

**IN THE HIGH COURT FOR THE STATE OF TELANGANA:
HYDERABAD**

*** * ***

W.P.Nos.9991, 3865 & 3866 of 2009 AND T.R.E.V.C.No.52 of 2008

Between:

M/s.SDE Engineers Limited and Others.

...Petitioners

VERSUS

Commercial Tax Officer,
Jubilee Hills Circle, Mayur Kushal Complex,
Abids, Hyderabad and Others.

...Respondents

COMMON ORDER PRONOUNCED ON: 03.07.2026

THE HON'BLE SRI JUSTICE P.SAM KOSHY

AND

THE HON'BLE SRI JUSTICE SUDDALA CHALAPATHI RAO

1. Whether Reporters of Local newspapers
may be allowed to see the Judgments? : Yes
2. Whether the copies of judgment may be
marked to Law Reporters/Journals? : Yes
3. Whether His Lordship wishes to
see the fair copy of the Judgment? : Yes

P.SAM KOSHY, J

*** THE HON'BLE SRI JUSTICE P.SAM KOSHY**
AND
THE HON'BLE SRI JUSTICE SUDDALA CHALAPATHI RAO
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! Counsel for Petitioner(s) : Mr. Raghavan Ramabadran,
appearing on behalf of M/s. Lakshmi Kumaran Sridharan, and
Mr. Shaik Jeelani Basha along with Mr. I. Sudhakar Reddy.

^Counsel for the respondent(s) : Mr. Swaroop Oorilla, learned
Special Government for State Tax.

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> HEAD NOTE:

? Cases referred

- 1) [2000] 119 STC 182 (SC)
- 2) 2006 (2) STR 161 (SC)
- 3) (2023) 5 SCC 469
- 4) (2011) 43 VST 323
- 5) (2024) 122 GSTR 1 : 2024 SCC OnLine SC 28
- 6) (2011) 43 VST 424 : 2011 SCC OnLine AP 1089
- 7) (1999) 9 SCC 182
- 8) (2007) 8 VST 314
- 9) (2008) 46 APSTJ 49

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AND

**Commercial Tax Officer,
Jubilee Hills Circle, Mayur Kushal Complex,
Abids, Hyderabad and Others.**

...Respondents

COMMON ORDER: *(per Hon'ble Sri Justice P.Sam Koshy)*

Heard Mr. Raghavan Ramabadrn, appearing on behalf of M/s. Lakshmi Kumaran Sridharan, and Mr. Shaik Jeelani Basha along with Mr. I. Sudhakar Reddy, learned counsel for the petitioners; and Mr. Swaroop Oorilla, learned Special Government for State Tax appearing on behalf of the respondents.

2. These are batch of petitions wherein the question of law raised by the respective assesseees were similar. Since the question of law involved is similar and the outcome either the claim involved by the petitioners being allowed or the issue stands in favour of Revenue, we proceed to decide these batch matters by this Common Order.

3. There are three writ petitions of the similar nature i.e. Writ Petition No.9991 of 2009 being the lead one along with Writ Petition Nos.3865 and 3866 of 2009. Along with this there is a Tax Revision Case raising out of / if not identical issue i.e., Tax Revision Case No.52 of 2008.

4. Writ Petition No.9991 of 2009 has been filed seeking an appropriate relief to be issued holding the action of the respondent No.1 in levying tax on the rental income received by the petitioners on immovable property along with facilities of generators, air conditioners, transformers, lifts and other amenities like furniture, fit outs to the lessees not being exigible to tax under Section 4(8) of the Andhra Pradesh Value Added Tax, 2005 (for short 'APVAT Act, 2005) and the demand raised being arbitrary and contrary to law and

without jurisdiction and also in violation of principles of natural justice.

5. Similar was the relief sought for in Writ Petition No.3865 and 3866 of 2009. Similar again is the issue that needs to be considered in Tax Revision Case No.52 of 2008. In Tax Revision Case No.52 of 2008, though the demand seems to be identical, however it is raised under the provisions of APGST Act.

6. In all these cases, the questions of law are that “whether the rent received by the petitioners towards immovable property would be amenable to tax under the APVAT Act and under Section 5A of the APGST Act and whether the petitioners are liable to pay tax for the rental income received on the supply of interiors, furniture and fixtures?”

7. The parties were also contending that the movables in the kitchen and the cafeteria and the income generated on that also has to be borne in mind in the course of adjudication of the dispute.

8. In all the Writ Petitions and Tax Revision Case, the common contention of all the petitioners is that the petitioners are engaged in

construction of high rise building in the industrial technology park and the same are let out to software companies. The petitioners entered into an agreement with the tenants i.e. the various IT companies for lease of immovable properties. In terms of the lease agreement, the facilities and amenities, both were to be provided by the petitioners such as IP floor, centralized air conditioning, raw power supply upto the distribution board, light fittings and functional toilets. In addition to these, the petitioners who are the developers were also required to provide portable drinking water facility, electricity, sub-station, DG Power Pack, sewage power plant, fully equipped kitchen and cafeteria, and also the furniture and other fixtures required for the amenities and facilities that the petitioners were to provide which were taken on lease on rental basis. The movability of these amenities is not disputed by the petitioners. According to the petitioners the taxable event is the transfer of right and not any delivery of goods or possession or the use of goods. It was contended that transfer of right is *sine qua non* for the right to use any goods is concerned.

9. The primary contention of the petitioners was that the entire consideration received by them from the IT companies was by way of rent, and that service tax had been paid on the entire consideration so received. However, the Department, taking note of the fact that the petitioners were also receiving rent in respect of certain movable and immovable fixtures and furniture attached to the premises, and that the agreement bifurcated the consideration into two components — namely, rent for the building and rent towards the movable and immovable fixtures and furniture attached to the premises — held that the rent received towards such fixtures and furniture constituted a transfer of the right to use goods and was, therefore, amenable to tax under the APVAT Act and APGST Act.

10. In all these cases, the contention of the petitioners has also been that they have merely granted permission to the lessee to use these products and as such there is only delivery of goods for use in furtherance of the lease of immovable property, no right whatsoever stands transferred. It was also the contention of all the petitioners that there being no transfer of right created in favour of the lessee stands proved from the fact that the control and possession of these goods

still remains with the petitioners and that the lessee only has a right to use the same.

11. It was the categorical contention of all the petitioners that even though the tenants who were using these common facilities, the same by no stretch of imagination can be brought within the ambit of “deemed sale” of a “deemed transfer”. Further, these facilities are being extended as being incidental to and also being a means of rendition of services of renting of the immovable property. The very fact that the substantial control over these fixtures and furniture and other immovable articles being with the petitioners would got to show that the control vests with the petitioners and transfer has not occurred or happened.

12. It was also the contention of all the petitioners that since there was no such control of goods vested with the person to whom the lease has been made, the transaction will be of rendering services within the meaning of Section 65(105)(ZZZZJ) of the Finance Act. It was also contended that mere providing of services of certain furniture, fixtures and equipment would in itself not amount to a “deemed sale” in terms of Article 366(294) of the Constitution of

India and the transaction is also not leviable to sales tax under Section 5(E) of the APGST Act.

13. The further contention of the petitioners is that the Revenue has carried out an artificial valuation by impermissibly dissecting the contract and treating the movable and immovable furniture and fixtures as goods, the right to use which was allegedly transferred to the IT companies, thereby subjecting the same to taxation. According to the petitioners, the entire contract has to be treated as a single, indivisible arrangement constituting a service contract. All facilities and amenities provided by the petitioners are merely incidental to the said service. It is for this reason that the petitioners had been paying service tax on the entire consideration received by them.

14. According to the petitioners, the statute itself places the burden of proof upon the Revenue to establish the nature of the transaction, which, in the present case, is alleged to be a transfer of the right to use goods. The orders passed by the tax authorities have also failed to deal with the essential ingredients necessary to establish a transfer of the right to use. A plain reading of the contract itself would make it clear that the arrangement is indivisible and, therefore, ought to be

treated as a service contract amenable only to service tax and not to tax under either the APVAT Act or the APGST Act.

15. Referring to the judgments of the Hon'ble Supreme Court in **20th Century Finance Corprn. Ltd. and Another vs. State of Maharashtra**¹ and subsequently in **Bharat Sanchar Nigam Limited vs. Union of India**², the petitioners strongly contended that the nature of the contract itself establishes that no right whatsoever was transferred by the petitioners to the occupants. Since the arrangement was essentially a contract for services, the amenities and facilities provided thereunder merely conferred a right to use and did not amount to a transfer of the right to use goods. According to the petitioners, many of the facilities constituted common amenities enjoyed by more than one occupant at the same point in time. In several instances, such common facilities were made available on common floors having access to multiple companies. Having paid service tax on the entire consideration received, the bifurcation of the contract undertaken by the tax authorities is wholly impermissible. The findings of the tax authorities have been recorded without

¹ [2000] 119 STC 182 (SC)

² 2006 (2) STR 161 (SC)

properly examining whether any transfer of the right to use had, in fact, taken place. There was also no cogent material placed on record by the Revenue authorities regarding the nature of the goods sought to be subjected to tax.

16. *Per contra*, the contention of the learned Special Government Pleader for State Tax was that the list of items i.e. furniture, fixture are all leased out properties to the IT Companies. Further, these are movable items and cannot be treated or equated as an immovable property.

17. The contention of the learned Special Government Pleader for State Tax in the course of subjecting the movability of the furniture and fixtures to tax, both under the APVAT Act as also under the APGST Act, was holding that these facilities which have been provided by the petitioners amounts to transfer of right to use goods. It was the further contention that such transfer of right to use goods amounts to a “deemed sale” as per Article 366 (29A)(D) of the Constitution of India read with Section 5E of the APGST Act.

18. It was further contended by the learned Special Government Pleader for State Tax that it is also a case where some of the goods are found to have been attached to the super structure of wall, thus making it immovable, and since the taxable goods, movable properties or immovable properties are not shown separately, the factor pertaining to transfer of right to use goods stands proved.

19. It was further contended by the learned Special Government Pleader for State Tax that if the furniture are used by several IT Companies by itself would not be sufficient to hold that there is no transfer of right to use goods. For transfer of right to use goods it is seen if the lessee is enjoying those goods or not, if the lessee is using those goods even if it being used by more than one lessee.

20. Learned Special Government Pleader for State Tax further submitted that the terms of the agreement and the various clauses contained in the lease deeds must be examined in their entirety before appreciating the factual matrix. Referring to the lease deeds and the clauses contained therein, the learned Special Government Pleader contended that the very bifurcation of rent clearly demonstrates that the arrangement was a composite contract. In support of this

contention, it was submitted that the rent was payable separately for individual items and components, which by itself establishes that the consideration attributable to the fixtures and furniture was distinct and identifiable.

21. Learned Special Government Pleader for State Tax further contended that there is a substantial distinction between movable and immovable properties. The dispute involved in the present batch of cases pertains only to movable properties, which are either movable in the ordinary sense or, though affixed to the premises for convenience, nevertheless retain their character as movable goods for all practical and legal purposes.

22. With regard to the contention concerning the bifurcation of rent and the allegation that the contract had been artificially dissected, the learned Special Government Pleader for State Tax, referring to the lease deeds and agreements entered into between the parties, submitted that the rent had been fixed item-wise and that the quantification was based upon the actual rent received in respect of each item, as reflected in the agreements and lease deeds themselves.

23. In support of his submissions, he placed strong reliance upon the judgments of the Hon'ble Supreme Court in **Commr. of Service Tax vs. Quick Heal Technologies Limited**³, the decision of this Court in **G.S. Lamba & Sons vs. State of Andhra Pradesh**⁴.

24. Having heard the contentions put forth on both sides, it is seen that the goods in question includes the fixtures and furniture affixed to the leased premises. In addition to these there are also raw power supply upto the raw power distribution board, light fittings, functional toilets, building management system, portable drinking water, electrical sub-station, DG sets and sewage treatment plant, and fully equipped kitchen and cafeteria were also given to the tenants / lessees through a permission to use for the relevant material time as per the agreement signed between them.

25. However, before dealing with the arguments advanced by respective parties, it would be appropriate at this juncture to take note of the definition of taxable service as defined under Section 65(105) of the Service Act, which reads as under:

³ (2023) 5 SCC 469

⁴ (2011) 43 VST 323

“65(105) “taxable service” means any service provided or to be [provided]”

26. The next relevant provision on the basis of which the petitioners are paying tax is clause (zzzz), which again for ready reference is reproduced hereunder:

(zzzz) [to any person, by any other person, by renting of immovable property or any other service in relation to such renting, for use in the course of or for furtherance of, business or commerce.]

Explanation 1. - For the purposes of this sub-clause, “immovable property includes-

.....

(iv) in case of a building located in a complex or an industrial estate, all common areas and facilities relating thereto, within such complex or estate.

.....

Explanation 2.- for the purposes of this sub-clause, an immovable property partly for use in the course or furtherance of business or commerce and partly for residential or any other purposes shall be deemed to be immovable property for use in the course of furtherance of business or commerce;”

27. The next article which needs to be appreciated at this juncture is the provision of Article 366 (29A), which again for ready reference is reproduced hereunder:

“(29A) "tax on the sale or purchase of goods" includes--

(a) a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;

(b) a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;

(c)

(d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;”

28. Likewise, the definition of ‘sale’ and ‘tax’ as defined under Section 2(n) and Section 2(q) of the APGST Act, also is reproduced hereunder:

“2(n) "Sale" with all its grammatical variations and cognate expressions means every transfer of the property in goods whether as such goods or in any other form in pursuance of a contract or otherwise by one person to another in the course of trade or business, for cash, or for deferred payment, or for any other valuable consideration or in the supply or distribution of goods by a society (including a co operative society), club, firm or association to its members, but does not include a mortgage, hypothecation or pledge of, or a charge on goods.”

2(q) "tax" means a tax on the sale or purchase of goods payable under this Act and includes,-

- i. a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;*

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

29. Chapter 5(E) of the APGST Act which deals with the tax on the amount realised in respect of any right to use goods is also reproduced hereunder:

“5E. Tax on the amount realised in respect of any right to use goods-Notwithstanding anything contained in this Act;-

(a) Every dealer who transfers the right to use any goods for any purpose, whatsoever, whether or not for a specified period, to any lessee or licensee for cash, deferred payment or other valuable consideration, in the course of his business shall, on the total amount realised or realisable by him by way of payment in cash or otherwise on such transfer or transfers of the right to use such goods from the lessee or licensee, pay a tax at the rate of eight

paise on every rupee of the aggregate of such amount realised or realisable by him during the year.

(b) the transfer of right to use any such goods entered into by any dealer, shall be deemed to have taken place in this State whenever the goods are used within the State, irrespective of the place where the agreement whether written or oral for such transfer of right is made. Provided that no such tax shall be levied if the total turnover of the dealer including such aggregate is less than rupees two lakhs.”

30. It would be also necessary at this juncture to take note of a few judgments on the subject matter.

31. In the case of **Bharat Sanchar Nigam Limited** (supra) it was held as under:

“31. It was submitted that the mere fact that the Union was levying tax on certain taxable services could not be used to deny the State's powers to tax the objects/provisions in the service. Therefore, the State's powers must be read harmoniously with the Union's power and it is only when such reconciliation is impossible that the primacy should be given to the non obstante clause under Article 248(1). Alternatively it was submitted that the theory of aspect would apply so that what was service in one aspect was a sale in the other. It was also submitted that because in sub-clauses (b) and (f) of clause (29-A) of Article 366 the tax on a component in a transaction of works is permissible, it cannot be assumed that in sub-clause (d) tax could not be imposed on an element of the sale component of that transaction. The sub-clause has no words or limitations and must be read as broadly as the language permitted.

It was submitted that the test of dominant object of a composite works contract was no longer relevant after the Forty-sixth Constitution Amendment. It was submitted that the service providers transfer the right to use radio frequency channel to a subscriber for a specific duration and thus have effected a deemed sale of goods under Article 366(29-A)(d).

32. *These broadly speaking are the respective contentions and in our opinion, the issues which arise for consideration in these matters are:*

(A) What are “goods” in telecommunication for the purposes of Article 366(29-A)(d)?

(B) Is there any transfer of any right to use any goods by providing access or telephone connection by the telephone service provider to a subscriber?

(C) Is the nature of the transaction involved in providing telephone connection a composite contract of service and sale? If so, is it possible for the States to tax the sale element?

(D) If the providing of a telephone connection involves sale, is such sale an inter-State one?

(E) Would the “aspect theory” be applicable to the transaction enabling the States to levy sales tax on the same transaction in respect of which the Union Government levies service tax?

33. *Before taking up the issues for decision seriatim, it is necessary for us to deal with the two further preliminary objections raised by the respondents on the merits. Regarding the first of such objections that the writ petitions have become infructuous—it may be true that in relation to the U.P. Trade Tax Act, 1948 the challenge to Sections 2(h) and 3-F which have basically reproduced Article 366(29-A) has not been pressed by the petitioners. What has been argued, however, is for a construction*

of Article 366(29-A), particularly sub-clause (d) thereof. That construction, if accepted by the Court, would be sufficient to grant the petitioners the relief claimed. The issue of interpretation of Article 366(29-A) is, therefore, a live one.

40. Recommendation (c) of the Law Commission to amend Article 366 by expanding the definition of sale to include the transactions negated by the courts, was accepted by the Government. The Constitution (Forty-sixth Amendment) Bill, 1981 which was subsequently enacted as the Constitution (Forty-sixth Amendment) Act, 1982 set out the background in which the amendment to Article 366(29-A) of the Constitution was amended. Having noted the various decisions of the Supreme Court as well as of the High Courts excluding certain transactions from the scope of sale for the purpose of levy of sales tax, it was said that the position had resulted in scope for avoidance of tax in various ways. In the circumstances, it was considered desirable to put the matter beyond any doubt. Article 366 was therefore amended by inserting a definition of “tax on the sale or purchase of goods” in clause (29-A). The definition reads:

“366. (29-A) ‘tax on the sale or purchase of goods’ includes—

(a) a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;

(b) a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;

(c) a tax on the delivery of goods on hire-purchase or any system of payment by instalments;

(d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

(e) a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;

(f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration,

and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made;”

41. *Sub-clause (a) covers a situation where the consensual element is lacking. This normally takes place in an involuntary sale. Sub-clause (b) covers cases relating to works contracts. This was the particular fact situation which the Court was faced with in Gannon Dunkerley [State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd., (1958) 9 STC 353 : AIR 1958 SC 560 : 1959 SCR 379] and which the Court had held was not a sale. The effect in law of a transfer of property in goods involved in the execution of the works contract was by this amendment deemed to be a sale. To that extent the decision in Gannon Dunkerley [State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd., (1958) 9 STC 353 : AIR 1958 SC 560 : 1959 SCR 379] was directly overcome. Sub-clause (c) deals with hire-purchase where the title to the goods is not transferred. Yet by fiction of law, it is treated as a sale. Similarly the title to the goods under sub-clause (d) remains with the transferor who only*

transfers the right to use the goods to the purchaser. In other words, contrary to A.V. Meiyappan decision [(1967) 20 STC 115 (Mad)] a lease of a negative print of a picture would be a sale. Sub-clause (e) covers cases which in law may not have amounted to sale because the member of an incorporated association would have in a sense begun as both the supplier and the recipient of the supply of goods. Now such transactions are deemed sales. Sub-clause (f) pertains to contracts which had been held not to amount to sale in State of Punjab v. Associated Hotels of India Ltd. [(1972) 1 SCC 472 : (1972) 29 STC 474] That decision has by this clause been effectively legislatively invalidated.

42. *All the sub-clauses of Article 366(29-A) serve to bring transactions where one or more of the essential ingredients of a sale as defined in the Sale of Goods Act, 1930 are absent, within the ambit of purchase and sales for the purposes of levy of sales tax. To this extent only is the principle enunciated in Gannon Dunkerley Ltd. [State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd., (1958) 9 STC 353 : AIR 1958 SC 560 : 1959 SCR 379] (sic modified). The amendment especially allows specific composite contracts viz. works contracts [sub-clause (b)]; hire-purchase contracts [sub-clause (c)], catering contracts [sub-clause (e)] by legal fiction to be divisible contracts where the sale element could be isolated and be subjected to sales tax.*

43. *Gannon Dunkerley [State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd., (1958) 9 STC 353 : AIR 1958 SC 560 : 1959 SCR 379] survived the Forty-sixth Constitutional Amendment in two respects. First with regard to the definition of “sale” for the purposes of the Constitution in general and for the purposes of Entry 54 of List II in particular except to the extent that the clauses in Article 366(29-A) operate. By introducing separate categories of “deemed sales”, the meaning of the word “goods” was not altered.*

Thus the definitions of the composite elements of a sale such as intention of the parties, goods, delivery, etc. would continue to be defined according to known legal connotations. This does not mean that the content of the concepts remain static. The courts must move with the times. [See Attorney General v. Edison Telephone Co. of London Ltd., (1880) 6 QBD 244 : 43 LT 697] But the Forty-sixth Amendment does not give a licence, for example, to assume that a transaction is a sale and then to look around for what could be the goods. The word “goods” has not been altered by the Forty-sixth Amendment. That ingredient of a sale continues to have the same definition. The second respect in which Gannon Dunkerley [State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd., (1958) 9 STC 353 : AIR 1958 SC 560 : 1959 SCR 379] has survived is with reference to the dominant nature test to be applied to a composite transaction not covered by Article 366(29-A). Transactions which are mutant sales are limited to the clauses of Article 366(29-A). All other transactions would have to qualify as sales within the meaning of the Sale of Goods Act, 1930 for the purpose of levy of sales tax.

91. As far as the question whether providing of a telephone connection involves inter-State sales, now that it has been clarified that electromagnetic waves or radio frequencies are not goods, the issue is really academic.

III. Traditionally, a contract for carriage of goods or passengers is by roadways, railways, airways and waterways. This is associated with carriage of tangible goods. Such a carrier has no right over the goods of the customer and does not effect transfer of right to use any goods used by the carrier for goods. On this analogy, the petitioners carry messages. They are only carriers and have neither property in the message nor effect any transfer to the subscriber. The advancement of technology should be so absorbed

in the interpretation that this method of carriage of message should also be understood as carriage of goods and not a transfer of a right to use goods, if any."

32. In the case of **K.P. Mozika vs. ONGC Ltd.**⁵ it was held as under:

28. Clause (29A) of article 366 was inserted on February 2, 1983, thereby introducing the concept of "deemed sale". We are concerned with sub- clause (d) of clause (29A), which we have reproduced earlier. As noted earlier, the condition for applicability of the sale of goods under the Sale of Goods Act is that apart from the transfer of possession of the goods, there must be a transfer of the property in goods to the buyer. However, sub- clause (d) of clause (29A) refers not to the transfer of property in the goods to the buyer but to the transfer of the right to use any goods for any purpose for consideration as mentioned in sub-clause (d) of clause (29A). The transfer of the right to use any goods can be for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration. Only because a person is allowed to use certain goods of the owner, per se, there is no transfer of the right to use any goods. The transaction can be either of transfer of right to use the goods or granting mere permission to use the goods without transfer of the right to use the goods.

29. This court has interpreted sub-clause (d) of clause (29A) in various decisions. The first important decision on this aspect is a decision of the Constitution Bench in the case of 20th Century Finance Corporation Limited [20th Century Finance Corporation Limited v. State of Maharashtra, (2000) 119 STC 182 (SC); (2000) 6 SCC 12.] . This was a case where the appellant had entered into

⁵ (2024) 122 GSTR 1 : 2024 SCC OnLine SC 28

a master- lease agreement with the lessee. The lessee was a party that desired to take equipment for use on hire. Under the agreement, the appellant agreed to give diverse machinery/equipment listed in the Schedule to the master- lease agreement. The master-lease agreement provided that the appellants would place the orders for individual equipment on the request made by the lessee, and the equipment to be leased would be dispatched by the manufacturer or supplier concerned to the location specified in the lease agreement. At the instance of the lessee, the appellant used to place purchase orders to the suppliers or manufacturers for the supply of individual items or equipment. After the equipment was delivered and put to use, the lessee used to execute supplementary lease schedules acknowledging the receipt of the leased equipment. Such supplementary lease agreements used to form an integral part of the master-lease agreements. The controversy arose because some States started levying tax merely because the goods were found to be located in their States at the time of executing the master contract. The States where the goods were delivered started levying taxes on the said goods. In particular, the challenge was to the validity of legislations of various States on the ground that one transaction of transfer of the right to use goods was subjected to tax in different States. In the facts of the case, the issue considered by the Constitution Bench was “where is the situs of the taxable event on the transfer of right to use goods under article 366(29A)(d) of the Constitution.” In paragraph 27 of the aforesaid decision, the Constitution Bench held that the levy of tax in accordance with clause (29A)(d) is not on the use of goods but on the transfer of the right to use goods. In other words, it was held that the right to use goods accrues only because of the transfer of the right to use goods. It was held that the transfer is sine qua non for the right to use any goods. It was

held that if the goods are available, the transfer of the right to use goods occurs when the contract for the goods is executed. In other words, if the goods are available, irrespective of whether the goods are delivered and the written agreement is entered into between the parties, a taxable event on such a deemed sale would be executing a contract to transfer the right to use goods. However, when there is no written agreement but an oral or implied transfer of the right to use goods, it may be effected by the delivery of goods. Only in such cases the taxable event would be the delivery of goods. In this context, in paragraph 28, the Constitution Bench held that it cannot be said that there would be no complete transfer of the right to use goods unless the goods are delivered. When the goods are in existence, the taxable event for the transfer of the right to use goods occurs when a contract is executed between the lessor and the lessee, and the situs of sale of such a deemed sale would be where the agreement in respect thereof is executed.

30. *There is another decision of this court in the case of BSNL [Bharat Sanchar Nigam Limited v. Union of India, (2006) 3 VST 95 (SC); (2006) 145 STC 91(SC); (2006) 282 ITR 273 (SC); (2006) 6 RC 276; (2006) 3 SCC 1.] . This case was decided by a Bench of three honourable Judges of this court. The question decided in this case was about the nature of the transaction by which mobile phone connections were provided. The question was whether it was a sale of goods that would attract sales tax or a service that would attract service tax under entry 97 of List I of the Seventh Schedule to the Constitution of India. There were several issues, including an issue of whether there is any transfer of the right to use any goods by providing access to telephone connection by the telephone service provider to the subscriber. Another issue was whether a transaction of providing a telephone connection was a sale, which is an inter-State sale. There were separate but*

concurring judgments delivered. Justice Ruma Pal authored the leading judgment for herself and Justice Dalveer Bhandari. In this decision, reference was made to the decision in the case of Gannon Dunkerley & Co. [State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd., (1958) 9 STC 353 (SC); AIR 1958 SC 560.] . It was held that even after clause (29A) of article 366 was introduced, the meaning of the word “goods” was not altered. It was held that even after clause (29A) was introduced, the ingredients of the sale of goods continue to have the same definition as discussed in the case of Gannon Dunkerley & Co. [State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd., (1958) 9 STC 353 (SC); AIR 1958 SC 560.] It was held that the transactions which are mutant sales are limited to clause (29A) of article 366. However, all the transactions must qualify as sales within the meaning of the Sales Tax Act to levy sales tax. In paragraph 74, the decision in the case of 20th Century Finance Corporation Limited [20th Century Finance Corporation Limited v. State of Maharashtra, (2000) 119 STC 182 (SC); (2000) 6 SCC 12.] was interpreted. In paragraphs 74 and 75 of the judgment in the case of BSNL [Bharat Sanchar Nigam Limited v. Union of India, (2006) 3 VST 95 (SC); (2006) 145 STC 91(SC); (2006) 282 ITR 273 (SC); (2006) 6 RC 276; (2006) 3 SCC 1.] , Justice Ruma Pal observed thus [Page 124 in 145 STC.] :

“74. In determining the situs of the transfer of the right to use the goods, the court did not say that delivery of the goods was inessential for the purposes of completing the transfer of the right to use. The emphasised portions in the quoted passage evidences that the goods must be available when the transfer of the right to use the goods takes place. The court also recognised that for oral contracts the situs

of the transfer may be where the goods are delivered (see para 26 of the judgment).

75. In our opinion, the essence of the right under article 366(29A)(d) is that it relates to user of goods. It may be that the actual delivery of the goods is not necessary for effecting the transfer of the right to use the goods but the goods must be available at the time of transfer, must be deliverable and delivered at some stage. It is assumed, at the time of execution of any agreement to transfer the right to use, that the goods are available and deliverable. If the goods, or what is claimed to be goods by the respondents, are not deliverable at all by the service providers to the subscribers, the question of the right to use those goods, would not arise.”

Thus, this court held that to attract sub-clause (d) of clause (29A) of article 366, the goods must be available at the time of transfer, must be deliverable and delivered at some stage. If the goods are not deliverable at all by the service provider to the subscriber, the question of the right to use those goods would not arise.

32. *The view taken by Dr. AR Lakshmanan, J has been consistently followed thereafter by this court in various decisions. In the case of Great Eastern Shipping Co. Ltd. [Great Eastern Shipping Co. Ltd. v. State of Karnataka, (2020) 72 GSTR 341 (SC); (2020) 3 SCC 354.], paragraph 97 of the view expressed by Dr. AR Lakshmanan, J was quoted with approval. A Bench of three honourable Judges of this court in the case of Commissioner of Service Tax, Ahmedabad v. Adani Gas Ltd. [(2020) 81 GSTR 1 (SC); 2020 SCC OnLine SC 682.] quoted paragraph 97 of the view expressed by Dr. AR Lakshmanan, J with approval. In fact, in paragraph 17, the Bench observed that the tests laid down in paragraph 97 of the decision in the case of BSNL [Bharat Sanchar*

Nigam Limited v. Union of India, (2006) 3 VST 95 (SC); (2006) 145 STC 91 (SC); (2006) 282 ITR 273 (SC); (2006) 6 RC 276; (2006) 3 SCC 1.] have been applied to determine whether the transaction involved the transfer of the right to use any goods under sub-clause (d) of clause (29A) of article 366 of the Constitution of India.

40. On a conjoint reading of the clauses mentioned above, it is apparent that there is no intention to transfer the use of any particular tank truck in favour of ONGC. The contract is to provide tank trucks for the transportation of goods. Once the tank trucks provided by the contractor are loaded with goods, the entire responsibility of their safe transit, including avoiding contamination, delivery, and unloading at the destination, is of the contractor. The test (c) is not satisfied in this case. Therefore, it is impossible to conclude that there is a transfer of the right to use tank trucks in favour of IOCL. Essentially, it is a contract to provide the service of transporting the goods using tank trucks to IOCL. Therefore, even in this case, all the five tests laid down by Dr. AR Lakshmanan, J are not fulfilled.”

33. In the case of Viceroy Hotels Ltd. vs. Commercial Tax Officer⁶ it was held as under:

“36. In the impugned order of assessment dated April 8, 2010, the assessing authority notes that the sample bill, produced as part of the objections, revealed that the petitioner-hotel was providing equipment to its customers on rental basis ; this amounted to a "deemed sale" under Explanation (iv) to section 2(28) of the Act ; the bill produced for verification did not reveal that technicians

⁶ (2011) 43 VST 424 : 2011 SCC OnLine AP 1089

were provided along with the LCD projectors or audio/video equipment; consideration was charged exclusively for the equipment; effective control over the said goods had been transferred to the ultimate customer for use in their functions ; the petitioner had given the LCD projectors and audio/video multimedia equipment on hire to their customers without rendering any other service, i.e., they merely delivered the equipment to their customers on hire ; the customer could use the equipment in any manner he wanted, and had to return the equipment at the end of the event ; possession and effective control was transferred to the customer during the event, and the customer had the right to use the same ; in view of Explanation (iv) to section 2(28), the activity of renting of LCD projectors and audio and video equipments was "sale" attracting tax under section 4(8) of the Act ; and, in the judgments relied on by the petitioner possession vested with the service provider, whereas, in the present case, the petitioner had transferred possession and control of the equipment rented to their customers.

37. Admittedly, there is no privity of contract between the outsourcing agency and the petitioner's customers. It is the case of the petitioner that they hire audio-visual equipment from the outsourcing agency for consideration and, in turn, provide the facility of audio-visual equipment to their customers for consideration. On the petitioners' own admission, they do not render any service to their customers in relation to the audio visual equipment. The contract between the petitioner and their customers is not a contract of "service" as it is not even the petitioner's case that they render any service to their customers with regards the audio visual equipment facility provided to them. Section 16(1) of the Act places the burden of proving that any sale, effected by a dealer, is not liable to tax on the dealer. The assessing authority

has held that the bill produced by the petitioner does not disclose that technicians were provided along with LCD projectors or the audio-video equipment. In the absence of any evidence being produced by the petitioner in this regard, the assessing authority was justified, in view of section 16 of the Act, in holding that, since the bill merely reflected audio-visual equipment rentals, there was a transfer of the right to use the audio-visual equipment. As section 16 of the Act casts the onus on the petitioner to establish that the transaction is not one of "deemed sale" involving transfer of the right to use goods, the petitioner's contention, that it was for the assessing authority to enquire and satisfy himself to the contrary, does not merit acceptance. To establish that the outsourcing agency had deputed their men to operate the audio-visual equipment, and the A. V. equipment remained under the control and possession of the outsourcing agency during the customer's conference, the petitioner should have produced the agreement between them and the outsourcing agency and other documents in support thereof. No copy of any such agreement was placed either before the assessing authority or before this court.

38. *The assessing authority has recorded the finding that the audio visual equipment was delivered to the customer who paid rental charges for such equipment ; the petitioner nowhere figured in the process of the customer putting the audio-visual equipment to use ; and, during the period of the conference, it was the customer who was using the said audio-visual equipment. It is thus evident that effective control over the audio-visual equipment has been transferred to the customer who pays rental charges to the petitioner. The assessing authority was, therefore, justified in treating the said transaction as a transfer of the right to use goods, and levying tax thereupon under section 4(8) of the Act."*

34. In the case of **Aggarwal Bros. vs. State of Haryana**⁷ it was held as under:

“3. The argument of learned counsel for the assessee goes thus: Entry 54 of Part II of Schedule VII of the Constitution enables the State to levy “taxes on the sale or purchase of goods other than newspapers ...”. Article 366 sets down definitions for the purposes of the Constitution. Clause (29-A) thereof refers to “tax on the sale or purchase of goods” and it includes

“(d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration”.

In the submission of learned counsel, having regard to Entry 54 of Part II of Schedule VII, the transfer contemplated by sub-clause (d) of clause (29-A) of Article 366 is a legal transfer of the right in the goods. It has to be a transfer of goods. It has to be permanent. It has to be something like a lease. The giving of goods on hire is not such a transfer and, therefore, falls outside the ambit of sub-clause (d) of clause (29-A) of Article 366. Learned counsel referred to para 40 of the judgment of this Court in Builders' Assn. of India v. Union of India [(1989) 2 SCC 645 : 1989 SCC (Tax) 317] which says: (SCC p. 675)

“As the Constitution exists today the power of the States to levy taxes on sales and purchases of goods including the ‘deemed’ sales and purchases of goods under clause (29-A) of Article 366 is to be found only in Entry 54 and not outside it.”

⁷ (1999) 9 SCC 182

4. The language used in Section 2(j)(iv) and 2(l)(iv) of the said Act is the language used in Article 366(29-A)(d), Section 2(j) dealing with purchase and Section 2(l) with sale. The argument before us is, therefore, not an argument on the constitutionality of these provisions of the said Act but of their interpretation and the application thereof to the facts of the present case.

5. The said Act defines “sale” to mean the transfer of property in goods for cash or deferred payment or other valuable consideration and includes the “transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration”. Such transfer of the right to use goods for consideration is “deemed” to be a sale. The provision expressly speaks of “transfer of the right to use goods” and not of transfer of goods. There is, therefore, no merit in the submission that to be a deemed sale within the meaning of the above-mentioned provision of the said Act there must be a legal transfer of goods or that the transaction must be like a lease.

6. Where there is a transfer of a right to use goods for consideration, the requirement of the above-mentioned provision of the said Act is satisfied and there is deemed to be a sale. In the instant case, the assessee owned shuttering. They transferred the shuttering for consideration to builders and building contractors for use in the construction of buildings. There can, therefore, be no doubt that the requirements of a deemed sale within the meaning of the above-mentioned provision of the said Act are satisfied.

35. In the case **Quick Heal Technologies Ltd.** (supra) it was held as under:

“68. In such circumstances referred to above, the appellant herein has come up before this Court by filing the present appeals. These appeals should succeed in the light of the reasoning assigned by us while dismissing Civil Appeal (Diary No. 24399 of 2020), as above.

69. However, while allowing these appeals, we may only observe that in Infotech Software Dealers Assn. v. Union of India [Infotech Software Dealers Assn. v. Union of India, 2010 SCC OnLine Mad 4503 : (2010) 20 STR 289 (Mad)] the challenge was to the validity of Section 65(105)(zzzz) levying service tax on the information technology software service. The High Court held that the question whether the software is “goods” or not would depend on the facts and circumstances of individual case. It is evident on plain reading of the judgment rendered by the Madras High Court in Infotech Software Dealers Assn. [Infotech Software Dealers Assn. v. Union of India, 2010 SCC OnLine Mad 4503 : (2010) 20 STR 289 (Mad)] that it has not referred to the decision of this Court in Tata Consultancy Services [Tata Consultancy Services v. State of A.P., (2005) 1 SCC 308] .

70. We take notice of the fact that the appellant herein had also filed Review Petition No. 205 of 2021 against the order dated 5-8-2021 [K7 Computing (P) Ltd. v. Commr., 2021 SCC OnLine Mad 16525] in Writ Appeal No. 1881 of 2021, which came to be rejected vide order dated 20-12-2021 [K7 Computing (P) Ltd. v. Commr., 2021 SCC OnLine Mad 16524] .

71. In view of the judgment [Set out in paras 2 to 59, above.] rendered above in Civil Appeal (Diary No. 24399 of 2020), these appeals should succeed and deserve to be allowed.

72. In the result, the appeals are allowed. The impugned order passed by the High Court dated 5-8-2021 [K7 Computing (P) Ltd. v. Commr., 2021 SCC OnLine Mad 16525] in Writ Appeal No.

1881 of 2021 as also the order dated 20-12-2021 [K7 Computing (P) Ltd. v. Commr., 2021 SCC OnLine Mad 16524] passed in Review Petition No. 205 of 2021 in Writ Appeal No. 1881 of 2021 are hereby set aside.

73. There shall be no order as to costs. Pending application(s), if any, also stands disposed of.”

36. In the case of **HLS Asia Ltd. vs. State of Assam**⁸ it was held as under:

“26. The judicially evolved principles to identify a transaction involving the transfer of right to use goods to be a sale under the Act clearly exclude the indispensability of delivery of physical possession thereof as an essential pre-condition. The other ordained features of such a transaction are, in our considered opinion, present in the instant case. The equipment, plants and machinery were available and identified by the parties. Under the contract, OIL derived the legal right to use the goods having hired the same on payment of charges. Customs duty had also been paid by it on the equipment imported by the contractor for executing the works. Under the stringent contractual terms, the contractor was bound to keep the equipment engaged exclusively for the works. The fact that the same had been operated by its technically qualified personnel does not militate against the element of exclusiveness in the use thereof for the services and benefit of OIL. During the subsistence of the contract, the appellant-company was neither authorised nor permitted to transfer the equipment or detail the same for others. The parties consciously limited the tax liability to the rental component only.

⁸ (2007) 8 VST 314

27. The provisions of the contract understandably have to be construed in the context of the service accorded to be rendered. The transfer of right to use the equipments has to be perceived in the context of the nature, manner and extent of engagement thereof. The retention of physical possession thereof by the appellant-company cannot be decisive. The parties entered into the contract understanding the implications of each and every provision thereof, which according to us, demonstrate an obvious dominion and control of OIL over the equipment used by the appellant for the execution of the works during the period of the contract. We, thus, have no hesitation to hold that the transaction in question involved transfer of right to use the equipment, plants and machinery under the lease within the meaning of section 2(33)(iv) of the Act.”

37. In the case of **G. S. Lamba & Sons** (supra) it was held as under:

“2. The undisputed factual matrix is in a narrow compass. The petitioners M/s. G. S. Lamba & Company, G. S. Lamba & Sons, and G. S. L. Coal Sales Pvt. Ltd.,—are dealers on the rolls of the Commercial Tax Officer (CTO), Begumpet Circle. In pursuance of the inspection and investigation by the Vigilance and Enforcement Wing, the CTO assessed tax for 2001-02 and 2002-03 under section 5E of the Act in respect of the taxable event, namely, the petitioners hiring their fleet of transit mixers to M/s. Grasim Industries Ltd., Secunderabad, a unit of M/s. Birla Ready Mix Concrete (hereafter, "Grasim"). The Appellate Deputy Commissioner agreed with assessee and treated the hiring of transit mixers as contract of transport service, and not the transfer of the right to use the goods. The Additional Commissioner (Legal), in exercise of the revisional jurisdiction, levied sales tax under

section 5E of the Act. The petitioners then went in further appeals before the learned Tribunal, which were dismissed.

3. The case of the petitioners is that Grasim manufactures Ready Mix Concrete (RMC), according to the specifications depending on the site requirements of a customer, at its batching plants in Miyapur and Nacharam in Hyderabad. RMC is a homogenized and a precise mixture. Its use reduces work at the site, minimises space requirements and allows smooth progress of the construction. It has a very short shelf life of 3 to 4 hours from the time of its manufacture at the batching plant, and has to be used within that period. Keeping all these in view the petitioners entered into agreements with Grasim. These contracts are for providing transportation service for shipping RMC by hiring specially designed transit mixers. Under the contracts, the transit mixers are never transferred and the effective control over running and using of these vehicles, as well as the disciplinary control over the drivers, always remained with the petitioners. They point out that it is their responsibility to obtain route permits, to take the risk or loss of transportation, to decide shifts for drivers and vehicles, to maintain and upkeep the vehicles in good condition. It is also their plea that damages to the goods, during the period of transportation, and the risk of loss of the vehicles have to be incurred by the petitioners, and that registration of the vehicles is never transferred to Grasim. They further contend that, if on reading the contract, two views are possible, revision by the Additional Commissioner, under section 20(2) of the Act, would not lie.

9. It is axiomatic that the machinery provisions of a taxing statute have to be interpreted in such a manner that they are workable (Commissioner of Income-tax, Central, Calcutta v. National Taj Traders [1980] 121 ITR 535 (SC) ; AIR 1980 SC 485 and J. K.

Synthetics Ltd. v. Commercial Taxes Officer [1994] 94 STC 422 (SC) ; AIR 1994 SC 2393). It does not, however, mean that the interpreter can interpolate something not intended by the Legislature, by supplying caususomissus (Illachi Devi (Dead) by Lrs. v. Jain Society, Protection of Orphans India (2003) 8 SCC 413 ; AIR 2003 SC 3397 and Sankar Ram & Co. v. Kasi Naicker (2003) 11 SCC 699 ; AIR 2003 SC 4156). If the plea of the petitioners is accepted, we have to read section 20(1) of the APGST Act as empowering revision, only when an order of assessing officer/appellate authority is erroneous in so far as it is prejudicial to the interest of revenue. This is plainly not permissible.

11. The petitioners allege that the contract with Grasim is for transportation service. They deny that it is for the transfer of the right to use the goods. Transit mixers are indisputably goods as defined in section 2(h) of the Act. Section 2(n) defines "sales" to mean transfer of the property in goods for cash in the course of trade or business and includes mortgage, hypothecation, pledge or charge on goods. This definition has eight Explanations. Fourth of them was inserted by Andhra Pradesh Act No. 18 of 1985 with effect from February 2, 1983. It is to the effect that "a transfer of the right to use any goods for any purpose" shall be deemed to be sale. When is the right to use goods said to have been transferred ? To appreciate this, a brief journey into the past relating to tax on sale of goods under entry 54 of List II of the Seventh Schedule to the Constitution of India may be necessary.

20. In I. T. C. Classic Finance and Services v. Commissioner of Commercial Taxes [1995] 97 STC 330 (AP) ; (1995) 20 APSTJ 150, the assessee, a finance company, was in the business of hiring out machinery, plant and equipment for rent. After purchasing the goods of required specifications, the manufacturer was advised to consign them directly to the customer on hire under an agreement

of lease of the equipment for a period of sixty months or more. As these goods were moved out of the State during the course of inter-State trade, in their sales tax return for the year 1988-89, the assessee claimed exemption on the ground that the transaction was not excisable to tax under section 5E of the Act. The original authority rejected the contention. The assessee was successful before the Appellate Deputy Commissioner. However, the Commissioner following the judgment of the Bombay High Court in 20th Century Finance Corporation Limited v. State of Maharashtra [1989] 75 STC 217 (Bom) in suo motu revision, set aside the appellate order restoring the original assessment order. The assessee then filed special appeal before this court, inter alia, contending that deemed sales cannot be distinguished from ordinary sales for the purpose of taxation under the Act, and that, the taxable event of delivering the goods having occurred in the State of Tamil Nadu, the same is not excisable under section 5E of the Act. Relying on Builders Association of India and Gannon Dunkerley & Co. v. State of Rajasthan [1993] 88 STC 204 (SC) ; (1993) 1 SCC 364 the contention was accepted observing thus (page 349 in 97 STC)

".. . In the determination of the inter-State character of a sale, the situs is immaterial. When goods are entrusted to a common carrier for delivery, it amounts to delivery to the consignee and when it takes place outside the State, the fact that subsequently the goods have reached the State where the tax is sought to be imposed, cannot be a ground for determining the tax liability. The decision of the Bombay High Court in 20th Century Finance Corporation Limited [1989] 75STC 217 (Bom), proceeds on the footing that a transfer of the right to use is different

from sale without considering the fiction introduced by clause (29A) of article 366 of the Constitution.

The principle that where a State law while defining the expression 'sale' makes the situs a relevant consideration for the purpose of determining a deemed sale, the same cannot bring within its ambit inter-State sales or sales in the course of import and export was again emphasized by the Supreme Court in Builders' Association of India v. State of Karnataka [1993] 88 STC 248 (SC) ; AIR 1993 SC 991.

21. In order to get over the above dicta, by A. P. Act No. 22 of 1995, section 5E was substituted, which reads as under.

5E. Tax on the amount realised in respect of any right to use goods.—Notwithstanding anything contained in this Act,—

(a) Every dealer who transfers the right to use any goods for any purpose, whatsoever, whether or not for a specified period, to any lessee or licensee for cash, deferred payment or other valuable consideration, in the course of his business shall, on the total amount realised or realisable by him by way of payment in cash or otherwise on such transfer or transfers of the right to use such goods from the lessee or licensee, pay a tax at the rate of five paise in every rupee of the aggregate of such amount realised or realisable by him during the year ;

(b) the transfer of right to use any such goods entered into by any dealer, shall be deemed to have taken place in this State whenever the goods are used within the State, irrespective of the place where the agreement whether written or oral for such transfer of right is made

Provided that no such tax shall be levied if the total turnover of the dealer including such aggregate is less than Rs. two lakhs.*

26. At this stage, the following principles to the extent relevant may be summed up

(a) The Constitution (Forty-sixth) Amendment Act intends to rope in various economic activities by enlarging the scope of "tax on sale or purchase of goods" so that it may include within its scope, the transfer, delivery or supply of goods that may take place under any of the transactions referred to in sub-clauses (a) to (f) of clause (29A) of article 366. The works contracts, hire-purchase contracts, supply of food for human consumption, supply of goods by association and clubs, contract for transfer of the right to use any goods are some such economic activities.

(b) The transfer of the right to use goods, as distinct from the transfer of goods, is yet another economic activity intended to be exigible to State tax.

(c) There are clear distinguishing features between ordinary sales and deemed sales.

(d) article 366(29A)(d) of the Constitution implies tax not on the delivery of the goods for use, but implies tax on the transfer of the right to use goods. The transfer of the right to use goods contemplated in sub- clause (d) of clause (29A) cannot be equated with that category of bailment where goods are left with the bailee to be used by him for hire.

(e) In the case of article 366(29A)(d) the goods are not required to be left with the transferee. All that is required is that there is a transfer of the right to use goods. In such a case taxable event occurs regardless of when or whether the goods are delivered

for use. What is required is that the goods should be in existence so that they may be used.

(f) The levy of tax under article 366(29A)(d) is not on the use of goods. It is on the transfer of the right to use goods which accrues only on account of the transfer of the right. In other words, the right to use goods arises only on the transfer of such right to use goods.

(g) The transfer of right is the sine qua non for the right to use any goods, and such transfer takes place when the contract is executed under which the right is vested in the lessee.

(h) The agreement or the contract between the parties would determine the nature of the contract. Such agreement has to be read as a whole to determine the nature of the transaction. If the consensus ad idem as to identity of the goods is shown the transaction is exigible to tax.

(i) The locus of the deemed sale, by transfer of the right to use goods, is the place where the relevant right to use goods is transferred. The place where the goods are situated or where the goods are delivered or used is not relevant.

40. *There is no dispute that the agreement between the petitioners and Grasim satisfies all conditionalities except that it does not contain the date and place of execution. Does it render it ineffective and unenforceable? We are afraid the answer cannot be in abstract or simplistic. If the agreement contains sufficient indication with regard to the grant and creation of rights and obligations with reference to such grant for the specified period therein, it would be sufficient to bind the parties to the agreement. The mere absence of date and place does not militate against the parties nor can they escape regulation by the applicable statute. It is also a well-settled rule of interpretation that even in the absence of a formal*

agreement, a contract can be inferred from the pre and post contract correspondence between the parties. In this case, clause (L) gives sufficient indication when it says that, "the agreement will come into force from October 1, 2002 and remain in effect till March 31, 2006, with liberty to parties to terminate the contract by giving three months notice in writing to the other party". The reading of the agreement does not anywhere indicate that it was entered into between the parties elsewhere than at Secunderabad. The first page of the agreement in its footnote contains the address of the Marketing Department of Grasim sufficient enough to conclude that it was entered into between the parties at Secunderabad. Even otherwise it is fairly well- settled that the transfer of the right to use goods can be effected even under an oral agreement. Hence, submission of the special counsel is rejected.

** (1) The clause usually following the granting part of the deed which defines the extent of the ownership in the thing granted to be held by the grantee. "The purpose of the Habendum is to limit the estate so that the general implication of the estate which by construction of law passeth in the premises is by the Habendum Controlled and qualified (Advanced Law Lexicon by P. Ramanatha Aiyar 3rd edition reprint 2007). (2) The part of a deed or conveyance which states the estate or quantity of interest to be granted, e.g., the term of a lease (The New Oxford Dictionary of English Fourth Impression 2002)*

42. As mentioned supra, whether the transaction amounts to transfer of right or not cannot be determined with reference to a particular word or clause in the agreement. The agreement has to be read as a whole to determine the nature of the transaction (RashtriyaIspat Nigam Ltd. [1990] 77STC 182 (AP)). We may, for ready reference extract important clauses from the agreement.

A. That the second party will maintain and provide a dedicated fleet of five vehicles to transport the produce of the first party from their plant to the various customers in the cities of Hyderabad. The number of vehicles required to be dedicated for the use will be subject to change and the parties will mutually agree to the new fleet size. This number shall not change unless otherwise indicated by the first party and agreed to by the second party and the remaining terms and conditions of this agreement will remain unaffected by this change.

B. That the second party will ensure that adequate number of vehicles are made available on a 24/7 basis, i.e., 24 hours and everyday of the weeks as per the instructions of the officials of the first party. If the second party fails to provide the vehicles as desired it shall attract penalties as prescribed later in this document. The first party agrees that the second party will require up to two days a month for the maintenance and upkeep of the vehicles and will, therefore, allow two days a month for this activity and will not demand any penalty for these days.

C. That the second party will be solely responsible for ensuring that the produce of the first party reach the destination in time and as per the agreed schedule. No delay on any account will be acceptable and the second party must ensure safe delivery of the produce.

D. That the produce of the first party has a strong brand equity in the market and they would like the vehicles to be painted in a particular style and color. The second party has agreed to get the same done at their cost and have also assured the first party that they shall paint the vehicles every six months.

E. That the second party has also agreed that the drivers will be suitably dressed in a uniform at all times and the uniform would

be neat and clean. The drivers will be qualified and licensed and will not consume any intoxicating substance while on job-whether at the plant or at the site of the customers of the first party. The staff of the second party engaged in providing services to the first party will also ensure that they obey all the lawful instructions of the officials of the first party and conform to the norms of decency while interacting. All the personnel of the second party will carry identification cards with them at all times.

F. and G. omitted

H. That the second party will obtain proper receipts from the customers of the first party after the goods are delivered and also submit reports to the first party in the formats supplied by the first party at the required intervals.

I to K omitted

L. That this agreement will come into force from the 1st October, 2002 and remain in effect till March 31, 2006. However, the parties will be at liberty to terminate this contract at any time by giving three months notice in writing to the other party. The first party will be at liberty to terminate this agreement at any time if the second party violates any of the terms of the agreement or if the quality of the services provided is not to its satisfaction. The decision of the first party as to the quality will be final.

M. That the second party will indemnify the first party against statutory claim being made by any authority on the first party for an act of omission or commission by the second party.

(emphasis supplied)”

38. It would be also necessary at this juncture to take note of the lease deed signed between the parties on 28.10.2002 which sheds

light on the nature of transaction of the contract between them. The relevant portions / paras of the lease deed for ready reference are reproduced hereunder:

“SECTION 4. RENT

Commencing on the Lease Commencement Date, Tenant covenants and agrees to pay to landlord a Monthly Rent of Rs. 694,666/- (Rupees Six Hundred Ninety Four Thousand Six Hundred and Sixty Six Only) as follows subject to the Rebates and Reductions described in Special Condition 2 of Exhibit "C".

(a) Rs.528,938/- (Rupees Five Hundred Twenty Eight Thousand Nine Hundred and Thirty Eight Only) for the demised premises (Hereinafter “Base Rent”) based on the computations described in Exhibit 'D' and subject to the conditions described in GTC-13 of Exhibit 'B'. The base rent shall remain the same for the first twenty four (24) months after the lease Commencement Date and thereafter shall be increased by 10% at the beginning of the each year for the remaining period of the Term as described in Section 3(b) of the Lease.

(b) Rs.75,000/- (Rupees Seventy Five Thousand Only) for the use of the Cafeteria (hereinafter "Cafeteria Usage Charges") subject to the conditions described in GTC-13 of Exhibit 'B'. The Cafeteria Usage Charges shall remain the same for the first twenty four (24) months after the Lease Commencement Date and thereafter shall be increased by 10% at the beginning of the each year for the remaining period of the Term as described in Section 3(b) of the Lease.

(c) *Rs.28,500/- (Rupees Twenty Eight Thousand and Five Hundred Only) for use of Parking Areas (hereinafter "Parking Charges") based on the computations described in Exhibit 'D' and subject to the conditions described in GTC-9 of Exhibit 'B'.*

(d) *Rs.62,228/- (Rupees Sixty Two Thousand Two Hundred and Twenty Eight Only) for common area and equipment maintenance as described in GTC-3(a) of Exhibit 'B' (hereinafter "Maintenance Charges") based on the computations described in Exhibit 'D'. The Maintenance Charges 'shall remain the same for the first twelve (12) months after the Lease Commencement Date and thereafter shall be increased in accordance with the provision of GTC-3(c) of Exhibit 'B'."*

GTC-1: FACILITIES & AMENITIES TO BE PROVIDED BY LANDLORD

Landlord agrees to provide the following amenities and facilities apart from the super built-up areas described in Exhibit 'D' for which sums mentioned in Section 4(a), Section 4(b) and Section 4(c) of the Lease Deed shall be payable by Tenant

(a) Demised Premises with

(i) IPS Flooring

(ii) Central Air-conditioning system from 4 x 180 TR air cooled screw chillers with ducting upto the AIIU Room (subject to the conditions described in GTC-7 of Exhibit 'B').

(iii) Raw power supply upto the distribution boards of the Demised Premises.

(iv) One Raw Power Distribution Board and separate Distribution Boards for lighting within the Demised Premises

(v) Functional Toilets

(vi) Access control system (for entrance to Demised Premises) with proximity cards,

(vii) Building Management System

(viii) Fire escape staircases (external)

(b) Lobby Areas in the Main Building with

(i) Central Air-conditioning system from 4 x 180 TR air cooled screw chillers with ducting and grills (subject to the conditions described in GTC-7 of Exhibit 'B')

(ii) Complete Lighting system

(iii) Eight (8) numbers 13-passenger elevators

(iv) Fire detection and Fire Fighting system

(v) Building Management System

(vii) Lift Walls cladding with granite and painting in other areas.

(viii) Public Address System

(ix) Internal Staircases

(c) Other Utilities and amenities

(i) Adequate potable drinking water

(ii) 33 KV Electrical Sub-station with 2300 KVA connected load

(iii) 100% power back-up with 3 x 750 KVA synchronized Diesel Generating Sets

(iv) One emergency power pack for 1 KVA load

(v) Sewerage Treatment plant with a treatment capacity of 100 cubic meters/day

(vi) Complete Fire Fighting system with hydrants. Sprinklers in the stilt floor of Building "H"

(vii) Parking for four-wheelers and two-wheelers (subject to the conditions described in GTC-9 of Exhibit 'B')

(viii) Integrated Building Management System

(ix) Fully equipped kitchen and cafeteria in two (2) levels to accommodate One thousand and One hundred (1,100) people at a time (subject to the conditions described in GTC-8 of Exhibit 'B').

GTC - 8 : CAFETERIA

(a) Landlord shall provide for a common cafeteria (usage mandatory for all tenants-lunch rooms inside Demised Premises not permitted) for all the occupants of the Campus with the following facilities

(i) Two (2) numbers 13-passenger elevators

(ii) Centralised air-conditioning from 4 x 180 TR air-cooled screw chillers

(iii) Furniture

(iv) Kitchen Equipment

(v) Cutlery & Crockery

(b) The Cafeteria is a self-service facility where disposal of used plates and glasses shall be done by the users.

(c) Tenant will pay for the consumption of food & beverages directly to the cafeteria management at rates mutually agreed upon by Tenant and Cafeteria Management.

(d) The Cafeteria shall be used for the purpose of consumption of food & beverages only by Tenant's employees during working hours

(e) Tenant shall not utilize the cafeteria to conduct any meetings, discussions or any other group of individual activity without the prior consent of Landlord.

GTC-21 : FURNITURE AND EQUIPMENT

Beyond the maximum weight of 350 kgs per square meter, Landlord shall have the right to prescribe the weight, and method of installation and position of safes or other heavy fixtures or equipment and Tenant shall not install in the Demised Premises any fixtures, equipment or machinery that shall place a load upon the floor exceeding the floor load per square foot area which such floor was designed to carry. All damage done to the Demised Premises or the Property by taking in or removing a safe or any other article of Tenant's office freight, furniture, or equipment, or due to its being in the Demised Premises, shall be repaired at the expense of Tenant. No freight, furniture or other bulky matter beyond the maximum weight of 350 kgs per square meter shall be received onto the Property or into the Demised Premises or carried in the elevators, except as approved by Landlord. Moving of furniture and equipment beyond the maximum weight of 350 kgs per square meter shall be under the direct control and supervision of Landlord, who shall, however, not be responsible for any

damage (unless caused by gross negligence or willful misconduct of Landlord, its agents or employees) to or charges for moving same.

GTC-22 : REPAIRS AND INSPECTION

(a) Tenant shall after receiving prior written notice, permit Landlord, its employees, agents, contractors, and representatives, to enter the Property, the Buildings, and the Demised Premises at reasonable times and in a reasonable manner to inspect and protect the same, and to make such alterations or repairs as Landlord may deem necessary, or to exhibit the same to prospective purchasers. In the event of an emergency, Landlord may enter the Property and any part thereof with a shorter notice and make whatever repairs are necessary to protect the same; provided, however, that Landlord is required and shall act carefully and reasonably when exercising any right of access to the Demised Property and ensure that any repairs or inspection undertaken by Landlord shall not interfere with the business of Tenant. Landlord shall use reasonable efforts to minimize interference to Tenant's business when making repairs, but Landlord shall not be required to perform such repairs at a time other than during normal working hours. There shall be no abatement of Rent and no liability by reason of any injury or inconvenience to or interference with Tenant's business arising from the making of any repairs, alterations or improvements in or to any portion of the Property, unless caused by the gross negligence or willful misconduct by Landlord, its agents or employees.

(b) Tenant shall take good care of the Demised Premises and the fixtures and appurtenances therein. Tenant shall, at its expense,

repair all damage thereto and any fixtures and equipment therein and otherwise to the Property to Landlord's reasonable satisfaction caused directly or indirectly by Tenant, its employees, agents, invitees, licensees, subtenants, or contractors. If Tenant fails to make such repairs, the same may be made by Landlord and the expense thereof shall be deemed Reimbursements due and payable by Tenant within fifteen (15) days after the sending of a statement thereof by Landlord to Tenant.

39. There is yet another lease deed again signed between the parties on 01.07.2003. The relevant portions / paras of the said lease deed, for ready reference, is reproduced hereunder:

“SECTION 4. RENT

Notwithstanding anything to the contrary provided in the Exhibits, the Tenant covenants and agrees to pay to Landlord, and Landlord agrees to accept from the Tenant, a Monthly Rent for the Demised Premises (together with easements, rights and advantages appurtenant thereof, for setting up their office premises and together with the right of Tenant, its employees, agents, contractors and servants to the use of the Demised Property) as follows:

(a) For the first Two (2) months of the Term Rs.176,155/- (Rupees One Hundred Seventy Six Thousand One Hundred and Fifty Five only) per month. For the next Four (4) months of the Term Rs.352,310/- (Rupees Three Hundred Fifty Two Thousand Three Hundred and Ten Only) per month and Rs.528,465 (Rupees Five Hundred Twenty Eight Thousand Four Hundred and Sixty Five Only) per month thereafter for the Demised Premises (hereinafter "Base Rent") based on the computations described in Exhibit 'D' (subject to reductions specified herein for the initial months) and subject to the conditions described in GTC-13 (e), (g) and (h) of

Exhibit 'B'. The Base Rent shall remain the same for the first twenty four (24) months of the Term and shall be increased by 10% thereafter at the beginning of the each year for the remaining period of the Term as described in Section 3(b) of the Lease.

(b) Commencing on September 15th, 2003 for the first Four (4) months Rs.50,000/- (Rupees Fifty Thousand only) per month and Rs.75.000% (Rupees Seventy Five Thousand Only) per month thereafter for the use of the Cafeteria (hereinafter "Cafeteria Usage Charges") subject to the conditions described in GTC-13 (e) and (h) of Exhibit 'B'. The Cafeteria Usage Charges shall remain the same for the first twenty four (24) months of the Term and shall be increased by 10% thereafter at the beginning of the each year for the remaining period of the Term as described in Section 3(b) of the Lease.

(c) Commencing on September 15th, 2003 Rs.28,500/- (Rupees Twenty Eight Thousand and Five Hundred Only) per month for use of Parking Areas (hereinafter "Parking Charges") based on the computations described in Exhibit 'D' and subject to the conditions described in GTC-9 of Exhibit 'B'

(d) Commencing on September 15th, 2003 for the first Four (4) months Rs. 40,264/- (Rupees Forty Thousand Two Hundred Sixty Four Only) per month and Rs.60,396/- (Rupees Sixty Thousand Three Hundred and Ninety Six Only) per month thereafter for common area and equipment maintenance as described in GTC-3(a) of Exhibit 'B' (hereinafter "Maintenance Charges") based on the computations described in Exhibit 'D' (subject to the reductions in Maintenance Charges for the initial months as specified herein). The Maintenance Charges shall remain the same for the first twelve (12) months after the Lease Commencement Date and thereafter may be increased in accordance with the provision of GTC-3(c) of Exhibit 'B', subject to the Landlord providing proper justification for such increase to the Tenant."

40. From the submissions advanced on behalf of all the parties in the present batch of petitions and upon perusal of the materials placed on record, particularly the contents of the lease deeds, it is evident that a reading of Article 366(29A) of the Constitution clearly reveals that tax can be levied only on the sale or purchase of goods, which includes any transfer of the right to use goods for cash, deferred payment, or other valuable consideration. It is also well settled that unless there is a transfer of the right to use goods from one person to another, the essential ingredients of a sale or purchase are not satisfied and, consequently, the transaction would not be liable to tax.

41. A similar principle emerges from a reading of the definition of “tax” under Section 2(q) of the APGST Act. The provision reiterates the same principle embodied in Article 366(29A). The definition contemplates the levy of tax only where there is a transfer of the right to use goods pursuant to a contract. Such transfer necessarily requires that the transferee be vested with the right to use the goods, implying effective possession and control over them. Where the transfer does not involve parting with possession or exclusive control over the goods, the transaction would not attract tax.

42. In the facts of the present batch of petitions, as is evident from the various clauses of the lease deeds, the petitioners have not parted with possession or control of the properties, except to the limited extent of permitting the tenants to use them as part of the common amenities and facilities provided under the lease. In several instances, such facilities are intended for the common use of more than one tenant. Further, a perusal of the lease agreements reveals that the petitioners have challenged the levy of tax on lease rentals, which are charged on a per square foot basis and not separately in respect of furniture and fixtures. Therefore, the revisional authority could not have, merely on the basis of presumption, bifurcated the composite lease rentals into components attributable to movable and immovable properties.

43. In **Bharat Sanchar Nigam Limited** (supra), while deciding the issues, the Hon'ble Supreme Court held that the goods involved in a transaction of transfer of the right to use must be in existence, deliverable, and actually delivered. However, a reading of the various clauses of the lease deeds in the present batch of matters shows that the facilities such as lifts, the sewage system, bathrooms, and the

cafeteria are common facilities shared by more than one tenant. Consequently, they are incapable of being exclusively delivered or made deliverable to any particular tenant.

44. The authorities, particularly the STAT as well as the appellate authorities, failed to consider that the transfer of right to use goods is complete only when the assessee obtains effective control or exclusive domain over the goods that are the subject matter of the lease transaction. The aforesaid principle stands affirmed by the Andhra Pradesh High Court in the case of **Barat Coca-cola South East Private Ltd. vs. State of Andhra Pradesh**⁹.

45. For the aforesaid reasons, this Bench is of the considered opinion that the finding of the Deputy Commissioner in the revisional assessment order, holding that the petitioners are liable to pay tax under Section 5E of the APGST Act on the lease rentals realized in respect of interiors, furniture and fixtures, as well as movable items provided in the kitchen and cafeteria, cannot be sustained.

⁹ (2008) 46 APSTJ 49

46. A reading of the judgment in **Bharat Sanchar Nigam Limited** (supra) shows that paragraph 97 lays down five essential ingredients for constituting a transfer of the right to use goods. When these five ingredients are examined in the light of the clauses contained in the lease deeds relating to the furniture and fixtures, it becomes evident that the lease deeds executed between the petitioners and their respective tenants do not satisfy these essential requirements. Accordingly, the transactions cannot be construed as constituting a transfer of the right to use goods so as to attract tax under Section 5E of the APGST Act.

47. The first ingredient laid down by the Hon'ble Supreme Court in **Bharat Sanchar Nigam Limited** (supra) is that **there must be goods available for delivery**. Upon comparing the said ingredient with the facts of the present batch of cases and the terms and conditions of the lease deeds, this Bench finds that the said requirement is not satisfied since the goods were not specifically identified for delivery as per any clause of the lease deeds.

48. The second ingredient laid down in the said judgment is that **there must be a consensus *ad idem* as to the identity of the goods**.

On examining the lease deeds in the present batch of cases, this Bench finds that the said ingredient is also not fulfilled since the agreement did not make provision for supply of specific goods which were identified for transferring the right to use such goods. The agreement only prescribed that the petitioners shall provide the service of making available certain facilities and amenities that could be suspended by the petitioners and that the furniture, fixtures and equipment were replaceable. Exhibit 'B' of lease deed dated 28.10.2002 entails common facilities and amenities.

49. The third ingredient laid down in the said judgment is that **the transferee should have a legal right to use the goods — consequently all legal consequences of such use including any permissions or licenses required therefore should be available to the transferee.** Upon consideration of the covenants contained in the lease deeds governing the present batch of cases, this Bench is of the view that this ingredient also remains unfulfilled since:

- (a) There is no legal right to use goods, insofar as the agreement does not specifically prescribe the same.

(b) Effective control and possession is with the landlord as per Exhibit B. GST 10 permits the landlord to suspend, delay or discontinue providing any facility. GTC 15 restricts the use of demised property and facility by tenant. GTC 17 precludes the tenant from further assigning, subleasing, transferring or encumbering the lease without prior permission of the landlord. GTC 19 prevents tenant from making any alterations.

(c) The legal consequences of use are not transferred to the tenant: GTC 28(a) requires the landlord to indemnify the tenant against all legal consequences arising from use, occupation and possession of demised premises. GTC 28(g) provides that all legal problems from use of demised premises will be total liability of landlord. Therefore, no legal consequences are borne by the lessee.

50. The fourth ingredient laid down in the said judgment is that **for the period during which the transferee has such legal right, it has to be to the exclusion of the transferor — this is the necessary concomitant of the plain language of the statute viz. a “transfer of the right to use” and not merely a licence to use the goods. A**

comparison of this requirement with the factual matrix of the present batch of cases demonstrates that this ingredient is likewise absent and not satisfied since the transfer of property involved by the lease agreement is not to the exclusion of the petitioners. No clause as per the agreement restricts use of goods by the petitioners during the lease. Further, common facilities including cafeteria as admitted in the STAT's order are not to the exclusion of the transferor and is commonly used by employees of several IT companies including the employees of petitioners stationed in the building.

51. The fifth ingredient laid down in the said judgment is that **having transferred the right to use the goods during the period for which it is to be transferred, the owner cannot again transfer the same rights to others.** Tested on the touchstone of the facts of the present batch of cases, this Court finds that this ingredient is also not satisfied since the common facilities and amenities are being used by numerous IT Companies. Admittedly in para 64 of the STAT order it was held that the leased goods were used by several IT companies. Further, GTC 28(h) provides that the landlord is free to dispose of or

encumber its interest in the demised premises by way of sale, transfer, charge, mortgage or otherwise.

52. For all the aforesaid reasons, justifications, and the judicial precedents referred to in the preceding paragraphs, we are of the considered opinion that the finding arrived at by the STAT affirming the orders of the Assessing Officer, the Appellate Deputy Commissioner, and the Deputy Commissioner is not sustainable in law. Accordingly, all these petitions, to the aforesaid extent, deserve to be allowed. Consequently, the orders passed by the STAT affirming the orders of the Assessing Officer, the Appellate Deputy Commissioner, and the Deputy Commissioner are held to be bad in law and are accordingly set aside. We further hold that the rent paid by the tenants to the petitioners / landlords towards the furniture, equipment, and other movable items provided in the kitchen and cafeteria, in respect of which the tenants have paid rent, would not be amenable to tax under the APGST Act, as such payments arise out of a contract of service. Therefore, they cannot, in any manner, be brought within the purview of a sale or purchase, nor can they be construed as involving a transfer of the right to use such goods.

53. Accordingly, Writ Petition Nos. 9991, 3865, and 3866 of 2009, along with Tax Revision Case No.52 of 2008, are allowed. The impugned orders in all these cases are set aside / quashed.

54. As a sequel, miscellaneous petitions pending if any, shall stand closed. However, there shall be no order as to costs.

P. SAM KOSHY, J

SUDDALA CHALAPATHI RAO, J

Date : 03.07.2026

Note: LR Copy to be marked.
(B/o) GSD / AQS