2019 INSC 1314

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.3383 OF 2004

THE GREAT EASTERN SHIPPING CO. LTD. ... APPELLANT

VERSUS

STATE OF KARNATAKA & ORS. ... RESPONDENTS

J U D G M E N T

ARUN MISHRA, J.

1. The question involved in the appeal is whether it is open to the State of Karnataka to levy Sales Tax in view of the Time Charter Agreement dated 8.1.1998 and whether it amounts to transfer of the right to use goods within the meaning of section 5C of the Karnataka Sales Tax Act, 1957 (for short, "the KST Act") read with Article 366 (29A) (d) of the Constitution of India.

2. The appellant – The Great Eastern Shipping Co. Ltd. filed a writ petition questioning the competence of the State Government to impose a sales tax in respect of the goods which are used within the territorial waters of India. The appellant owns a tug (towing vessel, namely "Kumari Tarini"). The company entered into a Charter Party Agreement with New Mangalore Port Trust on 8.1.1998. It agreed to make available the services of tug, for the purposes provided in the

agreement along with the master and other personnel of the company to the Port Trust for six months.

3. The Assistant Commissioner of Income Tax vide notification dated 8.6.1998 directed the company to register itself as a dealer under the provisions of the KST Act on the ground that the agreement attracted tax under section 5C thereof. The company in the reply dated 26.6.1998 repudiated the claim on the ground that there was no transfer of right to use the goods given by the company to the Port Trust as the possession and custody of the tug continued with it. The Assistant Commissioner sent another communication dated 28.12.1998 informing that last chance was given to the company to get itself registered under the KST Act within 15 days failing which he would be compelled to file charge-sheet against the company for the offence under section 29(2)(aaaa) of the KST Act. The Joint Commissioner of Income Tax (Commercial Taxes) on a query being made by the company wrote that he was not the competent authority to issue a clarification regarding liability or otherwise to pay tax under section 5C of the KST Act.

4. The company filed a writ petition on the ground that the KST Act does not extend to territorial waters of India situated adjacent to the landmass of the State of Karnataka. Thus, the State is not authorised to exact any tax on the hire charges received from the Port Trust. The

learned Single Judge dismissed the writ petition, aggrieved thereby the company preferred a writ appeal. The same has also been dismissed; hence, the appeal has been filed. A Division Bench of the High Court of Karnataka has rejected the submission raised by the appellant that over the territorial waters State of Karnataka has no power. The learned Single Judge was not justified in refusing to consider the question, whether there was a transfer of right to use the tug. It held that there was a transfer of right to use the tug by the company to the Port Trust.

5. Shri Arvind Datar, learned senior counsel appearing on behalf of the company submitted that the Time Charter Agreement dated 8.1.1998 does not amount to transfer of right to use goods within the meaning of section 5C of the KST Act. It was only a contract of service. The contract is for the hire of a tug on payment of Rs.1.5 lakh per day. The expression used in the agreement is 'service.' Time Charters world over are considered a contract of service. There is a difference between the ‘right to use goods’ and ‘the transfer of the right to use goods.’ In case of a lease, there is a transfer of an interest in the property, whereas, in a licence, there is a mere right to use the property. The Time Charter is recognised as an agreement in the nature of pure service. They are entirely distinct from Bareboat Charter Agreement or charter by demise. The charters are of three kinds *viz.* (a) Time

Charter, (b) Bareboat Charter or Charter by Demise, and (c) Voyage Charter. Time charter and voyage charter are contracts of service, whereas bareboat charter amounts to transfer of right to use the ship itself. In a time charter, master and crew are in the employment of the owner, and complete control, ownership, and possession of the vessel remain only with the owner through the master and crew. The delivery to the Port Trust is only a symbolic one, and the legal and physical possession of Tug continues to be with the company. Thus, the arrangement is a service, not a lease. Learned senior counsel has made reference to Scrutton on charter parties, Halsbury's Laws of England, and have also relied upon various decisions.

6. Mr. Datar has further submitted that the Port Trust cannot use the Tug for any purpose except, as mentioned in clause 3 of the Agreement. The Port Trust cannot take away the Tug outside the harbour limits of the Port Trust. Legal possession and fiscal control had not been transferred to the Port Trust, and only a conditional use of the vessel has been given. The use of the words ‘at the disposal of Port' in clause 7 is a standard term used in all charter agreements, and these do not indicate the transfer of legal possession or transfer of fiscal control. The contract indicates various liabilities and responsibilities of the owner; the insurance has to be provided by the appellants. For the performance of service, the Bank Guarantee also

has to be given. The owner is responsible for damage to his Tug, Jetty, port premises, or any other vessel in the port. The company is responsible for providing indemnity to the charterer. Thus, the owner has not lost his control over the vessel.

7. It is further urged that if the vessel is at the disposal of the Port Trust, does not mean that there is a transfer of right to use it. The expression must be understood in a proper context of the agreement itself. It would be absurd to suggest that the vessel can be partly in possession of the Port Trust and partly with the company. Any interpretation otherwise of the contract may create mayhem in the scheme of indirect taxation in India.

8. Mr. Datar has also referred to international laws relating to time charter and Bareboat Charter Agreements that have been in existence for more than 100 years. According to him, the time charter has always been treated as a contract of service. He has relied on the Ministry of Finance, Department of Revenue, a clarification dated 18.6.2008 issued on the basis of detailed examination and analysis of the Charter Party Agreements entered by shipping companies with their charterers and have clarified that vessels fall under the category of tangible goods. A charterer acquired the right to use the vessel without having the right to possession or effective control of the vessel. Therefore, the consideration paid for chartering of vessels is liable to

service tax under the category of 'supply of tangible goods for use by way of service without possession and control.' The fact that time charters are subject to service tax and bareboat charters are subject to sales tax, which indicates that time charters are contracts of service. If they involved a transfer of right to use, Parliament would never have subjected them to service tax.

9. Mr. Datar, learned senior counsel has also submitted that usually, only the Parliament can make laws relating to territorial waters. Under Article 246(4), read with Article 286, Parliament can make fiscal laws relating to imposition of tax on either supply of goods or services or both, where such supply takes place outside the State. Thus, even if the *situs* of agreement fell in the territory of State, it would be of no relevance as the vessel has to ply in territorial waters. An agreement cannot be signed in the high seas.

10. It was submitted that the High Court has erred in treating the territorial water as part of the territory of Karnataka, in contravention to Article 297 as well as the provisions of the Territorial Waters, Continental Shelf, Exclusive Economic Zone, and other Maritime Zones Act, 1976 (Act of 1976). None of the maritime States have been given the territorial waters as part of their territory. He has also referred to Dr. Ambedkar's speech in the Constituent Assembly to submit that the entire territorial waters would exclusively belong to

the Union, and it is only by way of an exception through Entry 21 in List II that "fisheries" has been kept under the control of a State Government. The State Government is, thus, competent to regulate fishing up to the territorial waters. The same would again be restricted by Entry 57 of List I, which provides that fisheries beyond the territorial waters would be under the control of the Union as per Entry 21, List II. The Karnataka Marine and Fishing (Regulation) Act, 1986 (Act of 1986) was passed by the State legislature, within purview of powers as per Entry 21 of List II. Section 2(j) of the Act of 1986 has defined Karnataka State to include the territorial waters, but that has to be read in the context of Entry 21 in List II. The definition in section 2(j) is confined to the regulation of fisheries, and cannot be interpreted to mean that the territorial waters belong to Karnataka. The State cannot claim 12 nautical miles as part of its territory; otherwise, each maritime State can pass laws with any of the items mentioned in List -I regarding the activities in the territorial waters, which are the prerogative of the Parliament.

11. Mr. Datar has further submitted that under Entries 56 and 57 of List II, the State legislature has the competence to levy tax on the carriage of goods and passengers only on inland waters base. By implication, any taxes on the carriage of goods or passengers in the territorial waters is outside the legislative competence of the State

legislature. Entries 25 to 27 of List I indicate that the entire shipping industry is exclusively within the domain of Parliament. Entry 27 of List-I cover the ports, and the agreement is with the Port Trust. He has further attracted our attention to section 5 of the Territorial Waters Act, 1976. Section 5 defines the contiguous zone to be at a distance of 24 nautical miles from the nearest point of the base-line. The Central Government has the exclusive power to make laws concerning customs and other fiscal matters on activities that take place in the contiguous zone. The Territorial Waters Act prevails over the State legislature dealing with sales tax, *i.e.*, the KST Act. Thus, the decision in *20th Century Finance Corporation Ltd. v. State of Maharashtra*, 2000 (6) SCC 12 is not attracted in which this Court was concerned with the controversy as to which State could levy sales tax, where signing of the contract, delivery of the goods or use of the rights were in different States. The majority held that the State where a contract is signed would have the power to levy a sales tax. Thus, the place where the goods were delivered or used could not be a ground for levy of sales tax. Merely signing of the contract in Mangalore conferred no jurisdiction to levy sales-tax on the State of Karnataka. The decision has no application to the transaction, the effect of which takes place in territorial waters or the high seas, even if the agreement is signed within a particular State.

12. Mr. Mohan Parasaran, learned senior counsel has taken us in detail to various clauses of the agreement. The agreement is in the nature of a time charter as approved by the New York Produce Exchange (NYPE), which is the standard form for time charters. It is neither a bareboat cum demise charter nor a voyage charter and is, therefore, only a time charter because of terms and conditions. He has relied upon *BSNL v. Union of India*, (2006) 3 SCC 1 wherein this Court has laid down essential attributes of a transaction to constitute a transfer of the right to use the goods. At no point of time, the vessel should go out of the possession or control of the company, therefore the essential ingredient to constitute it a transfer of the right to use is missing. He has also referred to *DLF Universal Ltd. v. Director, Town and Country Planning Department, Haryana*, (2010) 14 SCC 1. The very language of the agreement makes it clear to be a contract of service. The expressions like delivery and re-delivery are not to be understood in a literal sense. There are certain obligations upon the company, which makes out that effective control over the vessel is with the company. He had also referred to Harbour Craft Rules. The tug is always operated, controlled, run, maintained, and insured by the company. Possession of the Tug remains with it. In the event the tug is disabled from use, the charterer is not required to pay charter-

party charges to the company. The company has to indemnify the charterer.

13. Mr. Mohan Parasaran, learned senior counsel has also submitted that the concept of time charter-party is a charter for a specified period rather than for a specific task. There are other types of Charter Party Agreements like demise charter and voyage charter. Under a demise charter, the owner leases his ship to the charterer for an agreed period in exchange for periodic payments. In voyage charter, the owners agree that their ship officered, crewed and bunkered by them, shall carry specified cargo on an agreed voyage in exchange for freight, characteristically a "single payment." Under Mercantile jurisprudence, it is well-settled that insofar as time charter is concerned, it is only a service contract. He has also referred to *Scrutton on Charterparties and Bill of Lading, and British Shipping Laws, Carriage by Sea* book by Colinvaux, Raoul P. He has also referred to a decision in *British India Steam Navigation Co. Ltd. v. Shanmughavilas Cashew Industries & Ors.*, (1990) 3 SCC 481 and other decisions and the definition of time charter-party in Black's Law Dictionary. For the period during which the transferee has such legal right, it has to be to the exclusion of the transferor company, which is explicitly necessary to constitute a transfer of the right to use, which is not merely a licence to use the goods. Service tax is already leviable

treating it as service agreement as such sales-tax cannot be exacted by the State Government. The territorial waters are within the exclusive jurisdiction of the Union of India. In view of Article 297 of the Constitution, the State of Karnataka has no jurisdiction to impose a sales tax. The territorial waters are deemed Union territory. The sovereignty of India extends and has always extended to the territorial waters and the seabed and subsoil underlying and air space over, such waters and it is the Central Government which has the power to alter the limits of the territorial waters.

14. Mr. Devadatt Kamat, learned senior counsel submitted on behalf of the State of Karnataka that the transfer of right to use occurs when the agreement has been entered into and not when the delivery of the goods takes place. He has referred to various clauses of the agreement to take home the aforesaid submission and has relied upon *20th Century Finance Corporation Ltd. v. State of Maharashtra* (supra), a decision of the Constitution Bench of this Court which has been approved in *BSNL* (supra). He has further urged that a coastal State has jurisdiction to levy sales-tax in the territorial waters abutting the coast. He has also referred to Article 297. He has relied upon Dr. Ambedkar's speech in the Constituent Assembly that "State laws will prevail over that area, whatever law you make will have its operation over the area of three miles from the physical territory" and has also

referred to H.M. Seervai's seminal work on the "Constitutional Law of India" with respect to interpretation of Article 297 of the Constitution of India. Though the Article has been amended on more than one occasion, the Parliament has not altered the basic premise of Article 297. He has relied upon *Baliram Waman Hiray v. Justice B. Lentin*, (1988) 4 SCC 419; *P.T. Rajan v. T.P.M. Sahir* (2003) 8 SCC 498. Several States, including the State of Karnataka, have enacted the laws with respect to fisheries. He has referred to section 2(j) of the Karnataka Marine Fishing (Regulation) Act, 1986. There was a transfer of right to use the vessel as apparent from the various clauses of the agreement. He has also relied upon Article 366 and the debates relating to it. Parliament has chosen not to place any restriction on the power of the State Government under Article 366(29A)(d).

15. Mr. Tushar Mehta, learned Solicitor General of India has expressed the concern of the Union of India with respect to territorial waters and has submitted that the territorial waters vested in the Union of India as per Entries 25 to 27 and 30 of List I and the Territorial Waters Act. The decision of the Karnataka High Court to the extent of territorial waters, cannot be said to be correct. He has relied upon the debates in the Constituent Assembly as to Article 297. In accordance with Article 297(3), the Parliament has enacted the Territorial Waters Act, 1976; he has referred to sections 3, 5, and 7 of

the said Act. He has also relied on Articles 246 and 286 of the Constitution of India.

16. Following questions arise for consideration in the matter:

(i) Whether the State of Karnataka has jurisdiction to levy sales-tax under section 5C of the KST Act in respect of the Charter Party Agreement dated 8.1.1998?

(ii) Whether the agreement dated 8.1.1998 constitutes “transfer of the right to use"?

(iii) Whether the State of Karnataka has the competence to levy sales-tax on the agreement, which is effective within the territorial waters?

17. This Court issued notice to various coastal States, and they have filed response also with respect to territorial waters, such as the States of Goa, Maharashtra, Kerala, Tamil Nadu, Andhra Pradesh, and West Bengal, etc.

In Re: Section 5C of KST Act:

18. The State of Karnataka has sought to levy tax under section 5C of the KST Act on charter-party on the ground that it is a transfer of right to use vessel.

19. Section 5C of the KST Act reads:

“Section 5C - Levy of tax on the transfer of the right to use any goods-

Notwithstanding anything contained in sub-section (1) or sub-section (3) of section 5, but subject to sub-sections (4), (5) and (6) of the said section, every dealer shall pay for each year a tax under this Act on his taxable turnover in respect of the transfer of the right to use any goods mentioned in column (2) of the Seventh Schedule for any purpose (whether or not for a specified period) at the rates specified in the corresponding entries in column (3) of the said Schedule."

20. Section 2(t) of the KST Act defines "sale" and reads as under:

"Section 2(t) "sale" with all its grammatical variations and cognate expressions means every transfer of the property in goods (other than by way of a mortgage, hypothecation, charge or pledge)] by one person to another in the course of trade or business for cash or for deferred payment or other valuable consideration, and includes,—

(i) a transfer otherwise than in pursuance of a contract of property in any goods for cash, deferred payment or other valuable consideration;
(ii) a transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;
(iii) a delivery of goods on hire purchase or any system of payment by installments.
(iv) a 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;----

Explanation 1.—x x x
Explanation 2.— x x x
Explanation 3.— (a) The sale or purchase of goods (other than in the course of inter-State trade or commerce or in the course of import or export) shall be deemed, for the purposes of this Act, to have taken place in the State wherever the contract of sale or purchase might have been made, if the goods are within the State.
(i) n the case of specific or ascertained goods, at the time the contract of sale or purchase is made; and
(ii) in the case of unascertained or future goods, at the time of their appropriation to the contract of sale or purchase by the seller or by the purchaser, whether the assent of the other party is prior or subsequent to such appropriation.

3(b) x x x
3(c) x x x
3(d) x x x"

21. A reading of the definition of sale makes it crystal clear that every transfer of property in goods by one person to another in the

course of trade or business, includes the transfer of right to use any goods for any purpose. Section 5C of the Act also provides levy of tax on the transfer of the right to use any goods. Article 366(29A)(d) inserted by the Constitution (46th Amendment) Act, 1982 on 2.2.1983 reads:

> "366. (29) "tax on income" includes a tax in the nature of an excess profits tax;
> (29A) "tax on the sale or purchase of goods" includes--
> (a) a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;
> (b) a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;
> (c) a tax on the delivery of goods on hire purchase or any system of payment by instalments;
> (d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;
> (e) a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;
> (f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration,
> and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made;"
>
> (emphasis supplied)

22. A tax on the sale or purchase of goods includes a tax for transfer of right to use goods as that is deemed to be a sale. The question that arises for consideration is whether there is a transfer of the right to use the vessel. It has to be considered in view of the charter agreement entered into between the company and the Port Trust. The tender

documents pursuant to which agreement has been entered into contains the conditions and instructions to tenderers. The pre-qualification criteria provide that the tenderer has to submit the documents regarding ownership or possession of tug on bareboat/committed demise charter hire of tugs. In case he does not own the tug, he has to provide documents to prove that he has entered into a lease for charter hire of tug(s) for deploying them in the Port Trust during the period of the contract. The tenderer should have experience of manning and harbor practice for one year during the last 3 years. Tugs should be deployed at harbors at New Mangalore Port during the contract period.

23. General conditions of the contract are also specified in the tender documents. Paras 5(a), 6(ii) of the instructions to tenderers are extracted hereunder:

> "5. **PRE-QUALIFICATION CRITERIA:**
>
> Tenderers must fulfill the following pre-qualification criteria to prove the techno-commercial competence and submit the documents in support thereof:
>
> a) Tenderer should either own OR should be in possession of tug on bareboat/committed demise charter hire or Tug(s). In case the tenderer is not owning the tug(s), he should submit the valid documents to prove that he has entered into a lease for charter hire of tug(s) for deploying them in NMPT during the period of the contract."
>
> 6. **SUBMISSION OF TENDERS:**
>
> (a) ENVELOPE 'A' : The first Envelope shall be clearly marked as 'ENVELOPE NO.A.' It shall contain the following documents and information.
> (i) x x x

(ii) Proof of ownership of Tug/Tugs of having entered into a bareboat committed demise charter agreement and other documents to be submitted, in accordance with Clause 5(a)."

24. Instructions at paras 5, 6, 13 and 15 of General Conditions of Contract are as under:

"5. **PAYMENT OF TAXES:**
The contractor shall pay all taxes, duties, etc. which he may be liable to pay to State Government or Government of India or any other authority under any law for the time being in force in respect of or in accordance with the execution of a contract. The contractor shall further be liable to pay such an increase in tax, levy, duty, etc. under existing law or which may be leviable as a result of introduction of any laws, increase in taxes, levy, duty etc. or imposition of new taxes levy, duty etc.

6. **INDEMNITY:**

Notwithstanding that all reasonable and proper precautions may have been taken by the Contractor at all times during the currency of the agreement, the Contractor shall nevertheless be wholly responsible for all damages to the property of Charterers during the currency of the agreement."

"13. **NOTIFICATION OF AWARD**:
(a) x x x
(b) The Letter of Acceptance will be issued in the name of the company which has purchased/submitted the tender.
(c) The time to count for delivery of tug shall commence from the date of issue of the Letter of Acceptance."

"15. **PERFORMANCE GUARANTEE:**

The successful tenderer shall furnish a bank guarantee from a nationalized bank having its branch at Panambur/Mangalore, along with the Charter Party Agreement, for compliance with the contract terms and conditions, for an amount equivalent to 10% of average annual contract value. This guarantee shall be valid for a total period of 9 months from the date of commencement of service."

25. Clauses 1 and 3 to 15 of the Special Conditions which are relevant are extracted hereunder:

Special Conditions of Contract :

1. All operational costs, including wages (Minimum Wages Act or any other Act, allowances, victualing, Insurance (Personal), Hull and Machinery, Protection & Indemnity) will be borne by the Contractor. Repairs, survey, and other requirements to keep the tug operational will be to the Contractor's account and during any absence of the tug from duty or inability of tug to perform for these or any other reasons, will result in non payment of hire charges, for the period the Tug was not made available to the Charterer, on pro-rata basis and clause 16 of the Charter Party Agreement shall apply.
2. xxxxxxx
3. On the date of commencement of the service, the tug shall have completed all the necessary surveys and be in possession of all valid certificates. Drydocking should not be required for a minimum period of two years from the date of delivery of Tug on charter.
4. A joint survey will be carried out at NMPT before the tug is accepted for service in the port to assess the condition, capability, and performance of the Tug and the quantity of fuel, lubricants, etc.
5. On-hire and off-hire survey charges shall be borne equally by the Charterer and the Contractors.
6. The Charterer will not be responsible for any damage suffered by the tug due to failure of the tug or errors of the Tug Master and crew or any reason whatsoever.
7. The contract will be for a period of 6 months with effect from the date of commencement of the service. The contract may be extendable for a further period of one year at the discretion and option of NMPT. The Charterer may exercise the option for an extension not later than 30 days prior to the expiry of the first one year period.
8. The Tug shall be made available for port operations round the clock (24 hours a day) throughout the contract period.
9. The Contractor shall comply with the Indian Merchant Shipping Act and any other legislation related to the operation of a tug in Indian territorial waters, and if of foreign registry, shall obtain the appropriate licenses/permission from the Directorate General of Shipping, Mumbai for operating the tug in NMPT.
10. The Contractor has to pay the revised minimum wages to the crew engaged by them. If the crew is engaged for more than 8 hours, they should be compensated for the extra work. The contractor has to take the insurance policy covering all types of risks of all employees engaged by them.
11. The Contractor shall carry out the works strictly in accordance with the contract to the satisfaction of the Deputy Conservator and shall comply with and adhere strictly to his instructions and direction on any matter (whether mentioned in the contract or not).
12. The tug shall be delivered within 30 days from the date of issue of the Letter of Acceptance, in seaworthy and efficient condition, and should be in possession of all necessary certificates.
13. If the contractor fails to deliver the tug in all respects within 30 days, from the date of issue of Letter of Acceptance, liquidated damages at the rate of Rs. 30,000/- per day will be levied on the Contractor, and if

the Tug is not delivered for operation within 60 days from the date of issue of Letter of Acceptance, the contract shall be canceled and EMD forfeited.

14. The Contractor shall obtain necessary clearance, as required from D.G.Shipping, Ministry of Surface Transport, etc. for deploying the tug for service in the port before the tug is put into the service.
15. The steady/sustained Bollard pull of the Tug should not be less than 40 tonnes at the time of delivery. Bollard Pull test certificate should be from Classification society and should not be more than 6 months old from the date of delivery of the Tug to NMPT."

26. The relevant clauses of agreement *viz.*, clauses 1, 3, 4, 5, 7, 10, 11, 12, 13, 14, 14 (a), 15, 16, 17, 21 & 22 read thus:

"ANNEXURE – I

CHARTER PARTY AGREEMENT

x x x

NOW THIS AGREEMENT WITNESSETH.

1. The Contractors let and the Charterer hire the good Vessel …….. for a period of six months with effect from commencement of service. (Not a Sunday or a legal holiday unless taken over) the Vessel is delivered and placed at the disposal of the Charterers and the contractor undertakes to maintain the vessel during the period of this Charter.

3. The Vessel to be used for various lawful services required by Charterers including towing, docking and undocking of vessel at New Mangalore Port round the clock (24 hours a day) and throughout the contract period of six months including but not limited to:

a) berthing and unberthing of vessels in port.

b) To stand by as fire float, Oil spill dispersant spraying boat, etc.

c) To assist in double banking by way of acting as docking tug.

d) To maintain communication by VHF.

e) All other operations required in connection with docking/ undocking operations of vessels at Port and related to Harbour conservancy and/or movement of vessels within the Port and such other operations as are conventionally performed by Ports.

In the event the tug being unable to perform any of the operations, no hire to be paid by the Charterer to the Contractor and clause 16 of the Charter Party Agreement shall apply.

4. CONTRACTORS TO PROVIDE:

Except as otherwise stated in this charter or a: may be agreed from time to time the contractors shall provide and/ or pay for all requirements, cost, or expense relating to the vessel, her master and crew, which, without prejudice to the generality of the foregoing shall include.

(a) Drydocking, repairs, docking for the contractor,: Purpose, and all expenses associated therewith, (b) provisions, wages (as per minimum wages act)etc., shipping and discharging fee; and all other expenses of the Master, Officers and Crew (c)Deck , cabin and ongoing room stores (d) Adequate No. of Towing ropes tested and certified (o) galley fuel, (f) Marine and war risk insurance of the vessel (g) fumigation and deratisation exemption certificate (h) all customs, or import duties arising in connection with any of the foregoing (1) all taxes, duties, and levies including but not limited to the taxes, duties, and levies imposed on the income of the contractor, its employees or any levies, etc. on any purchase made by the contractors and/or any penalties imposed by any authorities from time to time.

5. Charterers to provide whilst the vessel is on hire fuel, lubricants, water, electricity, port charges, and anti-pollutants. In case of actual fire fighting as ordered by Charterer, the cost of foam/chemicals consumed for the fire fighting will be reimbursed by the Charterer at actuals.

6. The Charterers at port of delivery and the Contractors at port of redelivery to take over and pay for all fuel and lubricants remaining in the vessel at Mangalore.

7. MAINTENANCE AND OPERATION:

(a) The vessel shall, during the charter period, be for all purposes at the disposal of the Charterers and under the control in every respect. The Contractor shall maintain Vessel, machinery, appurtenances and spare parts in a good state of repair, inefficient operating condition and in accordance with good commercial maintenance practice and they, shall keep the vessel with unexpired classification of the class/MMD and with other required certificates in force at all times.

(b) The Charterer shall have the use of all outfits, equipment, and appliances on board at the time of delivery. The contractor shall, from time to time during the charter period, replace such items of equipment as shall be so damaged or worn as to be unfit for use. The Contractor shall carry out all repairs or replacement of any damaged, worn or lost parts or equipment in such manner (both as regards workmanship and quality of materials) as not to diminish the value and efficiency of the vessel.

x x x

10. INSPECTION:

The Charterers shall have the right to require the vessel to be dry-docked if the contractor is not docking vessel at normal classification/statutory intervals. The fees for such dry dock/inspection and survey shall be borne by the Contractor. All time taken in respect of dry docking, inspection, survey, or repairs shall not count as time on hire and shall not form part of the charter period, and clause 16 of the Charter Party Agreement shall apply.

11. INSURANCE:

(a) During the Charter period, the vessel shall be kept insured by the Contractors at their expense against marine Hull & Machinery and war risks. The Charterers and/ or Insurers shall not have any right of recovery or subrogation against the Contractors on account of the loss of any damage to the vessel or her machinery or appurtenances covered by such Insurance or on account of payments made to discharge claims against or liabilities of the vessel or the Charterers covered by such insurance.

(b) During the charter period, the vessel shall be kept insured by the contractors at their expense against protection and indemnity risks in such form as the charterers shall in writing approve which approval shall not be unreasonably withheld. If the contractors fail to arrange and keep any of the insurances provided for under the provisions of sub-clause (b) in the manner described therein, the Charterers shall notify Contractors whereupon the contractors shall rectify the position within seven running days.

(c) In the event of any act or negligence on the part of the contractors which may vitiate any claim under the insurance herein provided, the contractor shall indemnify the Charterers against all claims and demands which would otherwise have been covered by such insurance.

12. The whole reach and burthen of the vessel, including lawful deck capacity to be at the Charterers' disposal, reserving proper and sufficient space for the vessel's master, Officers, Crew, tackles, apparel, furniture, provisions and stores.

13. The vessel should have a set of competent and qualified Tug Master and Crew, as required by statutory regulation.

14. (a) The Master to execute the Charterer's instructions with the utmost dispatch and to render customary assistance with the vessel's crew. The Master to be under the order of the Charterers as regards employment, agency, or other arrangements. The Contractors to indemnify the Charterers against all consequences or liabilities arising from the Master, Officers, or Agents for their unlawful actions as well as from any irregularity in the vessel's papers.

(b) If the Charterers have the reason to be dissatisfied with the conduct or efficiency of the Master, Officer of the crew, the Contractors on

receiving particulars of the complaint, promptly investigate the matter and, if necessary, shall make a change in the appointment. However, the Charterers shall have the right to demand the changes of any Master or other crew, which demand shall not be unreasonable.

15. The Charterer or their representatives will give tile Master all instructions in English and the Master and Engineer to keep full and correct logs in English, accessible to the Charterers.

16. PENALTY:

(a) If the vessel is inoperative and/or unavailable, and the Charterer are denied use of the vessel, penalty will be levied from the time and date of such in operation/non-availability after allowing any downtime to the credit of the contractors up to the time and date of break down/in operation as follows, in addition to non payment of charter hire charges.

From the time and date of such incorporation non—availability, after following any downtime to the credit of the contractor up to the time and date of break down/in operation

to 14 days …….. 15% of hire charges per day.

15 to 21 days …… 30% of hire charges per day.

Beyond 22 days……..…… 50% of hire charges per day.

In case of non-deployment of the tug beyond 30 days, the Contract shall be liable for termination at the discretion of the charterer, and clause 22 of the Charter Party Agreement shall apply.

(b) If the vessel is required to be dry-docked as required by Class (LRS/any other Classification Society), or for any other reason whatsoever, the Contractors will be permitted to dry dock the Vessel to maintain her Class with the prior approval of Dy. Conservator, but no hire charges will be paid for that period, and penalty will be levied as per clause 16(a) above, if applicable.

17. The Contractors shall bear all expenses for mobilization and demobilization.

x x x x x

21. The Contractors shall be liable for pollution damage and the cost of clean up which has occurred due to the Contractor's and/ or the Contractor's personnel by willful, wanton, intentional acts or omissions or gross negligence which cause or allow the discharge, spills or leaks of any pollutants from any source whatsoever.

22. PERFORMANCE GUARANTEE:

> The Contractors shall furnish to the Charterers, within 30 days from the date of issue of the Letter of Acceptance, for chartering the vessel, an irrevocable and unconditional Bank Guarantee from a Nationalized Bank for a sum equivalent to 10% of the average annual contract value computed for a period of one year charter. This irrevocable Bank Guarantee shall be valid for a total period of 30 months from the date of commencement of service. In the event of the Contractors failing to honor any of the commitments entered 'into under this agreement, the Charterers shall have an unconditional option under guarantee to invoke the said Bank Guarantee and to claim the amount from the Bank. The Bank shall be obliged to make payment to the Charterer upon demand."

27. As per the Charter Party Agreement, Annexure I, the vessel has been taken by the Port Trust for various lawful services required by the chartered Port Trust, including towing, docking, and undocking at the Port round the clock for the contract period of 6 months. The contractor that is the company has to provide the cost or expenses related to the vessel, her master and crew, whereas the charterer to provide fuel, lubricants, water, electricity, port charges, and for anti-pollutants. The provisions for maintenance and operation are also contained in the agreement. As per clause 7, the vessel shall during the charter period be for all purposes at the disposal of the charterers and under their control in every respect, whereas the maintenance part is with the contractor company. The charterer shall have the use of all outfits, equipment, and appliances on board the vessel at the time of delivery. Insurance charges have to be borne by the contractor. The vessel shall be kept insured by the contractors at their expense against protection and indemnity risks. The whole reach and burthen

of the vessel, including the lawful capacity to be kept at the charterer's disposal.

28. A performance guarantee has to be furnished by the contractor to the charterer to the contract under clause 22.

29. It is apparent that to submit a tender, the tenderer should either own or should be in possession of a Tug on bareboat/committed demise charter hire of Tug(s), and in case he is not the owner, he has to prove that he has entered into a lease for charter hire of tug for deploying them at Mangalore Port during the period of the contract. No doubt about it that as provided in para 6(vii) of the instructions to the tenderers that the Tugs should be manned appropriately as per the minimum requirement of the Harbour Craft Rules during the contract period, and this is the responsibility of the tenderer. As per clause 6 of the General Conditions of Contract, the contractor is wholly responsible for all damages to the property of the charterer during the currency of the agreement. The indemnity clause indemnifies, charterer for any damage to its property; is to be provided by the contractor.

30. Condition 1 of the special conditions states that all operational costs, including wages to be borne by the contractor. To keep the tug operational has to be on the contractor’s account. As per condition 3

of the special conditions, the tug shall have completed all the necessary surveys and be in possession of all valid certificates. A joint survey to be carried out at the Port Trust before the tug is accepted for service in the Port to assess the condition. Capability and performance of the vessel and the quantity of fuel, lubricants, etc. On-hire and off-hire survey charges shall be borne equally by the charterer and the contractors as provided in condition 5. The charterer will not be responsible for any damage suffered by the tug is provided in condition 6.

31. The contract would be for six months and extendable for one year at the discretion and option of the Port Trust. The tug shall be made available for port operations round the clock throughout the contract period as per condition No.8. The contractor has to comply with the provisions of the Indian Merchant Shipping Act and the law as to licenses/permissions to operate tug. It is the liability of the contractor to pay revised minimum wages to its staff. The contractor shall carry out the work strictly to the satisfaction of the Deputy Conservator, and the tug shall be delivered within 30 days from the date of issue of the letter of acceptance.

32. The charter agreement also provides round the clock services throughout the contract period in clause 3 at the disposal of the port. The contractor has to pay the expenses for the master and crew. As

per clause 5, the charterer has to provide whilst the vessel is on hire, fuel, lubricants, water, electricity, port charges, and anti-pollutants. As per clause 7(a), the vessel shall be for all purposes at the disposal of the charterer and under the control of the contractor, and as provided in clause 7(b) of the charter agreement, the charterer shall have the use of all outfits, equipment, and appliances. No doubt about it that insurance is the liability of the contractor. The indemnification also is the liability of the contractor under the agreement. The whole reach and burthen of a vessel, including lawful deck capacity, is at the disposal of the charterer, reserving proper and sufficient space for the vessel's masters, officers, etc. A performance guarantee has also to be submitted.

33. When we peruse the various terms and conditions of the Charter Party Agreement (Annexure I), clause 1 provides that the contractors "let" and the charterer "hire" the goods vessel for six months. The expression 'let' has been used, and the vessel most significantly during the charter period has been placed at the "disposal" of the charterers and under their control in every respect. The charterers have been given the right to use all outfits, equipment, and appliances on board the vessel at the time of the delivery, including the whole reach, burthen, and deck capacity. Thus, in our considered opinion, merely by providing the staff, insurance, indemnity, and other responsibilities

of bearing officials costs. Effective control for the entire period of six months has been given to the charterers. It is a case of transfer of right to use the vessel for which certain expenses and staff are to be provided by the contractor, which is not sufficient to make out that the control and possession of the vehicle are with the contractor. The possession and control are clearly with the charterer. As in essence, it has to be seen from a conjoint reading of various conditions whether there is a transfer of right to use the vessel. In our considered opinion there is not even an iota of doubt that under the charter agreement coupled with the instructions to tenderers, general conditions and special conditions for the contract as specified in the tender documents and charter-party clauses, there is a transfer of right to use the vessel for the purposes specified in the agreement.

34. To constitute a transaction for the transfer of right to use of goods, essential is, goods must be available for delivery. In the instant case, the vessel was available for delivery and in fact, had been delivered. There is no dispute as to the vessel and the charterer has a legal right to use the goods, and the permission/licence has been made available to the charterer to the exclusion of the contractor. Thus, there is complete transfer of the right to use. It cannot be said that the agreement and the conditions subject to which it has been made, is not a transfer of right to use the goods, during the period of

six months, the contractor has no right to give the vessel for use to anyone else. Thus in view of the provisions inserted in Article 366(29A)(d), section 5C, and definition of 'sale' in section 2 of the KST Act, there is no room for doubt that there is a transfer of right to use the vessel.

35. What constitutes the transfer of right to use tangible property has been dealt with in various decisions. In *Bharat Sanchar Nigam Ltd. & Anr. v. Union of India & Ors.*, (2006) 3 SCC 1, this Court has observed thus:

> **"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 levy of sales tax. To this extent, only is the principle enunciated in *State of Madras v. Gannon Dunkerley Ltd. & Co. (Madras) Ltd.*, AIR 1958 SC 560 (*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.
>
> **44.** Of all the different kinds of composite transactions, the drafters of the Forty-sixth Amendment chose three specific situations, a works contract, a hire-purchase contract, and a catering contract to bring them within the fiction of a deemed sale. Of these three, the first and third involve a kind of service and sale at the same time. Apart from these two cases where splitting of the service and supply has been constitutionally permitted in sub-clauses (*b*) and (*f*) of clause (29-A) of Article 366, there is no other service which has been permitted to be so split. For example, the sub-clauses of Article 366(29-A) do not cover hospital services. Therefore, if during the treatment of a patient in a hospital, he or she is given a pill, can the Sales Tax Authorities tax the transaction as a sale? Doctors, lawyers, and other professionals render service in the course of which can it be said that there is a sale of goods when a doctor writes out and hands over a prescription or a lawyer drafts a document and delivers it to his/her client? Strictly speaking, with the payment of fees, consideration does pass from the patient or client to the doctor or lawyer for the documents in both cases.

45. The reason why these services do not involve a sale for the purposes of Entry 54 of List II is, as we see it, for reasons ultimately attributable to the principles enunciated in *Gannon Dunkerley case*, namely, if there is an instrument of contract which may be composite in form in any case other than the exceptions in Article 366(29-A), unless the transaction in truth represents two distinct and separate contracts and is discernible as such, then the State would not have the power to separate the agreement to sell from the agreement to render service, and impose tax on the sale. The test, therefore, for composite contracts other than those mentioned in Article 366(29-A) continues to be: Did the parties have in mind or intend separate rights arising out of the sale of goods? If there was no such intention, there is no sale even if the contract could be disintegrated. The test for deciding whether a contract falls into one category or the other is to as what is "the substance of the contract." We will, for want of a better phrase, call this the dominant nature test."

50. What are the “goods” in a sales transaction, therefore, remains primarily a matter of contract and intention. The seller and such purchaser would have to be *ad idem* as to the subject-matter of sale or purchase. The court would have to arrive at a conclusion as to what the parties had intended when they entered into a particular transaction of sale, as being the subject-matter of sale or purchase. In arriving at a conclusion, the court would have to approach the matter from the point of view of a reasonable person of average intelligence.

73. With respect, the decision in *20th Century Finance Corpn. Ltd.* v. *State of Maharashtra,* (2000) 6 SCC 12, cannot be cited as authority for the proposition that delivery of possession of the goods is not a necessary concomitant for completing a transaction of sale for the purposes of Article 366(29-A)(*d*) of the Constitution. In that decision, the Court had to determine where the taxable event for the purposes of sales tax took place in the context of sub-clause (*d*) of Article 366(29-A). Some States had levied a tax on the transfer of the right to use goods on the location of goods at the time of their use irrespective of the place where the agreement for such transfer of right to use such goods was made. The other States levied a tax upon delivery of the goods in the State pursuant to agreements of transfer while some other States levied a tax on deemed sales on the premise that the agreement for the transfer of the right to use had been executed within that State (vide para 2 of the judgment as reported). This Court upheld the third view, namely, merely that the transfer of the right to use took place where the agreements were executed. In these circumstances, the Court said that: (SCC p. 42, para 28)

> “*28*. No authority of this Court has been shown on behalf of the respondents that there would be no completed transfer of right to use goods unless the goods are delivered. Thus, the delivery of goods cannot *constitute a basis for the levy of tax on the transfer of right to use any goods*. We are, therefore, of the

> view that *where the goods are in existence*, the taxable event on the transfer of the right to use goods occurs when a contract is executed between the lessor and the lessee and situs of sale of such a deemed sale would be the place where the contract in respect thereof is executed. Thus, where goods to be transferred *are available*, and a written contract is executed between the parties, it is at that point situs of taxable event on the transfer of right to use goods would occur, and situs of sale of such a transaction would be the place where the contract is executed."
>
> (emphasis ours)

> **74.** In determining the situs of the transfer of the right to use the goods, the Court did not say that the delivery of the goods was inessential for the purposes of completing the transfer of the right to use. The emphasized 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 recognized that for oral contracts, the situs of the transfer might be where the goods are delivered (see para 26 of the judgment).
>
> **75.** In our opinion, the essence of the right under Article 366(29-A)(*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."

36. In a concurring opinion, Dr. A R Lakshmanan, J. in *BSNL* (supra) observed:

> **"97.** To constitute a transaction for the transfer of the right to use the goods, the transaction must have the following attributes:
>
> (*a*) there must be goods available for delivery;
>
> (*b*) there must be a consensus ad idem as to the identity of the goods;
>
> (*c*) the transferee should have a legal right to use the goods —consequently, all legal consequences of such use including any permissions or licenses required therefor should be available to the transferee;
>
> (*d*) for the period during which the transferee has such legal right, it has to be the exclusion to 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 license to use the goods;
>
> (*e*) 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."

37. The Charter Party Agreement qualifies the test laid down by this Court. Applying the substance of the contract and the nominal nature test, the vessel was available when the agreement for the right to use the goods has taken place. The vessel was available at the time of transfer, deliverable, and delivered and was at the exclusive disposal for six months round the clock with the charterer port trust. The use of license and permission was at the disposal of the charterer and to the exclusion of the contractor/transferor. It was not open to the contractor to permit the use of the vessel by any other person for any other purpose.

38. In *DLF Universal Ltd. & Anr. v. Director, Town, and Country Planning Department, Haryana & Ors*., (2010) 14 SCC 1 has been relied upon for interpretation of the contract thus:

> **"12.** The agreement with the Governor required to be entered into by the owners of the land intending to set up a colony is structured and regulated by Rule 11 of the Rules. The terms and conditions of the agreement and the obligations of the owner of the land and the covenants thereof are prescribed by statutory rules. The contract between the owner of the land and its buyers, unlike the agreement entered by the owner of the land with the Government, is not required to be in any statutory form. It is a contract between the two willing contracting parties whereunder the terms and conditions are mutually agreed upon. The covenants decide the mutual obligations between the owner of the land and the buyers thereof.
>
> ***Interpretation of contract***

> **13.** It is a settled principle in law that a contract is interpreted according to its purpose. The purpose of a contract is the interests, objectives, values, policy that the contract is designed to actualize. It comprises the joint intent of the parties. Every such contract expresses the autonomy of the contractual parties' private will. It creates reasonable, legally protected expectations between the parties and reliance on its results. Consistent with the character of purposive interpretation, the court is required to determine the ultimate purpose of a contract primarily by the joint intent of the parties at the time the contract so formed. It is not the intent of a single party; it is the joint intent of both the parties and the joint intent of the parties is to be discovered from the entirety of the contract and the circumstances surrounding its formation.
>
> **14.** As is stated in *Anson's Law of Contract*:
>
> "a basic principle of the common law of contract is that the parties are free to determine for themselves what primary obligations they will accept…. Today, the position is seen in a different light. Freedom of contract is generally regarded as a reasonable, social, ideal only to the extent that equality of bargaining power between the contracting parties can be assumed, and no injury is done to the interests of the community at large."

There is no dispute with the proposition that the terms and conditions have to be seen as intended by parties, and it has to be based on the objectives, values, and policies that contract is designed to actualize.

39. Reliance has also been placed on the *State of A.P. & Anr. v. Rashtriya Ispat Nigam Ltd.*, (2002) 3 SCC 314 thus:

> **"3.** The respondent is owning Visakhapatnam Steel Project. For the purpose of the steel project, it allotted different works to contractors. The respondent undertook to supply sophisticated machinery to the contractors for the purpose of being used in the execution of the contracted works and received charges for the same. The appellant made a provisional assessment levying a tax on hire charges under Section 5-E of the Act. The respondent filed a writ petition seeking a declaration that the tax levied, exercising power under Section 5-E of the Act on the hire charges collected during the period 1988-89, was illegal and unconstitutional. The appellant filed a counter-affidavit in the writ petition contending that the respondent was lending highly

> sophisticated and valuable imported machinery to the contractors engaged in the execution of the project work on specified hire charges; the machinery was given in possession of the contractor and he was responsible for any loss or damage to it and in view of the terms and conditions contained in the agreement, there was transfer of property in goods for use and on the amounts collected by the respondent as charges for lending machinery attracted tax liability under Section 5-E of the Act.
>
> **4.** The High Court after scrutiny and close examination of the clauses contained in the agreement and looking to the agreement as a whole, in order to determine the nature of the transaction, concluded that the transactions between the respondent and contractors did not involve transfer of right to use the machinery in favour of the contractors and in the absence of satisfying the essential requirement of Section 5-E of the Act, i.e., transfer of right to use machinery, the hire charges collected by the respondent from the contractors were not exigible to sales tax. On a careful reading and analysis of the various clauses contained in the agreement and, in particular, looking to clauses 1, 5, 7, 13, and 14, it becomes clear that the transaction did not involve a transfer of right to use the machinery in favor of contractors. The High Court was right in arriving at such a conclusion. In the impugned order, it is stated, and rightly so in our opinion, that the effective control of the machinery even while the machinery was in use of the contractor was that of the respondent Company; the contractor was not free to make use of the machinery for the works other than the project work of the respondent or move it out during the period the machinery was in his use; the condition that the contractor would be responsible for the custody of the machinery while it was on the site did not militate against the respondent's possession and control of the machinery. It may also be noticed that even the Appellate Deputy Commissioner, Kakinada, in the order dated 15-11-1999 in regard to Assessment Years 1986-87 and 1987-88, held that under the terms and conditions of the agreement, there was no transfer of right to use the machinery in favor of the contractor. Although it cannot be said that the appellant was estopped from contending otherwise in regard to Assessment Year 1988-89, it is an additional factor and circumstance, which supports the stand of the respondent."

It was a case of transfer of right to use the machinery. The High Court held that there was no transfer of right to use the machinery. In the absence of satisfying the essential requirement of section 5-E of the Andhra Pradesh General Sales Tax Act, 1957. What distinguishes the aforesaid case on facts is that the effective control of the

machinery even while it was in use of the contractor, was that of the respondent company; the contractor was not free to make use of the machinery for the works other than the project work of the respondent or move it out during the period the machinery was in his use; the condition that the contractor was responsible for the custody of the machinery, did not militate against the company's possession and control. It was a case of hiring of the machinery for a specific purpose on specified hire charges. The Charter Party Agreement is different in the present case.

40. Reliance has been placed on *British India Steam Navigation Co. Ltd. v. Shanmughavilas Cashew Industries & Ors.*, (1990) 3 SCC 481 thus:

> "**47**. Whether a charterparty operates as a demise or not depends on the stipulations of the charterparty. The principal test is whether the master is the employee of the owner or the charterer. In other words, whether the master becomes the employee of the charterer or continues to be the owner's employee. Where the charterparty is by way of demise, the charterer may employ ship in carrying either his goods or those of others. Where the charterparty does not operate as a demise, the charterer's right vis-a-vis the owner depends upon the terms of the contract. "The contract of carriage is personal to the charterer, and he cannot call upon the shipowner to undertake liabilities to third persons or transfer to third persons his liabilities to the shipowner unless the contract so provides." A charterparty has to be construed so as to give effect, as far as possible, to the intention of the parties as expressed in the written contract. The stipulations of charterparty may be incorporated in a bill of lading so that they are thereby binding on the parties. It is an accepted principle that when stipulations of the charterparty are expressly incorporated, they become terms of the contract contained in the bill of lading, and they can be enforced by or against the shipper, consignee or endorsee. The effect of a bill of lading depends upon the circumstances of the particular case, of which the most important is the position of the shipper and of the holder. Where there is a bill of lading relating to the

> goods, the terms of the contract on which the goods are carried are prima facie to be ascertained from the bill of lading. However, if a shipper chose to receive a bill of lading in a specific form without protest, he should ordinarily be bound by it. Thus, it cannot be said that the bill of lading is not conclusive evidence of its terms and the persons executing it is not necessarily bound by all its stipulations, unless he repudiates them on the grounds that, as he did not know, and could not reasonably be expected to know, of their existence, his assent to them is not to be inferred from his acceptance of the bill of lading without objection. Where there is a charterparty, the bill of lading is prima facie, as between the shipowner and an endorsee, the contract on which the goods are carried. This is so when the endorsee is ignorant of the terms of the charterparty, and maybe so even if he knows of them. As between the shipowner and the charterer, the bill of lading may, in some cases, have the effect of modifying the contract as contained in the charterparty, although, in general, the charterparty will prevail and the bill of lading will operate solely as an acknowledgment of receipt.
>
> **50**. There is nothing to show that the charterparty was by way of demise. Pacta dant legem contractui — the stipulations of parties constitute the law of the contract. Agreements give the law to the contract. Clause 4, having been a stipulation in the contract evidenced by the bills of lading the parties, could not resile therefrom. It is not clear whether the English Carriage of Goods by Sea Act, 1924, or the Indian Carriage of Goods by Sea Act, 1925, was applied by the High Court. The articles and the rules referred to are to be found in the Schedule to the Indian Act the Rules whereunder were not applicable to the facts of the case. The dispute could not have been decided partly according to municipal law and partly according to English law. The English law was not proved before the court, according to law."

It has been observed by this Court in *British India Steam Navigation Co. Ltd.* (supra) that whether a charter-party agreement operates as a demise or not, depends upon the stipulations of the charter-party. In the case of demise, the charterer may employ ship in carrying either his own goods or those of others. A charter-party has to be construed to give effect, as far as possible, to the intention of parties as expressed in a written contract. When stipulations of the charter-party are expressly incorporated, they become terms of the

contract. There was nothing to show that the Charter Party Agreement was by way of demise. Maxim "*Pacta dant legem contractui*" has been relied upon, which means that the stipulations of the parties constitute the law of the contract. The case was remitted for trial. The decision in *British India* (supra) lays down whether a charter-party should operate as a demise or not, depends on the stipulations of the charter-party. Based on stipulations, we have come to the conclusion that it is a case of 'transfer of right to use,' which is a deemed sale. The decision buttresses our conclusion that the charter-party has to be decided based on the stipulations.

41. In *the Union of India v. Gosalia Shipping (Pvt.) Ltd.*, (1978) 3 SCC 23 question of charter-party arose, the terms of which indicated that the charterers agreed to pay the owners for use and hire of the ship and not on account of carriage of goods. It was held that it was not governed by section 172 of the Income Tax Act, 1961, because the section creates a tax liability in respect of occasional shipping. However, what is important is that this Court has considered the charter-party and observed that all charter parties are not contracts of carriage. Sometimes ship itself and control over her working and navigation are transferred, for the time being to persons who use her. In such a case, the contract is very much of letting the ship. This Court has observed thus:

"**10**. The weakness of the argument advanced by the appellant's Counsel consists in its assumption that the charter-party has to be an agreement for the carriage of something like goods, passengers, livestock, or mail. A contract by charter-party, says B.C. Mitra in his Law of Carriage by Sea, Tagore Law Lectures 1972, "is a contract by which an entire ship or some principal part thereof is let to a merchant who is called the charterer, for the conveyance of goods on a determined voyage to one or more places, or until the expiration of a specified period; in the former case it is called a 'voyage charterparty' and in the latter a 'time charterparty'. A time charter, according to the author, is "one in which the ownership and also possession of the ship remains with the original owner and whose remuneration of hire is generally calculated at a monthly rate on the tonnage of the ship. While a voyage charter is a contract to carry specified goods on a defined voyage on remuneration or freight usually calculated according to the quantity of cargo carried,". In Carver's Carriage by Sea, Eleventh Ed., 1963, p. 263, it is stated that "all charter-parties are not contracts of carriage. Sometimes the ship itself and the control over her working and navigation are transferred for the time being to the persons who use her. In such cases the contract is really one of letting the ship, and, subject to the express terms of the charterparty, the liabilities of the shipowner and the charterer to one another are to be determined by the law which relates to the hiring of chattels, and not by reference to the liabilities of carriers and shippers". According to Scrutton on Charter-parties, Seventeenth Ed., 1964, p.4, charter-parties fall into three main categories: (i) charters by demise, (ii) time charters (not by way of demise), and (ii) voyage charters. "Sometimes categories (i) and (ii) are both referred to as time charters as distinguished from category (iii), and they have this in common that the ship owner's remuneration is reckoned by the time during which the charterer is entitled to the use of services of his ship." The contract in the instant case is of the nature of time charter-party, whether there is a demise of the ship or not being immaterial. Clause 4 of the charter-party provides for the payment by the charterers "for the use and hire" of the vessel at the rate of U.S. 4.50 dollars per ton on vessel's total deadweight carrying capacity, per calendar month, commencing on and from the date of delivery of the ship, "hire to continue until the hour of the day of her re-delivery". These clauses of the charterparty shows that the Aluminium Company took the ship from its owners on a time charterparty, that the owners were entitled to payment for the use and hire of the ship, that the amount was payable irrespective of what use the ship was put to by the time charterers or indeed, whether it was put to any use at all and that no part of the payment can be said to have been made on account of the carriage of goods. Similes can be misleading, but if a hall is hired for a marriage, the charges payable to the owner of the place are for the use and hire of the place, not on account of marriage."

42. The decision of the High Court of Madras in *State of Tamil Nadu & Ors. v. Tvl. Essar Shipping Ltd. & Ors.*, (2012) 47 VST 209 (Mad.) has been referred to on behalf of the appellants. The High Court of Madras has observed that whether the charter-party is a voyage charter-party or time charter-party or charter by demise or not, depends upon the intention of the parties. It has been observed that certain words in the charter-party are used in the standard forms of the time charter, such as 'let,' 'hire,' 'delivery,' and 'redelivery,' there is no hiring in the real sense. The High Court observed:

> "55. In the light of the various clauses evidencing the nature of transaction as one of rendering of service only, we have no hesitation in accepting the plea of the assessee that the use of the terms 'let', 'hire', 'delivery' and 'redelivery' are not to be understood in the literal sense of giving effective control and possession to the charterer. On the other hand, the same are referable to the time when the charter begins and ends. Even if the charterers have the right to direct the course that the Vessel will take so long as the Master and the crew remain the servants of the owner and the parties have understood that there is no demise of the ship in favour of the charterer, we do not find any legal ground to sustain the assessment.
>
> 59. We have no hesitation in accepting the plea of the assessee that the Tribunal committed a serious error in its understanding of what possession would mean, in the face of the time charter agreement. Going by the decision of the Apex Court reported in (1990) 3 SCC 481 *British India Steam Navigation Co. Ltd. v. Shanmughavilas Cashew Industries and Ors*. and the well laid down principles on the concept of time charterparty agreement, we hold that the essence of the agreement between the assessee and M/s. Poompuhar Shipping Corporation is one of services; hence, not amenable under the provisions of Section 3A of the Act."

In the abovesaid decision, reliance has been placed on the case of 'The Hill Harmony' reported in (2001) 1 LR 147 at page 156. When the ship can be arrested, was also discussed. It was observed that the

relationship of an agency is to be established between the owner and the charterer. The question was of recovery of the amount due and payable by the charterer. Following discussion has been made:

> "**36**. Dealing with the nature of rights that a charterer has over the Vessel under a time charter, in the decision reported in (1978) 3 SCC 23 Union of India vs. Gosalia Shipping (Pvt.) Ltd., the Supreme Court quoted from 'Law of Carriage by Sea' by B.C. Mitra, that 'a time charter is one in which the ownership and also possession of the ship remain in the original owner, whose remuneration or hire is generally calculated at a monthly rate on the tonnage of the ship, while a voyage charter is a contract to carry specified goods on a defined voyage on a remuneration or freight usually calculated according to the quantity of cargo carried.' Thus the consistent view of the Courts in India and elsewhere is that under the time charter, the owners provide services for the charterer with their ship, their officers, and the crew for an agreed period of time. In the decision reported in 2001 (1) LR 147 @ page 156 in the case of The Hill Harmony, Lord Hobhouse said, the owner who time charters his ship, transfers to the time charterer in return for payment of hire, 'the right to exploit the earning capacity of the vessel.' It was pointed out that despite the fact that certain keywords are used in most standard forms of the time charter such as 'let', 'hire,' 'delivery' and 'redelivery,' there is no hiring in the true sense' (Refer: The London Explorer 1971 (1) LR 523). Keeping in line with the well established and well-understood characteristic features on time charter, in the decision reported in 99 L.W. 517 Transworld Shipping Services (I) (P) Ltd. Vs. Owners & Other, this Court held that in respect of an interim prayer made for arrest of the ship, for the alleged amount due and payable by the charterer to his agent, neither the legal ownership nor the beneficial ownership or equitable ownership was in the hands of the charterer in the case of time charter agreement. Thus this Court viewed that for the amount due and payable by the charterer, unless the relationship of agency had been established between the owner and the charterer, the question of arrest of the ship did not arise. Time charterparty not being the demise of the ship but a contract for hire of services, thus viewed as not resulting in giving possession to the charterer to result in delivery or redelivery as is normally understood or to be literally construed as though on the delivery of the Vessel, the owner lost control to resume the same on the expiry of the period of time charter. Courts have also viewed that 'delivery' and 'redelivery' are not apt words to express the obligations of either party to the other under the contract. So long as the contract does not go as a charter by demise, when the owner gives the services through the ship along with her captain and the crew to transport cargo to the directions of the charterer for a specific period on certain terms, the only redelivery possible is to make such arrangements as would enable the owner to put the ship for his own convenience. Nevertheless, throughout the service extended, the Master and crew

> remain the servants of the owner, to represent his interest in the Vessel. Thus the word 'delivery' normally understood in a time charter party denotes the charterer giving directions to the course that the ship will take to determine the voyage. In the decision reported in 1991 (1) LLR 100 @ 107 (The 'Peonia'), referring to the decision reported in 1975 (1) LLR 422, the English Court pointed out 'references to 'delivery' and 'redelivery' are strictly inaccurate, since, the vessel never leaves the possession of the shipowner, but the expressions are conventionally used to describe the time when the period of the charter begins and ends (The Berge Tasta, (1975) 1 LR. 422 at p. 424)."

43. We are not turning our decision upon the terms used like ‘let’, ‘hire’, ‘delivery’ and ‘re-delivery’ but on the other essential terms of the Charter Party Agreement entered in the instant case which clearly makes out that there is a transfer of exclusive right to use the vessel which is a deemed sale and is liable to tax under the KST Act. In the instant case, full control of the vessel had been given to the charterer to use exclusively for six months, and delivery had also been made. The use by charterer exclusively for six months makes it out that it is definitely a contract of transfer of right to use the vessel with which we are concerned in the instant matter, and that is a deemed sale as specified in Article 366(29A)(d). On the basis of the abovementioned decision, it was urged that all Charter Party Agreements are service agreements. The submission cannot be accepted, as there is no general/invariable rule/law in this regard. It depends upon the terms and conditions of the charter-party when it is to be treated as only for service and when it is the transfer of right to use.

44. A decision by the Court of Appeal *In re: An Arbitration between sea and land securities Ltd. and William Dickinson & Co. Ltd. The Alresford*, (1942) 2 KB 65, has been relied upon in which the question arose of certain cesser of hire for the period occupied in fitting the degaussing apparatus. Since the employment of the ship did not come within the terms of clause 12 of the charter-party, nor did it constitute a breach of contract by the owners. The fact that the owners had the degaussing apparatus fitted while it was waiting to load her cargo did not result in her being withdrawn. It has been observed at the outset that the respective rights and obligations of the two parties to the time charter party must depend upon its written terms, for there is no special law applicable to the particular form of contract. The concept of demise charter parties is becoming an obsolete form of time charter party. The modern form of time charter party is one under which shipowner agrees with the time charterer that during a certain named period, the shipowner will render service as a carrier by his servants and crew to carry the goods which are put on board his ship by the time charterer. The words like, delivery, letting, or hiring are not determinative of the nature of the contract, there is no quarrel with the said proposition. However, the crux is that it would depend upon the terms and conditions of the charter-party.

45. Reliance has also been placed on *Scandinavian Trading Tanker Co. A.B. v. Flota Petrolera Ecuatoriana*, (1983) 2 LLR 253, wherein following observations have been made:

> "A time charter, unless it is a charter by demise, with which your Lordships are not here concerned, transfers to the charterer no interest in or right to possession of the vessel; It is a contract for services to be rendered to the charterer by the shipowner through the use of the vessel by the shipowner's own servants, the master and the crew, acting in accordance with such directions as to the cargoes to be loaded and the voyages to be undertaken as by the terms of the charter-party the charterer is entitled to give to them. Being a contract for services it is thus the very prototype of a contract of which before the fusion of law and equity, a Court would never grant specific performance. *Clarke v. Price, (1819) 2 Wils. Ch. 157; Lumley v. Wagner, (1852)* 1 Dc G.M. & G. 604. In the event of failure to render the promised services, the party to whom they were to be rendered would be left to pursue such remedies in damages for breach of contract as he might have at law. But as an unbroken line of uniform authority in this House, from *Tankexpress (ubi sup.)* to *The Chikuma [1981]* 1 Lloyd's Rep. 371; [1981] 1 W.L.R. 314 has held, if the withdrawal clause so provides, the shipowner is entitled to withdraw the services of the vessel from the charterer if the latter fails to pay an installment of hire in precise compliance with the provisions of the charter. So the shipowner commits no breach of contract if he does so, and the charterer has no remedy in damages against him."

Preceding discussion renders no help as it was not relating to the charter by demise. In the instant case control, excusive use is given to the charterer for six months.

46. Reliance has also been placed on *Port Line, Ltd. v. Ben Line Steamers, Ltd.* (1958) 1 AER 787 in which the court has observed:

> "The plaintiffs' charterparty with Silver Line was a gross time charter, not one by demise. It gave the plaintiffs no right of property in or to possession of the vessel. It was one by which Silver Line agreed with the plaintiffs that for thirty months from Mar. 9, 1955, they would render services by their servants and crew to carry the goods which were put on the vessel by the plaintiffs."

Again, the decision is based on the terms and conditions. Merely by employing the crew to render the service by the owner, is not decisive of the nature of charter.

47. In *Torvald Klaveness A/S v. Arni Maritime Corporation (The Gregos"),* 1993 (2) LLR 335, following observations have been made:

> "A time charter is a contract under which the owner agrees with the charterer that during a certain specified period he will render services by his servants and crew to carry goods which are put on board his ship by the time charterer. The charterer is free to decide, within the terms of the charter party, what use he will make of the vessel for its duration, e.g., by carrying goods himself or by sub-chartering. The vessel never leaves the possession of the owner, so that references to delivery and redelivery are not strictly accurate, but those expressions are regularly used to identify the time when the charter begins and ends."

Merely rendering service by the servants and crew to carry the goods will not make it a service contract. It depends upon the nature of each contract, and the terms and conditions agreed to. What is of relevance for our purpose is whether there is a transfer of right to use.

48. Reliance has also been placed on *Skibsaktieselskapet Snefonn, Skibsaksjeselskapet Bergehus, and Sig. Bergesen D.Y. & Co. v. Kawasaki Kisen Kaisha Ltd. (The "Berge Tasta*"), (1975) 1 LLR 422 in which as to time charter which is not a demise following observations have been made:

> "Under a time charter-party, not being a charter by way of demise, the shipowner undertakes to make the vessel available to the charterer

> for the purposes of undertaking ballast and loaded voyages as required by the charterer within a specified area over a stated period. The shipowner's remuneration known as "time chartered freight" or "hire" is at a fixed rate for a unit of time regardless of how the vessel is used by the charterer. Risk of delay thus falls on the charterer. The shipowner meets the cost of maintaining the vessel and paying the crew's wages, but the cost of fuel and port charges fall on the charterer.
>
> At the end of the period covered by the time charter the vessel is said to be "redelivered" to the shipowner. This is a misleading term for the vessel never leaves the possession of the shipowner. All that is meant is that the time charter then ends in exactly the same way as a voyage charter-party ends when the last cargo is discharged."

49. In *Hyundai Merchant Marine Co. Ltd. v. Gesuri Chartering Co. Ltd. (The "Peonia"*), (1991) 1 LLR 100, the following observations have been relied upon:

> "The immediate legal background to the dispute is not now controversial. A time charter-party such as this is a contract by which the shipowner agrees with the time charterer that during a certain named period he will render services by his servants and crew to carry the goods which are put on board his ship by the time charterer (Sea and Land Securities Ltd. v. William Dickinson and Co. Ltd., (1942) 72 I.I.L. Rep. 159 at p. 162, col. 2; [1942] 2 K.B. 65 at p. 69). It is for the time charterer to decide, within the terms of the charter-party, what use he will make of the vessel. References to delivery and redelivery are strictly inaccurate since the vessel never leaves the possession of the shipowner, but the expressions are conventionally used to describe the time when the period of the charter begins and ends (The Berge Tasta)".

The decision lends no support in view of the terms and conditions of the charter-party in question and the general discussion. Otherwise, also, it does not espouse cause concerning whether there is a right to transfer the use of the vessel.

50. In *Scrutton on Charterparties and Bills of Lading*, 20th Edn., Section IV dealing with the charter parties, following is the relevant discussion:

> "Article 28 – Charterparties by Demise – Classification
>
> CHARTERPARTIES may be categorized according to whether or not they amount to a demise or lease of the ship.
>
> A charter by demise operates as a lease of the ship itself, to which the services of the master and crew may or may not be superadded. The charterer becomes for the time the owner of the vessel; the master and crew become to all intents his servants, and through them the possession of the ship is in him
>
> Under a charter not by demise, on the other hand, the shipowner agrees with the charterer to render services by his master and crew to carry the goods which are put on board his ship by or on behalf of the charterer. In this case, notwithstanding the temporary right of the charterer to have his goods loaded and conveyed in the vessel, the ownership and also the possession of the ship remain in the original owner through the master and crew, who continue to be his servants. …
>
> Whether or not the charter amounts to a demise must turn on the particular terms of the charter. "The question depends, where other things are not in the way, upon this: whether the owner has by the charter, where there is a charter, parted with the whole possession and control of the ship, and to this extent, that he has given to the charterer a power and right independent of him, and without reference to him to do what he pleases with regard to the captain, the crew, and the management and employment of the ship. That has been called a letting or demise of the ship. The right expression is that it is a parting with the whole possession and control of the ship."
>
> "Time charters almost always contain expressions such as "letting," "hiring," "hire," "delivery," and "redelivery," which are really apt only in charters by demise. These expressions serve to distinguish such charters from voyage charters, but they do not in themselves characterize such charters as charters by demise."

51. It is apparent from the discussion mentioned above that the services of the master and crew may or may not be superadded in the

case of demise. Whether or not charter amount to demise would depend upon the particular terms of the charter.

52. Halsbury's Laws of England, 4th Edn., Vol. 43, has also been referred to in which the following discussion has been made:

> "402. Meaning of "contract by charterparty." A contract by a charterparty is a contract by which an entire ship or some principal part of her is let to a merchant, called "the charterer," for the conveyance of goods on a determined voyage to one or more places, or until the expiration of a specified period. In the first case, it is called a "voyage charterparty," and in the second a "time charterparty." Such a contract may operate as a demise of the ship herself, to which the services of the master and crew may or may not be added, or it may confer on the charterer nothing more than the right to have his goods conveyed by a particular ship, and, as subsidiary to it, to have the use of the ship and the services of the master and crew.
>
> 403. Charterparty by demise. Charterparties by way of demise are of two kinds: (1) charter without master or crew, or "bareboat charter", where the hull is the subject matter of the charterparty, and (2) charter with master and crew, under which the ship passes to the charterer in a state fit for the purposes of mercantile adventure. In both cases the charterer becomes for the time being the owner of the ship; the master and crew are, or become to all intents and purposes, his employees, and through them, the possession of the ship is in him. The owner, on the other hand, has divested himself of all control either over the ship or over the master and crew, his sole right being to receive the stipulated hire and to take back the ship when the charterparty comes to an end. During the currency of the charterparty, therefore, the owner is under no liability to third persons whose goods may have been conveyed upon the demised ship or who may have done work or supplied stores for her, and those persons must look only to the charterer who has taken his place.
>
> 404. Charterparty which is not a demise. Although a charterparty which does not operate as a demoise confers on the charterer the temporary right to have his goods loaded and conveyed in the ship, the ownership remains in the original owner, and through the master and crew, who continue to be his employees, the possession of the ship also remains in him. Therefore, the existence of the charterparty does not necessarily divest the owner of liability to third persons whose goods may have been conveyed on the ship, nor does it deprive him of his rights as owner.

> 405. Test whether charterparty operates as demise. Whether a charterparty operates as a demise or not is a question of construction, to be determined by reference to the language of the particular charterparty. The principal test to be applied is whether the master is the employee of the owner or of the charterer. Even where the charterparty provides for the nomination of the master by the charterer, he must be regarded as the owner's employee if the effect of the charterparty is that he is to be paid or dismissed by the owner and that he is to be subject to the owner's orders as to navigation. However, if the charterparty is otherwise to be regarded as a demise, it is immaterial that the owner reserves the right, in certain circumstances, of removing the master and appointing another in his place, or of appointing the chief engineer."

In a charter-party by demise, it may be charter without master or crew or bareboat charter, and another may be a charter with master and crew under which ship passes to the charterer for the purposes of mercantile adventure. As held in this case, full control has been given, and use is exclusively for the charterer. He has the right to use the space and burden. The discussion in Halsbury's also makes it clear that each and every charter-party need not be a service contract to provide services only.

53. The argument based upon the foreign courts decisions as to the charter agreements are only for service purpose, is not correct. As already discussed, even in the abovementioned foreign court's decisions, it depends upon the charter-party, and there is no super-check formula to find out the nature of the contract. It depends upon the terms and conditions of each contract. Merely use of specific words, as mentioned above, is not determinative, but the real crux is to be seen as per relevant conditions as agreed to between the parties.

54. When we consider the charter-party in question in the context of applicable law, particularly in view of the constitutional provisions of Article 366(29A)(d), we find that there is transfer of right to use tangible goods, which is determinative of deemed sale as per the Constitution of India and provisions of section 5C reflecting the said intendment. We are of the considered opinion that there is transfer of right to use exclusively given to charterer for six months, and the vessel has been kept under the exclusive control. The charterer qualifies the test laid down by this court in *BSNL* (supra).

55. Mr. Mohan Parasaran, learned senior counsel has also referred to New Mangalore Port Harbour Craft Rules, 1976. He has drawn our attention to Rule 4 relating to licensing of Harbour Craft according to which an application has to be filed by the owner, furnishing the required information concerning the vessel/harbor craft. A license has to be produced by Tindal, as per Rule 6, whenever called upon by Deputy Conservator. He has also referred to Rule 8 which provides that in case of change of ownership of licensed harbor craft, the license shall cease to be valid on expiry of six days. Changes in crew or carrying capacity of licensed harbor craft has to be reported to the Deputy Conservator. In case of any alteration in the cabin capacity, the licence is liable to be cancelled. The submission made by learned senior counsel is that as per the scheme of the Harbour Craft Rules;

also, the owner retains the control of the vessel. In our opinion, the submission cannot be accepted. Merely by the provisions mentioned above as to license, its production/change of ownership etc., it cannot be said that the owner has not transferred the right to use the vessel. The ownership in such a deemed sale is retained by owner. He does not cease to be an owner by transferring right to use the property. Merely by the fact that a license to be obtained with certain stipulations and to be produced by Tindal on being demanded and change incapacity to be reported to the Deputy Conservator, the provisions are not of any help for interpreting the Charter Party Agreement, and to decide the question whether there is a transfer of right to use the vessel.

In Re: Situs of the agreement

56. The next question for consideration is whether the State of Karnataka has power under section 5C of the Act to exact sales-tax though charter-party has been signed in Mangalore in view of the fact that vessel was to be used in territorial waters, it was open to the State Government to impose and realize the sales-tax on the basis of *situs* of agreement.

57. For the realization of tax imposed within the ken of power under Article 366(29A)(d), it is not material where the goods are passed, but

the situs of the agreement is determinative for the realization of tax. In this regard decision of Constitution Bench of this Court in *20th Century* (supra) is relevant, in which this Court has discussed the concept of deemed sale by a legal fiction created as per Article 366(29A) (e to f) and observed:

> **"21.** It may be noted that the transactions contemplated under sub-clauses (*a*) to (*f*) of clause (29-A) of Article 366 are not actual sales within the meaning of "sale" but are deemed sales by a legal fiction created therein. The situs of sale can only be fixed either by the appropriate legislature or by judge-made law, and there are no settled principles for determining the situs of sale. There are conflicting views on this question. One of the principles providing a situs of sale was engrafted in the explanation to clause (1)(*a*) of Article 286, as it existed prior to the Constitution (Sixth Amendment) Act, which provided that the situs of sale would be where the goods are delivered for consumption. The second view is, the situs of sale would be the place where the contract is concluded. The third view is that the place where the goods are sold or delivered would be the situs of sale. The fourth view is that where the essential ingredients, which complete a sale, are found in the majority would be the situs of sale. There would be no difficulty in finding out a situs of sale where it has been provided by legal fiction by the appropriate legislature. In the present case, we do not find that Parliament has, by creating any fiction, fixed the location of sale in case of the transfer of right to use goods. We, therefore, have to look into the decisional law.
>
> **24.** The aforesaid decisions unambiguously laid down that where situs of sale has not been fixed or covered by any legal fiction created by the appropriate legislature, the location of sale would be the place where the property in goods passes. The Constitution Bench held that it was the passing of the property within the State that was intended to be fastened on for the purpose of determining whether the sale was "inside" or "outside" the State.
>
> **25.** It was then urged on behalf of the respondents that it is the location of goods where they are put to use, which would furnish the situs of sale. According to them, there would be no completed transfer of right to use goods until the goods are delivered. We have traced the legislative history of sales tax in this country only to show that excepting where the appropriate legislature by creating legal fiction fixed the situs of sale on location or delivery of goods for consumption like the omitted explanation to Article 286(1)(*a*), there is no authority to show that mere location or delivery of goods would be the situs of sale. Here, we would like to cite an appropriate illustration

given in the decision in *the Bengal Immunity case*, AIR 1955 SC 661, only to resolve the controversy before us. The illustration given is as under:

> "Take, for instance, a case where both the seller and the buyer reside and carry on business in Gurgaon in the State of Punjab. Let us say that the seller has a godown in the State of Delhi where his goods are stored and that the buyer also has a retail shop at Connaught Circus also in the State of Delhi. The buyer and the seller enter into a contract at Gurgaon for the sale of certain goods and a term of the contract is that the goods contracted to be sold will be actually delivered from the seller's godown to the buyer's retail shop, both in the State of Delhi, for consumption in the State of Delhi. Pursuant to this contract made in Gurgaon in the State of Punjab, the buyer pays the full price of the goods at Gurgaon and the seller hands over to the buyer also at Gurgaon a delivery order addressed to the seller's godown-keeper in Delhi to deliver the goods to the buyer's retail shop.
>
> As a direct result of this sale, the seller's godown-keeper, on the presentation of this delivery order, actually delivers the goods to the buyer's retail shop at Connaught Circus for consumption in the State of Delhi. On one view of the law, the 'situs' of such a sale would be Gurgaon. We need not decide that it is, because that type of case is not before us and there may be other views to consider, but it is certainly a possible view.
>
> It is also possible to hold that this is not inter-State trade or commerce, because there is no movement of goods across a State boundary. Again, we need not decide that because that also may be controversial. But given these two postulates, the transaction would fall squarely within the explanation, and yet it would not come within clause (2), for there is no movement of the goods across the border of any State and both the seller and the buyer are in the same place. Surely, the explanation will, 'in praesenti,' govern such cases irrespective of whether Parliament has lifted the ban under clause (2).
>
> If these postulates are accepted then by virtue of clause (1) (*a*) read with the explanation the State of Delhi alone will be entitled to impose a tax on such a sale or purchase and the State of Punjab will be precluded from doing so by reason of the fictional 'situs' assigned to such a sale or purchase by the explanation, although the contract was made, price was paid, and symbolical or constructive delivery of the goods by the handing over of the delivery order took place in Gurgaon in the State of Punjab."

We, therefore, find that the location or delivery of goods within the State cannot be made a basis for levy of tax on sales of goods. Under general law, merely because the goods are located or delivery of which has been effected for use within the State would not be the situs of deemed sale for levy of tax if the transfer of right to use has taken

> place in another State. Therefore, if the contention on behalf of the respondents that there would be no completed transfer of right to use goods till the goods are delivered is to prevail, then the respondents are further required to show that the contract of transfer of right to use goods is also entered into in the said State in which the goods are located or delivered for use. The State cannot levy a tax on the basis that one of the events in the chain of events has taken place within the State. The delivery of goods may be one of the elements of transfer of right to use, but the same would not be the condition precedent for a contract of transfer of right to use goods. Where a party has entered into a formal contract, and the goods are available for delivery irrespective of the place where they have located the situs of such sale would be where the property in goods passes, namely, where the contract is entered into."

This Court has observed that the location of the delivery of goods cannot be made the basis for the levy of tax on the sale of goods. Where a party has entered into a formal contract, and the goods are available for delivery irrespective of the place where they are located, the situs of sale where the property or goods passes, would be at the place where the contract has been entered into.

58. This Court in *the 20th Century* (supra) has considered for Article 366(29A)(d), the taxable event is the transfer of the right to use the goods regardless of when or whether the goods are delivered for use. The deemed sale takes place at the site where the right to use the goods is transferred. It is of no relevance where the goods are delivered under the right to transfer to use them. In the present case, the agreement has been admittedly signed in Mangalore, and the vessel is used in the territorial waters, which is as per the submission of the company, fully in territory of the Union of India. It makes no difference

as the situs of the deemed sale is in Mangalore. Thus, the liability to pay tax under the Act cannot be countenanced. This Court in the *20th Century* (supra) has observed:

> **"26.** The next question that arises for consideration is, where is the taxable event on the transfer of the right to use any goods. Article 366(29-A)(*d*) empowers the State Legislature to enact a law imposing sales tax on the transfer of the right to use goods. The various sub-clauses of clause (29-A) of Article 366 permit the imposition of tax thus: sub-clause (*a*) on transfer of property in goods; sub-clause (*b*) on transfer of property in goods; sub-clause (*c*) on delivery of goods; sub-clause (*d*) on transfer of the right to use goods; sub-clause (*e*) on supply of goods; and sub-clause (*f*) on supply of services. The words "and such transfer, delivery or supply …" in the latter portion of clause (29-A), therefore, refer to the words transfer, delivery, and supply, as applicable, used in the various sub-clauses. Thus, the transfer of goods will be a deemed sale in the cases of sub-clauses (*a*) and (*b*), the delivery of goods will be a deemed sale in case of sub-clause (*c*), the supply of goods and services respectively will be deemed sales in the cases of sub-clauses (*e*) and (*f*) and the transfer of the right to use any goods will be a deemed sale in the case of sub-clause (*d*). Clause (29-A) cannot, in our view, be read as implying that the tax under sub-clause (*d*) is to be imposed not on the transfer of the right to use goods but on the delivery of the goods for use. Nor, in our view, can a transfer of the right to use goods in sub-clause (*d*) of clause (29-A) be equated with the third sort of bailment referred to in *Bailment* by Palmer, 1979 Edn., p. 88. The third sort referred to there is when goods are left with the bailee to be used by him for hire, which implies the transfer of the goods to the bailee. In the case of sub-clause (*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 the goods. In our view, therefore, on a plain construction of sub-clause (*d*) of clause (29-A), the taxable event is the transfer of the right to use the goods 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. And further contract in respect thereof is also required to be executed. Given that, the locus of the deemed sale is the place where the right to use the goods is transferred. Where the goods are when the right to use them is transferred is of no relevance to the locus of the deemed sale. Also of no relevance to the deemed sale is where the goods are delivered for use pursuant to the transfer of the right to use them, though it may be that in the case of an oral or implied transfer of the right to use goods, it is affected by the delivery of the goods.
>
> **27.** Article 366(29-A)(*d*) further shows that the levy of tax is not on the use of goods but on the transfer of the right to use goods. The right

to use goods accrues only on account of the transfer of right. In other words, the right to use arises only on the transfer of such a right, and unless there is a transfer of the right, the right to use does not arise. Therefore, it is the transfer, which is a sine qua non for the right to use any goods. If the goods are available, the transfer of the right to use takes place when the contract in respect thereof is executed. As soon as the contract is executed, the right is vested in the lessee. Thus, the situs of a taxable event of such a tax would be the transfer that legally transfers the right to use goods. In other words, if the goods are available irrespective of the fact where the goods are located, and a written contract is entered into between the parties, the taxable event on such a deemed sale would be the execution of the contract for the transfer of right to use goods. But in case of an oral or implied transfer of the right to use goods, it may be affected by the delivery of the goods.

28. No authority of this Court has been shown on behalf of the respondents that there would be no completed transfer of right to use goods unless the goods are delivered. Thus, the delivery of goods cannot constitute a basis for the levy of tax on the transfer of right to use any goods. We are, therefore, of the view that where the goods are in existence, the taxable event on the transfer of the right to use goods occurs when a contract is executed between the lessor and the lessee and situs of sale of such a deemed sale would be the place where the contract in respect thereof is executed. Thus, where goods to be transferred are available, and a written contract is executed between the parties, it is at that point situs of a taxable event on the transfer of right to use goods would occur, and situs of sale of such a transaction would be the place where the contract is executed."

40. A perusal of Explanation 3(*d*) to Section 2(*t*) shows that the transfer of right to use any goods would be deemed to have taken place in the State of Karnataka if the goods are for use within the State irrespective of the place where the contract of transfer of right to use the goods is executed. The said Explanation 3(*d*) to Section 2(*t*) widens the ambit of the definition of "sale" by including sales outside the State of Karnataka and the sales which occasioned import of goods into India, merely on the premise that goods put to use are located within the State of Karnataka irrespective of the place where the contract or transfer has taken place. This explanation is in excess of legislative power under Entry 54 of List II of the Seventh Schedule. Another important aspect to notice is that the provision of Section 5(3), which provides for single-point taxation, has been omitted in its application to Section 5-C. Therefore, Explanation 3(*d*) to Section 2(*t*) of the Act has to be held in excess of the legislative power conferred on the State Legislature under Entry 54 of List II of the Seventh Schedule of the Constitution following the reasoning given while discussing the Maharashtra Act. We, accordingly, direct that Explanation 3(*d*) to Section 2(*t*) of the Act shall be read down to this effect that it would not be applicable to the transactions of transfer of

> right to use any goods if such deemed sale is (*i*) an outside sale; (*ii*) sale in course of the import of the goods into or export of the goods out of the territory of India; and (*iii*) an inter-State sale."

59. This Court also dealt with proposition whether the State can create a deemed fiction that in case the goods are for use within the State irrespective of the place where the contract of transfer of right to use the goods is made. That is not the question involved in the present matter. The situs of the agreement is relevant, which is admittedly within the territory of Karnataka. The situs of the deemed sale is in Mangalore, and the decision of a Constitution Bench of this Court in *the 20th Century* (supra) is binding on us and effectively repels the submission to the contrary.

60. In *Aggarwal Brothers v. State of Haryana & Anr.*, (1999) 9 SCC 182, the submission was raised that to make a deemed sale there must be a legal transfer of goods or that the transaction must be like a lease, was not accepted by this Court. It has distinguished the transfer of the right to use the goods for consideration. Following observations have been made:

> **"3.** The argument of learned counsel for the assessees 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 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."

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 the purchase and Section 2(*l*) with the 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 the "transfer of the right to use goods" and not of the transfer of goods. There is, therefore, no merit in the submission that to be deemed sale within the meaning of the provision as mentioned above 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 a 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 assessees 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."

61. A reference has also been made to the decision in *the State of Orissa & Anr. v. Asiatic Gases Ltd.*, (2007) 5 SCC 766 in which what is

the nature of, transfer of right to use the goods, has been discussed and *Aggarwal Brothers* (supra) has been relied upon, thus:

> **"8.** Lastly, it is important to bear in mind that Section 2(*g*)(*iv*) was placed on the statute in terms of Article 366(29-A)(*d*) of the Constitution. In *Aggarwal Bros.* v. *State of Haryana,* (1999) 9 SCC 182 a Division Bench of this Court has held that the provision under Section 2(*l*)(*iv*) of the Haryana General Sales Tax Act, 1973 [which was similar to Section 2(*g*)(*iv*) of this Act] expressly spoke of "transfer of the right to use goods" and not "transfer of goods". In that matter, it was argued on behalf of the assessee that in the case of a deemed sale within the meaning of Section 2(*l*)(*iv*), there must be a legal transfer of goods. This argument was rejected by this Court, stating that the levy of tax was not on transfer of the goods itself, but the levy was on the transfer of the right to use such goods for consideration. In our view, the judgment of this Court in *Aggarwal case* would squarely apply to the present case. In the present case, as stated above, the cylinders filled with medical oxygen/industrial gas were loaned to the customers. The loan was free from the payment of charges for 14 days. The over retention charges were levied after 14 days. In the circumstances, the levy was on the transfer of the right to use the goods for consideration."

62. It was submitted on behalf of appellant that the amendment to Finance Act had been made and a clarification dated 10.5.2008 has been issued that service tax is to be levied on the Charter Party Agreement. Hence it was urged that it cannot be treated as that of deemed sale. The said clarification as to service tax does not advance any cause as the levy of service tax is permissible or not is not the question to be examined by this Court. The question germane to the instant matter is not whether service tax can be levied. The question involved in the case is only to the extent whether the State of Karnataka can realize the sales tax on deemed sale under section 5C of the KST Act in view of the provisions contained in Article 366(29A) (d) of the Constitution. Thus, we refrain from going into the effect of

the aforesaid notification/clarification as to service tax. That is not the question involved in the matter.

In Re: Rights and liabilities in territorial waters

63. With respect to territorial waters, to what extent the coastal State can exercise power has been considered by the High Court, and specific findings have been recorded. The High Court has gone into the question of whether the territorial waters abutting the landmass form part of the State of Karnataka. It was not disputed that the extent of territorial waters is up to 12 nautical miles from the landmass that is the baseline. Article 297 has been considered by the High Court and the Lists in the 7th Schedule of the Constitution. Entries 25 to 27 and 30 of List I, Entry 32 of List III, i.e., Concurrent List have been referred.

64. Learned senior counsel appearing for the parties have also referred to various decisions and the debates in the Constituent Assembly and answers given by Dr. B.R. Ambedkar as to scope of Article 293 of the Constitution. The High Court has also relied upon the definition of State as provided in section 2(j) of the Marine & Fishing Act, 1986, Entries 13 and 21 of State List II of the 7th Schedule and in respect of fisheries Entry 21 of List II.

65. We need not go into the aforesaid questions. However, as the High Court has given a finding, and on being impleaded, coastal States have filed their response as notices were issued to them. We need not go into the question in respect of the right of the States and the Central Government as to territorial waters at all because of our finding concerning exaction of tax under the KST Act owing to situs where the transfer right to use the vessel, which is a deemed sale, had taken place. As such, we leave the question open and dilute the finding recorded by the High Court in this regard.

66. Charter party has been entered into admittedly in Mangalore, and the ship is used at the New Mangalore Port by the New Mangalore Port Trust. Though vessel was used in the territorial waters, makes no difference with respect to exigibility of sales-tax under the provisions of the KST Act in view of the decision of this Court in *20th Century* (supra), which has been affirmed in *BSNL* (supra) and has been followed in various other decisions of this Court.

67. Lastly, it was submitted that the High Court ought to have remitted the matter to the concerned assessing authorities to decide the aspect that whether there was deemed sale in view of transfer of right to use vessel. The submission is, untenable as the appellant company filed the writ petition, and a writ appeal too was filed by it.

They have submitted on merits not only before the High Court but this Court as well, after having failed to convince on merits they have raised aforesaid submission that too at the fag end as an alternative. They have questioned the notice and invited a decision. Once it has gone against them; they cannot submit that this question should be left to be considered to be taken in another round of litigation for adjudication by the concerned tax authorities making an assessment. The submission is wholly untenable and stands repelled.

68. Resultantly, we hold that the Charter Party Agreement tantamount to a deemed sale as there was a transfer of right to use the vessel as provided in Article 366(29A)(d) read with section 5C or section 2(j) of the Karnataka Sales Tax Act. Thus, the transaction is liable to be taxed by the concerned authorities in the State of Karnataka. However, for the reasons recorded by this Court in the judgment, the appeal is without merits and is dismissed. No costs.

.....J.
(Arun Mishra)

.....J.
(M.R. Shah)

New Delhi;
December 04, 2019.

.....J.
(B.R. Gavai)