renders the goods unascertained and relocates the point of sale to Auraiya in Uttar Pradesh, the High Court categorically rejected the same, holding that the transportation of gas in a common pipeline on an open access basis does not affect the inter-State character of the original transaction, and that any processing or change in the nature of gas during transportation does not alter the nature of the sale effected in pursuance of inter-State trade.

82. The aforesaid clause 2 of GSPA clearly stipulates the definition of 'delivery point'. A plain reading of the aforesaid clause 2 read with clause 7 indicate that, there is no doubt, the title and risk both pass at the delivery point on delivery to the buyers designee, i.e., at Gadimoga where RIL's facilities are interconnected to the facilities of the transporter. Therefore, learned senior counsel, Dr. Singhvi, has rightly submitted that the role of RIL concludes once the natural gas is handed over at Gadimoga to RGTIL, thereby concluding the sale. As such, we are in respectful agreement with the findings given by the High Court in the impugned judgment, which are well-founded both on the terms of the agreements and on the applicable provisions of Section 3 of the CST Act.

83. It is also pertinent to mention that, even the State of Uttar Pradesh acknowledges that the above sale transaction was inter-State transaction and accordingly has issued Form-C to the buyers in terms of Rule 12 of the CST Rules. There is no doubt that Rule 12 read with Section 8(4) of CST Act provides that a declaration be made under the prescribed form in regard to the inter-state trade (Form-C). Having recognised inter-State sale by providing Form-C to the buyer, it is not appropriate for the State of Uttar Pradesh to approbate and reprobate in characterizing the nature of transaction. Further, the State of Uttar Pradesh heavily relies on the Section 4 of CST Act to contend that the goods were unascertained and came to be ascertained only at Uttar Pradesh, therefore, the sale took place within the State. The aforesaid argument is completely misplaced, as it tries to over amplify Section 4 of the CST Act, whereas, the aforesaid provision is clearly subjected to Section 3 of the CST Act. A Constitution Bench of this Court in ***Tata Iron and Steel Co. Limited vs. S.R. Sarkar & Ors.***[18] while determining as to the correct place in which the sale could be said to have taken place, interpreted Section 4 of the CST Act and held as under:

[18] 1960 SCC OnLine SC 106

> **"***...Fourthly, section 4 is expressly made subject to section 3. This can only mean that an case any conflict between the two sections appears, section 3 would prevail. Now these two sections define two kinds of sale, namely, an sale an the course of inter-State trade and an sale taking place outside an State. If an sale happens to come under both definitions, it would have to be taken as an sale an the course of interstate trade for section 4 has been made subject to section 3. That being so, it would be impossible to hold that section 4(2) indicates where an sale falling under section 3(b) is to be held to have been effected.***"**

Therefore, once an transaction of sale fulfils a condition of an inter-State trade under Section 3 of the CST Act, as pointed out in the present set of facts, application of Section 4 of the CST Act is completely misplaced.

84. Furthermore, the Appellant State tried to argue that provisions of Section 23(2) of Sales of Goods Act, 1930 has to be utilized to state that the delivery to transporter/carrier given at Gadimoga was not sale, rather the sale happened at Auraiya, Uttar Pradesh. At the outset, the argument with respect to ascertainment and appropriation are irrelevant as Section 23(2) of Sales of Goods Act makes it clear that once goods are delivered to a carrier for the purpose of transmission to the buyer, then the goods are treated to be appropriated. Even otherwise, for purposes of Section 3 of CST Act, once there is movement of goods from one state to another, pursuant to a contract of sale, the nature of

goods, whether they are unascertained or ascertained goods are irrelevant. At this juncture it is relevant to note the judgment of this court is ***Manganese Ore (India) Ltd. v. The Regional Assistant Commissioner of Sales Tax, Jabalpur***[19], wherein it was held as under:

> ***"7.*** *Category IV is in respect of contracts of sale, copies of which are Annexures 1 to 7 before the High Court. These sales were admittedly made by the appellant in favour of the buyers within the territory of India but outside the State. It was, however, contended that as the goods purported to have been sold to the buyers did not in fact move from the State of Madhya Pradesh, therefore, there was no inter-State sale, but only an inside sale in the State where the goods were delivered, and therefore the State of Madhya Pradesh had no jurisdiction to levy tax under the Central Sales Tax Act. The same arguments were applied to Categories II and III on the ground that if the sales comprised in Categories II and III were not sales in the course of export they also were not inter-State sales, because the goods which moved from the State of Madhya Pradesh were not actually the goods which were sought to be sold to the buyers in other States in India. The High Court has considered this matter at great length and has relied on a number of authorities. In a recent judgment of this Court in Balabhgas Hulaschand v. State of Orissa [(1976) 2 SCC 44 : 1976 SCC (Tax) 164] after review of all the authorities on the point, this Court held as follows:*
>
> *"That the following conditions must be satisfied before a sale can be said to take place in the course of inter-State trade or commerce:*
>
> *(i) that there is an agreement to sell which contains a stipulation express or implied regarding the movement of the goods from one State to another;*

[19] (1976) 4 SCC 124

(ii) that in pursuance of the said contract the goods in fact moved from one State to another; and

(iii) that ultimately a concluded sale takes place in the State where the goods are sent which must be different from the State from which the goods move.

If these conditions are satisfied then by virtue of Section 9 of the Central Sales Tax Act it is the State from which the goods move which will be competent to levy the tax under the provisions of the Central Sales Tax Act."

On a careful consideration of the facts and circumstances of the present case we are satisfied that the present case is directly covered by the decision of this Court in Balabhgas Hulaschand case [(1976) 2 SCC 44 : 1976 SCC (Tax) 164].

*** *** ***

14. *Lastly it was contended by counsel for the appellant that as the manganese ores despatched by the appellant were unascertained or future goods which would come into existence only after the manganese ores extracted in various mines in Madhya Pradesh and Maharashtra were stocked and piled up one after the other the provisions of Section 3(a) of the Central Sales Tax Act would not apply.* ***This contention is completely without substance in view of the decision of this Court in Balabhgas Hulaschand case [(1976) 2 SCC 44 : 1976 SCC (Tax) 164] , where it was pointed out that so far as Section 3(a) of the Central Sales Tax Act is concerned there is no distinction between unascertained and future goods and goods which are already in existence****, if at the time when the sale takes place these goods have come into actual physical existence…….*

(Emphasis Supplied)

85. The Appellant State's contention on co-mingling of gas to indicate the change in nature of sale so as to disentitle the benefit of Section 3 of the CST Act is completely irrelevant. The co-mingling of gas as pointed out by the High Court is an statutory

obligation imposed is terms of the Petroleum and Natural Gas Regulatory Board Act, 2006 and the PNGRB (Access Code for Common Carrier or Contract Carrier Natural Gas Pipelines) Regulations, 2008, which requires transporters to maintain common carriers on an open access basis. The Supreme Court of the United States in ***Peoples Natural Gas Co. v. Public Service Commission***[20] laid down the principle that the passing of custody and title at the agreed delivery point, without arresting the movement of the gas to its ultimate destination, constitutes the legally operative moment of the transaction, and that the subsequent feeding of gas into a common pipeline, including its inevitable physical commingling with gas from other sources, does not alter or relocate the character of the sale already concluded. Applying this principle to the facts of the present case, the gas having been metered, delivered, and title having passed at Gadimoga in the State of Andhra Pradesh in terms of the GSPA, the sale stood concluded at that point. The subsequent commingling of the gas and the re-metering at Auraiya in the State of Uttar Pradesh were mere incidents of transportation, attendant upon a sale already fully completed in another State, and cannot

[20] [270 U.S. 550 (1926)]

create a fresh occasion for the levy of tax under the VAT Act. Therefore, the movement of gas *via* common carrier, does not change the nature of sale to disentitle the benefit of Section 3 of the CST Act. Further, even the Clause 2.6(a) of the GTA stipulates that the transporter shall not receive any title and is merely transporting and delivering the gas on behalf of the buyer.

86. Moreover, the State of Uttar Pradesh has contended that the gas which is delivered by GAIL, after carrying out the processing in the transmission of gas, at Uttar Pradesh is the final product, and therefore the sale takes place at Uttar Pradesh, cannot be accepted in light of the agreement between GAIL and buyers being an agreement solely for the purpose of transportation. In any case, any processing if being carried out by GAIL is not material to the present dispute for determining the inter-sate nature of transaction under Section 3 of the CST Act as the role of the Respondent No. 1/seller, in the facts of the case, ends with the sale of gas at the delivery point, i.e., Gadimoga.

87. Before parting, it is necessary to deal with the submission of the State of Uttar Pradesh concerning gas being unascertainable and its reliance on the judgment of Gujarat High Court in ***State of***

Gujarat vs. Gas Authority of India Limited[21] and batch, wherein the High Court upheld the finding of the Gujarat Sales Tax Tribunal, Ahmedabad and held as under:

> *"**[8.8].** The findings arrived at by the learned Tribunal are not only based on appreciation of evidence led by both the parties but also after site inspections carried out by the learned Tribunal itself. The Appellate Tribunal is a statutory Tribunal specifically constituted under the GST Act to decide taxability of transactions either under the GST Act or CST Act and is, therefore, conferred with the appellate powers to examine the factual and technical aspects involved in the transactions. The findings recorded by the learned Tribunal are on appreciation of evidence which are neither perverse nor contrary to the evidence on record. On facts and on appreciation of evidence the learned Tribunal after considering the decision of the Hon'ble Supreme Court in the case of M/s. Balabhagas Hulaschand & Anr. (Supra) has observed and held that the goods would fall under Case 2 as enumerated in the aforesaid decision and thereafter has specifically come to the conclusion that transactions would not amount to inter-State sales.*
>
> ***[8.9]** Now, so far as the reliance placed upon the decision of the Allahabad High Court in the case of Reliance Industries Ltd. (Supra) is concerned, we are of the opinion that on facts and considering the transactions in the present case as well as the transactions which were before the High Court in the aforesaid decision, the transactions in the present case are not comparable. Therefore, considering the findings recorded by the learned Tribunal while holding that the transactions in question can be said to be Branch Transfer and cannot be said to be inter-State sale, on facts the decisions relied upon by the learned Counsel appearing on behalf of the petitioner referred to herein above shall not be applicable to the facts of the case on hand.*
>
> ***[8.10]** Learned Tribunal has given cogent reasons and has given the specific finding after long drawn reasoning and therefore, the same are not required to be interfered by*

[21] SCA No. 12980 of 2007

this Court in exercise of powers under Article 226/227 of the Constitution of India."

From the reading of the above judgment, it is evident that the reliance by the State of Uttar Pradesh on the aforementioned judgment is distinguishable on the facts of the present case. In fact, the very same judgment relied upon by the State of Uttar Pradesh categorically differentiates the facts of the present case. In the case cited before us, GAIL was acting in the capacity of the seller itself, whereas in the present case, as observed herein above, GAIL is merely an transporter. Therefore, the said judgment has no application in this Appeal.

88. Lastly, the State of Uttar Pradesh has also submitted that the public trust doctrine mandates that the Union of India is the trustee of the natural resources and the Respondent No. 1 acts only as an agent. Accordingly, it is submitted that the sale transaction is complete only at the terminating point in the State of Uttar Pradesh. Although the argument looks impressive at the outset, however the devil is in the details. The Public Trust Doctrine, as enunciated by this Court in ***M.C. Mehta v. Kamal Nath***[22] and subsequently elaborated in ***Intellectuals Forum,***

[22] (1997) 1 SCC 388

Tirupathi v. State of Andhra Pradesh[23] is a doctrine rooted in environmental jurisprudence, grounded in Articles 21, 48A and 51A(g) of the Constitution of India, and directed towards the protection and preservation of natural resources for the benefit of present and future generations. As this Court held in ***Intellectuals Forum*** (supra), the doctrine does not specifically proscribe the alienation of property held in trust for the public; its operation is concerned with normative standards of resource management and governance, not with the determination of taxable situs or the adjudication of fiscal claims. The doctrine, in its avowed purpose, imposes affirmative duties upon the State as trustee; it does not and cannot serve as an instrument to override the constitutional scheme of legislative competence or to create taxing jurisdiction where the Constitution has not conferred any. Extending this principle to its logical conclusion, the doctrine cannot be utilised to enable multiple taxation by State upon a single inter-State transaction, when the constitutional scheme has expressly and exclusively reserved that field to the Union. The Courts must necessarily limit this doctrine to its avowed purpose; to expand it beyond that purpose would be to distort a valuable

[23] AIR 2006 SC 1350

instrument of environmental governance into a tool for overriding constitutional guarantees, an expansion that this Court is not prepared to countenance.

89. From the above following conclusion, we do not find any valid reason to interfere with the well-reasoned judgment of the High Court. It needs to be observed that High Court's order is in line with the constitutional scheme and statutory mandate, which was not dispelled by the Appellant herein. Accordingly, the appeal is dismissed.

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90. In light of the reasoning given in the civil appeal no. 3910 of 2016, we find no reason to entertain these appeals. Accordingly, they are dismissed.

.....J.
(J.K. MAHESHWARI)

.....J.
(ATUL S. CHANDURKAR)

New Delhi,
15th May, 2026