Reserved On : 13/09/2024
Pronounced On : 03/01/2025

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 11345 of 2023

With
R/SPECIAL CIVIL APPLICATION NO. 1278 of 2024
With
R/SPECIAL CIVIL APPLICATION NO. 3736 of 2024
With
R/SPECIAL CIVIL APPLICATION NO. 4638 of 2024
With
R/SPECIAL CIVIL APPLICATION NO. 4224 of 2024
With
R/SPECIAL CIVIL APPLICATION NO. 7108 of 2024
With
R/SPECIAL CIVIL APPLICATION NO. 9364 of 2024
With
R/SPECIAL CIVIL APPLICATION NO. 9845 of 2024
With
R/SPECIAL CIVIL APPLICATION NO. 9868 of 2024
With
R/SPECIAL CIVIL APPLICATION NO. 10186 of 2024
With
R/SPECIAL CIVIL APPLICATION NO. 10924 of 2024
With
R/SPECIAL CIVIL APPLICATION NO. 12345 of 2024
With
R/SPECIAL CIVIL APPLICATION NO. 12318 of 2024
With
R/SPECIAL CIVIL APPLICATION NO. 19876 of 2023
With
R/SPECIAL CIVIL APPLICATION NO. 19880 of 2023
With
R/SPECIAL CIVIL APPLICATION NO. 690 of 2024
With
R/SPECIAL CIVIL APPLICATION NO. 19418 of 2023
With
R/SPECIAL CIVIL APPLICATION NO. 118 of 2024
With
R/SPECIAL CIVIL APPLICATION NO. 21840 of 2023
With
R/SPECIAL CIVIL APPLICATION NO. 21932 of 2023
With

R/SPECIAL CIVIL APPLICATION NO. 17214 of 2023
With
R/SPECIAL CIVIL APPLICATION NO. 17792 of 2023
With
R/SPECIAL CIVIL APPLICATION NO. 2630 of 2024
With
R/SPECIAL CIVIL APPLICATION NO. 2655 of 2024
With
R/SPECIAL CIVIL APPLICATION NO. 18222 of 2023
With
R/SPECIAL CIVIL APPLICATION NO. 18296 of 2023
With
R/SPECIAL CIVIL APPLICATION NO. 1093 of 2024
With
R/SPECIAL CIVIL APPLICATION NO. 18593 of 2023
With
R/SPECIAL CIVIL APPLICATION NO. 18611 of 2023
With
R/SPECIAL CIVIL APPLICATION NO. 19064 of 2023
With
CIVIL APPLICATION (FOR AMENDMENT) NO. 1 of 2024
In R/SPECIAL CIVIL APPLICATION NO. 19064 of 2023
With
R/SPECIAL CIVIL APPLICATION NO. 19111 of 2023
With
R/SPECIAL CIVIL APPLICATION NO. 19173 of 2023
With
CIVIL APPLICATION (FOR STAY) NO. 1 of 2025
In R/SPECIAL CIVIL APPLICATION NO. 19173 of 2023
With
R/SPECIAL CIVIL APPLICATION NO. 1250 of 2024
With
R/SPECIAL CIVIL APPLICATION NO. 1653 of 2024
With
R/SPECIAL CIVIL APPLICATION NO. 3497 of 2024
With
R/SPECIAL CIVIL APPLICATION NO. 4795 of 2024
With
R/SPECIAL CIVIL APPLICATION NO. 8347 of 2024
With
R/SPECIAL CIVIL APPLICATION NO. 8807 of 2024
With
R/SPECIAL CIVIL APPLICATION NO. 10180 of 2024
With
R/SPECIAL CIVIL APPLICATION NO. 10501 of 2024

With
R/SPECIAL CIVIL APPLICATION NO. 11016 of 2024
With
R/SPECIAL CIVIL APPLICATION NO. 11943 of 2024
With
R/SPECIAL CIVIL APPLICATION NO. 12436 of 2024
With
R/SPECIAL CIVIL APPLICATION NO. 12659 of 2024
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R/SPECIAL CIVIL APPLICATION NO. 12764 of 2024
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R/SPECIAL CIVIL APPLICATION NO. 12828 of 2024
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R/SPECIAL CIVIL APPLICATION NO. 12914 of 2024
With
R/SPECIAL CIVIL APPLICATION NO. 12943 of 2024
With
R/SPECIAL CIVIL APPLICATION NO. 13157 of 2024
With
R/SPECIAL CIVIL APPLICATION NO. 13277 of 2024
With
R/SPECIAL CIVIL APPLICATION NO. 13283 of 2024
With
R/SPECIAL CIVIL APPLICATION NO. 13322 of 2024

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE BHARGAV D. KARIA

and
HONOURABLE MR. JUSTICE NIRAL R. MEHTA

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Approved for Reporting	Yes	No

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GUJARAT CHAMBER OF COMMERCE AND INDUSTRY & ORS.
Versus
UNION OF INDIA & ORS.

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Appearance:
Mr.S.N.Soparkar, Senior Advocate with Mr.Monal Davawala, Senior Advocate Mr.Mihir

Joshi with Mr.Tarak Damani and Mr.Aditya Joshi, Senior Advocate Mr.Deven Parikh with Mr.Nirav P. Shah, Mr.Manav Gupta with Mr.Parth Shah, Mr.Rajat Bose with Mr.Sarvaswa Chhajer and Ms.Shohini Bhattacharya, Mr.Hardik Modh, Mr.Uchit Sheth, Mr.V. Sreedharan, Senior Advocate, Mr.Sahil Pargi, Mr.Avinash Poddar, Mr.Hardik Vora with Ms.Palak Kshatriya and Mr.S.S.Iyer for the respective petitioners.

Advocate General Mr.Kamal Trivedi with Assistant Government Pleader Mr.Vinay Bairagra and Mr.Raj Batada and Ms.Nidhi Vyas for the respective respondents.

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CORAM:**HONOURABLE MR. JUSTICE BHARGAV D. KARIA**
and
HONOURABLE MR. JUSTICE NIRAL R. MEHTA

CAV JUDGMENT

(PER : HONOURABLE MR. JUSTICE BHARGAV D. KARIA)

1. Heard learned Senior Advocate Mr.S.N.Soparkar with learned advocate Mr.Monal Davawala, learned Senior Advocate Mr.Mihir Joshi with learned advocate Mr.Tarak Damani and learned advocate Mr.Aditya Joshi, learned Senior Advocate Mr.Deven Parikh with learned advocate Mr.Nirav P. Shah, learned advocate

Mr.Manav Gupta with learned advocate Mr.Parth Shah, learned advocate Mr.Rajat Bose with learned advocate Mr.Sarvaswa Chhajer and learned advocate Ms.Shohini Bhattacharya, learned advocate Mr.Hardik Modh, learned advocate Mr.Uchit Sheth, learned Senior Advocate Mr.V. Sreedharan with learned advocate Mr.Sahil Pargi, learned advocate Mr.Avinash Poddar, learned advocate Mr.Hardik Vora with learned advocate Ms.Palak Kshatriya and learned advocate Mr.S.S.Iyer for the respective petitioners and learned Advocate General Mr.Kamal Trivedi with learned Assistant Government Pleader Mr.Vinay Bairagra and learned advocate Mr.Raj Batada and learned advocate Ms.Nidhi Vyas for the respective respondents.

2. Rule returnable forthwith. Learned

Assistant Government Pleader Mr.Vinay Bairagra, learned advocate Mr.Raj Batada and learned advocate Ms.Nidhi Vyas waives service of notice of rule on behalf of the respective respondents.

3. In this group of petitions, the issue pertains to levy of goods and service tax on assignment of leasehold rights of the plot of land allotted on lease by Gujarat Industrial Development Corporation (GIDC) and building constructed thereon by the lessee or its successor (assignor) to a third party (assignee) on payment of lump-sum consideration considering the same as supply of service under the provisions of Central/State Goods and Service Tax Act, 2017 (For short “the GST Act”).

4. Special Civil Application No. 11345 of 2023 preferred by Gujarat Chamber of Commerce and Industry and its members is treated as a lead matter.

5. It is the case of the petitioners that GIDC is established under the Gujarat Industrial Development Act, 1962 and acts as Nodal agency of Government of Gujarat for the purpose of development of industrial estates in the State of Gujarat. GIDC acquires land and develops same as industrial estate by creating infrastructure thereon such as road, water supply, street light, drainage, etc. and allots plot of land to an industrial entity/person on long term lease for a period of 99 years. The terms and conditions of the allotment letter issued by the GIDC includes the method and manner in which premium and

lease rent is required to be paid by the allottee/lessee.

6. A licensing agreement is also executed between GIDC and the allottees/lessees to set up industrial unit subject to approval and permission from the regulatory authorities. Licensing agreement also contains a clause whereby GIDC agrees to execute lease deed for a period of 99 years in favour of the allottee/lessee upon fulfilling the terms and conditions of licensing agreement.

7. Thereafter on fulfilling the terms and conditions of the license agreement, a registered lease deed is executed by GIDC in favour of the allottee/lessee after payment of applicable stamp duty wherein all terms and conditions of the allotment letter and

licensing agreement are incorporated. Lease deed also permits the allottees/lessee to assign the leasehold rights and interest in the plot to any other person subject to approval of GIDC.

8. After coming into force of the the GST Act with effect from 1.07.2017, respondent authorities have issued the summons/show cause notices to the members of the petitioner no.1 and others who have assigned the leasehold rights and interest in their plots allotted by GIDC to assignee to show cause as to why GST at the rate of 18% should not be levied on such transaction of assignment of leasehold rights.

9. The petitioner Gujarat Chamber of Commerce and Industries made several representations

before the respondents to clarify that the levy of tax under the GST Act is not attracted on transfer of leasehold rights in the plot of land or in alternative in any case input tax credit of such tax would be admissible under the GST Act. However, the respondent authorities have not considered such representations and hence the present petition is filed. Prayers made in Special Civil Application No.11345 of 2023 are as under:

> “(A) Your Lordships be pleased to admit and allow the present Petition.
>
> (B) Your Lordships be pleased to issue a writ in the nature of Mandamus and hold that the notices/summons (Annexure A) issued by the Respondent Authorities are ex-facie illegal and without jurisdiction and further be pleased to hold and declare that the Respondents are not entitled to charge Goods and Service Tax on the transaction of assignment of the long-term Leasehold rights under the provisions of the Goods and Service Tax, 2017;

And in the alternate,

(C) Your Lordships be pleased to issue a writ of mandamus and hold and declare that the Respondent Authorities are liable to give Input Tax Credit under Section 16 of the Goods and Service Tax Act, 2017 as and when Goods and Service Tax is paid on the transaction of assignment of the long-term Leasehold rights to all the assignee's in whose favor the long-term Leasehold rights have been assigned;

(D) Pending hearing and final disposal of the present petition, Your Lordships be pleased to stay the inquiry/proceedings and any consequential action being undertaken by the Respondents Authorities on the transaction of the assignment of the long-term Leasehold rights;

(E) This Hon'ble Court be pleased to grant such other and further relief as deemed just and proper in the interest of justice."

10. To consider the issue as to whether assignment of leasehold rights would be covered by the provisions of GST Act as

“supply of service” or not, it would be germane to refer to relevant provisions of law.

:GST Act:

[1] Section 2(17) defines “business” as under:

> “(17) "business" includes—
>
> (a) any trade, commerce, manufacture, profession, vocation, adventure, wager or any other similar activity, whether or not it is for a pecuniary benefit;
>
> (b) any activity or transaction in connection with or incidental or ancillary to sub-clause (a);
>
> (c) any activity or transaction in the nature of sub-clause (a), whether or not there is volume, frequency, continuity or regularity of such transaction;
>
> (d) supply or acquisition of goods including capital goods and services in connection with commencement or closure of business;
>
> (e) provision by a club,

> association, society, or any such body (for a subscription or any other consideration) of the facilities or benefits to its members;
>
> (f) admission, for a consideration, of persons to any premises;
>
> (g) services supplied by a person as the holder of an office which has been accepted by him in the course or furtherance of his trade, profession or vocation;
>
> (h) activities of a race club including by way of totalisator or a license to book maker or activities of a licensed book maker in such club; and]
>
> (i) any activity or transaction undertaken by the Central Government, a State Government or any local authority in which they are engaged as public authorities;”

[2] “Goods” are defined under section 2(52) of the GST Act as under :

> ““goods" means every kind of movable property other than money and securities but includes actionable claim, growing crops, grass and things attached to or forming part of the land which are

> agreed to be severed before supply or under a contract of supply;”

[3] Section 2(94) defines a “registered person” as under:

> ““registered person” means a person who is registered under section 25 but does not include a person having a Unique Identify Number.”

[4] “Services” is defined under section 2(102) as under:

> ""services" means anything other than goods, money and securities but includes activities relating to the use of money or its conversion by cash or by any other mode, from one form, currency or denomination, to another form, currency or denomination for which a separate consideration is charged;
>
> [Explanation. - For the removal of doubts, it is hereby clarified that the expression "services" includes facilitating or arranging transactions in securities;]”

[5] section 2(105) defines “supplier” as

under:

> ""supplier" in relation to any goods or services or both, shall mean the person supplying the said goods or services or both and shall include an agent acting as such on behalf of such supplier in relation to the goods or services or both supplied:"

[6] Section 2(107) defines a "taxable person" as under:

> "(107) "taxable person" means a person who is registered or liable to be registered under section 22 or section 24;"

[7] Section 7 of the GST Act falling under Chapter III for levy and collection of tax defines the scope of supply as under: section 7 reads as under:

> "Scope of supply.
>
> 7.(1) For the purposes of this Act, the expression "supply" includes—
>
> (a) all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal

made or agreed to be made for a consideration by a person in the course or furtherance of business;

(aa) the activities or transactions, by a person, other than an individual, to its members or constituents or vice versa, for cash, deferred payment or other valuable consideration.

Explanation.—For the purposes of this clause, it is hereby clarified that, notwithstanding anything contained in any other law for the time being in force or any judgment, decree or order of any Court, tribunal or authority, the person and its members or constituents shall be deemed to be two separate persons and the supply of activities or transactions inter se shall be deemed to take place from one such person to another;]

(b) import of services for a consideration whether or not in the course or furtherance of business; [and]

(c) the activities specified in Schedule I, made or agreed to be made without a consideration 40[***]

(d) 41[***]

42(1A) Where certain activities or transactions constitute a supply in accordance with the provisions of sub-section (1), they shall be treated either as supply of goods or supply of services as referred to in Schedule II.]

(2) Notwithstanding anything contained in sub-section (1),—

(a) activities or transactions specified in Schedule III; or

(b) such activities or transactions undertaken by the Central Government, a State Government or any local authority in which they are engaged as public authorities, as may be notified by the Government on the recommendations of the Council,

shall be treated neither as a supply of goods nor a supply of services.

(3) Subject to the provisions of 40[sub-sections (1), (1A) and (2)], the Government may, on the recommendations of the Council, specify, by notification, the transactions that are to be treated as—

(a) a supply of goods and not as a supply of services; or

(b) a supply of services and not as a supply of goods."

40. Word ";and" omitted by the Central Goods and Services Tax (Amendment) Act, 2018 w.r.e.f 1-7-2017

41. Omitted ibid Prior to its omission, clause(d) read as under: "(d) the activities to be treated as supply of goods or supply of services as referred to in Schedule II."

[8] Schedule III refers to sub-section (2) of section 7 for excluding the activities or transactions which shall be neither treated as supply of goods nor as supply of services and includes Entry No.5 as "sale of land and, subject to clause(b) of paragraph 5 of Schedule II, sale of building."

[9] Clause (b) of paragraph no.5 of Schedule II refers to supply of services as per sub-section (1A) of section 7 pertaining to construction of a complex

building, civil structure or a part thereof including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate were required by the competent authority or after its first occupation whichever is earlier. Paragraph no. 5 of Schedule II reads as under:

> "5. Supply of services
>
> The following shall be treated as supply of services, namely:—
>
> (a) renting of immovable property;
>
> (b) construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier.

Explanation.—For the purposes of this clause—

(1) the expression "competent authority" means the Government or any authority authorised to issue completion certificate under any law for the time being in force and in case of non-requirement of such certificate from such authority, from any of the following, namely:—

(i) an architect registered with the Council of Architecture constituted under the Architects Act, 1972 (20 of 1972) ; or

(ii) a chartered engineer registered with the Institution of Engineers (India); or

(iii) a licensed surveyor of the respective local body of the city or town or village or development or planning authority;

(2) the expression "construction" includes

additions, alterations, replacements or remodelling of any existing civil structure;

(c) temporary transfer or permitting the use or enjoyment of any intellectual property right;

(d) development, design, programming, customisation, adaptation, upgradation, enhancement, implementation of information technology software;

(e) agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act; and

(f) 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."

:Constitution :

[10] Article 246A of the Constitution of India pertains to special provision with respect to goods and service tax and reads as under:

> “246A Special Provision with respect to goods and services tax-
>
> 1) Notwithstanding anything contained in Articles 246 and 254, Parliament, and, subject to clause (2), the Legislature of every State, have power to make laws with respect to goods and services tax imposed by the Union or by such State.
>
> (2) Parliament has exclusive power to make laws with respect to goods and services tax where the supply of goods, or of services, or both takes place in the course of inter-State trade or commerce.
>
> *Explanation*.—The provisions of this article, shall, in respect of goods and services tax referred to in clause (5) of Article 279-A, take effect from the date recommended by the Goods and Services Tax Council.]

[11] Clause (12A) of Article 366 of the Constitution of India, defines “goods and service tax” as under:

> “12-A) “goods and services tax” means any tax on supply of goods,

> or services or both except taxes on the supply of the alcoholic liquor for human consumption;]”

[12] Clause (26A) of Article 366 of the Constitution of India defies “Services” as under:

> (26-A) “Services” means anything other than goods;

:Finance Act,1994 (Service Tax):

[13] Section 65B(44) of the Finance Act, 1994 defines “Services” as under:

> “(44) “service” means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include—
>
> (a) an activity which constitutes merely,—
>
> (i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or
>
> (ii) such transfer, delivery or supply of any goods which is

deemed to be a sale within the meaning of clause (29-A) of Article 366 of the Constitution; or

(iii) a transaction in money or actionable claim;

(b) a provision of service by an employee to the employer in the course of or in relation to his employment;

(c) fees taken in any court or tribunal established under any law for the time being in force.

Explanation 1.—For the removal of doubts, it is hereby declared that nothing contained in this clause shall apply to,—

(A) the functions performed by the Members of Parliament, Members of State Legislative, Members of Panchayats, Members of Municipalities and Members of other local authorities who receive any consideration in performing the functions of that office as such member; or

(B) the duties performed by any person who holds any post in

pursuance of the provisions of the Constitution in that capacity; or

(C) the duties performed by any person as a Chairperson or a Member or a Director in a body established by the Central Government or State Governments or local authority and who is not deemed as an employee before the commencement of this section.

192[Explanation 2.—For the purposes of this clause, the expression “transaction in money or actionable claim” shall not include—

(i) any activity relating to use of money or its conversion by cash or by any other mode, from one form, currency or denomination, to another form, currency or denomination for which a separate consideration is charged;

(ii) any activity carried out, for a consideration, in relation to, or for facilitation of, a transaction in money or actionable claim, including the activity carried out—

195[(a) by a lottery distributor or selling agent on behalf of the

State Government, in relation to promotion, marketing, organising, selling of lottery or facilitating in organising lottery of any kind, in any other manner, in accordance with the provisions of the Lotteries (Regulation) Act, 1998 (17 of 1998);]

(b) by a foreman of chit fund for conducting or organising a chit in any manner.]

Explanation 3.—For the purposes of this chapter,—

(a) an unincorporated association or a body of persons, as the case may be, and a member thereof shall be treated as distinct persons;

(b) an establishment of a person in the taxable territory and any of his other establishment in a non-taxable territory shall be treated as establishments of distinct persons.

Explanation 4.—A person carrying on a business through a branch or agency or representational office in any territory shall be treated as having an establishment in that territory;"

[14] Entry No. 41 of Notification No.12/2017 dated 28.06.2017 has granted exemption from levy of GST on one Time upfront amount called as premium, salami, cost price, development charges or by any other name leviable in respect of the service, by way of granting long term (30 years, or more) lease of industrial plots, provided by the State Government Industrial Development Corporations or Undertakings to industrial units falling under Chapter Heading 9972 of Tariff Code as under:

> "One time upfront amount (called as premium, salami, cost, price, development charges or by any other name) leviable in respect of the service, by way of granting long term (thirty years, or more) lease of industrial plots, provided by the State Government Industrial Development Corporations or Undertakings to industrial units."

11. On conjoint reading of above provisions and notifications, it is required to be determined as to whether the

transfer/assignment of leasehold rights is a transaction of sale pertaining to immovable property or is supply of goods or supply of services in the course or furtherance of business so as to levy GST as per section 9(1) of the GST Act at the rate which may be notified by the Government on recommendations of the GST Council.

12. Learned advocates for the petitioners have made submissions referring to various decisions which are summarised as under:

12.1) Learned Senior Advocate Mr. Mihir Joshi for learned advocate Mr. Tarak Damani appearing for the petitioners of Special Civil Application No.11345 of 2023 contended that lease of immovable property is an interest in land and building and

every interest in immovable property or benefit arising out of land will be immovable property for the purpose of Section 105 of Transfer of Property Act. In support of such submission, reliance was placed on the decision in case of **Sri Tarkeshwar Sio Thakur Jiu v. Dar Dass Dey & Co and others** reported in (1979) 3 Supreme Court Cases 106 wherein it is held as under:

> “34. Section 105, Transfer of Property Act, defines a 'lease' of immovable property as-
>
> > "a transfer of a right to enjoy such property, made for a a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms."
>
> 36. The definition of 'immovable

> property' given in Section 3, Para I of that Act is in the negative, and is not exhaustive. Therefore, the definition given in Section 3(26) of the General Clauses Act (X of 1897) will apply to the expression used in this Act, except as modified by the definition in the first clause of Section 3. According to the definition given in Section 3(26) of the General Clauses Act, "immovable property" shall include land, benefits to arise out Or land, and things attached to the earth, or permanently fastened to anything attached to the earth". In short, the expression 'immovable property' comprehends all that would be real property according to English Law and possibly more. (See 1 I.A. 34). Thus, every interest in immovable property or a benefit arising out of land, will be 'immovable property' for the purpose of Section 105, Transfer of Property Act.”

12.2) It was submitted that an assignment of leasehold rights constitutes absolute transfer of right in immovable property which itself is immovable property as such transfer extinguishes all the rights of the

transferor in the immovable property and snaps any legal relationship with the lessor, and the assignee becomes liable for obligations under the Lease Deed vis-a-vis the Lessor. It was submitted that since the assignor steps out of the equation entirely due to sale, there is no element of service in the transaction. In support of this submission, reliance was placed on the decision in case of **Gopal Saran v. Satyanarayana** reported in 1989(3) SCC 56 wherein it is held as under:

> “10 .On the facts found, it cannot be said or even argued that there was any assignment by the tenant, "Assignment", it has been stated in Black's Law Dictionary, Special Deluxe Ed., p. 106, "is a transfer or making over to another of the whole of any property, real or personal, in possession or in action, or of any estate or right therein". It has further been stated as "The transfer by a party of all its rights to some kind of property, usually intangible property such as

> rights in a lease, mortgage, agreement of sale or partnership." It has to be examined whether there was sub-letting or otherwise parting with possession in terms of Sec. 13(1)(e) of the Act."

12.3) Reliance was placed on the decision in case of **State of West Bengal v. Gautam Sur** reported in AIR 2008 Cal 1, wherein it is held as under:

> "2. The facts leading to the writ petitions are that the lease was originally granted by the Government of West Bengal in 1953 in favour of the lessees for a period of 999 years at a fixed rent per year on some terms and conditions viz. (i) there will be no transfer without permission, (ii) construction on the leasehold land is to be completed within the specified period, (iii) forfeiture clause will be application etc. The lessees transferred their leasehold interest for the unexpired period in favour of the petitioners who paid stamp duty along with fees on the basis of consideration amount as mentioned in the deed of transfer.
>
> XXX

8. The provisions relating to Articles. 63 and 23 of Schedule IA of the Indian Stamp Act, 1899, as amended, are reproduced below:

> "63. Transfer of lease by way of assignment, and not by way of under-lease The same duty as a Conveyance (No. 23) for the market value of the property. Exemption Transfer of any lease exempt from Duty.
>
> 23. Conveyance (as defined by Section 2(10), not being a transfer charged or exempted under S. 62. (a) Six per centum of the market value when the property is situated in the areas within the jurisdiction of any Municipal Corporation or Exemptions Municipality or a notified area;
>
> (a) Assignment of copyright by entry made under the Copyright Act, 1957 (14 of 1957), Section 18.
>
> (b) Co-partnership Deed. See Partnership (No. 46) (b) five per centum of the market value when the property is situated in the areas other than those included in clause(a).

9. The object of the said

provision of Article 63 is to make the instrument chargeable with higher duty prescribed for conveyance in the State. The Article provides for transfer of lease by way of assignment and not by way of underlease which is provided in Article 35.

10. A lease of immovable property, as defined in Section 105 of the Transfer of Property Act, 1882, is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.

11. The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent.

12. A lease contemplates, as observed in Byramjee Jeejeebhoy (P) Ltd. v. State of Maharashtra , "a demise or a transfer of a right to enjoy land for a term or in perpetuity in consideration of a

price paid or promised or services or other things of value to be rendered periodically or on specified occasions to the transferor." The words "transfer of a right to enjoy such property" indicate that all rights of ownership are not transferred. The significance of those words as indicative of the limited estate transferred is apparent if contrasted with those in Section 54 where a sale is defined as a "transfer of ownership in exchange for a price."

13. An underlease is a grant by a lessee to another of part of his whole interest under the original lease reserving to himself a reversion: it differs from an assignment, which conveys the lessee's whole interest and passes to the assignee the right and liability to sue and be sued upon the covenants in the original lease (Wharton's Law Lexicon). In the case on hand, the lessee's whole interest having been assigned without reserving a reversion, the question of calling the impugned transfer an underlease or sub-lease, as contended by the learned advocate for the respondent, is out of the way.”

12.4) Reliance was also placed on the decision in case of **Narendra Dhar v. State of Uttar Pradesh** reported in 2010(4) AIILJ 481.

12.5) Learned Senior Counsel Mr. Joshi further submitted that such transfer is also covered as transfer of immovable property under Section 54 of Transfer of Property Act and for the purpose of Section 53-A of the said Act, as also a right under Section 108 (j) of the Transfer of Property Act.

12.6) It was submitted that the definition of "Service" under Section 2(102) of GST Act states anything other than goods, money and securities which cannot encompass absolute transfer of

property and since it has been held that conceptually sale and service are not interchangeable terms as understood in its ordinary sense and the term service does not refer to transfer of property. In support of such submission, reliance was placed on the decision in case of **Narinder S. Chadha and others v. Municipal Corporation of Greater Mumbai and others** reported in (2014) 15 Supreme Court Cases 689, wherein it is held as under:

> “13. We cannot accept this contention for more than one reason. First and foremost, it is difficult conceptually to say that "sale" and "service" are interchangeable items. "Sale" is defined under the Act as meaning a transfer of property in goods for consideration. It is obvious that "sale" has to be understood in this sense, and properly so understood would not include "service" which would refer not to transfer of property in goods but to "service" as is understood in its ordinary sense. In Northern India Caterers (India) Ltd. v. Lt.

Governor of Delhi [1979] 1 S.C.R. 557, a distinction was made between sale of food and the provision of services in hotels and restaurants. The Court held: -

> "Like the hotelier, a restaurateur provides many services in addition to the supply of food. He provides furniture and furnishings, linen, crockery and cutlery, and in the eating places of today he may add music and a specially provided area for floor dancing and in some cases a floor show. The view taken by the English law found acceptance on American soil, and after some desultory dissent initially in certain states it very soon became firmly established as the general view of the law. The first addition of American Jurisprudence [Vol. 46, p. 207, para 13] sets forth the statement of the law in that regard, but we may go to the case itself, Electa B. Merrill v. James W. Hodson [1915 B LRA 481] from which the statement has been derived. Holding that the supply of food or drink to customers did not partake of the character of a sale of goods the Court commented:

"The essence of it is not an agreement for the transfer of the general property of the food or drink placed at the command of the customer for the satisfaction of his desires, or actually appropriated by him in the process of appeasing his appetite or thirst. The customer does not become the owner of the food set before him, or of that portion which is carved for his use, or of that which finds a place upon his plate, or in side dishes set about it. No designated portion becomes his. He is privileged to eat, and that is all. The uneaten food is not his. He cannot do what he pleases with it. That which is set before him or placed at his command is provided to enable him to satisfy his immediate wants, and for no other purpose. He may satisfy those wants; but there he must stop. He may not turn over unconsumed portions to others at his pleasure, or carry away such portions. The true essence of the transaction is service in the satisfaction of a human need or desire,- ministry to a bodily want. A necessary incident of this service or ministry is the consumption of the food required. This

> consumption involves destruction, and nothing remains of what is consumed to which the right of property can be said to attach. Before consumption title does not pass; after consumption there remains nothing to become the subject of title. What the customer pays for is a right to satisfy his appetite by the process of destruction. What he thus pays for includes more than the price of the food as such. It includes all that enters into the conception of service, and with it no small factor of direct personal service. It does not contemplate the transfer of the general property in the food applied as a factor in the service rendered."

This led to the Constitution 46th Amendment Act by which Article 366 (29A) was inserted. Article 366 (29A) reads as follows:-

> "Article 366 (29-A) "tax on the sale or purchase of goods" includes-
>
> (a) a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;

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

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

(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;".

It will be seen that the definition of tax on the sale or purchase of goods has been artificially expanded more particularly by sub-clause (f), with which we are concerned, where the distinction between "sale" and "service" has been done away with. In the present case, the well established distinction between "sale" and "service" would continue to apply in view of the definition of "sale" contained in Section 3(m). It will be noticed that the definition is a "means" and "includes" one. It is well settled that such definition is an exhaustive definition (see: P. Kasilingam and others v. P.S.G. College of Technology and others 1995 Supp (2) SCC 348 at para 19). There is thus, no scope to include "service' in such a definition. Further, even if we were to accept Mr. Bhatt's contention, Rule 4(3) would become ultra vires Section 6 of the Act inasmuch as it would prohibit the sale of cigarettes and other tobacco products in a smoking area in hotels, restaurants and airports, thus, adding one more exception to the two exceptions already contained in Section 6. It is, thus, clear that this condition would be ultra vires the Cigarettes Act and the Rules properly so read."

12.7) It was submitted that the term service has not been defined by the Legislature to include things not ordinarily covered within the meaning of the term and therefore, the term service does not lose its natural meaning, that is to say, something other than absolute transfer of property. It was submitted that the attempt of the respondents to encompass transfer of property within the meaning of service amounts to extending the meaning of the word “service” beyond its reasonable connotation in an anxiety to preserve the power of legislature. It was submitted that the same would amount to tax on service, something which in no rational sense can be regarded as service, which is impermissible.

12.8) Learned Senior advocate Mr. Joshi further submitted that the contention of the respondent that by excluding only sale of land and building by including the same in Schedule III as being neither sale nor service would consequentially imply that sale of other immovable property would be covered within service is not tenable for the following reasons:

i. Such exclusion does not displace the principle of giving a natural meaning to the word 'Service' in the definition clause.

ii. The inclusion is clearly *ex abundanti cautela*

iii. The same also supports the submissions of the petitioners that the Legislature never intended to tax sale of immovable property. Therefore, the

term "land" ought not to be restricted to land per se but would encompass rights in relation to land which constitute immovable property as per law. Even under Entry 18 of List II to the Seventh Schedule of the Constitution, "land" is stated to mean 'Land that is to say, right in or over land,...", Moreover by excluding both land and building, the legislative intent to exclude immovable property is clearly discernible.

12.9) It was further submitted that the assignment of Leasehold rights is even otherwise not covered under Section 7(1)(a) of the Act because:

i. Assignment of the Leasehold rights is neither in the course of nor in furtherance of business as mentioned under Section 7(1)(a) of the Act, 2017 and therefore also, it is not "Supply of Services".

ii. The assignment of Lease hold rights is not a "business" as defined under 2(17) of the Act, 2017 or "input" as defined under 2(59) of the GST Act, 2017.

iii. The transaction of assignment is simpliciter selling/transferring of absolute rights in the land, it has nothing to do with the business of the Assignor nor it is in the course or furtherance of business and therefore, the said transaction does not fall within the purview of Section 7(1)(a) of the Act, 2017 and therefore also, it is not "Supply of Services”.

12.10) Learned Senior advocate Mr. Joshi further submitted the contention that since the transaction is covered in the Tariff, the same is taxable, is contrary

to the judgment of Hon'ble Supreme Court in case of **Commissioner of Central Excise-I, New Delhi v. S.R. Tissues(P) Ltd. and another** reported in (2005) 6 Supreme Court Cases 310.

12.11) It was further submitted that the reliance of the respondents on the Council Directive dated 28.11.2006 is not justified for the following reasons:

i. As the title itself indicates, it is a Directive for adoption by members of the EU and not Law.

ii. Article 25, which has been relied upon, states that a supply of service may consist in the assignment of intangible property which means that the same will have to be examined on case-to-case basis particularly since a sub-lease and

> assignment in some cases are used interchangeably. This can be distinguished with the language of Articles 24 and 26 which used the word “shall” while referring to Services.

12.12) It was therefore, submitted that the assignment of leasehold rights, which is an absolute transfer of rights and interest arising out of land, amounts to transfer/sale of immovable property and therefore, cannot be said to be service under the Act nor can such transfer of rights and interest be said to be in course or furtherance of business. The said assignment/transfer of rights does not fall within the meaning of the term 'Service' in the Act and the Legislature has not extended the meaning by including transactions which are not service and

therefore the term would have to be construed as per its natural meaning, which excludes absolute transfer of property. The levy/demand of tax on Assignment may therefore be held to be illegal and without authority of law.

13. Learned advocate Mr. Uchit Sheth for the petitioners in Special Civil Application No. 19418 of 2023, Special Civil Application No. 4224 of 2024 and Special Civil Application No.13157 of 2024 submitted that the GST regime was brought into force after the One Hundred and First (Constitution Amendment) Act, 2016. Statement of objects and reasons of the said Act clearly stated that the intention of the constitutional amendment was to subsume some of the existing indirect taxes so as to reduce the cascading effect of taxes. It was

submitted that with such object in mind, Entry No. 84 of List I of the Seventh Schedule which is relating to excise duty was curtailed to only include specific goods which continued under the old regime. Similarly, Entry No. 92C of List I of the Seventh Schedule which was regarding tax on services was deleted. Even under List II, Entry Nos. 52 and 55 which were relating to entry tax and luxury tax were deleted whereas Entry No. 54 regarding tax on sales and purchases of goods as well as Entry No. 62 relating to entertainment tax were curtailed. It was further submitted that simultaneously, Article 246A of the Constitution was introduced for giving parallel power to the Parliament and State legislatures to impose "goods and services tax". It was submitted that the constitutional amendment read with the statement of objects

and reasons clearly shows that the object of introducing GST regime was to subsume some of the indirect taxes so as to reduce cascading effect of taxes, however, the entries in List I and List II relating to stamp duty were left untouched. This shows that GST was not intended to be imposed on any transfer of immovable property.

13.1) Learned advocate Mr. Sheth further submitted that the term "service" was defined under Section 65B(44) of the Finance Act, 1994. There was specific exclusion of transfer of title in immovable property from the definition of "service" itself. Thus it was never the intention of the legislature to impose tax on transfer of immovable property. It was submitted that the Customs Excise and

Service Tax Tribunal, Chandigarh bench in the case of **DLF Commercial Projects Corporation v/s Commissioner of Service Tax, Gurugram** reported in 2019 SCC Online CESTAT 9281 held that development rights are "benefits arising from land" and therefore not liable for service tax. It was submitted that while the Government has filed appeal before Hon’ble Supreme Court for challenging such decision, the operation of the order has not been stayed. It was submitted that while holding that development rights are "benefits arising from land", the CESTAT has followed judgement of Hon’ble Bombay High Court in the case of **Cheda Housing Development Corporation v/s Bibijan Shaikh** reported in 2007 SCC Online Bom 130. It was further submitted that leasehold right

is in fact a greater right and interest in land than development right and therefore the principle under the service tax regime will continue to apply even under the GST regime particularly when object of introduction of GST regime is to subsume existing taxes.

13.2) Learned advocate Mr. Sheth further submitted that the fact that only existing taxes were sought to be continued under the GST regime is fortified by Agenda 2A to the 5th GST Council meeting wherein, while noting that service tax was not leviable on transfer of immovable property, a specific proposal was made to impose GST on sale of immovable property on the ground that there was no constitutional embargo for imposing such

tax and that stamp duty was leviable on a different aspect of the transaction. It was submitted that this agenda was discussed in the 7th GST Council meeting held on 22/23 December, 2016 and a detailed discussion took place wherein number of State Finance Ministers pointed out that stamp duty had not been subsumed in GST and therefore, imposition of GST on land and building would lead to double taxation and it might also be unconstitutional. Considering such objections, the GST Council decided to defer imposition of tax on land and buildings. It is therefore that Sr. No. 5 of Schedule III to the GST Acts excludes sale of land and building. It was submitted that this exclusion is nothing but manifestation of intention not to

impose tax on transfer of immovable property as was the case even under the erstwhile service tax regime.

13.3) It was further submitted that proposed imposition of GST on assignment of leasehold rights leads to double taxation inasmuch as both stamp duty at rate equal to conveyance of land as well as GST are imposed which will lead to cascading effect of taxes which is specifically sought to be avoided by introduction of the GST regime. It was therefore, submitted that proposed imposition of GST is contrary to the object, purpose and scheme of the GST Acts as well as arbitrary in as much as it leads to double taxation.

13.4) Learned advocate Mr. Sheth placed reliance on the judgment of this Court in case of **Munjaal Manishbhai Bhatt v/s Union of India** reported in (2022) 104 GSTR 419 (Guj.) wherein it was observed that the intention of introduction of GST regime was not to change the basis of taxation of the Vat and service tax regime and that supply of land in every form was excluded from the purview of the GST Acts.

13.5) It was further submitted that what is assigned by the petitioners is not mere right to use land. In fact building was constructed on the land allotted by GIDC and the entire land along with building thereon have been assigned. In other words, something which was constructed on the land is also transferred along with

the rights and interest in land. The petitioners thus earned benefit out of the land by way of constructing and operating factory building/shed. This constitutes "profit a pendre" which is an immovable property and transfer of such immovable property cannot be subjected to tax under the GST Acts.

13.6) Reliance was placed on the following judgements of Hon’ble Supreme Court wherein different types of rights have been considered to be profit a pendre or benefits arising from land:

(1) In case of **Anand Behera v/s State of Orissa** AIR 1956 SC 17, wherein it is held as under:

> “9. The facts disclosed in paragraph 3 of the petition make

it clear that what was sold was the right to catch and carry away fish in specific sections of the lake over a specified future period. That amounts to a license to enter on the land coupled with a grant to catch and carry away the fish, that is to say, it is a profit a prendre: see 11 Halsbury's Laws of England, (Hailsham Edition), pages 382 and 383. In England this is regarded as an interest in land (11 Halsbury's Laws of England, page 387) because it is a right to take some profit of the soil for the use of the owner of the right (page 382). In India it is regarded as a benefit that arises out of the land and as such is immoveable property.

10. Section 3 (26) of the General Clauses Act defines "immoveable property" as including benefits that arise out of the land. The Transfer of Property Act does not define the term except to say that immoveable property does not include standing timber, growing crops or grass. As fish do not come under that category the definition in the General Clauses Act applies and as a profit a prendre is regarded as a benefit arising out of land it follows that it is immoveable property within the meaning of the Transfer

of Property Act.

> 11. Now a "sale" is defined as a transfer of ownership in exchange for a price paid or promised. As a profit a prendre is immoveable property and as in this case it was purchased for a price that was paid it requires writing and registration because of section 54 of the Transfer of Property Act. If a profit a prendre is regarded as tangible immoveable property, then the "property" in this case was over Rs. 100 in value. If it is intangible, then a registered instrument would be necessary whatever the value. The "sales" in this case were oral: there was neither writing nor registration. That being the case, the transactions passed no title or interest and accordingly the petitioners have no fundamental right that they can enforce.”

(2)In case of **State of Orissa v/s Titaghur Paper Mills Co. Ltd.** reported in (1985) Supp. SCC 285, wherein it is held as under:

> “98. The meaning and nature of a profit a prendre have been thus

described in Halsbury's Laws of England, Fourth Edition, Volume 14, paragraphs 240 to 242 at pages 115 to 117:

> "240. Meaning of 'profit a prendre' A profit a prendre is a right to take something off another person's land. It may be more fully defined as a right to enter another's land to take some profit of the soil, or a portion of the soil itself, for the use of the owner of the right The term 'profit a prendre' is used in contradistinction to the term 'profit a prendre', which signified a benefit which had' to be rendered by the possessor of land after it had come into his possession.A profit a prendre is a servitude.
>
> "241. Profit a prendre as an interest in land. A profit a prendre is an interest in land and for this reason any disposition of it must be in writing. A profit a prendre which gives a right to participate in a portion only of some specified produce of the land is just as much an interest in the land as a right to take the whole of that produce...

"242. What may be taken as a profit a prendre. The subject matter of a profit a prendre, namely the substance which the owner of the right is by virtue of the right entitled to take, may consist of animals, including fish and fowl, which are on the land, or of vegetable matter growing or deposited on the land by some agency other than that of man, or of any part of the soil itself, including mineral accretions to the soil by natural forces. The right may extend to the taking of the whole of such animal or vegetable matters or merely a part of them. Rights have been established as profits a prendre to take acorns and beech mast, brakes, fern, heather and litter, thorns, turf and peat, boughs and branches of growing trees, rushes, freshwater fish, stone, sand and shingle from the seashore A and ice from a canal; also the right of pasture and of shooting pheasants. There is, however, no right to take seacoal from the foreshore. The right to take animals ferae naturae while they are upon the soil belongs to the owner of the soil, who may grant to others

> as a profit a prendre a right to come and take them by a grant of hunting, shooting, fowling and so forth."

99. A profit a prendre is a servitude for it burdens the land or rather a person's ownership of land by separating from the rest certain portions or fragments of the right of ownership to be enjoyed by persons other than the owner of the thing itself (see Jowitt's Dictionary of English Law, Second Edition, Volume 2, page 1640. under the heading "Servitude"). "Servitude" is a wider term and includes both easements and profits a prendre (see Halsbury's Laws of England, Fourth Edition, Volume 14, paragraph 3, page 4). The distinction between a profit a prendre and an easement has been thus stated in Halsbury's Laws of England, Fourth Edition, paragraph 43 at pages 21 to 22:

> "The chief distinction between an easement and a profit a prendre is that whereas an easement only confers a right to utilise the servient tenement in a particular manner or prevent the commission of some act on that tenement, a profit a prendre confers a right to take from the servient

> tenement some part of the soil of that tenement or minerals under it or some part of its natural produce or the animals ferae naturae existing upon it. What is taken must be capable of ownership, for otherwise the right amounts to a mere easement".

In Indian law an easement is defined by section 4 of the Indian Easement Act, 1882 (Act No. V of 1882) as being ' a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of, certain other land not his own”. A profit a prendre when granted in favour of the owner of a dominant heritage for the beneficial enjoyment of such heritage would, therefore, be an easement but it would not be so if the grant was not for the beneficial enjoyment of the grantee's heritage.

100. Clause (26) of section 3 of the General Clauses Act, 1897, defines "immovable property" as including inter alia "benefit to arise out of land". The definition of "immovable property" in clause

(f) of section 2 of the Registration Act 1908, illustrates a benefit to arise out of land by stating that immovable property "includes...rights to ways, lights ferries, fisheries or any other benefit lo arise out of land". As we have seen earlier, the Transfer of Property Act, 1882, does not give any definition of "immovable property" except negatively by stating that immovable property does not include standing timber, growing crops, or grass. The Transfer of Property Act was enacted about fifteen years prior to the General Clauses Act, However, by section 4 of the General Clauses Act, the definitions of certain words and expressions, including "immovable property" and "movable property", given in section 3 of that Act are directed to apply also, unless there is anything repugnant in the subject or context, to all Central Acts made after January 3 1968, and the definitions of these two terms, therefore, apply when they occur in the Transfer of Property Act. In Ananda Behra and another v. The State of Orissa and another (1) this Court has held that a profit a prendre is a benefit arising out land and that in view of clause (26) of section 3 of the General Clauses Act, it is immovable property within the

meaning of the Transfer of Property Act.

101. The earlier decisions showing what constitutes benefits arising out of land have been summarized in Mulla on The Transfer of Property Act, 1882", and it would be pertinent to reproduce the whole of that passage. That passage (at pages 16-17 of the Fifth Edition) is as follows:

> "A 'benefit to arise out of land' is an interest in land and therefore immovable property. The first Indian Law Commissioners in their report of 1879 said that they had 'abstained from the almost impracticable task of defining the various kinds of interests in immovable things which are considered immovable property. The Registration Act, however, expressly includes as immovable property benefits to arise out of land, here diary allowances, rights of way lights, ferries and fisheries'. The definition of immovable property in the General Clauses Act applies to this Act. The following have been held to be immovable (1) 11955] 2 S. C. R. 919 property:-varashasan or annual allowance charged on land; a right to collect dues at a fair

> held on a plot of land; a hat or market; a right to possession and management of a saranjam; a malikana; a right to collect rent or jana: a life interest in the income of immovable property; a right of way; a ferry; and a fishery; a lease of land".

102. Having seen what the distinctive features of a profit a prendre are, we will now turn to the Bamboo Contract to ascertain whether it can be described as a grant of a profit a prendre and thereafter to examine the authorities cited at the Bar in this connection. Though both the Bamboo Contract in some of its clauses and the Timber Contracts speak of "the forest produce sold and purchased under this Agreement", there are strong countervailing factors which go to show that the Bamboo Contract is not a contract of sale of goods. While each of the Timber Contracts is described in its body as "an agreement for the sale and purchase of forest produce", the Bamboo Contract is in express terms described as "a grant of exclusive right and licence to fell, cut, obtain and remove bamboos...for the purpose of converting the bamboos into paper pulp or for purposes connected

with the manufacture of paper...." Further, throughout the Bamboo Contract, the person who is giving the grant, namely, the Governor of the State of Orissa, is referred to as the "Grantor." While the Timber Contracts speak of the consideration payable by the forest contractor, the Bamboo Contract provides for payment of royalty. "Royalty" is not a term used in legal parlance for the price of goods sold. "Royalty" is defined in Jowitt's Dictionary of English Law, Fifth Edition, Volume 2, page 1595, as follows.

> "Royalty, a payment reserved by the grantor of a patent, lease of a mine or similar right, and payable proportionately to the use made of right by the grantee. It is usually a payment of money, but may be a payment in kind, that is, of part of the produce of the exercise of the right.
>
> Royalty also means a payment which is made to an author or composer by a publisher in respect of each copy of his work which is sold, or to an inventor in respect of each article sold under the patent."

We are not concerned with the second meaning of the word H

"royalty" given in Jowitt. Unlike the Timber Contracts, the Bamboo Contract is not an agreement to sell bamboos standing in the contract areas with an accessory licence to enter upon such areas / for the purpose of felling and removing the bamboos nor is it, unlike the Timber Contracts, in respect of a particular felling season only. It is an agreement for a long period extending to fourteen years, thirteen years and eleven years with respect to different con tract areas with an option to the Respondent Company to renew the contract for a further term of twelve years and it embraces not only bamboos which are in existence at the date of the contract but also bamboos which are to grow and come into existence thereafter. The payment of royalty under the Bamboo Contract has no relation to the actual quantity of bamboos cut and removed. Further, the Respondent Company is bound to pay a minimum royalty and the amount of royalty to be paid by it is always to be in excess of the royalty due on the bamboos cut in the contract areas.”

13.7) It was submitted that mere fact that there is an exemption granted for lease of land by State Industrial Development Corporations cannot ipso facto mean that assignment of leasehold rights by private individuals is taxable and grant of exemption by State Government cannot determine as to whether the transaction is otherwise leviable to tax under the Act. Reliance is placed in this regard upon judgement of this Court in the case of **Chunilal Mayachand v/s State of Gujarat** (1992) 86 STC 105 (Guj.).

13.8) It was therefore, submitted that the exclusion of sale of land and building as per Sr. no. 5 of Schedule III to the GST Acts has to be interpreted in light of

legislative history as well as object and purpose of the statute to mean sale of immovable property which would cover sale of interest in land and benefits arising out of land and proposed imposition of tax under the GST Acts on such sale of interest in land and benefits arising out of land is wholly without jurisdiction, contrary to the object, purpose and scheme of the GST Acts, bad and illegal. It was therefore, submitted that in any case the consideration attributable to sale of building is ex-facie outside the purview of the GST Acts and proposed imposition of tax thereon is wholly without jurisdiction and illegal.

14. Learned advocate Mr. Rajat Bose for the petitioner in Special Civil Application

No.18296 of 2023 submitted that the consideration for transfer of leasehold rights paid to the original lessee is nothing but a consideration for the plot of land. It was further submitted that after GIDC had allotted the land on 99 years lease, the lessee thereafter has to construct building thereon for running the industry. It was pointed out that lessee had transferred the leasehold rights along with the ownership of the building for a consideration. It was therefore, submitted that as per Entry No.4 in Schedule III of the GST Act, such transaction cannot be considered as supply of goods or services for levy of GST. It was further submitted that the leasehold rights are nothing but benefits arising out of the land. Reference was also made to section 54 of the Transfer of Property Act which defines sales

of immovable property to mean transfer of ownership in exchange for a price paid or promised or part-paid or part-promised and such transfer in the case of tangible immovable property of the value of one hundred rupees and upwards or in the case of reversion or other intangible thing, can be made only by a registered instrument. It was therefore, submitted that the transfer of leasehold rights of the land in question along with the immovable property constructed thereon is by a registered deed liable to be compulsorily registered under section 17 of the Registration Act, 1908.

14.1) Reliance was also placed on section 2(6) of the Registration Act which defines immovable property which includes land, buildings, hereditary allowances,

right to ways, lights, ferries, fisheries or any other benefit to arise out of land and things attached to the earth or permanently fastened to anything which is attached to the earth, but not standing timber, growing crops nor grass. It was therefore, submitted that leasehold rights are nothing but any such benefit to arise out of land and therefore, same is required to be considered as an “immovable property”. It was therefore, submitted that as per section 7(1) of the Act, no GST can be levied upon sale of immovable property.

14.2) Learned advocate Mr. Bose also referred to section 2(26) of the General Clauses Act which defines “immovable property” which includes land, benefits to

arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth.

14.3) Reference was also made to section 3A of the Land Acquisition Act, 1994. Reference was also made to Gujarat Stamp Act which levies stamp duty on the transfer of leasehold rights equivalent to rate of conveyance. It was pointed out that as per Article 265 of the Constitution of India, no tax can be levied or collected except by authority of law. It was therefore, submitted that no GST can be levied upon transaction of transfer of leasehold rights.

14.4) In support of his submissions, reliance was placed on the following

decisions:

(1) In case of **Archaka Sundara Rama Dikshatulu v. Archakam Seshadri Dikshathulu and others** reported in (1928) 54 MLJ 76, wherein it was argued that a lease for 99 years or for a long term in consideration of premium paid down is as much an alienation as a sale or mortgage and mere use of the word ‘lease’ or the fact that a long term is fixed would, having regard to the mischief which is sought to be guarded against by holding that service inam lands are not alienable make the lease valid.

(2) In case of **Rama Varma Tambaran v. Rraman Nayar** reported in I.L.R. , 5

Madras 89, there was kanam for 96 years and Innes and Muthuswami Aiyar JJ held that kanam was invalid by observing that there seems to be no real distinction between the mischief of such a transfer in perpetuity and a transfer for the long period of ninety-six years.

(3) In case of **Rama Reddy v. Rangadasan** reported in I.L.R., 49 Madras 543, Davadoss J observed that "A permanent lease is as much an alienation as a sale. The mere fact that rent is payable by the permanent lessee does not make a permanent lease any the less an alienation than a sale."

15. Learned advocate Mr. Manav Gupta appearing for the petitioner in Special Civil Application No.7108 of 2024 referred to the show cause notice, offer of allotment, form of agreement, Notification no. 28/2019, Notification dated 28.06.2017 and subsequent deed to point out that there is a transfer of leasehold rights which cannot be subjected to levy of GST as the same would amount to transfer of immovable property which cannot be considered as supply of either goods or services as perpetual lease of 99 years along with right to construct building thereon on the plot of land, would only suggest that the lessee was de-facto owner and word ‘lessee’ is a misnomer. In support of his submission, reliance was placed on decision of Delhi High Court in case of **M/s. Housing &**

Urban Development Corporation Ltd. v. Municipal Corporation of Delhi reported in ILR (1999) II Delhi wherein it was held that section 120(1)(c) of the Delhi Municipal Corporation Act would not apply to the Housing Urban Development Corporation as allotment of land was made merely to develop for the benefit of Union of India for construction of community centre. In such circumstances, it was held by Delhi High Court in para no. 21 of the decision that for transfer of leasehold right something more is required and from the bare reading of the terms of allotment of the perpetual lease deed, land in question was released on payment of consideration though of minimal premium and the annual gross rent was also payable till the subsistence of lease period along with right to let out the properties and accordingly, the petitioner was

liable to pay the property tax on the leasehold right in the property under section 120(1)(c) of the Delhi Municipal Corporation Act. It was therefore, submitted that the leasehold rights is as an immovable property.

15.1) Reliance was placed on the decision of Delhi High Court in case of **Union of India & another v. Hotel Excelsior Ltd and another** reported in 2012 SCC OnLine Del 4758, wherein it was held that right to conversion of leasehold land into freehold land cannot be permitted as the lessee can never acquire the status of an owner and transfer of leasehold rights cannot be construed as granting permission to convert the land into freehold land as transferee cannot become absolute owner of the property but has only a limited

leasehold rights and ownership cannot be smuggled in through back door of lease. It was therefore, held that whether the term of the lease be 5 years, 50 years, 99 years or even 999 years, the transaction is only a lease and there is always a reversion which continues to vest in the owner in the entire term of the lease and the lessee even if for 999 years does not become the owner and freehold conversion is in the sole discretion of lessor. It was therefore, submitted by learned advocate Mr. Gupta that leasehold rights are required to be considered as an immovable property distinct from the ownership rights.

16. Learned advocate Mr. S.H. Iyer submitted that transfer of leasehold rights in the

property cannot be considered as supply of services.

17. Learned Senior Advocate Mr. Deven Parikh appearing for the petitioner in Special Civil Application No.1653 of 2023 submitted that section 7(1) of the GST Act would not be applicable as dealing with immovable property is not covered either under supply of goods or services. Reference was made to provisions of section 3(4) of the Bombay land Revenue Code. Reliance was placed on the decision of Hon'ble Apex Court in case of **The Anant Mills Co. Ltd. v. State of Gujarat and others** reported in AIR 1975 SC 1234, wherein the Apex Court held that word "land" has been defined in clause (30) of section 2 of the Corporations Act to include land which is being built upon or is built upon or covered

with water, benefits to arise out of land, things attached to the earth or permanently fastened to anything attached to the earth and rights created by legislative enactment over the street. The definition is of inclusive nature and does not exclude from its ambit the underground strata of the land. It was therefore, submitted that the leasehold rights are nothing but benefits to arise out of land.

17.1) Reliance was also placed on the decision of Apex Court in case of **UT Chandigarh Administration and another v. Amarjeet Singh and others** reported in (2009) 4 Supreme Court Cases 660, wherein subject matter was auction of sites for grant of lease for 99 years and it involves neither sale of goods nor rendering of any service and act of

leasing plots by auction did not result in the successful bidder becoming a consumer or the appellants auctioneer becoming service provider so as to award penal interest under the provisions of Consumer Protection Act. The Hon’ble Apex Court held as under:

> “21. With reference to a public auction of existing sites (as contrasted from sites to be `formed'), the purchaser/lessee is not a consumer, the owner is not a `trader' or `service provider' and the grievance does not relate to any matter in regard which a complaint can be filed. Therefore, any grievance by the purchaser/lessee will not give rise to a complaint or consumer dispute and the fora under the Act will not have jurisdiction to entertain or decide any complaint by the auction purchaser/lessee against the owner holding the auction of sites.”

17.2) Reliance was placed on the decision in case of **Gaziabad Development Authority and another v. Mithilesh Goel** reported in (2017) 14 Supreme Court Cases 300, wherein Hon'ble Apex Court held that allotment of house by Gaziabad Development Authority was an immovable property and not services of any kind.

17.3) Reliance was also placed on the decision of Hon'ble Apex Court in case of **Commissioner, Central Excise and Customs, Kerala v. Limited and Toubro Limited** reported in (2016) 1 Supreme Court Cases 170, wherein Hon'ble Apex Court while considering the levy of service tax on indivisible works contract held that same

is not leviable prior to amendment in the Finance Act, 1994 with effect from 1.06.2007 as works contracts is a separate species of contract distinct from contracts for services simpliciter recognised by the world of commerce and the law and has to be taxed separately as such.

17.4) Reliance was placed on decision in case of **Narne Construction Private Limited and others v. Union of India and others** reported in (2012) 5 Supreme Court Cases 359, wherein Hon'ble Apex Court held as under:

> "8. Having regard to the nature of the transaction between the appellant-company and its customers which involved much more than a simple transfer of a piece of immovable property it is clear that the same

constituted 'service' within the meaning of the Act. It was not a case where the appellant- company was selling the given property with all advantages and/or disadvantages on "as is where is" basis, as was the position in U.T. Chandigarh Administration and Anr.v.Amarjeet Singh and Ors., II (2009) CPJ 1 (SC)=II (2009) SLT 736=(2009) 4 SCC 660. It is a case where a clear cut assurance was made to the purchasers as to the nature and the extent of development that would be carried out by the appellant-company as a part of the package under which sale of fully developed plots with assured facilities was to be made in favour of the purchasers for valuable consideration. To the extent the transfer of the site with developments in the manner and to the extent indicated earlier was a part of the transaction, the appellant-company had indeed undertaken to provide a service. Any deficiency or defect in such service would make it accountable before the competent Consumer Forum

> at the instance of consumers like the respondents."

17.5) Reliance was placed on the decision in case of **State of Karnataka and others v. Pro Lab and others** reported in (2015) 8 Supreme Court Cases 557, wherein it is held as under:

> "20. To sum up, it follows from the reading of the aforesaid judgment that after insertion of clause 29-A in Article 366, the Works Contract which was indivisible one by legal fiction, altered into a contract, is permitted to be bifurcated into two: one for "sale of goods" and other for "services", thereby making goods component of the contract exigible to sales tax. Further, while going into this exercise of divisibility, dominant intention behind such a contract, namely, whether it was for sale of goods or for services, is rendered otiose or immaterial. It follows, as a sequitur, that by virtue of clause 29-A of Article 366, the State Legislature is now empowered to segregate the goods part of the Works Contract and impose sales

tax thereupon. It may be noted that Entry 54, List II of the Constitution of India empowers the State Legislature to enact a law taxing sale of goods. Sales tax, being a subject-matter into the State List, the State Legislature has the competency to legislate over the subject.

21. Keeping in mind the aforesaid principle of law, the obvious conclusion would be that Entry 25 of Schedule VI to the Act which makes that part of processing and supplying of photographs, photo prints and photo negatives, which have "goods" component exigible to sales tax is constitutionally valid. Mr. Patil and Mr. Salman Khurshid, learned senior counsel who argued for these assessees/respondents, made vehement plea to the effect that the processing of photographs etc. was essentially a service, wherein the cost of paper, chemical or other material used in processing and developing photographs, photo prints etc. was negligible. This argument, however, is founded on dominant intention theory which has been repeatedly rejected by this Court as no

> more valid in view of 46th Amendment to the Constitution.”

18. Learned advocate Mr. Hardik Modh for the petitioner submitted that transfer of leasehold rights is nothing but a capital asset as held by the Hon’ble Apex Court in case of **R.K. Palshikar (HUF) v. Commissioner of Income Tax M.P. Nagpur** reported in (1998) 3 Supreme Court Cases 594, wherein it is held as under:

> “8. The next question which we have to consider is whether the provisions of Section 12-B of the said Act can be brought into play, although, what was transferred was only lease hold interests in the lands in question. In this connection, it is significant that the leases are for a long period of 99 years and in all the transactions of lease premium has been charged by the assessee for the grant of the lease concerned. In Traders

and Miners Ltd. V/s. Commr. of Income-tax, Bihar and Orissa, (1955) 27 ITR 341, a case decided by a Division Bench of the Patna High Court, the assessee let on lease for 99 years a portion of a Zamindari acquired by it. The lease related to the surface right together with nine mica mines located in that area. The consideration for the lease was the payment of a 'salami' and a reserve rent per year. The Income-tax Officer determined the cost to the assessee of the mineral rights and after deducting this amount from the salami, he assessed the balance to tax as capital gains under Section 12-B of the said Act. It was held by the Patna High Court that the gains arising from the said transaction were rightly taxed. This decision has been cited without comment by Kanga and Palkhivala in their commentary on the Law of Income-tax (7th Edition) at page 550 and no contrary case has been cited in the said text book or has been brought to our attention. It is true that the decision of the Patna High Court relates to a case of mining lease, but to our mind, the principle laid down

> in that case can well be applied to the case before us. In the first place, the lease is for a long period, namely, 99 years, hence it would appear that under the leases in question the assessee has parted with an asset of an enduring nature, namely, the rights to possession and enjoyment to the properties leased for a period of 99 years subject to certain conditions on which the respective leases could be terminated. A premium has been charged by the assessee in all the leases. In these circumstances, we fail to see how it could be said that the provisions of Section 12-B of the said Act cannot be brought into play. The grant of the leases in question, in our view, amounts to a transfer of capital assets as contemplated under Section 12-B of the said Act."

19. Learned Senior Advocate Mr. Sreedharan appearing for the petitioner in Special Civil Application No.10501 of 2024 reiterated the submissions made by the learned advocates for other petitioners. It was submitted that

leasehold rights transferred by the lessee is in relation to the property which has been defined and construed in various ways. It was submitted that property refers not only to physical objects that are owned but also to rights of ownership. He invited the attention of the Court with regard to property defined in *Corpus Juris Secundum* wherein the property has been defined as under:

> “The word "property" has been defined and construed in various ways; it refers not only to physical objects that are owned but also to rights of ownership.
>
> The word "property" is a very comprehensive one. In addition to its meaning in the popular vernacular, it has a common-law definition as understood by the courts, and it may be defined in statute for a particular purpose or for a general purpose
>
> The construction of the word "property" depends on the context with which it is used. Commonly, the word "property" is used in two different senses. First, it is

> applied to external things that are the objects of rights or estates; that is, things that are the object of ownership. Second, it is applied to the rights or estates that a person may acquire in or to things. In strict legal parlance," "property" is used to designate a right of ownership or an aggregate of rights that are guaranteed and protected by the government. "Property" has been defined as the right of any person to possess, use, enjoy, and dispose of a thing" and to exclude everyone else from interfering with it. More succinctly, it has been defined as any vested right of any value
>
> > Thus, unless a more specific definition applies, "property" refers to both the actual physical object and the various incorporeal ownership rights in the object, such as the rights to possess, to enjoy the income from, to alienate, or to recover ownership from one who has improperly obtained title to the object.”

19.1) Referring to the above definition, it was submitted that the property includes the right of ownership or

aggregate of rights that are guaranteed and protected by the Government. It was therefore, submitted that the leasehold rights is a property which is an incorporeal ownership right in the objects such as the rights to possess, to enjoy income from, to alienate, or to recover ownership. It was submitted that property is more than just the physical thing, the land, the bricks, the mortar, as it is also the sum of all the rights and powers incident to ownership of the physical thing, it is the tangible and intangible. Reliance was placed on decision in case of **Union Pacific Railroad Company v. Santa Fe Pacific Pipelines** reported in Inc., 231 Cal. App. 4Th 134.

19.2) Reliance was also made to the

decision in case of **Schweihs v. Chase Home Finance , LLC** reported in 2015 IL App(1st) 140683, wherein it is held that a common idiom describes property as a “bundle of sticks”, i.e. collection of individual rights which, in certain combinations, constitute property, state law determines only which sticks are in a person’s bundle.

19.3) Reference was also made to section 54 of the Transfer of Property Act which defines “Sale” read with section 105 and 108 of Transfer of Property Act. Reliance was also placed on clause(j) of the section 108 of the Transfer of Property Act relating to lease as part of rights and liabilities of the lessee which reads as under:

> “108(j) the lessee may transfer absolute or by way of mortgage or sub-lease the whole or any part of his interest in the property, and any transferee of such interest or part may again transfer it. The lessee shall not , by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease.”

19.4) It was therefore, submitted that immovable property may be tangible or intangible right which relates to the thing as the sale is an absolute assignment whereas whatever right the lessee has, is sale of interest in land which is equivalent to sale of land. It was therefore, submitted that sale of leasehold rights cannot fall within the scope of supply of goods or services as it is not an activity but an event of transfer of leasehold right. It was

submitted that prior to coming into force of GST, service tax was also not leviable on transfer of leasehold rights as the service tax is leviable on bilateral contract whereas deed of assignment is not a contract.

19.5) Reference was also made to commentary on principles of law of transfer by Shantilal Mohanlal Shah on the Transfer of Property Act, 1882 wherein it is opined that “there is a clear distinction between a contract which is still to be performed and of which specific performance may be sought and a conveyance by which title of property has actually passed”. It was further pointed out that scope of Transfer of Property Act is stated to regulate and deal with the

transfer of property only by act of parties other than transfer of property by operation of law which occurs in cases of intestate and testamentary succession, forfeiture, insolvency and Court sales and the Transfer of Property Act deals with transfer of property inter vivos i.e. from one living person to another living person.

19.6) Considering the aforesaid scope of Transfer of Property, reference was made to commentary on Law of Property by K. Krishna Menon in relation to sections 54 to 57 of the Transfer of Property Act pertaining to sale. Reference was made to analysis of the sale transaction where four points were noted with regard to the parties, the price, the subject matter and

the manner of transfer.

19.7) Reference was made to the decision in case of **Mohori Bibi** reported in 30 Cal 539, P.C. wherein all the contracts by infants were declared to be void and infant cannot be a vendor of property. In that context it was pointed out that “in other words as Sulaiman, counsel for the appellant, put it, conveyance is something more than a contract; as soon as the sale deed is executed, the transaction passes from the domain of contract into that of conveyance. The former would be governed by the Contract Act, the latter by the Transfer of Property Act, and the Transfer of Property Act nowhere says that an infant is incapable of being a transferee.” It was therefore, submitted

that even as per Indian law, guardian of an infant is competent to bind the minor for its estate by contract or purchase of immovable property.

19.8) Reference was made to the above commentary to point out that transaction of sale of leasehold rights is nothing but sale of immovable property as contract of sale of leasehold right results into transfer of property on being reduced into writing by Deed of Assignment.

19.9) Reliance was also placed on the following decisions:

(1) In case of **Commissioner of Income Tax, Madras v. Bagyalakshmi & Co.** reported in (1965)55 ITR 550 (SC)

Court, wherein it is held as under:

> "We have held in Commissioner of Income-tax v. Abdul Rahim & Co. [1965] 55 ITR 651 that the Income-tax Officer can reject the registration of a firm if it is not genuine or valid and if the application for registration has not complied with the rules made under the Act. Here we have admittedly a genuine partnership. It cannot even be suggested that it is invalid. The only objection is that Guruswamy Naidu and Venkatasubba Naidu have less shares in the partition deed than those shown in the partnership deed. If the distinction between the three concepts is borne in mind much of the confusion disappears. A partnership is a creature of contract. Under Hindu law a joint family is one of status and right to partition is one of its incidents. The income-tax law gives the Income-tax Officer a power to assess the income of a person in the manner provided by the Act. Except where there is a specific provision of the Income-tax Act which derogates from any other statutory law or personal law, the provision will have to be considered in the light of the relevant branches of law. A contract of partnership has no concern with the obligation of the

partners to others in respect of their shares of profit in the partnership. It only regulates the rights and liabilities of the partners. A partner may be the karta of a joint Hindu family; he may be a trustee ; he may enter into a sub-partnership with others; he may, under an agreement, express or implied, be the representative of a group of persons; he may be a benamidar for another. In all such cases he occupies a dual position. Qua the partnership, he functions in his personal capacity ; qua the third parties, in his representative capacity. The third parties, whom one of the partners represents, cannot enforce their rights against the other partners nor the other partners can do so against the said third parties. Their right is only to a share in the profits of their partner-representative in accordance with law or in accordance with the terms of the agreement, as the case may be. If that be so, Guruswamy Naidu could have validly entered into a genuine partnership with others taking a 10 annas share in the business, though in fact as between the members of the family he has only a 2 annas share therein. He would have been answerable for the profits pertaining to his share to the

divided members of the family, but it would not have affected the validity or genuineness of the partnership. So much is conceded by the learned Attorney-General. If so, we do not see why a different result should flow if instead of one member of the divided family two members thereof under some arrangement between the said members of the family took 10 annas share in the partnership. If the contention of the revenue was of no avail in the case of representation by a single member, it could not also have any validity in the case where two members represented the divided members of the family in the partnership. As the partnership deed was genuine, it must be held that the shares given to Guruswamy Naidu and Venkatasubba Naidu in the said partnership are correct in accordance with the terms of the partnership deed.

This court in Charandas Haridas v. Commissioner of Income-tax [1960] 39 ITR 202, 208; [1960] 3 SCR 296 had to consider a converse position. There, a karta of a Hindu undivided family was a partner in 6 managing agency firms and the share of the managing agency commission received by him as such partner was being assessed as the income of the family.

Thereafter, there was a partial partition in the family by which he gave his daughter a one pie share of the commission from each of two of the managing agencies and the balance in those agencies and the commission in the other four managing agencies were divided into five equal shares between himself, his wife and three minor sons. The memorandum of partition recited that the parties had decided that commission which accrued from January 1, 1946, ceased to be joint family property and that each became absolute owner of his share. Notwithstanding the partition, the income-tax authorities assessed the said total income as the income of the joint family. The Bombay High Court agreed with that view. But this court held that as the partition document was a genuine one, it was fully effective between the members of the family and therefore the income in respect of the divided property was not the income of the Hindu joint family. In that context, Hidayatullah J., speaking for the court, made the following observations :

> "The fact of a partition in the Hindu law may have no effect upon the position of the

partner, in so far as the law of partnership is concerned, but it has full effect upon the family in so far as the Hindu law is concerned. Just as the fact of a karta becoming a partner does not introduce the members of the undivided family into the partnership, the division of the family does not change the position of the partner vis-a-vis the other partner or partners. The income-tax law before the partition takes note, factually, of the position of the karta, and assesses not him qua partner but as representing the Hindu undivided family. In doing so, the income-tax law looks not to the provisions of the Partnership Act, but to the provisions of Hindu law. When once the family has disrupted, the position under the partnership continues as before, but the position under the Hindu law changes. There is then no Hindu undivided family as a unit of assessment in point of fact, and the income which accrues cannot be said to be of a Hindu undivided family. There is nothing in the Indian income-tax law or the law of partnership which prevents the members of a Hindu joint family from dividing any asset."

> These observations support the conclusion we have arrived at. The division in the joint family does not change the position of the karta as a partner vis-a-vis the other partner or partners in a pre-existing partnership, because the law of partnership and Hindu law function in different fields. If so, on the same principle, a divided member or some of the divided members of an erstwhile joint family can certainly enter into a partnership with third parties under some arrangement among the members of the divided family. Their shares in the partnership depends upon the terms of the partnership; the shares of the members of the divided family in the interest of their representative in the partnership depends upon the terms of the partition deed."

(2) In case of **Vijaya Oil Mills v. State of Kerala** reported in 1980(45)STC (Ker), wherein it is held as under:

> "11. To pay tax is a duty. When it is levied it becomes a liability. Consequently, tax after it becomes

due is a debt. It does not cease to be a debt from the mere fact that special provisions for its collection are made in the Act imposing its levy. After tax becomes due the relationship between the assessee and the department is really that of debtor and creditor. Arrears of sales tax are "debts" and an assessee who defaults to pay tax is a "debtor" coming within the meaning of those expressions in Sections 59 and 60 of the Indian Contract Act.

12. When an enactment is said to be complete what is meant is only that it is exhaustive to the extent it goes. It does not mean that in respect of matters not specifically covered by it general principles of law are excluded from consideration and cannot be applied even if they are not inconsistent with it. Otherwise, even principles of interpretation of statutes cannot be applied to it. A statute until it is repealed is living law. To attempt to imprison it within the sections in it is about as reasonable as to attempt to confine a stream within a pond. The water in the pond would soon become a stagnant pool and there would no longer be a living stream. General principles of law to the extent they are not

specifically excluded are applicable to any enactment. With respect we consider the decision in Jogendra Mohan Sen v. Uma Nath Guha (1908) I.L.R. 35 Cal. 636, as laying down the correct law and do not agree with the decision in Ganga Bishun Singh v. Mahomed Jan (1906) I.L.R. 33Cal. 1193."

(3) In case of **Income Tax Officer v. Mani Ram Etc.** reported in (1969) 72 ITR 203, wherein it is held as under:

"7. The argument was that these sections apply to a case of a regular assessment and the enactment of these sections should be treated as a Parliamentary exposition of section 18A(3) of the earlier Act as referring only to a case of regular assessment. We are unable to accept this argument as correct. There is nothing in the 1961 Act to suggest that Parliament intended to explain the meaning or clear up doubts about the meaning of the word "assessed" in section 18A(3) of the earlier Act. Generally speaking, a subsequent Act of Parliament affords no useful guide to the meaning of another Act which came into existence before

the later one was ever framed. Under special circumstances, the law does, however, admit of a subsequent Act to be resorted to for this purpose but the conditions under which the later Act may be resorted to for the interpretation of the earlier Act are strict; both must be laws on the same subject and the part of the earlier Act which it is sought to construe must be ambiguous and capable of different meanings. For example, in Kirkness (Inspector of Taxes) v. John Hudson & Co. Ltd. [1955] AC 696, it was held by the House of Lords that the ordinary meaning of the word "sale" importing a consensual relation is to be attributed to the use of it in the context of section 17(1)(a) of the Act of 1945. Since there was no ambiguity in the section, it was not permissible to seek guidance in its construction from later Finance Acts, although it was directed by Parliament to be construed as one with them. At page 714 of the report Viscount Simonds states:

> "I have looked at the later Acts to which the Attorney-General referred in order to satisfy myself that they do not contain a retrospective declaration as to the meaning of the earlier Act. They

> clearly do not, and I do not think that it has been contended that they do. At the highest it can be said that they may proceed upon an erroneous assumption that the word 'sold' in section 17(1)(a) of the Income Tax Act, 1945, has a meaning which I hold it has not. This may be so and, if so, it is an excellent example of the proposition to which reference was made in the report of the Committee of the Privy Council in In re MacManaway [1951] SC 161 and again by my noble and learned friend Lord Radcliffe in Inland Revenue Commissioners v. Dowdall, O'Mahoney & Co. Ltd. [1952] AC 401 that the beliefs or assumptions of those who frame Acts of Parliament cannot make the law."

(4) In case of **Commissioner of Income Tax v. Shaw Wallace and Company** reported in (1932) SCC 515 (SC), wherein it is held as under:

> “15. Some reliance has been placed in argument upon Section 4 (3)(v) which appears to suggest that the word " income " in this Act may

have a wider significance than would ordinarily be attributed to it. The Sub-section says that the Act " shall not apply to the following classes of income," and in the category that follows, Clause (v) runs:-

> Any capital sum received in commutation of the whole or a portion of a pension, or in the nature of consolidated compensation for death or injuries, or in payment of any insurance policy, or as the accumulated balance at the credit of a subscriber to any such Provident Fund.

16. Their Lordships do not think that any of these sums, apart from their exemption, could be regarded in any scheme of taxation of income, and they think that the clause must be due to the over anxiety of the draftsman- to make this clear beyond possibility of doubt. They cannot construe it as enlarging the word "income " so as to include receipts of any kind'-, which are not specially exempted. They do not think that the clause is of any assistance to the appellant.”

19.10) Reliance was placed on the decision of Hon’ble Apex Court in case of **D.G. Gose and Co.(Agents) Pvt. Ltd. v. State of Kerala and another** reported in (1980) 2 Supreme Court Cases 410, wherein Hon’ble Apex Court while considering validity of provisions of Kerala Building Tax Act, 1975 interpreted words tax and taxation in relation to Article 366(28) of the Constitution of India read with Article 246 Schedule VII List I and Entry 86 and List II Entry 49 of the Constitution of India.

19.11) The Hon’ble Apex Court has also analysed words “assets” in relation to Schedule VII List I of Entry 86 so as to interpret the tax on the lands and building. It was submitted that

alternatively GST on the consideration of transfer of leasehold right would also be taxed on the building which was never leased by GIDC but constructed by lessee to run the industry on the leasehold land. It was further submitted that land apurtenant to building is also a building. Reliance was placed on the decision of Apex Court in case of **Dr. K.A. Dhairayawan and others v. J.R. Thakur and others** reported in 1959 SCR 799, wherein Hon'ble Apex Court while analysing the provisions of Bombay Rents, Hotel and Lodging House Control Act, 1947 held that upon a proper construction of lease, there was a demise only of the land and not of the building and consequently, the provisions of the Act did not apply to the contract for delivery of possession of the building as

the ownership in the building was with the lessees and in which the lessors had no right while the lease subsisted. It was held that there was no absolute rule of law in India that whatever was affixed or built on the soil became part of it and was subjected to the same rights of property as the soil itself. It was therefore, submitted that the building transferred along with leasehold rights cannot be subjected to levy of GST as per Entry No.5 in Schedule-III of the GST Act as it cannot be considered as supply of goods or services.

19.12) Reference was made to the Notification No.26/2012-ST dated 20.06.2012 as amended by Notification No. 2/2013 dated 1.03.2013 and 9/2013 dated

8.5.2013 in section 66B of the Finance Act 1994 pertaining to charge of service tax. In the said notification, construction as per Entry No.12 with regard to construction of a complex, building, civil structure or a part thereof intended for a sale, value of the land is included in the amount charged from the service receiver. It was therefore, submitted that same provision is incorporated in the GST Act while prescribing rate of GST being GST on service under Heading 9954 with regard to construction services. Reference was made to Notification No.11/2017 dated 28.06.2017 more particularly, Note No.2 wherein the rate of GST applicable at 9% would consider the value of land or undivided share of land, as the case may be, in such supply of services to be

deemed to 1/3rd of total amount charged for such supply.

19.13) Reference was also made to Explanation which has been inserted with effect from 25.01.2018 wherein it is explained that total amount means the sum total of consideration charged for aforesaid service and amount charged for transfer of land or undivided share of land as the case may be including by way of lease or sublease. It was therefore, submitted that as per Entry No.16 of the said notification, services by Central Government, State Government, etc., on supply of land or undivided share of land by way of lease or sub-lease where such supply is a part of composite supply of construction of flats etc. provides nil

rate of GST wherein it is further provided that nothing contained in this entry shall apply to an amount charged for such lease or sub lease-in excess of one third of the total amount charged for the said composite supply. It was therefore, submitted in the alternative that if transaction of transfer of leasehold right is held to be liable as supply of services then transferror should also entitled to take the benefit of input tax credit as provided in section 11 of the GST Act.

19.14) Reference was also made to relevant portion of modal GST law published in November 2016 prior to coming into force of GST Act to point out that in Agenda Item 2A, GST Treatment of Land and Building (Real Estate) was considered.

Thereafter reference was made to the minutes of the 7th GST Council Meeting held on 22-23 December 2016 wherein the aforesaid agenda was considered and GST council decided not to introduce GST on land and building at this stage and agreed that this issue can be revisited after a year or so of the implementation of GST. It was therefore, submitted that there is no prescribed rate of GST on land and building but by virtue of Schedule III, Item No.5, land and building are excluded from the scope of supply of goods and services. It was therefore, submitted that the transfer of leasehold rights being one of the right of bundle of properties is nothing but an immovable property and therefore, would fall within the scope of land and building which is specifically

excluded from the purview of scope of supply of goods and services by Schedule-III of the GST Act.

19.15) It was submitted that leasehold rights are nothing but a benefit arising out of the land which is allotted by GIDC and such interest in land is also to be regarded as immovable property.

19.16) It was therefore, submitted that as per the terms of the lease deed executed by GIDC, lessee can assign his interest in any lawful manner and such interest itself would be an immovable property which can be validly assigned. However, it is also true that right of lessee is not as much absolute as that of purchaser of property inasmuch as it may

be excluded altogether by the parties. It was therefore, submitted that as per the permission of GIDC, lessee has right to assign leasehold rights in the property.

19.17) Reference was also made to General Clauses Act where the immovable property is defined under section 3 of the said Act as well as Registration Act and definition in both the Acts define immovable property which includes land and building intangible rights such as easement rights, rights to ferries and fisheries which would also include equity of redemption in mortgaged property, the interest of a mortgagee and other rights which cannot come within the ordinary exception of actual physical moveable property and those which cannot be included in the

definition mentioned in Sale of Goods Act. It was therefore, submitted that there is a distinction between moveable and immoveable property and the leasehold rights would partake the character of immovable property as it is right in land and it affects only immovable propety being incorporeal right as during the lease, lessee would be entitled to exclusive possession to enjoy the interest in the property.

19.18) It was submitted that as per the guiding rule of statutory interpretation, purposive interpretation is required to be made of provisions of section 7 of the GST Act.

19.19) Reliance was placed on the

decision of Hon’ble Apex Court in case of **Gopal Saran v. Satyanarayana** reported in (1989) 3 Supreme Court Cases 56, wherein interpretation of word “assignment” is made as under:

> “10. On the facts found, it cannot be said or even argued that there was any assignment by the tenant, "Assignment", it has been stated in Black's Law Dictionary, Special Deluxe Ed., p. 106, "is a transfer or making over to another of the whole of any property, real or personal, in possession or in action, or of any estate or right therein". It has further been stated as "The transfer by a party of all its rights to some kind of property, usually intangible property such as rights in a lease, mortgage, agreement of sale or partner- ship." It has to be examined whether there was sub-letting or otherwise parting with possession in terms of Sec. 13(1) (e) of the Act.”

19.20) Referring to above, it was submitted that assignment of leasehold rights is transfer of intangible property

with interest and possession of the land and building and therefore, the same can only be considered as sale of land and building which would be out of purview of scope of supply of goods and services under the GST Act. It was therefore, submitted that GST cannot be levied upon the transaction of assignment of leasehold rights of the land allotted by GIDC under 99 years of lease.

20. Learned Senior Advocate Mr. S.N. Soparkar appearing for the petitioner in Special Civil Application No. 3736 of 2024 adopted the submissions made by other learned advocates for the petitioners referred to conveyance deed executed by the original lessee for assignment of leasehold rights which comprises both the leasehold rights in land and

ownership rights in building. It was therefore, submitted referring to the provisions of section 7(1) read with section 2(52) and section 2(102) of the GST Act that transaction in question cannot be considered as supply of goods or services as it pertains to the immovable property being land and building which is excluded from the scope of supply of goods and services under Schedule III of the GST Act. Reliance was placed on the decision of Apex Court in case of **Jilubhai Nanbhai Khachar and others v. State of Gujarat and another** reported in 1995 Supp (10) Supreme Court Cases 596 wherein the Hon'ble Apex Court has analysed the definition of land given in Black's Law dictionary and Law Lexicon as under:

> "11. In Black's Law Dictionary (Sixth Edition) at page 877, land is defined to mean- "in the most general sense, comprehends any

ground, soil or earth whatsoever, including.....rocks. "Land" may include any estate or interest in lands, either legal or equitable, as well as easements and incorporeal hereditaments. Technically, land signifies everything comprehending all things of a permanent nature, and even of an unsubstantial provided they be permanent. Ordinarily, the term is used as descriptive of the subject of ownership and not the ownership. Land is the material of the earth, whatever may be the ingredients of which it is composed, weather, soil, rock, or other substance, and includes free or occupied space for an indefinite distance upwards as well as downwards, subject to limitations upon the use of airspace imposed, and rights in the use of airspace granted by law.

12. According to the Law Lexicon (Reprint edn. 1987) by Ramanatha Iyer p. 701, the word 'land" in the ordinary legal sense comprehends everything of a fixed or permanent nature and, therefore, growing trees, land includes the benefit arise out of the land and things attached to the earth or permanently means everything attached to the earth and also

the share in or charges on, the revenue or rent of villages or other defined portions of territory. Land includes the bed of the sea below high water mark.....Land shall extend to messuages, and all other hereditaments, whether corporal or incorporeal and whether freehold or of any other tenure and to money to be paid out in the purchase of land. Land in its widest signification would therefore include not only the surface of the ground, cultivable, uncultivable or waste lands but also everything on or under it. In Jagannath Singh v. State of U.P., AIR (1960) SC 1563 p. 1568, this Court held that the word "land" is wide enough to include all lands whether agricultural or non-agricultural land. In State of U.P. v. Sarju Devi, [1978] 1 SCF 18, this court held that the definition of the land in Section 3 (14) shows that it is not necessary for the land to fall within its purview that it must be actually under cultivation or occupied for purposes connected with agriculture. The requirement is amply satisfied even if the land is

either held or occupied for the purposes connected with agriculture. The word "held" only means possession of legal title and does not require actual connected occupation. In State of Gujarat v. Kamla Ben Jivan Bhai, [1979] Supp. 2 SCC 440, this Court held that actual cultivation is not necessary to constitute an estate and the right to collect grass is a right annexed to land which was held to be an estate and abolition of the right to pay annual amount was an agrarian reform. In Sri Ram Ram Narain Medhi v. State of Bombay, [1959] Supp. 1 SCR 489, this Court held that the Code is a law relating to land tenures. The right in relation to an estate .used in Article 31A has been noted in a very com-prehensive sense. In Digvijay Singh Hamirsinhji v. Manji Savda, [1969] 1 SCR 405, this Court interpreting Section 18 of Saurashtra Land Re-forms Act, 1951 held that the Girasdar to whom the ruler made the grant was bound by the provisions of that Act and that he was not entitled to have his tenant evicted except in accordance with the provisions of the Act."

20.1) Referring to above definition, it was submitted that land includes benefits arising out of land and leasehold right is nothing but a benefit arising out of land and as such assignment of such leasehold rights is nothing but a transfer of immovable property subjected to stamp duty as well as registration. It was further submitted that under the provisions of Wealth Tax Act, 1957, asset and property are defined which are subject matter of controversy which is before Hon'ble Supreme Court in case of **Ahmed G.H. Arif and others v. Commissioner of Wealth Tax, Calcutta** reported in (1969) 2 Supreme Court Cases 471, wherein Hon'ble Apex Court has analysed the property vis-a-vis assets as under:

“8. Now "property" is a term of the widest import and subject to any limitation which the context may require, it signifies every possible interest which a person can clearly hold or enjoy. The meaning of the word "property" has come up for examination before this Court in a number of cases. Reference may be made to one of them in which the question arose whether Mahantship or Shebaitship which combines elements of office and property would fall within the ambit of the word "property" as used in Article 19(1)(f) of the Constitution. It was observed in the Commissioner, Hindu Religious Endowments, Madras v. Shri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt(1) that there was no reason why that word should not be given a liberal and' wide connotation and should not be extended to those well recognised types of interests which had the insignia or characeristics of proprietary right. Although Mahantship was not heritable like the ordinary property, it was still held

> that the Mahant was entitled to claim protection of Art. 19(1) (f) of the Constitution. It is stated in the Halsbury's Laws of England, Vol. 32 3rd Edn. page 534 that an annuity (which is a certain sum of money payable yearly either as a personal obligation of the grantor or out of property not consisting exclusively of land) can be an item of property separate and distinct from the beneficial interests therein and from 'the funds and other property producing it is property capable of passing on a death and can be separately valued for the purpose of estate duty."

20.2) Referring to above analysis, it was submitted that the word "property" should be given liberal and wide connotation including the various types of interest which have characteristics of property right and therefore, the leasehold rights are nothing but property in land which is an immovable property.

20.3) Reliance was also made on the decision of Apex Court in case of **Commissioner of Income Tax Assam, Tripura and Manipur v. Panbari Tea Co. Ltd** reported in (1965) 57 ITR 422, wherein with regard to whether premium payable in installments in addition to rent of a leasehold property was a revenue or capital income, the Hon'ble Apex Court held as under by drawing distinction between the premium and rent:

> "2. The short question that arises in this appeal is whether the amount described as premium in the lease deed is really rent and, therefore, a revenue receipt. Before we look at the lease deed it will be convenient to notice briefly the law pertaining to the concept of premium, which is also described as salami.
>
> The distinction between premium and rent was brought out by the Judicial Committee in Raja Bahadur

Kamakshya Narain Singh of Ramgarh v. Commissioner of Income-tax [1943] 11 ITR 513 (PC), thus:

> "It (salami) is a single payment made for the acquisition of the right of the lessees to enjoy the benefits granted to them by the lease. That general right may properly be regarded as a capital asset, and the money paid to purchase it may properly be held to be a payment on capital account. But the royalties are on a different footing."

It is true that in that case the leases were granted for 999 years; but, though it was one of the circumstances, it was not a decisive factor in the Judicial Committee coming to the conclusion that the salami paid under the leases was a capital asset. This court in Member for the Board of Agricultural Income-tax, Assam v. Sindhurani Chaudhurani [1957] 32 ITR 169; [1957] SCR 1019 denned "salami" as follows:

> "The indicia of salami are (1) its single non-recurring character and (2) payment prior to the creation of the tenancy. It is the consideration paid by the tenant for being let into possession and can be neither

> rent nor revenue but is a capital receipt in the hands of the landlord."

It is true that in that case the payment was paid in a single lump sum, but that was not a conclusive test, for salami can be paid in a single payment or by instalments. The real test is whether the said amount paid in a lump sum or in instalments is the consideration paid by the tenant for being let into possession. This court again in Chintamani Saran Nath Sah Deo v. Commissioner of Income-tax [1961] 41 ITR 506 [1961] 2 SCR 790 considered all the relevant decisions on the subject in the context of licences granted to the assessee to prospect for bauxite in some cases for six months and in others for a year or two and observed:

> "The definition of salami was a general one, in that it was a consideration paid by a tenant for being let into possession for the purpose of creating a new tenancy."

> Applying that test this court held in that case that under the said licences there was a grant of a right to a portion of the capital of the licensor in the shape of a general

right to the capital asset."

20.4) Referring to above decision, it was submitted that even the premium is held to be a capital receipt and not as revenue receipt by the Hon'ble Apex Court considering that the real test is whether the amount paid in a lump-sum or in installments, is the consideration paid by the tenant for being let into possession resulting into grant of right to a portion of the capital of the lessor in the shape of a general right to the capital asset. It was therefore, submitted that leasehold rights are nothing but a capital asset in an immovable property which cannot be subjected to in form of land and building and therefore, will be out of scope of supply of goods and services as per the Schedule-III of the Act.

21. On the other hand, learned Advocate General Mr. Kamal Trivedi for the respondent State submitted that leasehold right with respect to the immovable property (I.e. land) is an "interest" in the immovable property. In fact, it is an intangible estate, which does not have physical existence or identity as being commonly understood.

21.1) It was submitted that when transfer of such a leasehold right takes place, it would be nothing but transfer of interest in the immovable property.

21.2) It was submitted that the question as to what is the meaning of the term "immovable property", more particularly when the said term is not defined under

the CGST Act, 2017, or GGST Act, 2017, as per well settled legal position, in such an eventuality, meaning of the said term should be understood in context of the provisions of the legislation with which the question has arisen i.e. GST Act and not in terms of the definition of the said expression obtaining under various other legislations, which are not pari materia legislations or in other words, which are enacted for different purposes.

21.3) It was therefore, submitted that in view of this, even though lease-hold right is an interest in immovable property, the said interest cannot be dubbed as an immovable property' itself, since, it is not envisaged like this under various other provisions of the GST Act,

some of which are referred to hereunder:-

(i) Section 2(119) of the GST Act, which defines the 'Works Contract, wherein the term 'immovable property is used in the sense that it has to be any immovable property in tangible form ie in physical form

(ii) Section 17(5)(c) and (d) of the GST Act dealing with Apportionment of credit and blocked credits, once again uses the term an immovable property (other than plant and machinery)

(iii) Section 12 of the IGST Act, which applies by virtue of Section 2(120) of the Act, whereby words and expressions not defined in the Act shall have the same meaning as assigned to them, inter-alia, in the said IGST Act.

The said Section 12(3) refers to the

term 'an immovable property with reference to its physical location so as to determine the place of supply of services.

(iv) Section 13(4) of the IGST Act dealing with place of supply of services where location of supply or recipient is outside India uses the term Immovable property.

21.4) It was submitted that the aforesaid reasoning of interpretation would also be applicable with reference to the erstwhile Finance Act, 1994, which also did not define the term "immovable property and its Section 65B(44), dealt with the term 'service tax, wherein the activity relating to transfer of title in immovable property, by way of sale, gift or in any other manner, was excluded from the purview of 'service tax. In the

Finance Act, 1994, also, the interest in immovable property was not being considered as immovable property', which is also discernible from the reading of other provisions like Sections 65(90a), 65(105)(zzzz) of the Finance Act, which consider immovable property' in tangible / physical form.

21.5) It was submitted that if any benefit arising out of land or anything attached to the land were to be treated as land itself ie immovable property by itself, as defined under Section 3(26) of the General Clauses Act, 1897, or under Section 2(6) of the Registration Act, 1908, then in that case, it would, in the first blush, seem to be highly illogical to treat growing crops, grass and things

attached to the land as 'movable property under Section 2(52) of the GST Act. However, it is not so, because it has been deemed fit by the legislature to treat 'growing crops, grass and things attached to or forming part of the land, as movable, under the GST Act as well as the Transfer of Property Act, 1882, though the same is treated as immovable property under the above-referred General Clauses Act, 1897, and the Registration Act, 1908.

21.6) It was submitted that in the present case, GIDC being the owner of the land has bundle of rights qua the same, viz

(i) right to own;
(ii) right to construct:
(iii) right to give a license;
(iv) right to possess and occupy
(v) right to give a lease,
(vi) right to sue.

(vii) right to compensation; etc.
(viii) reversion right

21.7) It was therefore, submitted that now, when one of the rights i.e. right to occupy the land is transferred by GIDC in in favour of the lessee, it is to be treated as supply of service under the GST Act and same is susceptible to GST, then its further transfer, which is also transfer of the right to occupy / possess, will continue to remain as supply of service, which characteristic will not change, merely because, the lessee of GIDC effects absolute transfer thereof in favour of an assignee, leaving no right whatsoever with him in respect of the said lease-hold land.

21.8) It was therefore, submitted that the interest in land would remain the same

with the recipient of service. whether he gets the same supplied directly by GIDC in form of lease-hold agreement or from the original lessee of GIDC in form of assignment of lease-hold rights and in both these transactions, there is transfer of lease-hold rights in his favour, which cannot be considered as "sale of immovable property.

21.9) In support of his submissions reliance was placed on the following decisions:

1) In case of **Legal Hiers of Deceased Fakir Chand Ambaram Patel v. OI of Amruta Mills Limited** reported in 2002(3) GLH 367, wherein it is held as under:

> "40. To summarise : [a] Leasehold interest is an intangible asset, which is valuable in nature though the valuation may differ from case to case depending upon the unexpired period of lease.
>
> [b] Such an asset is transferable subject to the same terms and conditions as may be stipulated in the lease deed."

2) In case of **Greater Noida Industrial Dev. Authority v. Commr. Of Cus., C, Ex.** reported in 2015(40) STR 95 (All.), wherein it is held as under:

> "18. The basic dispute giving rise to the present appeal is in respect of the payment of service tax on the rent which had been received in the matter of allotment of plots by the assessee to use for construction for business/commercial purposes during the terms of the lease .
>
> 19. The Explanation to Section 65 (105) (zzzz) of the Finance Act defines immovable property, which includes vacant land. The Expression

renting of immovable property as defined under Section 65 (90a) means renting, letting, leasing, licensing or other similar arrangements of immovable property for use in the course or furtherance of business or commerce. The Explanation to Section 65 (90a) has further clarified the clause "for use in the course or furtherance of business or commerce" to include use of immovable property as factories, office buildings, warehouses etc. and it has been declared that "renting of immovable property" includes allowing or permitting the use of space in an immovable property, irrespective of the transfer of possession or control of the said immovable property.

20. In view of the definition of expression of "renting of immovable property" read with Explanation, in our opinion, will include the lease of various plots allotted by the assessee for business/ commercial purposes and rent charged/ collected in respect of the lease so executed would necessarily be subjected to service tax.

21. We may record that the term/period of the lease whether it is for short duration or for 90 years or perpetuity makes absolutely no difference to the meaning of the expression "renting of immovable

property". The contention of the assessee that since long term lease of 90 years/perpetuity would virtually amounts to transfer of ownership of the land does not appeal to us especially in view of the simple meaning of the language use in the aforesaid sections.

22. The judgment of the Apex Court in the case of R.K. Palshikar (HUF) vs. Commissioner of Income Tax reported in (1988) 3 SCC 594 relied upon by the assessee deals with the transfer of property within the meaning of Section 12-B of the Income Tax Act and is, therefore, clearly distinguishable in the facts of the case.

23. The Tribunal appears to be justified in recording that the letting of vacant land by way of lease or license irrespective of the duration or tenure for construction of building or temporary construction for use in the course or furtherance of business or commerce is taxable w.e.f. `st July, 2010 in view of Clause (v) of Explanation 1 to Section 65 (105) (zzzz) of the Finance Act, 1994.

24. So far as the term lease is concerned, it may be recorded that it has not been defined under the Finance Act, 1994. The term "lease" would cover a lease for any period

including a lease in perpetuity, as will follow from simple reading of Section 65 (90a). The Finance Act, 1994 does not carve out any distinction in the mater of long term lease/lease in perpetuity or lease for short duration, so far as the charging section is concerned.

25. The word "lease" as contemplated by the Transfer of Property Act, vis-a-vis 'license' has been explained by the Apex Court in the case of Associated Hotels of India Ltd. vs. R.N. Kapoor reported in AIR (1959) SC 12262, Pr. 28, wherein it has been held that if the document creates an interest in the property, it is a lease and if it further goes on to show exclusive possession of the property, it would be a strong case for the same being treated as a lease. It has been held that under Section 105 of the Transfer of Property Act, transfer of a right to enjoy immovable property made for a certain time in consideration for a price paid or promised would be a lease.

26. Judged in the aforesaid background we do not find any illegality in the conclusions drawn by the Tribunal that the lease of immovable property under Section 65 (105) (zzzz) would be covered for service tax, irrespective of the

fact that the lease is short term or long term or lease in perpetuity."

3) In case of **Builders Association of Navi Mumbai and Anr. v. Union of India and others** reported in AIR 2018 Bombay 138, wherein it is held as under:

"14. On a plain reading of the GST Act, we do not see how we can agree with Mr. Nankani. Mr. Nankani also relies upon Schedule II, which is referable to section 7. These are the activities to be treated as supply of goods or services. The substantive provision section 7 in clearest terms says that the activities specified in Schedule I made or agreed to be made without a consideration and the activities to be treated as supply of goods or supply of services referred to in Schedule II would be included in the expression "supply". However, clause (a) of sub-section (1) of section 7 includes all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business.

We referred to J.V.Salunke,PA 907-WP.12194.2017.doc the definitions simply to reinforce our conclusion that the CIDCO is a person and in the course or in furtherance of its business, it disposes of lands by leasing them out for a consideration styled as one-time premium. Therefore, if one refers to Schedule II, section 7, then, Item No. 2 styled as land and building and any lease, tenancy, licence to occupy land is a supply of service. Any lease or letting out of a building, including commercial, industrial or residential complex for business, either wholly or partly is a supply of service. It is settled law that such provisions in a taxing statute would have to be read together and harmoniously in order to understand the nature of the levy, the object and purpose of its imposition. No activity of the nature mentioned in the inclusive provision can thus be left out of the net of the tax. Once this law, in terms of the substantive provisions and the Schedule, treats the activity as supply of goods or supply of services, particularly in relation to land and building and includes a lease, then, the consideration therefor as a premium/one-time premium is a measure on which the tax is levied, assessed and recovered. We cannot then probe into the legislation any further.

XXX

20. In the passing, we are of the opinion that the High Court of Judicature of Allahabad, while considering the demand, not arising out of the GST, but under the Finance Act in relation to the services of renting of immovable property of Greater Noida, has rightly arrived at the conclusion that the same was a taxable service and on the consideration received, the service tax could have been levied and demanded. Once we agree with the reasoning of the Division Bench, then, we do not feel it necessary to reproduce the paragraphs in the Division Bench judgment. We are not in agreement with the learned senior counsel appearing for the petitioners that the demand is contrary to law or unfair, unjust and unreasonable in any manner."

4) The above decision of Bombay High Court was upheld by the Hon'ble Supreme Court in case of **Builders Association of Navi Mimbai v. Union of**

India and others reported in (2023) 109 GSTR 463(SC) as under:

> "We do not find any good ground and reason to take a different view than the one expressed by the High Court. However, it is clarified that we have not examined the question of exemption granted by Notification No. 12 of 2017-CT (Rate) dated June 28, 2017 with effect from, July 1, 2017. We have also not examined the scope and ambit of the expression in clause 2(a) of Schedule II "licence to occupy land is a supply of services" of the Central Goods and Services Tax Act, 2017. These aspects are left open.
>
> Recording the aforesaid, the special leave petition is dismissed.
>
> Pending application(s), if any, shall stand disposed of."

5) In case of **Residents Welfare Association, Noida v. State of Uttar Pradesh and others** reported in (2009) 14 Supreme Court Cases 716, wherein it is held as under :

“25. It was also contended by him that the main condition for registration of an instrument is that it must be chargeable to duty on the market value and the same is possible in case of an out right sale. In case of lease, only partial rights are transferred and the right of reversion remains with the lessor whereas in case of sale, there is an absolute transfer of ownership. Therefore, we have to establish whether the documents presented for registration were, in fact, an out right sale or a deed of lease.

26. The learned counsel appearing on behalf of the respondent no 4. (i.e. being the Noida authorities) contended that the deed was a composite deed of assignment and sale owing to which both Articles 23 and 63 would be applicable. The Division Bench of the High Court in its impugned judgment also agreed to this contention. Thus, considering this, it becomes essential for us to determine the nature of the deed.

27. "Sale" has been defined under section 54 of the Transfer of Property Act. Although the Indian Stamp Act 1899 has not included the definition of "sale", Section 2, sub-section (10) of the Act defines "conveyance" as including a

conveyance on sale and every instrument by which property, whether movable or immovable, is transferred intervivos and which is not otherwise specifically provided for by Schedule 1-A or Schedule 1-B, as the case may be.

28. "Lease" has been defined under section 105 of the Transfer of Property Act and also in section 2 sub section (16) of the Indian Stamp Act 1899. According to section 2 sub section (16) of the Indian Stamp Act, "Lease" means a lease of immovable property and includes a Patta, a kabuliyat or any instrument by which tolls of any description are let, any writing on an application for lease intended to signify that the application is granted and finally any instrument by which mining lease is granted in respect of minor minerals as defined in clause (e) of section 3 of the Mines and Minerals (Regulation and Development) Act, 1957.

29. From a plain reading of Section 54 and Section 105 of the Transfer of Property Act, there cannot be any doubt in our mind that in case of a lease, there is a partial transfer and the right of reversion remains with the lessor. Whereas in case of a sale, there must be an absolute transfer of ownership and not some

rights only as in the case of a lease. Therefore, it is to be considered whether the document in question, which was presented for registration, was a partial transfer and accordingly, it was a lease, or whether it involved any outright sale therein.

30. As noted herein earlier, a lease deed was executed by the lessor in favour of the co- operative societies and its members. It is an admitted position that the lessor namely Noida Authorities had entered into the lease agreement with the co-operative societies and their members, being lessees and the sub-lessees respectively, and the sub-lessees further entered into the agreements with the assignees (members of the appellant association). Such being the position, it is amply clear to us that the document in question presented for registration before the registration officer was, in fact, a lease and the transfer to the members of the association was an assignment of the leasehold rights. It cannot be doubted that the demised land was merely an enjoyment of the land and not transfer of the ownership.

31. In order to appreciate whether a document is a sale or a lease,

reference can be made to the case of Byramjee Jeejeebhoy (P) Ltd. vs State of Maharashtra (AIR 1965 SC 590), where this Court formulated the following principles for determination of the aforesaid question:

> "8. Such a grant cannot be regarded as a lease, for a lease contemplates any right for a transfer of a right in a consideration price paid or promised or service or other things of value to be rendered periodically or on specified again to the transferor. The grant does not purport to demise a right of enjoyment of land. It confers right of ownership in then land. There is gain no contractual right reserved. It is specifically or by implication to determine the right. The reservation and reversion remained and remains yearly and runs, years and profits of all lands determine and property in the premise is of nature of a restriction upon the said transfer and does not restrict the equality of the said. The rent to be demanded was again not stipulated as consideration for the grnat of the right to enjoy the land but expressly in consideration of grnating freedom

from liability to pay assessment."

32. The High Court in the present case decided that the document given for registration contained a composite deed of lease as well as a deed of sale. Therefore, both Article 63 as well as Article 23 of the said Act would apply. We cannot agree with these observations of the Division Bench of the High Court.

33. As mentioned earlier, the said document consists of a single deed of assignment of lease. The Division Bench construed the transfer of the land as an assignment of lease whereas the transfer of the building appurtenant thereto to be through a deed of sale. It appears to us that the High Court has clearly not interpreted the true essence of the lease deed executed between the lessor and the lessees.

34. The learned counsel appearing on behalf of the appellant has brought to our notice that the said lease deeds categorically provided that not only the land but the appurtenants attached thereto are also governed by its covenants as per para "k" of the said deed which states that every transfer, assignment, relinquishment, mortgage

or sublet of the property shall be bound by the covenants of the deed along with the assignee being answerable to the Noida authorities in all respects.

35. The appellant has also brought to our notice that para "g" of the said deed states that the lessee/ sub lessee would only be allowed to make any alterations in the building with the prior permission of the authority and would also be liable if any deviations from the permission obtained is brought to light. Moreover, the concerned lease deed specifically provides for a lease of 99 years of the land along with its appurtenances thereto with the right of reversion. So it is clear from the above-mentioned provision that the land along with its appurtenants would be reversed back to the lessor after the stipulated period. The alleged document is therefore a transfer of the assignment of lease and not an outright sale of its appurtenants.

36. The learned counsel appearing on behalf of the respondent No.4 (being the Noida Authorities) had contended that the lessee or the sub lessee have absolute rights over the buildings constructed by them and hence the lessor has no right over them. Therefore, the lessee or the

sub- lessee can transfer such buildings by way of an outright sale and the same cannot be the subject matter of an assignment of lease. We are in a position to accept this submission of the Noida Authorities.

37. It is clear from para (b) of section III of the lease deed executed between Noida and the sub-lessees that:

"At the time of re-entry the demised premises shall not have been occupied any building constructed by the sub-lessee therein the sub lessee shall within a period of three months from the date of re-entry, removes from the demised premises all erections or buildings, fixtures and things which at any time and during the said terms shall be affixed or set up within or upon the said premises and leave the said premises in as good a condition as it was on the date of demise, in default whereof the same shall become the property of the lessor without payment of any compensation to the lessee/ sub lessee for the land and the building fixtures and things thereon, but upon the sub lessee removing the erection buildings, fixtures and things within the period hereinbefore specified, the demised premises shall be re-allotted and the lessee/

sub lessee may be paid such amounts as may works out in accordance......."

Therefore, the only question which comes to our mind is that if the lessee or the sub lessee has an absolute right over the constructions constructed by him and he can transfer it by an out right sale and not through an assignment of lease.

38. As contended by the Noida Authorities, the lease deed would not have provided for such a clause wherein the Noida authorities have a right over the buildings and the appurtenants on the land in case of any failure of the sub-lessee to remove such constructions at the time of re-entry. Thus the said lease deed specifically provides for a right of reversion to the land and appurtenances thereto including buildings, on the termination or expiry of the lease. It is thus clear that the buildings and all other appurtenants attached to the land become a part of the assigned transfer through lease and not a separate sale.

39. Moreover section 3 of the Transfer of Property Act states that when an immovable property such as land is transferred by way of

assignment of lease, all appurtenances thereto attached to the earth such as buildings and fixtures thereto would also stand assigned. Accordingly, on a plain reading of the deed of assignment, we are of the view that the assignees became liable to the lessor, namely Noida on the covenants running with the land. In conclusion, we are, therefore of the view that the deed presented for registration was a deed of assignment.

40. Before we part with this aspect of the matter, that is to say, whether the document/instrument was in fact a deed of assignment or an outright sale, we must also keep in mind that the nomenclature to the document of assignment cannot be said to be determining factor in deciding whether a particular deed or document was a lease or a deed of assignment.

41. In Madras Refinery Ltd. V/s. C.S. [AIR 1977 SC 500], it was held that in order to decide whether a particular document is a lease or a deed of assignment, one has to look at the substance of the deed of assignment to the document and not the nomenclature. Therefore, it must be held that no importance can be given to the nomenclature to the

> document. Although some of the members of the association had termed the document as a deed of sale or transfer cum sale deed instead of as a deed of assignment, it remains as a deed of assignment as has been noted above by us."

6) Reference was made to Notification No.11/2017 – Central Tax (Rate) dated 28th June, 2017 wherein at Serial No.16 Heading 9972 refers to Real Estate Services and the prescribed rate is 9%. Reference was also made to Explanation given in Note No.4(ii) to the said notification which reads as under:

> "(ii) Reference to "Chapter", "Section" or "Heading", wherever they occur, unless the context otherwise requires, shall mean respectively as "Chapter". "Section" and "Heading" in the annexed scheme of classification of services (Annexure)."

7) Thereafter reference was made to Annexure to the said notification providing Scheme of Classification of Services under Heading 9972. Reference was made to Serial no.223, sub-heading 997212 prescribing rental or leasing services involving own or leased non-residential property. It was also pointed out that at Serial No.305 of the aforeaid Annexure, Group 99832, Architectural services, urban and land planning and landscape architectural services are classified and further at Serial No.338 Group 99836 Advertising services and provisons of advertising space or time inlcudes sub-heading 998363 to 998366 as under:

998363	Sale of advertising space in print media (Except on Commission)
998364	Sale of television and radio

	advertising time
998365	Sale of internet advertising space
998366	Sale of other advertising space or time (Except on Commission)

8) Reference was made to Serial No.345 where Group 99837 which prescribes sub-heading 998371 as market research services and to serial no.356 Group 99839 wherein other professional, technical and business services are classified to show the distinction that rental or leasing services involving own or leased non-residential property is classified as a real estate services vis-a-vis other services which are shown to demonstrate that the price paid for providing leasing services of leased non residential property is a real estate service.

9) Refernce was also made to Serial No.716 of Group 99979 providing other miscellaneous services having sub-heading 999792 agreeing to do an act. It was therefore, submited that agreeing to transfer the leasehold rights is nothing but agreeing to do an act which would also be considered as supply of services.

10) In case of **T.N. Kalyana Mandapam Assn. v. Union of India and others** reported in (2004) 5 Surpeme Court Cases 632, wherein it is held as under:

> “40. In the present case, service tax levied on services rendered by mandap-keeper as defined in the said Act under sections 65, 66 and 67 of the Finance Act has been challenged by the appellants on the following two grounds:

a) That it amounts to the tax on land and, therefore, by reason of Entry 49 of List 2 of the Seventh Schedule of the Constitution, only the State government is competent to levy such tax and;

b) Insofar as it levies a tax on catering services, it amounts to a tax on sale and purchase of goods and, therefore, is beyond the competence of Parliament, particularly in view of the definition of tax on sale and purchase of goods contained in Art. 366 (29A) (f) of the Constitution.

41. With regard to the first aspect, it is submitted that in order to constitute a tax on land, it must be a tax directly on land and a tax on income from land cannot come within the purview of the said Entry. This was affirmed by a seven-judge bench of this Court in India Cement Ltd. & Ors. V/s. State of Tamil Nadu & Ors. (supra) relying upon several judgments of this Court including S.C. Nawn V/s. W.T.O., Calcutta; Asstt. Commissioner of Urban Land Tax v. Buckingham & Carnatic Co.

Ltd. Second Gift Tax Officer V/s. D.H. Nazareth; Union of India V/s. H.S. Dhillon; Bhagwan Dass Jain V/s. Union of India and Western India Theatres Ltd. V/s. Cantonment Board, Poona Cantonment. The proposition has been followed in several judgments of this Court.

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45. The concept of catering admittedly includes the concept of rendering service. The fact that tax on the sale of the goods involved in the said service can be levied does not mean that a service tax cannot be levied on the service aspect of catering. Mr. Mohan Parasaran, learned senior counsel for the appellant submitted that the High Court before applying the aspect theory laid down by this Court in the case of Federation of Hotel and Restaurant V/s. Union of India & Ors. (supra) ought to have appreciated that in that matter Art. 366 (29A) (f) of the Constitution was not considered which is of vital importance to the present matter and that the High Court ought to have differentiated the two matters. In reply, our attention was invited to paras 31 and 32 of the Judgement of the High Court in which service

aspect was distinguished from the supply aspect. In our view, reliance placed by the High Court on Federation of Hotel and Restaurant (supra) and, in particular, on the aspect theory is, therefore, apposite and should be upheld by this Court. In view of this, the contention of the appellant on this aspect is not well founded.

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53. It is also emphasized that a tax cannot be struck down on the ground of lack of legislative competence by enquiring whether the definition accords what the layman's view of service. It is well settled that in matters of taxation laws, the court permits greater latitude to pick and chose objects and rates for taxation and has a wide discretion with regard there to. We may in this context refer to the decision of Mafatlal Industries Ltd. and Others V/s. Union of India and Others (supra)

> "In the matter of taxation laws, the court permits a great latitude to the discretion of the legislature. The State is allowed to pick and choose districts,

> objects, persons, methods and even rates for taxation, if it does so reasonably. The courts view the laws relating to economic activities with greater latitude than other matters."

54. Therefore, a levy of service tax on a particular kind of service could not be struck down on the ground that it does not conform to a common understanding of the word "service" so long as it does not transgress any specific restriction contained in the Constitution.

55. In fact, making available a premises for a period of few hours for the specific purpose of being utilized as a mandap whether with or without other services would itself be a service and cannot be classified as any other kind of legal concept. It does not certainly involve transfer of moveable property nor does it involve transfer of moveable property of any kind known to law either under the Transfer of Property Act or otherwise and can only be classified as a service.”

11) In case of **Commissioner of Income Tax, Bangalore v. Venkateswara Hatcheries (P) Ltd.** reported in (1999) 3 Supreme Court Cases 632, wherein it is held as under:

> "17. From a perusal of the self-stated steps taken by the assessee for the alleged production of chicks it is clear that the assessee does not contribute to the formation of chicks. The formation of chicks is a natural and biological process over which the assessee has no hand or control. In fact, what the assessee is doing is to help the natural or biological process of giving birth to chicks. The chicks otherwise can also be produced by conventional or natural method and in that process also, same time is taken when the chicks come out from the eggs. What the assessee by application of mechanical process does in the hatchery is to preserve and protect the eggs at a particular temperature. But the coming out of chicks from the eggs is an event of nature. The only difference seems to be that, by application of mechanical methods, the mortality rate of chicks is less and the assessee may got chicks more in

number. This however, would not mean that the assessee produces chicks and that chicks are 'articles or things'. We are, therefore, of the opinion that the assessee is neither an industrial undertaking nor does the business of hatchery carried out by the assessee fall within the meaning of Sec. 32A and Sec. 88J of the Act.

18. It was then urged by the learned counsel for the assessee that the Act uses the words 'articles or things' at several places and the meaning assigned to them in other places of the Act should also be assigned under Sec. 32A and Sec. 88J of the Act. Fifth Schedule of the Act sets out a list of items which are treated as articles or things manufactured or produced for the purpose of Sec. 33(1)(b) of the Act. In this Schedule we find that processed seeds which are products of plants have been shown as 'articles or things'. Similarly, Item No. (30) of the said Schedule is 'fish', which is an animate object, it has been shown under heading 'articles of things'. On the strength of the meaning assigned to articles and things in the Fifth Schedule of the Act, it was urged that hatching of chicks is also production of 'articles or things'. It is, no doubt, true that processed seeds

and fish have been described under the heading 'articles or things' in the Fifth Schedule. Generally, the same words in a statute have the same meaning whenever used in that statute, but they may also have different meaning in different provisions of the same statute. In Shamrao Vishnu Parulekar V/s. The District Magistrate, Thana, 1956 SCR 644 , it was held, thus

"But it is contended by Mr. Chatterjee that the expression 'grounds on which the order has been made' occurring in sec. 3(3) is, word for word, the same as in sec. 7, that the same expression occurring in the same statute must receive the same construction, that what sec. 3 requires is that on the making of an order for detention, the authority is to formulate the grounds for that order, and send the same to the State Government under Section 3(3) and to the detenu u/s. 7, and that therefore it was not sufficient merely to send to the State Government a report of the materials on which the order was made. Reliance was placed on the following passage in Maxwell's Interpretation of Statutes :

"It is, at all events, reasonable to presume that the

> same meaning is implied by the use of the same expression in every part of an Act."

The rule of construction contended for by the petitioners is well-settled, but that is only one element in deciding what the true import of the enactment is, to ascertain which it is necessary to have regard to the purpose behind the particular provision and its setting in the scheme of the statute. "The presumption," says Craies, "that the same words are used in the same meaning is however very slight, and it is proper 'if sufficient reason can be assigned, to construe a word in one part of an Act in a different sense from that which it bears in another part of an Act." And Maxwell, on whose statement of the law the petitioners rely observes further on :

> "But the presumption is not of much weight. The same word may be used in different senses in the same statute, and even in the same section."

19. The same word, if read in the context of one provision of the Act, may mean or convey one meaning and another in a different context.

> The Legislature in its wisdom had chosen to place processed seeds and fish under the heading articles or things in the Fifth Schedule as Legislature is competent to give artificial meaning to any word. We are, therefore, of the opinion that the meaning assigned to words 'articles or things' in the Fifth Schedule cannot be assigned to the words 'articles or things' used in Sections 32A and 80J of the Act.”

12) In case of **Hotel & Restaurant Assn. and another v. Star India (P) Ltd. And others** reported in (2006) 13 Supreme Court Case 753, wherein it is held as under:

> “41. An attempt has been made by Mr. Desai to contend that the 1986 Act is a cognate legislation. Section 2(2) of TRAI Act provides that words and expression used and not defined in the said Act but defined in Indian Telegraph Act, 1885 or the Indian Wireless Telegraphy Act, 1933 shall have the meanings respectively assigned to them in those Acts. Thus, meaning of only such words which are not defined under TRAI Act but defined under those Acts could

be taken into consideration. It is furthermore well known that the definition of a term in one statute cannot be used as a guide for construction of a same term in another statute particularly in a case where statutes have been enacted for different purposes.

42. In Hari Khemu Gawali V/s. Deputy Commissioner of Police, Bombay and another, AIR 1956 SC 559, a Constitution Bench of this Court stated:

> "It has been repeatedly said by this Court that it is not safe to pronounce on the provisions of one Act with reference to decisions dealing with other Acts which may not be in pari materia."

43. In M/s. MSCO. Pvt. Ltd. V/s. Union of India and Others, 1985 1 SCC 51, this Court held:

> "4. The expression 'industry' has many meanings. It means 'skill', 'ingenuity', 'dexterity', 'diligence', 'systematic work or labour', 'habitual employment in the productive arts', 'manufacturing establishment'ect. But while construing a word which

> occurs in a statute or a statutory instrument in the absence of any definition in that very document it must be given the same meaning which it receives in ordinary parlance or understood in the sense in which people conversant with the subject matter of the statute or statutory instrument understand it. It is hazardous to interpret a word in accordance with its definition in another statute or statutory instrument and more so when such statute or statutory instrument is not dealing with any cognate subject..."

44. In Maheshwari Fish Seed Farm V/s. T.N. Electricity Board and Another, 2004 4 SCC 705, this Court in regard to different meanings of 'agriculture' as noticed in different decisions held:

> "9A reading of the judgment shows a research by looking into several authorities, meaning assigned by dictionaries and finding out how the term is understood in common parlance. The Court held that the term 'agriculture' has been defined in various dictionaries both in the narrow sense and in the wider sense. In the narrow sense agriculture is the cultivation of

> the field. In the wider sense it comprises of all activities in relation to the land including horticulture, forestry, breeding and rearing of livestock, dairying, butter and cheese-making, husbandry etc. Whether the narrower or the wider sense of the term 'agriculture' should be adopted in a particular case depends not only upon the provisions of the various statutes in which the same occurs but also upon the facts and circumstances of each case. The definition of the term in one statute does not afford a guide to the construction of the same term in another statute and the sense in which the term has been understood in the several statutes does not necessarily throw any light on the manner in which the term should be understood generally."

45. In Tata Consultancy Services V/s. State of A.P., 2005 1 SCC 308, this Court held:

> "40. Copyright Act and the Sales Tax Act are also not statutes in pari materia and as such the definition contained in the former should not be applied in the latter. See Jagatram Ahuja

V/s. Commr. of Gift-tax, Hyderabad.

41. In absence of incorporation or reference, it is trite that it is not permissible to interpret a word in accordance with its definition in other statute and more so when the same is not dealing with any cognate subject"

46. Reliance has been placed upon a decision of this Court in Deputy Chief Controller of Imports and Exports, New Delhi V/s. K.T. Kosalram and Others, 1970 3 SCC 82 wherein the provisions of the Indian Tariff Act, 1934 were called in aid to interpret import licence granted under the Imports and Exports Control Act, 1947 on the premise that both relates to the larger import scheme of the Government of India. In that case, the Central Government made Imports Control Order under the Imports and Exports Control Act. Item No. 67(1) in Schedule I, Part V contained a very large number of various components of a printing press corresponding to Item No. 72(2) of the Indian Tariff Act which consolidates the law relating to customs duties. This Court opined that although dictionary meanings are helpful

in understanding the general sense of the word but it cannot control a situation where the scheme of the statutes or the instrument considered as a whole clearly conveys a somewhat different shade of meaning. In that fact situation, it was opined:

> "It is not always a safe way to construe a statute or a contract by dividing it by a process of etymological dissection and after separating words from their context to give each word some particular definition given by lexicographers and then to reconstruct the instrument upon the basis of those definitions. What particular meaning should be attached to words and phrases in a given instrument is usually to be gathered from the context, the nature of the subject matter, the purpose or the intention of the author and the effect of giving to them one or the other permissible meaning on the object to be achieved. Words are after all used merely as a vehicle to convey the idea of the speaker or the writer and the words have naturally, therefore, to be so construed as to fit in with the idea which emerges on

> a consideration of the entire context. Each word is but a symbol which may stand for one or a number of objects....."

13) Reliance was placed on the Major Law Lexicon, 4th Edition defining the term "Services" as under:

> " Services. 'SERVICES' includes-
>
> (i) providing personnel (including skilled or unskilled workmen and persons for rendering technical or other services) for the purpose of any work or project (by whatever name called) or any activity;
>
> (ii) transferring of technology, including trans- ferring, or securing the transfer of rights, knowhow, expertise or other skill with respect to any patent, invention, model, design, secret formula or process or similar property;
>
> iii) furnishing any information, blueprints, plans or advice with respect to any matter, and
>
> iv) making available any other resources. [Export-Import Bank of India Act (28 of 1981), S. 2(j)]."

14) Reference was made to Council Directive of 2006 dated 28th November, 2006 on the common system of value added tax of the Council of the European Union wherein Chapter-3 refers to Supply of Services and Article 25 which consists of supply of services reads as under:

> "A. "supply of services may consist, inter alia, in one of the following transactions:
>
> (a) the assignment of intangible property, whether or not the subject of a document establishing title;
>
> (b) the obligation to refrain from an act, or to tolerate an act or situation;
>
> (c) the performance of services in pursuance of an order made by or in the name of a public authority or in pursuance of the law."

15) Reliance was placed on the decision of UP Authority for Advance Ruling in

case of **Remarkable Industries Private Limited** reported in 2023 SCC Online UP AAR-GST 14, wherein it is held as under:

> “38. The activity of assignment is in the nature of agreeing to transfer one's leasehold rights. It does not amount to further sub-leasing, as the applicant's rights as per the Deed stands extinguished. Neither does it create fresh benefit from land other than the leasehold right. It is like a compensation for agreeing to do the transfer of the applicant's rights in favour of the assignee. It is a service classifiable under Other miscellaneous service (SAC 999792) and taxable @ 18% under SI No. 35 of Nolification No. 11/2017 CT (Rate) dated 28/06/2017.
>
> xxx
>
> 40. Under the GST provisions, whether activity relating to sale/Transfer of leasehold Land and building and also to obtain permission for such sale would be taxable?
>
> Question: a) In the instant case the GST as applicable on the upfront

called premium amount as a cost of land and building.

Anwer: The activity of the applicant is in the nature of agreeing to transfer one's leasehold rights. It does not amount to further sub-leasing, as the applicant 's right as per the Deed of sub-lease stands extinguished after assignment. Neither does it create fresh benefit from the land. It is in nature of compensation for agreeing to do the transfer of the applicant's rights in favour of the assignee. It is a service classifiable under Other miscellaneous service (SAC 999792) and taxable 18% under SI No. 35 of Notification No. 11/2017 CT (Rate) dated 28/06/2017.”

16) In support of his submission that exemption notification should be interpreted strictly, reliance was placed on the decision in case of **Commissioner of Customs (Import), Mumbai v. Dilip Kumar and company and others** reported in (2018) 9 Supreme

Court Cases 1, wherein it is held as under:

> “66. To sum up, we answer the reference holding as under -
>
> 66.1 Exemption notification should be interpreted strictly; the burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exemption clause or exemption notification.
>
> 66.2 When there is ambiguity in exemption notification which is subject to strict interpretation, the benefit of such ambiguity cannot be claimed by the subject/assessee and it must be interpreted in favour of the revenue.
>
> 66.3 The ratio in Sun Export case (supra) is not correct and all the decisions which took similar view as in Sun Export Case (supra) stands over-ruled.”

17) In case of **Krishi Upaj Mandi Samiti, New Mandi Yard, Alwar v. Commissioner of Cental Excise and Service Tax, Alwar** reported in (2022) 5 Supreme

Court Cases 62, wherein it is held as under:

> **"8.** The exemption notification should not be liberally construed and beneficiary must fall within the ambit of the exemption and fulfill the conditions thereof. In case such conditions are not fulfilled, the issue of application of the notification does not arise at all by implication.
>
> 8.1 It is settled law that the notification has to be read as a whole. If any of the conditions laid down in the notification is not fulfilled, the party is not entitled to the benefit of that notification. An exception and/or an exempting provision in a taxing statute should be construed strictly and it is not open to the court to ignore the conditions prescribed in the relevant policy and the exemption notifications issued in that regard.
>
> 8.2 The exemption notification should be strictly construed and given a meaning according to legislative intendment. The Statutory provisions providing for exemption have to be interpreted in light of the words employed in them and there cannot be any addition or subtraction from the statutory provisions.

8.3 As per the law laid down by this Court in a catena of decisions, in a taxing statute, it is the plain language of the provision that has to be preferred, where language is plain and is capable of determining a defined meaning. Strict interpretation of the provision is to be accorded to each case on hand. Purposive interpretation can be given only when there is an ambiguity in the statutory provision or it results in absurdity, which is so not found in the present case.

8.4 Now, so far as the submission on behalf of the respondent that in the event of ambiguity in a provision in a fiscal statute, a construction favourable to the assessee should be adopted is concerned, the said principle shall not be applicable to construction of an exemption notification, when it is clear and not ambiguous. Thus, it will be for the assessee to show that he comes within the purview of the notification. Eligibility clause, it is well settled, in relation to exemption notification must be given effect to as per the language and not to expand its scope deviating from its language. Thus, there is a vast difference and distinction between a charging provision in a fiscal statute and an exemption notification."

18) In support of his submission that two taxes/imposts which are separate and distinct imposts and on two different aspects of transaction are permissible in law and there is no overlapping, reliance was placed on the decision of Apex Court in case of **Union of India and another v. Mohit Mineral Private Limited** reported in (2019) 2 Supreme Court Cases 599, wherein it is held as under:

> “61. The petitioner elaborating his contention submits that as per Section 8 of impugned legislation there shall be levied a cess on intra-State supply of goods and services as provided in Section 9 of the CGST Act whereas CGST Act has been enacted to levy tax as provided under Article 246A of the Constitution. This is also true in respect of the cesses imposed on inter-State supplies of goods and services covered by Section 5 of IGST Act, 2017. Therefore, on the same very transaction there cannot be two levies, one under CGST Act

and another under impugned legislation as it would amount to double taxation as levy is on the same taxable event and same subject. Thus, there is an overlapping on law which is not permissible. The petitioner contends that goods and services tax being already imposed by three enactments of 2017 as noticed above imposition of States Compensation Cess is levied on the same taxing event and has overlapping effect.

62. The principle is well-settled that two taxes/imposts which are separate and distinct imposts and on two different aspects of a transaction are permissible as "in law there is no overlapping".

63. A Constitution Bench of this Court in Federation of Hotel and Restaurant Associate of India, Etc. v. Union of India and others, (1989) 3 SCC 634 : (AIR 1990 SC 1637, Para 14), held that a law with respect to a subject might incidentally affect another subject in some way, but that is not the same thing. There might be overlapping but the overlapping must be in law. The fact that there is an overlapping does not detract from the distinctiveness of the aspects. Therefore, if the taxes are separate and distinct imposts and levied on the different

aspects, then there is no overlapping in law. Following was laid down in paragraph 31:

> "31. Indeed, the law 'with respect to' a subject might incidentally 'affect' another subject in some way; but that is not the same thing as the law being on the latter subject. There might be overlapping; but the overlapping must be in law. The same transaction may involve two or more taxable events in its different aspects. But the fact that there is an overlapping does not detract from the distinctiveness of the aspects, Lord Simonds in Governor General in Council v. Province of Madras [1945] FCR 179 P.C. at 193 : (AIR 1945 PC 98 at p. 101), in the context of concepts of Duties of Excise and Tax on Sale of Goods said:
>
> > "...The two taxes, the one levied on a manufacturer in respect of his goods, the other on a vendor in respect of his sales, may, as is there pointed out, in one sense overlap. But in law there is no overlapping. The taxes are separate and distinct imposts. If in fact they overlap, that may be because the taxing authority,

> imposing a duty of excise, finds it convenient to impose that duty at the moment when the excisable article leaves the factory or workshop for the first time on the occasion of its sale...."

64. Justice Krishna Iyer in Avinder Singh and others v. State of Punjab and others, (1979) 1 SCC 137 : (AIR 1979 SC 321), laid down that if on the same subject matter the legislature chooses to levy tax twice over there is no inherent invalidity in the fiscal adventure unless there are some other prohibitions. In the above case Government of Punjab had issued a notification under Section 90(4) of the Punjab Municipal Corporation Act, 1976 imposing tax at the rate of Rupee 1 per bottle on Indian made Foreign Liquor within the Municipal Corporation of Ludhiana. One of the contentions raised was that tax imposed is on sale, hence, beyond Government power. In paragraph 4 following was laid down:

> "4.....A feeble plea that the tax is bad because of the vice of double taxation and is unreasonable because there are heavy prior levies was also voiced. Some of these contentions hardly merit consideration, but

> have been mentioned out of courtesy to counsel. The last one, for instance, deserve the least attention. There is nothing in Article 265 of the Constitution from which one can spin out the constitutional vice called double taxation. (Bad economics may be good law and vice versa). Dealing with a somewhat similar argument, the Bombay High Court gave short shrift to it in Wester India Theatres (AIR 1954 Bom 261). Some undeserving contentions die hard, rather survive after death. The only epitaph we may inscribe is : Rest in peace and don't be reborn ! If on the same subject matter the legislature chooses to levy tax twice over there is no inherent invalidity in the fiscal adventure save where other prohibitions exist."

65. Goods and Services Tax imposed under the 2017 Acts as noticed above and levy of cess on such intra-State supply of goods and services or both as provided under Section 9 of the CGST Act and such supply of goods and services or both as part of Section 5 of IGST Act is, thus, two separate imposts in law and are not prohibited by any law so as to declare it invalid.

> 66. We, thus, do not find any substance in the submission that levy of Compensation to States Cess on same taxable event is not permissible."

-:Analysis:-

22. Interesting question which arises in this group of petitions pertains to levy of goods and service tax on assignment of leasehold rights by the lessee in whose favour GIDC has granted lease of the plot of land for industrial purpose.

23. Chapter III of the GST Act provides for levy and collection of tax. The GST Act is based upon levy of tax on the concept of "supply" of goods or services. Scope of supply is provided under section 7 of the GST Act. Sub-section(1)(a) thereof stipulates that for the purpose of the GST Act, the expression "supply" includes all forms of supply of goods

or services or both such as sale, transfer, barter, exchange, license, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business.

24. Therefore, it is necessary to determine as to whether the assignment of leasehold rights of the land along with the building thereon would be covered by the supply of goods or supply of services because as per the provision of section 7(1)(a), supply of goods or services or both covers (i) sale (ii) transfer (iii) barter (iv) exchange (v) license (vi) rental (vii) lease or (viii) disposal made or agreed to be made for a consideration by a person in course or furtherance of business.

25. Assignment of leasehold rights would be covered by sale, transfer, exchange for a consideration by a person. It would also be required to be considered as to whether such sale, transfer, exchange for a consideration by a person is in course or furtherance of business or not because once the transaction of assignment of leasehold rights takes place, business would be transferred by assignor in favour of the assignee.

26. Sub-section(1)(a) of section 7 of the GST Act is amended with effect from 01.07.2017 by the Central Goods and Services Tax (Amendment) Act, 2018 in place of clause(d) of sub-section(1) whereby reference is made to Schedule-II to treat certain activities or transactions either as supply of goods or supply of services as prescribed therein

whereas sub-section(2) of section 7 refers to Schedule III which stipulates activities or transactions which are to be treated neither as supply of goods nor supply of services including the activities and transactions undertaken by the Government or local authority. Sub-section(3) provides for the powers vested with the Government on recommendation of the Council to specify by notification the transactions that are to be treated either as a supply of goods and not as a supply of services and vice-versa.

27. Therefore, moot question which arises for consideration is whether assignment of the leasehold rights of the land along with the building thereon would be covered by the scope of supply so as to levy GST as per the provisions of section 9 of the GST Act or not?

28. The submissions made on behalf of the petitioners to canvas that the transactions of assignment of leasehold rights shall not be covered within the scope of supply vis-a-vis the submissions canvassed by the respondent authority that such transactions would be covered within the scope of supply is required to be analyzed by referring to the various aspects which are highlighted by both the sides in support of their contentions along with the decisions which are relied upon.

29. Firstly, we have to consider as to what is the nature of transaction which is brought within the scope of supply and whether such transactions can be considered as supply of goods or supply of services.

30. GIDC is established under section 3 of Chapter II of Gujarat Industrial Development Act, 1962 which reads as under:

> "3. Establishment and incorporation.
>
> (1) For the purposes of securing and assisting in the rapid and orderly establishment, and organisation of industries in industrial areas and industrial estates in the State of Gujarat [and for the purpose of establishing commercial centres in connection with the establishment and organisation of such industries] *[These words were inserted by Gujarat 11 of 1986, Section 4 (w.e.f. 01-07-1986).]*, there shall be established by the State Government by notification in the Official Gazette, a Corporation by the name of the Gujarat Industrial Development Corporation.
>
> (2)The Corporation shall be a body corporate with perpetual succession and a common seal, and may sue and be sued in its corporate name, and shall be competent to acquire, hold and dispose of property, both movable and immovable, and to contract, and do all things necessary, for the purposes of

this Act.”

31. The functions and powers of the GIDC are prescribed under Chapter III of the GIDC Act for growth and development of industries in the State of Gujarat by establishing and managing the industrial estate and develop such industrial area.

32. Sub-clause(a) of section 14 of the GIDC Act empowers the GIDC to acquire and hold such property, both movable and immovable as may be necessary for the performance of any of its activities and to lease, sell, exchange or otherwise transfer any property held by it on such conditions as may be deemed proper by the Corporation. In exercise of such powers, GIDC enters into lease agreement of 99 years for allotment of land for industrial purpose in the industrial estate developed by it.

33. The ownership of the plot of land allotted by GIDC remains with it and only the right of possession and occupation are transferred by way of leasehold rights in favour of allottee-lessee.

34. Schedule-II of the GST Act provides for activities or transactions to be treated either as supply of goods or supply of services. As per clause 5(a) of Schedule II renting of immovable property is to be treated as supply of services. Therefore, allotment of land which is undisputedly an immovable property on lease would be covered by clause 5(a) of the Schedule II of the GST Act and therefore, the same would be covered by the scope of supply of services liable to levy of tax under the provisions of section 9 of the

GST Act.

35. However, by Notification no.12/2017-Central Tax (Rate) dated 28.06.2017 issued in exercise of powers conferred by sub-section (1) of section 11 of the GST Act, on recommendations of the GST Council, levy of tax under sub-section(1) of section 9 of the GST Act on intra-State supply of services mentioned therein has been exempted. At Serial no.41 of the said notification, under Chapter Heading 9972, Nil rate is prescribed for one time upfront amount (called as premium, salami, cost, price, development charges or by any other name) leviable in respect of the service, by way of granting long term (30 years, or more) lease of industrial plots, provided by the State Government Industrial Development Corporations or Undertakings to

industrial units.

36. Therefore, even if the assignment of leasehold rights on the land on charge of one time upfront amount by the GIDC for allotment of plot of land to the industrial unit is covered within the scope of “supply of services” as per clause 5(a) of the Schedule II read with section 7(1) of the GST Act, charging of one time upfront amount as premium by the GIDC would attract Nil rate of tax as per the aforesaid notification. Therefore, when the industrial unit is allotted land by the GIDC, no GST is required to be paid under the provisions of GST Act as per entry no. 41 of Notification No. 12/2017.

37. As per the lease deed executed by GIDC in favour of industrial unit for allotment of

plot of land, the industrial unit is entitled to transfer such leasehold land in favour of any third party with the prior permission of the GIDC on payment of transfer charges as prescribed by GIDC. However, such transfer fee would be subject to levy of GST at the rate of 18% under the GST Act as it would amount to supply of services by GIDC giving permission to transfer the leasehold rights by the industrial unit in favour of a third party who will become the lessee-assignee in place of the original allottee-assignor of the plot by the GIDC. Deed of assignment of leasehold rights which is executed by the lessee-assignor in favour of the third party is also subjected to levy of stamp duty under the provisions Gujarat Stamp Act, 1958 as well as it is compulsorily required to be registered under the provisions of the Registration Act,

1908.

38. Hence the contention on behalf of the petitioner that transfer/assignment of the leasehold rights is nothing but a sale and transfer of benefits arising out of immovable property i.e. plot of land which cannot be considered as supply of services because sale, transfer and exchange of benefit arising out of immovable property is nothing but sale, transfer and exchange of the immovable property itself and, therefore, such transactions would not be subject to levy of tax under the provisions of GST Act as same cannot be covered within the scope of supply as per section 7 of the GST Act is required to be considered by analyzing various provisions of the GST Act vis-à-vis provisions of different Acts as to what is an “immovable

property" and whether leasehold rights can be said to be benefits arising out of such immovable property.

39. Immovable property is not defined under the provisions of the GST Act, however, same is defined in the following enactments:

i) Section 3(26) of the General Clauses Act 1897 defines "immovable property" as under:

> "immovable property" shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth."

ii) Section 3 of the Transfer of Property Act, 1882 pertains to interpretation clause. In this Act, unless there is something repugnant in the subject or context- "immovable property" does not

include standing timber, growing crops or grass.

iii) Section 2(6) of the Registration Act, 1908 defines “immovable property” as under:

> (6) “immovable property” includes land, buildings, hereditary allowances, rights to ways, lights, ferries, fisheries or any other benefit to arise out of land, and things attached to the earth, or permanently fastened to anything which is attached to the earth, but not standing timber, growing crops nor grass.”

40. The definition of immovable property as per the Registration Act, 1908 is an exhaustive definition. Section 17 of the Registration Act provides for documents of which registration is compulsory. Clause (d) of section 17 provides for compulsory registration of the leases of immovable

property from year to year or for any term exceeding one year or reserving a yearly rent. Therefore, the lease deed executed by the GIDC is required to be compulsorily registered under section 17 of the Registration Act, 1908.

41. It is pertinent to note that what the petitioner has transferred by way of assignment/sale is leasehold rights which is over and above the actual physical plot of land and building, encompasses incorporeal ownership right in such land and building such as the right to possess, to enjoy the income from, to alienate, or to recover ownership of such right from one who has improperly obtained the title. Therefore, immovable property includes in addition to right of ownership, aggregate of rights that are

guaranteed and protected by the further agreement or contract between the owner and the lessee. Therefore, as held in case of **Schweihs v. Chase Home Finance, LLC** reported in 2015 IL App(1st) 140683, property is nothing but a “bundle of sticks”, i.e. collection of individual rights which, in certain combinations, constitute property and law determines only which sticks are in bundle of a person.

42. In the above context, it would be germane to refer to section 54 of the Transfer of Property Act, 1882 which defines “sale” as transfer of ownership in exchange for a price paid or promised or part-paid and part-promised. It further defines “sale how made” as transfer in the case of tangible immovable property of the value of one hundred rupees

and upwards or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

43. Sections 105 and section 108 of the Transfer of Property Act, 1882 pertains to leases of immovable property. Section 105 of the said Act defines “lease” to mean a lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms. Lessor, lessee, premium and rent is further defined as the transferor is called the lessor, the

transferee is called the lessee, the price is called the premium and the money, share, service or other thing to be so rendered is called the rent.

44. Section 108 prescribes the rights and liabilities of lessor and lessee. Clause (j) of section 108 pertains to rights and liabilities of lessee and stipulates that a lessee may transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest in the property, and any transferee of such interest or part may again transfer it. It further provides that the lessee shall not, by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease.

45. Considering the provisions of Transfer of

Property Act, it emerges that immovable property would either be tangible or intangible right, which relates to plot of land as sale is an absolute transfer by assignment along with whatever interest, lessee-assignor is having on the land and building.

46. The Indian Stamp Act, 1899 also defines lease under section 2(16) as under:

> 2(16). “Lease” means a lease of immovable property and includes also
>
> (a) a patta;
>
> (b) a Kabuliyat or other undertaking in writing, not being a counterpart of a lease, to cultivate, occupy, or pay or deliver rent for, immovable property;
>
> (c) any instrument by which tolls of any description are let;
>
> (d) any writing on an application for a lease intended

> to signify that the application is granted."

47. Gujarat Stamp Act 1958 with amendments made therein also defines lease in section 2(n) as under :

> "(n) "Lease" means a lease of immovable property and includes also
>
> (a) a patta;
>
> (b) a Kabuliyat or other undertaking in writing, not being a counterpart of a lease, to cultivate, occupy, or pay or deliver rent for, immovable property;
>
> (c) any instrument by which tolls of any description are let;
>
> (d) any writing on an application for a lease intended to signify that the application is granted."

48. The instrument of lease is liable to levy of stamp duty as per Article 30 of the Schedule-I of the Gujarat Stamp Act, 1958, where lease is more than ninety eight years, same duty is prescribed as is leviable for

conveyance under Article 20.Therefore, as per the provisions of the Gujarat Stamp Act, instrument of lease is considered at par with the conveyance for the sale of immovable property.

49. Learned Advocate General Mr. Kamal Trivedi has drawn distinction between “immovable property” and “interest in immovable property” i.e. difference between tangible rights and intangible rights in the immovable property so as to submit that immovable property as such is not liable to levy of GST whereas interest in immovable property like leasehold rights which is transferred by way of sale is liable to levy of GST falling within the scope of “supply of services”.

50. Therefore, the submission was made to the effect that right to occupy the land which is one of the bundle of rights falling within the interest of immovable property when transferred by GIDC in favour of lessee is to be treated as supply of service under the GST Act and any further transfer which is the same right to occupy/possess will continue to remain as supply of service. It was submitted that characteristics of interest in immovable property on further transfer would not change only because the lessee-assignor effects absolute transfer in favour of assignee with respect to leasehold rights.

51. This submission seems to be very attractive at the first blush, however, there are two transactions, one when the GIDC allots plot of land along with right to occupy, right

to construct, right to possess on long term lease basis, it is nothing but supply of service as right of ownership of plot in question remains with the GIDC which will revert back on expiry of lease period whereas transaction of sale and transfer of leasehold rights by the lessee- assignor in favour of assignee divest lessee-assignor of all the absolute rights in the property. Therefore, interest in the immovable property in form of leasehold rights cannot be said to be different than the immovable property itself. Section 2(119) of the GST Act defines “works contract” being a contract for building, construction, fabrication, completion, erection etc., of any immovable property wherein transfer of property in goods is involved in execution of such contract. Therefore, there is no reference to the

interest in immovable property in works contract. Similarly section 17(5)(c) and (d) of the GST Act refers to the immovable property regarding works contract services and goods or services both received by taxable person for construction of an immovable property. Section 12 of the Integrated Goods and Service Tax Act,2017 (for short ‘the IGST Act’) refers to place of supply of services in reference to section 2(120) of the GST Act which applies to the IGST Act also and as per sub-section(3) of section 12, place of supply of services in relation to immovable property includes services provided by architect, interior decorators etc. and includes any service provided by way of grant of right to use immovable property or for carrying out or coordination of construction work by way of lodging accommodation by a hotel, by way of

accommodation in any immovable property for organizing marriage or any services ancillary to the services referred to in other clauses, shall be the location at which the immovable property is located.

52. Therefore, the place of supply of service may be at the location of the immovable property, however when the lessee-assignor transfers absolute right by way of sale of leasehold rights in favour of the assignee, the same shall be transfer of “immovable property” as leasehold rights is nothing but benefits arising out of immovable property which according to the definition contained in other statutes would be “immovable property”. Therefore, the question of supply of services or place of supply of services does not arise in view of the above analysis of the

provisions of the GST Act as the term “immovable property” is not defined under the GST Act.

53. Lord Wensleydale reaffirmed by Lord Halsbury and Lord Simonds in Micklehwait, (1885) 11 Ex 452 referred to in Tenant v. Smith (1892) AC 150 154 (HL) and St. Aubyn v AG, (1951) 2 ALL ER 473(HL) as well as in case of Member Secretary, Andhra Pradesh State Board for Prevention and Control of Water Pollution v. Andhra Pradesh Rayons Ltd. reported in (1989) 1 SCC 44 and Saraswati Sugar Mills v. Haryana State Board reported in (1992) 1 SCC 418, it is held that “ taxing statute is to be strictly construed”. It is observed by Lord Wensleydale that “the subject is not to be taxed without clear words for that purpose; and also that every Act of

Parliament must be read according to the natural construction of its words."

54. Rowlatt J, has expressed the principle in following words "In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

55. Therefore, it is clear that in a taxing statute there is no room for any intendment but regard must be had to the clear meaning of the words and entire matter is governed only by the language of the provision.

56. The Hon'ble Apex Court in case of **CIT**

Madras v. Kasturi and Sons reported in (1999) 3 SCC 346, has held that the principle of strict construction of taxing statute is required to be implemented in the facts of the said case where the words “moneys” in the expression “”moneys payable” in section 41(2) of the Income Tax Act, 1961 was not construed to include “money’s worth”.

57. Hon’ble Justice Bhagwati in case of **AV Fernandez v. State of Kerala** reported in AIR 1957 SC 657 enunciated the principle of interpretation of taxation laws as under:

> “In construing fiscal statute and in determining the liability of a subject to tax one must have regard to the strict letter of the law. If the Revenue satisfies the Court that the case falls strictly within the provisions of the law, the subject can be taxed. If, on the other hand, the case is not covered within the four corners of the taxing statute, no tax

> can be imposed by interference or by analogy or by trying to probe into the intention of the legislature and by considering what was the substance of the matter."

58. Considering the above conspectus of law for construing the provisions of the GST Act, relating to the scope of supply as per section 7, regard must be given to the clear meaning of the words as the entire issue is governed only by the language of the provisions.

59. Section 7 of the GST Act read with Schedule II and Schedule III thereof indicates wide scope for interpretation of concept of supply which is the basis to levy the tax as per the charging provision of section 9 of the GST Act.

60. Statement of object and reasons stated in

Central Goods and Service Tax Bill, 2017 reads as under:

> “STATEMENT OF OBJECTS AND REASONS
>
> Presently, the Central Government levies tax on, manufacture of certain goods in the form of Central Excise duty, provision of certain services in the form of service tax, inter-State sale of goods in the form of Central Sales tax. Similarly, the State Governments levy tax on and on retail sales in the form of value added tax, entry of goods in the State in the form of entry tax, luxury tax and purchase tax, etc. Accordingly, there is multiplicity of taxes which are being levied on the same supply chain.
>
> 2. The present tax system on goods and services is facing certain difficulties as under-
>
> (i) there is cascading of taxes as taxes levied by the Central Government are not available as set off against the taxes being levied by the State Governments;
>
> (ii) certain taxes levied by State Governments are not allowed as set off for payment of other taxes being levied by them;

(iii) the variety of Value Added Tax Laws in the country with disparate tax rates and dissimilar tax practices divides the country into separate economic spheres; and

(iv) the creation of tariff and non-tariff barriers such as octroi, entry tax, check posts, etc., hinder the free flow of trade throughout the country. Besides that, the large number of taxes create high compliance cost for the taxpayers in the form of number of returns, payments, etc.

3. In view of the aforesaid difficulties, all the above mentioned taxes are proposed to be subsumed in a single tax called the goods and services tax which will be levied on supply of goods or services or both at each stage of supply chain starting from manufacture or import and till the last retail level. So, any tax that is presently being levied by the Central Government or the State Governments on the supply of goods or services is going to be converged in goods and services tax which is proposed to be a dual levy where the Central Government will levy and collect tax in the form of central goods and services tax and the State Government will levy and collect tax in the form of state goods and

services tax on intra-State supply of goods or services or both.

4. In view of the above, it has become necessary to have a Central legislation, namely the Central Goods and Services Tax Bill, 2017. The proposed legislation will confer power upon the Central Government for levying goods and services tax on the supply of goods or services or both which takes place within a State. The proposed legislation will simplify and harmonise the indirect tax regime in the country. It is expected to reduce cost of production and inflation in the economy, thereby making the Indian trade and industry more competitive, domestically as well as internationally. Due to the seamless transfer of input tax credit from one stage to another in the chain of value addition, there is an in-built mechanism in the design of goods and services tax that would incentivise tax compliance by taxpayers. The proposed goods and services tax will broaden the tax base, and result in better tax compliance due to a robust information technology infrastructure.

5. The Central Goods and Services Tax Bill, 2017, inter alia, provides for the following, namely:-

(a) to levy tax on all intra-State supplies of goods or services or both except supply of alcoholic liquor for human consumption at a rate to be notified, not exceeding twenty per cent. as recommended by the Goods and Services Tax Council (the Council);

(b) to broad base the input tax credit by making it available in respect of taxes paid on any supply of goods or services or both used or intended to be used in the course or furtherance of business;

(c) to impose obligation on electronic commerce operators to collect tax at source, at such rate not exceeding one per cent. of net value of taxable supplies. out of payments to suppliers supplying goods or services through their portals;

(d) to provide for self-assessment of the taxes payable by the registered person:

(e) to provide for conduct of audit of registered persons in order to verify compliance with the provisions of the Act;

(f) to provide for recovery of arrears of tax using various modes including detaining and sale of goods, movable and immovable

property of defaulting taxable person;

(g) to provide for powers of inspection, search, seizure and arrest to the officers;

(h) to establish the Goods and Services Tax Appellate Tribunal by the Central Government for hearing appeals against the orders passed by the Appellate Authority or the Revisional Authority;

(i) to make provision for penalties for contravention of the provisions of the proposed Legislation;

(j) to provide for an anti-profiteering clause in order to ensure that business passes on the benefit of reduced tax incidence on goods or services or both to the consumers; and

(k) to provide for elaborate transitional provisions for smooth transition of existing taxpayers to goods and services tax regime.

6. The Notes on clauses explain in detail the various provisions contained in the Central Goods and Services Tax Bill, 2017.

7. The Bill seeks to achieve the above objectives."

61. A bare perusal of the above Statement of Object and Reasons, clearly indicates the legislative intention to subsume all the existing indirect taxes in a single tax called Goods and Services Tax to be levied on supply of goods or services or both at each stage of supply chain by converging any tax that was being levied on the supply of goods or services to be converged in Goods and Service tax to be levied under the GST Act.

62. In view of the legislative intention, section 7 of the GST Act which provides for the scope of supply of good or services or both for the purpose of the GST Act includes all forms of supply of goods or services or both by any form such as transfer, sale, barter, exchange, license, rental, lease or disposal made or agreed to be made for a

consideration by a person in the course or furtherance of business. Therefore, considering the settled legal position as held by the Hon’ble Supreme Court and other High Courts from time to time, it is true that any lease or letting out of a building including commercial, industrial, residential complex for business either wholly or partly would be “supply of service”. Therefore, reading the provisions of the Act together and harmoniously to understand the nature of levy and the object and purpose of its imposition, no activity of the nature mentioned in the inclusive provision of section 7 of the GST Act can be left out of the net of tax. Simultaneously, the provisions of section 7 has to be read in terms of substantive provision and Schedules which treats the activity as supply of service, particularly,

in relation to land and building and includes a lease. The consideration, therefore, as premium/one time premium is a measure on which tax is to be levied, assessed and recovered. Therefore, when the GIDC allots the plot of land on lease of 99 years and charges premium for such allotment followed by periodical lease rent to be paid, is to be considered as supply of service in relation to land and building read with clause 5(a) of Schedule-II which specifically provides that renting of immovable property shall be treated as supply of services.

63. However, when such leasehold right is transferred by the lessee-assignor in favour of a third person-assignee by execution of deed of assignment , it would be nothing but transfer of an “immovable property” in view of

the settled legal position to the effect that lease for 99 years or for a long term in consideration of premium paid is as much an alienation as sale or mortgage.

64. Corpus Juris Secundum relied upon on behalf of the petitioner defines the word “property” which depends on the context with which it is used. Firstly, it is applied to the external things that are the objects of rights or estates that is things that are the object of the ownership and secondly, it is applied to the rights or estates that a person may acquire in or to things. Therefore, in strict legal parlance “property” is used to designate a right of ownership or an aggregate of rights that are guaranteed and protected by the Government and has been defined as the right of any person to possess, use, enjoy and

dispose of a thing and to exclude everyone else from interfering with it and more succinctly, it has been defined as any vested right of any value which refers to both the actual physical object and various incorporeal ownership rights in the object i.e. plot of land and building thereon in facts of the case as the right to possess, to enjoy the income from, to alienate or to recover ownership from one who has obtained title to the object.

65. Under the GST Act and IGST Act relating to Rate of Tax, Exemption, Reverse Charge Scheme and other matters concerning supply of services are covered by notifications issued in exercise of powers conferred by sub-sections (1), (3) and (4) of section 9, sub-section (1) of section 11, sub-section (5) of section 15 and sub-section (1) of section 16

of the GST Act on the basis of recommendations of the GST Council.

66. As per the notification no. 11/2017, lease of property is included in Heading No. 9954 relating to construction services which provides rates of GST involving transfer of land or undivided share of land, as the case may be, and value of such supply shall be equivalent to the total amount charged for such supply less the value of transfer of land or undivided share of land, as the case may be, and value of such transfer of land or undivided share of land shall be deemed to be 1/3rd of the total amount charged for such supply and total amount means sum total of consideration charged for the aforesaid service and amount charged for transfer of land or undivided share of land, as the case

may be, including by way of lease or sub-lease. Therefore, levy of GST on construction services are exclusive of 1/3rd of total amount charged for such supply which includes transfer by way of lease or sub-lease meaning thereby even for levy of GST on construction services, value of the land by way of lease is to be excluded considering such value being the value of immovable property which is transferred.

67. In such circumstances, the contention raised on behalf of the petitioner that leasehold rights are nothing but interest in immovable property as per the provision of section 105 read with section 108(j) of the Transfer of Property Act constituting absolute transfer of right in such property because transfer of such leasehold right extinguishes

the estate of the transferor-lessee-assignor in the immovable property and all legal relationships with lessor-GIDC are severed and third party-assignee becomes lessee liable for obligation under the assignment deed vis-à-vis the lessor-GIDC. As the assignor transfers leasehold rights after receiving the consideration as determined on the basis of value of such leasehold rights, such transaction therefore would of an “immovable property” and cannot be considered as “supply of services” as held by Hon’ble Apex Court in case of **Gopal Saran v. Satya Narayana** reported in (1989) 3 Supreme Court Cases 56 wherein definition of “assignment” as stated in Black's Law Dictionary, Special Deluxe Edition page 106, is referred to as assignment means "is a transfer or making over to another of the whole of any property, real or personal,

in possession or in action, or of any estate or right therein". It has further been held that assignment would include "The transfer by a party of all its rights to some kind of property, usually intangible property such as rights in lease, mortgage, agreement of sale or a partnership." Considering such definition of assignment, assignment of leasehold rights is also subject to levy of stamp duty being transfer of “immovable property”.

68. The Hon’ble Apex Court in case of **Byramjee Jeejeebhoy (P) Ltd vs State Of Maharashtra** reported in AIR 1965 Supreme Court 590 while holding as to what a lease contemplates has observed that a demise or a transfer of a right to enjoy land for a term or in perpetuity in consideration of a price

paid or promised or services or other things of value to be rendered periodically or on specified occasions to the transferor. The words “transfer of right to enjoy such property” indicates that all the rights of ownership are not transferred. Therefore, the significance of those words as indicative of the limited estate transfer is apparent in contrasted which flows in section 54 where a sale is defined as “transfer of ownership in exchange for a price”. Therefore, while assignment conveys the whole interest in the property which passes to the assignee along with rights and liability to sue and be sued upon the covenants in the original lease.

69. The Hon’ble Supreme Court in case of **Sri Tarkeshwar Sio Thakur Jiu v. Dar Dess Dey Co. and others** reported in (1979) 3 Supreme Court

Cases 106 while considering the provisions of West Bengal Estates Acquisition Act, 1953 regarding mining operation has interpreted the scope of term “lease” in section 3(c) of the Mines and Minerals (Regulation and Development) Act (67 of 1975) in juxtaposition to sections 105 and 108 of the Transfer of Property Act 1882 as under :

> “34. Section 105, Transfer of Property Act, defines a 'lease' of immoveable property as ---
>
> "a transfer of a right to enjoy such property made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms."
>
> 35. In the second paragraph of the Section, it is expressly stated that the price so paid in consideration of the transfer is called "the premium, and the

money, share, service, or other thing to be so rendered, is called the rent."

36. The definition of "immoveable property" given in Section 3, para 1 of that Act is in the negative, and is not exhaustive. Therefore, the definition given in Section 3 (26) of the General Clauses Act (X of 1897) will apply to the expression used in this Act, except as modified by the definition in the first clause of Section 3. According to the definition given in section 3 (26) of the General Clauses Act, "immoveable property" shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth." In short, the expression 'immoveable property' comprehends all that would be real property according to English Law and possible more. Thus, every interest in immovable property 'or a benefit arising out of land, will be "immovable property" for the purpose of section 105, Transfer of property Act.”

70. The Hon’ble Apex Court in case of **Narinder S. Chadha and others v. Municipal Corporation of Greater Mumbai and others** reported in (2014) 15 Supreme Court Cases 689 has held that words “sale” and “service” are not interchangeable terms as “sale” is defined under the Act as to mean a transfer of property in goods for consideration which would not include “service” which would not refer to transfer of property in goods but to services.

71. In case of **Northern India Caterers (India) Ltd. Lt. Governor of Delhi** reported in (1978) 4 SCC 36, the Hon’ble Apex Court has made a distinction between sale of food and the provisions of services in hotels and restaurants which has led to Constitution 46th Amendment Act by which Article 366 (29-A) was

inserted expanding the scope of tax on the sale or purchase of goods artificially, more particularly, by sub-clause (f) thereof which stipulates tax on supply, by way of or part of any service or in any other manner whatsoever of goods being food etc.

72. Considering above dictum of law, when section 7 of the GST Act refers to the scope of supply, it is well settled that such definition is an exhaustive definition as held by Hon'ble Apex Court in case of **P. Kasilingam v. P.S.G. College of Technology** reported in 1995 Supp (2) SCC 348 as under:

> "19. We will first deal with the contention urged by Shri Rao based on the provisions of the Act and the Rules. It is no doubt true that in view of clause (3) of Section 1 the Act applies to all private colleges. The expression "college" is, however, not defined in the Act. The expression "'private college" is defined in

Clause (8) of Section 2 which can, in the absence of any indication of a contrary intention, cover all colleges including professional and technical colleges. An indication about such an intention is, however, given in Rules wherein the expression "college" has been defined in Rule 2(b) to mean and include Arts and Science College, Teachers Training College, Physical Education College, Oriental College, School of Institute of Social Work and Music College. While enumerating the various types of colleges in Rule 2(b) the Rule making authority has deliberately reframed from including professional and technical colleges in the said definition. It has been urged that in Rule 2(b) the expression "means and includes" has been used which indicates that the definition is inclusive in nature and also covers categories which are not expressly mentioned therein. We are unable to agree. A particular expression is often defined by the Legislature by using the word 'means' or the word 'includes'. Sometimes the words 'means and includes' are used. The use of the word' ' indicate that "definition is a hard- and-fast definition. and no other meaning can be assigned to the expression that is

put down in definition." [See Gough v. Gough, (1891) 2 QB 665; Punjab Land Development and Reclamation Corpn. Ltd. v. Presiding Officer, Labour Court, (1990 (3) SCC 682, at p. 717]. The word 'includes' when used, enlarges the meaning of the expression defined so as to comprehend not only such things as they signify according to their natural import but also those things which the clause declares that they shall include. The words 'means and includes', on the other hand, indicate "an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions."' [See : Dilworth v Commissioner of Stamps, (1899 AC 99 at pp. 105-106 (Lord Watson);1 Mahalakshmi Oil Mills v. State of Andhra Pradesh, (1989) 1 SCC 164, at p. 169]. The use of words 'means and includes' in Rule 2(b) would, therefore, suggest that the definition of "college" is intended to be exhaustive and not extensive and would cover only the educational institutions failing in the categories specified in Rule 2(b) and other educational institutions are not comprehended……..”

73. Therefore, the scope of “supply of

services" would not include transfer of leasehold rights as supply of service as it would be transfer of "immovable property" being a benefit arising out of immovable property consisting of land and building.

74. Clause 5 of Schedule III of the GST Act clearly provides that sale of land cannot to be treated as supply of goods or services. Therefore, leasehold rights which are to be considered as sale of land would be out of purview of the provisions of scope of supply as per section 7 of the GST Act.

75. As the GST Act is nothing but a levy of tax upon all the indirect taxes which were levied under different legislation, it would be germane to refer to definition of "service" as provided in section 2(102) of the GST Act

to mean as anything other than goods, money and securities. Considering such definition in juxtaposition to provisions of section 65B(44) of the Finance Act, 1944, there was specific exclusion of transfer of title in immovable property from definition of ‘service’ itself which clearly shows that there was no intention of the legislature to impose tax on transfer of immovable property. Under the Service Tax Act, even the development rights which are the benefits arising from land were not liable to tax. Leasehold right is in fact a greater right and interest in land than development rights and the principle under the service tax regime would therefore, continue even to apply under the GST regime as the object of introduction of GST is to subsume the existing taxes.

76. It would also be necessary to refer to the Minutes of the meeting of 5th GST Council to the Agenda 2A which clearly notes that service tax was not leviable on transfer of immovable property and a specific proposal was made to impose GST on sale of immovable property on the ground that there was no constitutional embargo for imposing such tax and the stamp duty was leviable on a different aspect. 7th GST Council meeting held on 22nd and 23rd December, 2016 after a detailed discussion decided to defer imposition of tax on land and building and thereafter, clause 5 of Schedule III of the GST Act clearly excludes sale of land and building which fortifies the intention of the GST Council not to impose tax on transfer of immovable property continuing the underlying object of erstwhile service tax regime.

77. In case of **Munjaal Manishbhai Bhatt v. Union of India** reported in (2022) 104 GSTR 419 (Guj), this court has observed that the intention of introduction of GST regime was not to change the basis of taxation of the Value Added and Service Tax regime and that supply of land in every from was excluded from the purview of GST Act.

78. Moreover, in the facts of the various cases, GIDC had only allotted the plot of land to the lessee who constructed the building and developed the land to run the business or industry for which such plot of land was allotted. Therefore, what is assigned by the lessee/assignor to the assignee for a consideration is not only the land allotted by GIDC on lease but the entire land along with

building thereon which was constructed on such land. The entire land and building is therefore, transferred along with leasehold rights and interest in land which is a capital asset in form of an immovable property and the lessee/assignor earned benefits out of land by way of constructing and operating factory building/shed which constitutes a “profit a pendre” which is also an immovable property and therefore, would not be subject to tax under the GST Act.

79. The Hon’ble Apex Court in case of **Anand Behera v. State of Orissa** reported in AIR 1956 SC 17 has held as under:

> “9. The facts disclosed in paragraph 3 of the petition make it clear that what was sold was the right to catch and carry away fish in specific sections of the lake over a specified future period. That amounts to a license to enter on the land coupled with

a grant to catch and carry away the fish, that is to say, it is a profit a prendre: see 11 Halsbury's Laws of England, (Hailsham Edition), pages 382 and 383. In England this is regarded as an interest in land (11 Halsbury's Laws of England, page 387) because it is a right to take some profit of the soil for the use of the owner of the right (page 382). In India it is regarded as a benefit that arises out of the land and as such is immoveable property.

10. Section 3 (26) of the General Clauses Act defines "immoveable property" as including benefits that arise out of the land. The Transfer of Property Act does not define the term except to say that immoveable property does not include standing timber, growing crops or grass. As fish do not come under that category the definition in the General Clauses Act applies and as a profit a prendre is regarded as a benefit arising out of land it follows that it is immoveable property within the meaning of the Transfer of Property Act.

11. Now a "sale" is defined as a transfer of ownership in exchange for a price paid or

> promised. As a profit a prendre is immoveable property and as in this case it was purchased for a price that was paid it requires writing and registration because of section 54 of the Transfer of Property Act. If a profit a prendre is regarded as tangible immoveable property, then the "property" in this case was over Rs. 100 in value. If it is intangible, then a registered instrument would be necessary whatever the value. The "sales" in this case were oral: there was neither writing nor registration. That being the case, the transactions passed no title or interest and accordingly the petitioners have no fundamental right that they can enforce.”

80. In case of **State of Orissa v. Titaghur Paper Mills Co. Ltd** reported in (1985) Supp. SCC 285, it is held as under :

> “98. The meaning and nature of a profit a prendre have been thus described in Halsbury's Laws of England, Fourth Edition, Volume 14, paragraphs 240 to 242 at pages 115 to 117:

"240. Meaning of 'profit a prendre' A profit a prendre is a right to take something off another person's land. It may be more fully defined as a right to enter another's land to take some profit of the soil, or a portion of the soil itself, for the use of the owner of the right The term 'profit a prendre' is used in contradistinction to the term 'profit a prendre', which signified a benefit which had' to be rendered by the possessor of land after it had come into his possession. A profit a prendre is a servitude.

241. Profit a prendre as an interest in land. A profit a prendre is an interest in land and for this reason any disposition of it must be in writing.A profit a prendre which gives a right to participate in a portion only of some specified produce of the land is just as much an interest in the land as a right to take the whole of that produce…

242. What may be taken as a profit a prendre. The subject matter of a profit a prendre, namely the

> substance which the owner of the right is by virtue of the right entitled to take, may consist of animals, including fish and fowl, which are on the land, or of vegetable matter growing or deposited on the land by some agency other than that of man, or of any part of the soil itself, including mineral accretions to the soil by natural forces. The right may extend to the taking of the whole of such animal or vegetable matters or merely a part of them. Rights have been established as profits a prendre to take acorns and beech mast, brakes, fern, heather and litter, thorns, turf and peat, boughs and branches of growing trees, rushes, freshwater fish, stone, sand and shingle from the seashore A and ice from a canal; also the right of pasture and of shooting pheasants. There is, however, no right to take seacoal from the foreshore. The right to take animals ferae naturae while they are upon the soil belongs to the owner of the soil, who may grant to others as a profit a prendre a right to come and take them by a grant of hunting, shooting, fowling and so forth."

99. A profit a prendre is a servitude for it burdens the land or

rather a person's ownership of land by separating from the rest certain portions or fragments of the right of ownership to be enjoyed by persons other than the owner of the thing itself (see Jowitt's Dictionary of English Law, Second Edition, Volume 2, page 1640. under the heading "Servitude"). "Servitude" is a wider term and includes both easements and profits a prendre (see Halsbury's Laws of England, Fourth Edition, Volume 14, paragraph 3, page 4). The distinction between a profit a prendre and an easement has been thus stated in Halsbury's Laws of England, Fourth Edition, paragraph 43 at pages 21 to 22:

> "The chief distinction between an easement and a profit a prendre is that whereas an easement only confers a right to utilise the servient tenement in a particular manner or prevent the commission of some act on that tenement, a profit a prendre confers a right to take from the servient tenement some part of the soil of that tenement or minerals under it or some part of its natural produce or the animals ferae naturae existing upon it. What is taken must be capable of ownership, for

otherwise the right amounts to a mere easement".

In Indian law an easement is defined by section 4 of the Indian Easement Act, 1882 (Act No. V of 1882) as being ' a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of, certain other land not his own".A profit a prendre when granted in favour of the owner of a dominant heritage for the beneficial enjoyment of such heritage would, therefore, be an easement but it would not be so if the grant was not for the beneficial enjoyment of the grantee's heritage.

100. Clause (26) of section 3 of the General Clauses Act, 1897, defines "immovable property" as including inter alia "benefit to arise out of land". The definition of "immovable property" in clause (f) of section 2 of the Registration Act 1908, illustrates a benefit to arise out of land by stating that immovable property "includes...rights to ways, lights ferries, fisheries or any

other benefit lo arise out of land". As we have seen earlier, the Transfer of Property Act, 1882, does not give any definition of "immovable property" except negatively by stating that immovable property does not include standing timber, growing crops, or grass. The Transfer of Property Act was enacted about fifteen years prior to the General Clauses Act, However, by section 4 of the General Clauses Act, the definitions of certain words and expressions, including "immovable property" and "movable property", given in section 3 of that Act are directed to apply also, unless there is anything repugnant in the subject or context, to all Central Acts made after January 3 1968, and the definitions of these two terms, therefore, apply when they occur in the Transfer of Property Act. In Ananda Behra and another v. The State of Orissa and another (1) this Court has held that a profit a prendre is a benefit arising out land and that in view of clause (26) of section 3 of the General Clauses Act, it is immovable property within the meaning of the Transfer of Property Act.

101. The earlier decisions showing what constitutes benefits arising out of land have been summarized in Mulla on The Transfer of Property

Act, 1882", and it would be pertinent to reproduce the whole of that passage. That passage (at pages 16-17 of the Fifth Edition) is as follows:

> "A 'benefit to arise out of land' is an interest in land and therefore immovable property. The first Indian Law Commissioners in their report of 1879 said that they had 'abstained from the almost impracticable task of defining the various kinds of interests in immovable things which are considered immovable property. The Registration Act, however, expressly includes as immovable property benefits to arise out of land, here diary allowances, rights of way lights, ferries and fisheries'. The definition of immovable property in the General Clauses Act applies to this Act. The following have been held to be immovable (1) 11955] 2 S. C. R. 919 property:-varashasan or annual allowance charged on land; a right to collect dues at a fair held on a plot of land; a hat or market; a right to possession and management of a saranjam; a malikana; a right to collect rent or jana: a life interest in the income of immovable property; a

right of way; a ferry; and a fishery; a lease of land".

102. Having seen what the distinctive features of a profit a prendre are, we will now turn to the Bamboo Contract to ascertain whether it can be described as a grant of a profit a prendre and thereafter to examine the authorities cited at the Bar in this connection. Though both the Bamboo Contract in some of its clauses and the Timber Contracts speak of "the forest produce sold and purchased under this Agreement", there are strong countervailing factors which go to show that the Bamboo Contract is not a contract of sale of goods. While each of the Timber Contracts is described in its body as "an agreement for the sale and purchase of forest produce", the Bamboo Contract is in express terms described as "a grant of exclusive right and licence to fell, cut, obtain and remove bamboos...for the purpose of converting the bamboos into paper pulp or for purposes connected with the manufacture of paper...." Further, throughout the Bamboo Contract, the person who is giving the grant, namely, the Governor of the State of Orissa, is referred to as the "Grantor." While the Timber Contracts speak of the consideration payable by the forest contractor, the Bamboo Contract

provides for payment of royalty. "Royalty" is not a term used in legal parlance for the price of goods sold. "Royalty" is defined in Jowitt's Dictionary of English Law, Fifth Edition, Volume 2, page 1595, as follows.

> "Royalty, a payment reserved by the grantor of a patent, lease of a mine or similar right, and payable proportionately to the use made of right by the grantee. It is usually a payment of money, but may be a payment in kind, that is, of part of the produce of the exercise of the right.
>
> Royalty also means a payment which is made to an author or composer by a publisher in respect of each copy of his work which is sold, or to an inventor in respect of each article sold under the patent."

We are not concerned with the second meaning of the word H "royalty" given in Jowitt. Unlike the Timber Contracts, the Bamboo Contract is not an agreement to sell bamboos standing in the contract areas with an accessory licence to enter upon such areas / for the purpose of felling and removing the bamboos nor is it,

> unlike the Timber Contracts, in respect of a particular felling season only. It is an agreement for a long period extending to fourteen years, thirteen years and eleven years with respect to different con tract areas with an option to the Respondent Company to renew the contract for a further term of twelve years and it embraces not only bamboos which are in existence at the date of the contract but also bamboos which are to grow and come into existence thereafter. The payment of royalty under the Bamboo Contract has no relation to the actual quantity of bamboos cut and removed. Further, the Respondent Company is bound to pay a minimum royalty and the amount of royalty to be paid by it is always to be in excess of the royalty due on the bamboos cut in the contract areas.

103. We may pause here to note what the Judicial Committee of the Privy Council had to say in the case of Raja Bahadur Kamkashya Narain Singh of Ramgarh v. Commissioner of Income- tax, Bihar and Orissa about the payment of minimum royalty under a coal mining lease. The question in that case was whether the annual amounts payable by way of minimum royalty to the lessor were in his

hands capital receipt or revenue receipt. The Judicial Committee held that it was an income flowing from the covenant in the lease. While discussing this question, the Judicial Committee said (at pages 522-3):

> "These are periodical payments, to be made by the lessee under his covenants in consideration of the benefits which he is granted by the lessor. What these benefits may be is shown by the extract from the lease quoted above, which illustrates how inadequate and fallacious it is to envisage the royalties as merely the price of the actual tons of coal. The tonnage royalty is indeed only payable when the coal or coke is gotton and despatched: but that is merely the last stage. As preliminary and ancillary to that culminating act, liberties are granted to enter on the land and search, to dig and sink pits, to erect engines an (1) (1943)11 I.T.R. 513 P.C. machinery, coke ovens, furnaces and form railways and , roads. All these and the like liberties show how fallacious it is to treat the lease as merely one for the acquisition of a certain number of tons of coal, or the agreed item of royalty as

> merely the price of each ton of coal."

Though the case before the Judicial Committee was of a lease of a coal mine and we have before us the case a grant for the purpose of felling, cutting and removing bamboos with various other rights and licences ancillary thereto, the above observations of the Judicial Committee are very pertinent and apposite to what we have to decide.

104. Under the Bamboo Contract, the Respondent Company has the right to use all lands, roads and streams within as also outside the contract areas for the purpose of free ingress to and egress from the contract areas. It is also given the right to make dams across streams, cut canals, make water courses, irrigation works, roads, bridges, buildings, tramways and other work useful or necessary for the purpose of its business of felling, cutting, and removing bamboos for the purpose of converting the same into paper pulp or for purposes connected with the manufacture of paper. For this purpose it has also the right to use timber and other forest produce to be paid for at the current schedule of rates. The Respondent Company has the right to attract fuel from areas

allotted for that purpose in order to meet the fuel requirements of the domestic consumption in the houses and offices of the persons employed by it and to pay a fixed royalty for this purpose. Further, the Government was bound, if required by the Respondent Company, to lease to it a suitable site or sites selected by it for the erection of store houses, sheds, depots, bungalows, staff offices, agencies and other buildings of a like nature.

105. We have highlighted above only the important terms and conditions which go to show that the bamboo Contract is not and cannot be a contract of sale of goods. It confers upon the Respondent Company a benefit to arise out of land, namely, the right to cut and remove bamboos which would grow from the soil couple with several ancillary rights and is thus a grant of a profit a prendre. It is equally not possible to view it as a composite contract one, an agreement relating to standing bamboos agreed to be severed H and the other, an agreement relating to bamboos to come into existence in the future. The terms of the Bamboo Contract make it clear that it is one, integral and indivisible contract which is not capable of being severed in the manner canvassed on

behalf of the Appellant. It is not a lease of the contract areas to the Respondent Company for its terms clearly show that there is no demise by the State Government of any area to the Respondent Company. The Respondent dent Company has also no right to the exclusive possession of the contract areas but has only a right to enter upon the land to take a part of the produce thereof for its own benefit. Further, it is also pertinent that while this right to enter upon the contract areas is described as a "licence", under clause XXV of the Bamboo Contract the Respondent (company has the right to take on lease a suitable site or sites of its choice within the contract areas for the erection of store houses, sheds, depots, bungalows, staff offices, agencies and other buildings of alike nature required fourth purpose of its business. The terms and conditions of the Bamboo Contract leave no doubt that it confers upon the Respondent Company a benefit to arise out of land and it would thus be an interest in immovable property. As the grant is of the value exceeding Rs. 100, the Bamboo Contract is compulsorily registrable. It is, in fact, not registered. This is, however, immaterial because it is a grant b the Government of an interest in land and under section Registration

> Act it is exempt from registration. The High Court was, therefore, right in holding that the Bamboo Contract was a grant of a profit prendre, though the grant of such right not being for the beneficial enjoyment of any land of the Respondent Company it would not be an easement. Being a profit a prendre or a benefit to arise out of land any attempt on the part of the State Government to tax the amounts payable under the Bamboo Contract would not only be ultra vires the Orissa Act but also unconstitutional as being beyond the State's taxing power under Entry 54 in List II in the Seventh Schedule to the Constitution of India."

81. Therefore, the contention of the respondents that by excluding only sale of land and building as per Schedule-III would not amount to transfer of leasehold rights as the interest in immovable property being an intangible form would be covered by the scope of supply of service, is not tenable as transaction of assignment is nothing but

absolute transfer of right and interest arising out of the land which would amount to transfer/sale of immovable property which cannot be said to be “service” as contemplated under the provisions of GST Act. Moreover, assignment/transfer of rights would be out of scope of supply of service.

82. In view of above discussion and analysis of the provisions of section 7 read in context of the facts of the case, the decisions relied upon on behalf of the respondent are required to be dealt in support of the proposition that interest in immovable property cannot be considered as an immovable property as it is not envisaged as such in the GST Act, as immovable property is nothing but bundle of rights and right to give such property on lease is one of such rights and further

transfer of the right to occupy or possess will continue to remain as supply of service which character will not change merely because lessee of GIDC affects absolute transfer thereof in favor of the assignee leaving no right whatsoever in respect of such leasehold land and building.

(1) Decision in case of **Legal Hiers of Deceased Fakir Chand Ambaram Patel** (supra) of this Court holding that lease creates an interest in immovable property which is an intangible asset and therefore, would amount to supply of service, would not be applicable as along with the leasehold rights, there is an absolute transfer of all rights in the land and building.

(2) Similarly, decision of Allahabad High Court in case of **Greater Noida Industrial Development Authority** (supra) would also not be applicable in the facts of the case as it related to the demand of service tax on renting of immovable property on lease for any period and the term of lease would not determine the character of service of renting on property under section 65 (105) (zzzz) of the Finance Act, 1994 as now under Schedule II, clause 5(a) renting of immovable property is deemed to be supply of services. Therefore, there is a thin line of distinction as to renting of immovable property and assignment of such leasehold rights in immovable property for a consideration. In facts

of the case, therefore, such assignment of leasehold right for a consideration in immovable property would be out of scope of purview of the supply of service as it would amount to sale of immovable property in form of land and building which would not be covered by definition of section 7(1)(a) read with clause 5 to Schedule III of the Act.

(3) Therefore, merely because GIDC is having title of the ownership over the land in question would not be sufficient to exclude the assignment of leasehold rights to be included as supply of service as levy of GST would depend upon the nature of transaction in question . In facts of the case

when the lessee/assignor transfers the land having leasehold rights and building to the assignee, same cannot be considered as supply of service as it would be a transfer of immovable property. Therefore, reliance placed on decision of Hon'ble Apex Court in case of **Residents Welfare Association, Noida** (supra) is in context of levy of stamp duty on the deed of assignment of lease not being an outright sale of land in context of section 47-A of the Stamp Act, 1989 for the purpose of valuation of the property for levy of stamp duty.

(4) Whereas in facts of the case, levy of GST considering the nature of transaction, the assignment deed

executed by the lessee/assignor is not a composite deed of lease as well as deed of sale but by deed of assignment executed by the lessee there is no lease or sub-lease by the lessee but it is a deed of divesting all the rights of lessee in favour of assignee and the assignee becomes liable to the lessor on the covenants running with the land and liable to the stamp duty accordingly.

(5) Reliance was placed on the decision in case of **P. Kishore Kumar v. Vittal K. Patkar** reported in 2023 SCC OnLine SC 1483 to canvas the proposition that a vendor cannot transfer a title to the vendee better than he himself possesses and the principle arising

from the maxim Nemo dat quod non habet i.e. “no one can confer a better title than what he himself has”. Considering the nature of transaction when lessor assignor transfers the entire leasehold rights along with building constructed thereon to the lessee assignee, it would amount to assignment of all the rights in the immovable property by the lessor assignor.

(6) Reliance placed by the respondent on levy of GST under Heading 9972 and Group 997212 for rental or leasing service vis-a-vis Group 99979 for other miscellaneous services in which Sub-group 999792 providing for agreeing to do an Act would not

attract the transaction of assignment of leasehold rights along with building on the plot of land as lessee/assignee is not liable to receive any rental from the assignee. Similarly, reliance placed on Group 99836 for Advertising services and sub-group 998363 to 998366 for Sale of advertising space in print media, Sale of television and radio advertising time etc. would also not apply to the transaction of assignment of leasehold rights over land and building as such assignment is nothing but transfer of immovable property for consideration. Therefore, reliance placed on the decision in case of **T.N. Kalyana Mandapam Assn.**(supra), for levy of service tax on the mandap-

keeper and caterer service provided by them cannot be applied in the facts of the case, as in case of catering service provided by mandap-keeper it was a tax on service and not a tax on sale or purchase of goods by applying doctrine of pith and substance whereas in the facts of the case there cannot be any element of service for assignment of leasehold rights of the land and building as interest in leasehold rights of land and building would be transfer/sale of the immovable property.

(7) Reliance placed on the decision of Apex Court in case of **Venkateswara Hatcheries (P) Ltd.**(supra) wherein it is observed that as per principle of

interpretation of statute that external aids to other statutes cannot be imported for definition of a word in the statute as the word occurring in the provisions of the Act must take its colour from the context in which they are so used. In other words, for arriving at the true meaning of a word, the said word should not be detached from the context. Therefore, in the facts of the case when legislative intent is not to levy GST on the sale of immovable property by specific provision in clause 5 of Schedule-III, then attempt on part of the revenue to consider assignment of leasehold rights equal to the renting of immovable property as per clause 5(b) of the Schedule II would be

contrary to such legislative intent. Therefore, when the legislature in its wisdom has chosen to exclude the sale of land and building from purview of GST Act, there is no ambiguity that section 7(1)(a) would be applicable to the sale of immovable property and once it is held that assignment of the leasehold rights being the benefit/interest arising out of immovable property would partake the character as such, cannot be covered under the scope of supply of services by any stretch of imagination.

(8) Reliance placed on the decision of Hon'ble Apex Court in case of **Hotel & Restaurant Assn. and another** (supra) wherein it is held that it is

hazardous to interpret a word in accordance with its definition in another statute or statutory instrument and more so, when such statute or statutory instrument is not dealing with any cognate subject and definition of the term in one statute does not afford a guide to the construction of the same term in another statute would not be applicable in the facts of the case as the very nature of transaction of assignment of the absolute right in the property has to be considered as transfer of immovable property and accordingly, would be out of purview of the scope of supply for levy of GST.

(9) Reliance placed on the definition of “services” in the Major Law Lexicon by the respondent which includes transfer of technology including transferring or securing the transfer of rights etc. would not be applicable to the nature of the transaction of assignment of leasehold rights.

(10) Reliance placed on Articles 24 and 25 of the Council Directive of the Council of the European Union on the common system of value added tax, more particularly, Article 25 which stipulates that a supply of service may consist inter-alia the transaction of assignment of immovable property whether or not the subject to document establishing title, would also be not

applicable in facts of the case inasmuch as the assignment of leasehold rights along with building constructed thereon or otherwise is an immovable property itself and not an intangible property as leasehold rights transferred by lessee/assignee is with the concurrence of lessor GIDC in facts of the case and therefore, transfer charges paid by the assignee, would be subject to levy of GST but at the same time consideration paid by the assignee to the lessee/assignor would amount to transfer of immovable property which would be out of purview of provision of section 7(1)(a) of the GST Act read with Schedule II and Schedule III thereof.

(11) Contention of the respondent that activity of lessee/assignor to transfer the leasehold rights is in nature of compensation for agreeing to do the transfer in favour of the assignee is a service classifiable under other miscellaneous service under Group 999792 and taxable at the rate of 18% under serial no.35 of Notification No.11/2017 - Central Tax (Rate) dated 28.06.2017 would not cover the nature of transaction as consideration received by lessee/assignee is not in nature of premium but is a consideration for outright sale of leasehold rights which cannot be equated with subleasing in any manner as tried to be applied by Uttar Pradesh Authority

for Advance Ruling (GST) in case of **Remarkable Industries Private Limited** reported in 2023 SCC OnLine UP AAR-GST 14 so as to bring the transaction within the purview of **clause 5(b**) of Schedule II of the GST Act.

12) It is true that exemption granted as per Sr no.41 of the Exemption Notification No.12/2017 dated 28.06.2017 would not be applicable to the transaction of assignment of leasehold rights by lessee who is neither a State Government Industrial Development Corporation or undertaking. Fine line of distinction to be drawn for assignment of leasehold rights vis-a-vis allotment of plot of land by GIDC

on lease by charging one time premium which is exempt under the said notification is that subsequent transaction of assignment of leasehold rights is transfer of interest in immovable property which would be equivalent to transfer of immovable property, would be covered by Clause 5 of Schedule III whereas renting of the plot of land by GIDC would be covered by clause 5(b) of Schedule II. Lessee/Assignor is not transferring leasehold right by way of a sub-lease so as to earn rent on such assignment of leasehold rights, so as to apply clause 5(b) of Schedule II to such transaction. As nature of transaction in facts of the case is outright assignment resulting into

sale/transfer of the leasehold rights in favour of assignee by lessee/assignor for a consideration would be covered by clause 5 of Schedule III which provides that sale of land and building shall not be considered as supply of services. Therefore, it cannot be said that assignment of the outright leasehold rights would be a service or transferring of leasehold right.

-:CONCLUSION:-

83. In view of foregoing reasons, assignment by sale and transfer of leasehold rights of the plot of land allotted by GIDC to the lessee in favour of third party-assignee for a consideration shall be assignment/sale/ transfer of benefits arising out of

“immovable property” by the lessee-assignor in favour of third party-assignee who would become lessee of GIDC in place of original allottee-lessee. In such circumstances, provisions of section 7(1)(a) of the GST Act providing for scope of supply read with clause 5(b) of Schedule II and Clause 5 of Schedule III would not be applicable to such transaction of assignment of leasehold rights of land and building and same would not be subject to levy of GST as provided under section 9 of the GST Act.

84. In view of above, question of utilisation of input tax credit to discharge the liability of GST on such transaction of assignment would not arise.

85. The petitions accordingly succeed and

impugned show cause notices and orders in original or appeal as the case may be, are hereby quashed and set aside. Rule is made absolute to the aforesaid extent. No order as to costs.

(BHARGAV D. KARIA, J)

(NIRAL R. MEHTA,J)

FURTHER ORDER

After pronouncement of the judgment, learned Advocate General Mr.Kamal Trivedi prays for stay of the operation and implementation of the judgment.

Considering the facts of the case and the reasons assigned for arriving at the conclusion, the request is rejected.

(BHARGAV D. KARIA, J)

(NIRAL R. MEHTA,J)

RAGHUNATH R NAIR