REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.4184 OF 2009

State of West Bengal and Others — Appellant(s)

Versus

Calcutta Club Limited — Respondent(s)

J U D G M E N T

DIPAK MISRA, J.

The present appeal, by special leave, is directed against the judgment and order passed by the Division Bench of the High Court of Calcutta in W.P.T.T. No.652 of 2006, wherein it has affirmed the view expressed by the West Bengal Taxation Tribunal (for short, 'the tribunal') and disposed of the appeal preferred by the respondent along with other connected appeals holding, *inter alia*, that the assessee, the Calcutta Club Limited, was not liable for

payment of sales tax under the West Bengal Sales Tax Act, 1994 (for brevity, 'the Act').

2. The facts that are necessary to be stated are that the Assistant Commissioner of Commercial Taxes issued a notice to the respondent-Club assessee apprising it that it had failed to make payment of sales tax on sale of food and drinks to the permanent members during the quarter ending 30.6.2002. After the receipt of the notice, the respondent-Club submitted a representation and the assessing authority required the respondent-Club to appear before it on 18.10.2002. The notice and the communication sent for personal hearing was assailed by the respondent before the tribunal praying for a declaration that it is not a dealer within the meaning of the Act as there is no sale of any goods in the form of food, refreshments, drinks, etc. by the Club to its permanent members and hence, it is not liable to pay sales tax under the Act. A prayer was also made before the tribunal for nullifying the action of the revenue threatening to levy tax on the supply of food to the permanent members.

3. It was contended before the tribunal that there could be no sale by the respondent-Club to its own permanent members, for doctrine of mutuality would come into play. To elaborate, the respondent-Club treated itself as the agent of the permanent members in entirety and advanced the stand that no consideration passed for supplies of food, drinks or beverages, etc. and there was only reimbursement of the amount by the members and therefore, no sales tax could be levied.

4. The tribunal referred to Article 366(29A) of the Constitution of India, Section 2(30) of the Act, its earlier decision in ***Hindustan Club Limited v. Additional Commissioner of Commercial Taxes and Others***[1], distinguished the authority rendered in ***The Automobile Association of Eastern India v. State of West Bengal and Others***[2] and, eventually, opined as follows:-

> "Considering the relevant fact presented before us and the different judgments of the Supreme Court and the High Court we find that supplies of food, drinks and refreshments by the petitioner clubs to their permanent members cannot be treated as 'deemed sales' within the meaning of section 2(30) of the 1994 Act. We find that the payments made by the permanent members are

1(1995) 98 STC 347
2(2002) 40 STA 154

> not considerations and in the case of Members' Clubs the suppliers and the recipients (Permanent Members) are the same persons and there is no exchange of consideration."

Being of this view, the tribunal accepted the contention of the respondent-Club and opined that it is not exigible to tax under the Act.

5. Being dissatisfied with the aforesaid order passed by the tribunal, the revenue preferred a writ petition and the High Court opined that the decision rendered in ***Automobile Association of Eastern India*** (supra), was not a precedent and came to hold that reading of the Constitutional amendment, as well as the provisions of the definition under the Act, it was clear that supply of food, drinks and beverages had to be made upon payment of consideration, either in cash or otherwise, to make the same exigible to tax but in the case at hand, the drinks and beverages were purchased from the market by the club as agent of the members. The High Court further ruled that the members collectively was the real life and the club was a superstructure only and, therefore, mere fact of presentation of bills and non-payment thereof

consequently, striking off membership of the club, did not bring the club within the net of sales tax. The High Court further opined that in the obtaining factual matrix the element of mutuality was not obliterated. The expression of the aforesaid view persuaded the High Court to lend concurrence to the opinion projected by the tribunal.

6. We have heard Mr. Kailash Vasdev, learned senior counsel along with Mr. Soumik Ghosal, learned counsel for the appellants and Mr. Rana Mukherjee, learned senior counsel along with Mr. Arijit Prasad, learned counsel for the respondent.

7. It is submitted Mr. Vasdev, learned senior counsel that the reasoning of the tribunal as well as the High Court is faulty as there has been erroneous appreciation and application of clause (29A) of Article 366 of the Constitution of India. It is urged by him that after the constitutional amendment, the concept of mutuality and the pronouncements made in that context have no applicability. He has commended us to the decision in ***Bharat Sanchar Nigam Ltd. and another v. Union of India and others***[3].

3 (2006) 3 SCC 1

8. Mr. Mukherjee, learned senior counsel for the respondent, in his turn, would contend that the view expressed by the High Court is absolutely flawless and irreproachable inasmuch as the constitutional amendment does not envision sale by one to himself or for that matter by the agent to those who have engaged it as an agent. It is further argued that the aspect of mutuality still holds the field. For the aforesaid purpose, inspiration has been drawn from the authorities in ***Fateh Maidan Club v. Commercial Tax Officer, Hyderabad***[4] and ***Cosmopolitan Club v. State of Tamil Nadu & Others***[5]. Learned counsel has further submitted that the concept of deemed sale is not attracted to the present nature of transaction and supply.

9. At the very outset, we may mention certain undisputed facts. It is beyond cavil that the respondent is an incorporated entity under the Companies Act, 1956. The respondent-assessee charges and pays sales tax when it sells products to the non-members or guests who accompany the permanent members. But when the

4 (2008) 12 VST 598 (SC)
5 (2009) 19 VST 456 (SC)

invoices are raised in respect of supply made in favour of the permanent members, no sales tax is collected.

10. Section 2(30) of the Act defines 'sale' as follows:-

> "(30) "sale" means any transfer of property in goods for cash, deferred payment or other valuable consideration, and includes-
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> (a) any transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;
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> (b) any delivery of goods on hire-purchase or any system of payment by instalments;
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> (c) any 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;
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> (d) any 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;
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> (e) any supply of goods by any unincorporated association or body of persons to a member thereof 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 or unincorporated association or body of persons making the transfer, delivery, or supply and a purchase of those goods by the person to whom such transfer, delivery, or supply is made, but does not include a mortgage, hypothecation,

charge or pledge.

Explanation: A sale shall be deemed to take place in West Bengal if the goods are within West Bengal –

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

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

PROVIDED that where there is a single contract of sale in respect of goods situated in West Bengal as well as in places outside West Bengal, provisions of this Explanation shall apply as if there were a separate contract of sale in respect of the goods situated in West Bengal;."

11. The said provision has been introduced after incorporation of clause (29A) to Article 366 of the Constitution vide 46th amendment, 1982, which reads as follows:-

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

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

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

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

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

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

(f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration, and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made;"

12. It is submitted by Mr. Vasdev that statutory provision is in accord with the Constitution of India. Learned senior counsel would submit that clause (29A)(f) clearly lays a postulate that when there is a supply by way of or as a part of supply of food or any other article for human consumption or any drink whether or not intoxicating for supply or service, for cash or deferred payment or valuable consideration would amount to

deemed sale. According to Mr. Vasdev, the earlier decisions which related to the concept of mutuality have lost their force.

13. In this context, he has referred to the decision in ***Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi***[6], the three-Judge Bench was dealing with the issue whether in the case of non-residents the service of meals by the appellant in the restaurant constitutes a sale of foodstuffs. Answering the said issue, the Court held:-

> "It has already been noticed that in regard to hotels this Court has in *Associated Hotels of India Ltd.*[7] adopted the concept of the English law that there is no sale when food and drink are supplied to guests residing in the hotel. The Court pointed out that the supply of meals was essentially in the nature of a service provided to them and could not be identified as a transaction of sale. The Court declined to accept the proposition that the Revenue was entitled to split up the transaction into two parts, one of service and the other of sale of foodstuffs. If that be true in respect of hotels, a similar approach seems to be called for on principle in the case of restaurants. No reason has been shown to us for preferring any other. The classical legal view being that a number of services are concomitantly provided by way of hospitality, the supply of meals must be regarded as ministering to a bodily want or to the satisfaction of a human need".

6 (1978) 4 SCC 36 : AIR 1978 SC 1591

7 *State of Punjab v. Associated Hotels of India Ltd*., (1972) 1 SCC 472

14. Earlier the Constitution Bench decision in ***Joint Commercial Tax Officer v. Young Men's Indian Association***[8] dealing with the liability of a club to pay sales tax when there is supply of refreshment to its members, had Court concluded thus:-

> "The essential question, in the present case, is whether the supply of the various preparations by each club to its members involved a transaction of sale within the meaning of the Sale of Goods Act, 1930. The State Legislature being competent to legislate only under Entry 54, List II, of the Seventh Schedule to the Constitution the expression "sale of goods" bears the same meaning which it has in the aforesaid Act. Thus in spite of the definition contained in Section 2(*n*) read with Explanation I of the Act if there is no transfer of property from one to another there is no sale which would be exigible to tax. If the club even though a distinct legal entity is only acting as an agent for its members in matter of supply of various preparations to them no sale would be involved as the element of transfer would be completely absent. This position has been rightly accepted even in the previous decision of this Court".

15. In ***Fateh Maidan Club*** (supra), the Court was considering the defensibility of the judgment and order of a Division Bench of the High Court of Andhra Pradesh whereby it has held that the assessee club was liable to pay sales tax under the Andhra Pradesh General Sales Tax

8 (1970) 1 SCC 462

Act, 1957 on the supplies of food and drink to their members. It was contended before the Court that when the club supplies food or drink to its members, there is no sale because a members' club only acts as the agent of the members. The Court placed heavy reliance on ***Young Men's Indian Association*** (supra) and remanded the matters stating that:-

> "In some of the present matters the appellants filed writ petitions against notices seeking to assess them to sales tax on the supply of food and beverages to their members. There was, therefore, no determination by the fact-finding authorities of the relationship between the appellants and their members in the matter of supply by the former to the latter of food and drink and such like; that is to say, was the club acting as the agent of the members or did the property in the food and drink pass from the club to the members? In the other matters the High Court was approached after orders of assessment had been made and appeals filed but there was no inquiry into the said relationship. We think it appropriate, therefore, that the matters should go back to the assessing authorities who will determine, on facts in regard to each appellant. What was the said relationship and, with that finding in mind, decide, whether or not the appellants are liable to sales tax in this behalf under the provisions of the Andhra Pradesh General Sales Tax Act, 1957."

16. In the case of ***Cosmopolitan Club*** (supra), the controversy related to liability of the club to pay sales tax

under the Tamil Nadu General Sales Tax Act, 1959 for supply of food and drinks to its members. Relying on the earlier judgment, the Court remanded the matter by holding that:-

> "…. it may be further stated that the said show cause notice was challenged in 1993 by the Club by filing a Writ Petition in the High Court which came to be later transferred to the Tribunal. The Tribunal dismissed the matter on merits. That decision of the Tribunal has been confirmed by the impugned judgment. Suffice it to state that in this case there was no determination by the fact finding authorities regarding the relationship between the Club and its members in the matter of supply of food and drinks; that is to say, was the Club acting as an agent of the members or did the property in food and drinks pass from the Club to the members?
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> At this stage it may be mentioned that after the judgment of the High Court dismissing the Writ Petition, the Assessment Order was passed against which the Club has preferred an appeal before the First Appellate Authority which has also dismissed this appeal and as of today the matter, being T.A.No. 17 of 2000, is pending before the Tribunal.
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> In the circumstances, we think it appropriate that the matter should go back to the Tribunal, who will decide, on facts, as to the exact relationship between the parties in the matter of supply by the Club of food and drinks to its members. In other words, the principle of mutuality and agency among other circumstances shall be gone into by the Tribunal before which the said appeal is pending."

17. The aforesaid decisions, thus, refer to principle of mutuality and agency. Submission of the learned counsel for the appellant is that after the amendment the said principles cannot be made applicable. For the aforesaid purpose, he has commended us to the pronouncement in ***Bharat Sanchar Nigam Ltd.*** (supra). Learned senior counsel has drawn our attention to the views expressed by Lakshmanan, J., which is to the following effect:-

> "104. Parliament had to intervene as the power to levy tax on goods involved in works contract should appropriately be vested in the State Legislatures as was pointed out in *Gannon Dunkerley & Co*[9]., the passages quoted hereinabove. There were five transactions in which, following the principles laid down in *Gannon Dunkerley & Co.* relating to works contract, this Court ruled that those transactions are not exigible to sales tax under various State enactments. Parliament, therefore, in exercise of its constituent power, by the Forty-sixth Amendment, introduced Article 366(29-A). The Statement of Objects and Reasons has fully set out the circumstances under which the Forty-sixth Amendment was necessitated.
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> 105. The amendment introduced fiction by which six instances of transactions were treated as deemed sale of goods and that the said definition as to deemed sales will have to be read in every provision of the Constitution wherever the phrase "tax on sale or purchase of goods" occurs. This definition changed the law declared in the ruling in *Gannon Dunkerley & Co.* only with regard to

9 *State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd.*, AIR 1958 SC 560

> those transactions of deemed sales. In other respects, law declared by this Court is not neutralised. Each one of the sub-clauses of Article 366(29-A) introduced by the Forty-sixth Amendment was a result of ruling of this Court which was sought to be neutralised or modified. Sub-clause (*a*) is the outcome of *New India Sugar Mills Ltd.* v. *CST*[10] and *Vishnu Agencies (P) Ltd.* v. *CTO*[11]. Sub-clause (*b*) is the result of *Gannon Dunkerley & Co.* Sub-clause (*c*) is the result of *K.L. Johar and Co.* v. *CTO*[12]. Sub-clause (*d*) is consequent to *A.V. Meiyappan* v. *CCT*[13]. Sub-clause (*e*) is the result of *CTO* v. *Young Men's Indian Assn. (Regd.)*[14]. Sub-clause (*f*) is the result of *Northern India Caterers (India) Ltd.* v. *Lt. Governor of Delhi* (supra) and *State of Punjab* v. *Associated Hotels of India Ltd.* (supra)."

18. In addition to the aforesaid paragraphs, learned senior counsel appearing for the appellant has also heavily relied on paragraphs 106 and 107 of the said judgment. They read as follows:-

> "106. In the background of the above, the history prevailing at the time of the Forty-sixth Amendment and pre-enacting history as seen in the Statement of Objects and Reasons, Article 366(29-A) has to be interpreted. Each fiction by which those six transactions which are not otherwise sales are deemed to be sales independently operates only in that sub-clause.
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> 107. While the true scope of the amendment may be appreciated by overall reading of the entirety of Article 366(29-A), deemed sale under each par-

10 1963 Supp (2) SCR 459: (1963) 14 STC 316
11 (1978) 1 SCC 520
12 AIR 1965 SC 1082
13 (1967) 20 STC 115 (Mad)
14 (1970) 1 SCC 462

> ticular sub-clause has to be determined only within the parameters of the provisions in that sub-clause. One sub-clause cannot be projected into another sub-clause and fiction upon fiction is not permissible. As to the interpretation of fiction, particularly in the sales tax legislation, the principle has been authoritatively laid down in *Bengal Immunity Co. Ltd.* v. *State of Bihar*[15], SCR at p. 647:
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> "The operative provisions of the several parts of Article 286, namely, clause (1)(*a*), clause (1)(*b*), clause (2) and clause (3) are manifestly intended to deal with different topics and, therefore, one cannot be projected or read into another." (S.R. Das, Actg. C.J.)"

19. Before we proceed further, it is necessary to appreciate the doctrine of mutuality in proper perspective. The said doctrine or the general law relating to mutual concern is predicated on the principle enunciated in ***Styles v. New York Life Insurance Company***[16] by Lord Watson in the following words:-

> "When a number of individuals agree to contribute funds for a common purpose, such as the payment of annuities or of capital sums, to some or all of them, on the occurrence of events certain or uncertain, and stipulate that their contributions, so far as not required for that purpose, shall be repaid to them, I cannot conceive why they should be regarded as traders, or why contributions returned to them should be regarded as profits."

15 (1955) 2 SCR 603
16 (1889) 2 TC 460, 471 (HL)

20. This doctrine was subsequently explained in ***IR v. Cornish Mutual Assurance Co. Ltd.***[17] and it has been laid down that the mutual concern should be held to be carrying on business or trade with its members, albeit the surplus arising from such trade is not taxable as income or profit. However, the principle is not free from diversity or contra opinion which can relate to issues like complete identity between the contributors and participators or whether such doctrine would equally apply to incorporate company which is a juristic entity, and if so, under what circumstances. The principle of mutuality was examined by this Court in ***CIT v. Royal Western India Turf Club Ltd.***[18] and then in ***CIT v. Bankipur Club Ltd.***[19], followed by ***Chelmsford Club v. CIT***[20]. In ***Bankipur Club Ltd.*** (supra), it has been observed as under:-

> "... The gist of the various English decisions has been succinctly summarised in the textbooks which we have adverted to hereinabove (*Halsbury's Laws of England, Simon's Taxes, Wheatcroft* etc.). Particular stress was laid on the decisions of the Supreme Court in *CIT v. Royal Western India Turf Club Ltd.* (supra), *CIT v. Kumbakonam Mutual Benefit Fund Ltd.*[21], *Fletcher v.*

17 [1926] 12 TC 841 [HL]
18 AIR 1954 SC 85
19 (1997) 5 SCC 394
20 (2000) 3 SCC 214
21 1964 SCR 204 : AIR 1965 SC 96

> *CIT*[22]. We do not think it necessary to deal at length with the above decisions except to state the principle discernible from them. We understand these decisions to lay down the broad proposition — that, if the object of the assessee company claiming to be a "mutual concern" or "club", is to carry on a particular business and money is realised both from the members and from non-members, for the same consideration by giving the same or similar facilities to all alike in respect of the one and the same business carried on by it, the dealings as a whole disclose the same profit-earning motive and are alike tainted with commerciality. In other words, the activity carried on by the assessee in such cases, claiming to be a "mutual concern" or "members' club" is a trade or an adventure in the nature of trade and the transactions entered into with the members or non-members alike is a trade/business/transaction and the resultant surplus is certainly profit — income liable to tax. We should also state, that "at what point, does the relationship of mutuality end and that of trading begin" is a difficult and vexed question. A host of factors may have to be considered to arrive at a conclusion. "Whether or not the persons dealing with each other, is a 'mutual club' or carrying on a trading activity or an adventure in the nature of trade", is largely a question of fact. (*Wilcock case*[23] Tax Cases at p. 132; KB at pp. 44 and 45)."

21. Earlier in ***Kumbakonam Mutual Benefit Fund Ltd*** (supra) the Court had held that where an association or a company trades with its members only and the surplus out of the common fund is distributable among the

22 (1971) 3 ALL ER 1185 : (1972) 2 WLR 14 (PC)

23 *Wilcock (Inspector of Taxes) v. Pinto & Co.*, 9 TC 111 : (1925) 1 KB 30, CA

members, there is no mutuality and the surplus is assessable to tax as profit, for there is no complete identity between the contributors and the participators. The reason being that the members, who have not contributed to surplus as customers, are nevertheless entitled to participate and receive a part of the surplus. However, where the surplus is distributed among the customers as such, there would be complete identity between the contributors and the participators, for only customers would be entitled to participate in the surplus.

22. In the light of the aforesaid position and the law of mutual concerns, we have to ascertain the impact and the effect of sub-clause (e) to clause (29A) to Article 366 of the Constitution of India, as enacted vide 46th amendment in 1982 and applicable and applied to Sales or VAT Tax. The said clause refers to tax on supply of goods by an unincorporated association or body of persons. The question would be whether the expression 'body of persons' would include any incorporated company, society, association, etc. The second issue is what would be included and can be classified as transactions relating to

supply of goods by an unincorporated association or body of persons to its members by way of cash, deferred payment or valuable consideration. Such transactions are treated and regarded as sales. The decisions of the Court in ***Fateh Maidan Club*** (supra) and ***Cosmopolitan Club*** (supra) in that context have drawn a distinction when a club acts as an agent of its members and when the property in the goods is sold, i.e., the property in food and drinks is passed to the members. The said distinction, it is apparent to us, has been accepted by the two Benches. However, the decisions do not elucidate and clearly expound, when the club is stated and could be held as acting as an agent of the members and, therefore, would not be construed as a party which had sold the goods. The agency precept necessarily and possibly refers to a third party from whom the goods, i.e., the food and drinks had been sourced and provided to by the club acting as an agent of the members, to the said members. These are significant and relevant facets which must be elucidated and clarified so that there is no ambiguity in appreciating and understanding the aforesaid concepts "acting as an

agent of the members" or when property is transferred in the goods sold to the members.

23. At this stage, we would appropriately like to refer to some of the arguments raised, to understand the scope and width of the controversy. Learned senior counsel for the State has submitted that the revenue has treated it as a sale under Section 2(30) and clause (29A) (e) and (f) to Article 366 of the Constitution. Mr. Rana, learned senior counsel appearing for the respondent-assessee would submit that once a club is incorporated, it is beyond the State to impose tax or its provision. He would submit that clause (29A)(f) would not apply and in any case when the Club is acting as an agent for its members in supply of various preparation, there cannot be any demand of any sales tax as the concept of mutuality is still alive after the amendment to the Constitution. Mr. Vasdev has taken us through the objects and reasons to the 46th amendment and stressed how various decisions of this Court were referred to in the objects and reasons to remove the base of certain judgments. Paragraph 8 of the objects and reasons which has been emphatically placed reliance upon is

extracted below:-

> "Besides the above mentioned matters, a new problem has arisen as a result of the decision of the Supreme Court in *Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi* (supra). States have been proceeding on the basis that the Associates Hotels of India case was applicable only to supply of food or drink by a hotelier to a person lodged in the hotel and that tax was leviable on the sale of foodstuffs by a restaurant. But, overruling the decision of the Delhi High Court, the Supreme Court has held in the above case that service of meals whether in a hotel or restaurant does not constitute a sale of food for the purpose of levy of sales tax but must be regarded as the rendering of a service in the satisfaction of a human need or ministering to the bodily want of human beings. It would not make any difference whether the visitor to the restaurant is charged for the meal as a whole or according to each dish separately".

24. Learned senior counsel for the State would contend that the objects and reasons throw immense light how clause (29A) was added and what it intends to cover. It is argued by him that the club has an independent entity and it supplies food and beverages to the permanent members and invoices are raised. Money goes to the club and, therefore, there is supply or service for value. Mr. Mukherjee would submit that the controversy is covered by the decisions in ***Young Men's Indian Association*** (supra)

and the concept of mutuality applies, because neither clause (e) or (f) to clause (29A) of Article 366 of the Constitution has removed the concept of mutuality or agency. It is urged by him that the club merely acts as an agent for supply of goods and agent does not sell the goods to the principal. It only acts as a conduit to pass on the goods and the money whether it is in cash deferred payment or by way of security.

25. Mr. Vasdev has submitted that whether mutuality exists or not is a question of fact, for the contention of the State is assuming the mutuality clause applies then also the respondent assessee is liable to pay tax , for its supply or sale to a member by the club which is a dealer. In ***Bharat Sanchar Nigam Ltd.*** (supra), the Court has opined that by virtue of the constitutional amendment, the Parliament has neutralised the rulings of this Court. In ***Fateh Maidan Club*** (supra), the three-Judge Bench remanded the matter as there was no determination by the fact-finding authorities as regards the relationship between the club and its members in the matter of supply by the former to the latter of food and drinks and such like. The

Court has also observed the relationship would govern the fate of imposition of sales tax. In ***Cosmopolitan Club*** (supra), the Court has remarked that there was no determination that the club was acting as an agent of the members or for that matter its property in food and drink has passed from the club to the members. The matter was remanded to the tribunal to decide on facts as regards the relationship between the parties in the matter of supply of food and drinks to its members. The Court clarified whether the principle of mutuality amongst other circumstances has to be gone into. Thus, in a way, the principle of mutuality has been regarded as the base of imposition or non-imposition of sales tax. It is also noticeable that the Court has not addressed the issue whether the facet of mutuality survives after the amendment to the Constitution. There is observation in the case of ***Bharat Sanchar Nigam Ltd.*** (supra) that the judgment of this Court has been neutralised. Clause (29A)(f), as Mr. Vasdev would submit has to be understood independently and not in conjunction with Clause 29A(e). It is put forth by him that the litmus test has to be that the

transaction has to be determined only within the parameters of provisions in that sub-clause. Learned senior counsel would submit that clause (29A)(e) relates to a different field altogether and clause (29A)(f) has a different field wherein it operates. In any case, according to him, the club does not act as an agent. An attempt has been made to draw a distinction between doctrine of mutuality and principle of agency and also between "unincorporated association" or "body of persons".

26. It is appropriate to state here what has transpired in the course of hearing. Learned senior counsel for both sides, at one point of time, had submitted that this Court following the decision in ***Cosmopolitan Club*** (supra) and ***Fateh Maidan Club*** (supra) can remand the matter. In the said cases, the Court had observed that the authorities below had not recorded any finding with regard to exact relationship or the mutuality facet. The argument before us is that even if the principle of mutuality or agency is in existence or established, still it would be a sale on the basis of clause (29A)(e) or (29A)(f). Thus, the initial suggestion by the learned senior counsel for the parties

was not pursued and we are disposed to think, rightly.

27. In our considered opinion, the controversy that has arisen in this case has to be authoritatively decided by a larger Bench in view of the law laid down in ***Cosmopolitan Club*** (supra) and ***Fateh Maidan Club*** (supra). We are disposed to think so as none of the judgments really lay down that doctrine of mutuality would apply or not but proceed on the said principle relying on the earlier judgments. It is desirable that the position should be clear. For the aforesaid purpose, the matter should be referred to a larger Bench and for the said purpose, we frame following three questions.

i. Whether the doctrine of mutuality is still applicable to incorporated clubs or any club after the 46th amendment to Article 366 (29A) of the Constitution of India?

ii. Whether the judgment of this Court in ***Young Men's Indian Association*** (supra) still holds the field even after the 46th amendment of the Constitution of India; and whether the decisions in ***Cosmopolitan Club*** (supra) and ***Fateh Maidan Club*** (supra) which remitted the matter applying the doctrine of mutuality after the constitutional amendment can be treated to be stating the correct principle of law?

iii. Whether the 46th amendment to the Constitution, by deeming fiction provides that provision of food and beverages by the

incorporated clubs to its permanent members constitute sale thereby holding the same to be liable to sales tax?

28. Let the papers be placed before the Hon'ble Chief Justice of India for constitution of appropriate larger Bench.

.....J.
(Dipak Misra)

.....J.
(Shiva Kirti Singh)

New Delhi;
May 04, 2016.