
(1969) 07 OHC CK 0021

In the Orissa High Court

Case No : Special Jurisdiction Case No. 9 of 1965

Auddy and Co.

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 08-07-1969

Acts Referred:

Orissa Sales Tax Act, 1947 — Section 24(1)

Citation : (1969) 35 CLT 961 : (1970) 25 STC 453

Hon'ble Judges : G.K. Misra, C.J.;B.K. Patra, J

Bench : Division Bench

Advocate : R. Mohanty, for the Appellant; Government Advocate, for the Respondent

Judgement

G.K. Misra, C.J.—The Sales Tax Tribunal has referred the following two questions u/s 24(1) of the Orissa Sales Tax Act:

(1) Whether on the facts and in the circumstances of the case, the Tribunal is right in its view that the contracts in question are divisible contracts attracting liability to tax under the Orissa Sales Tax Act, having regard to the terms, conditions and specifications of the contracts in their entirety.

(2) Whether on the facts and in the circumstances of the case, the property in the goods supplied in the execution of the contracts in question passed by accession to. immovable property and not by sale as movable goods.

2. The facts on the basis of which this reference has been made have been put by the Tribunal in its appellate order thus :

The appellant, Auddy and Co., is a Calcutta firm of contractors specialised in sanitary fittings. The Hindustan Steel Ltd. engaged this Calcutta firm for providing sanitary installation, internal drainage and internal water-supply, in a number of its buildings. For the execution of this sort of work the appellant-firm purchased some materials from the Hindustan Steel Ltd. and the sale prices of those materials were included in its bills. The appellant-firm also supplied the

other necessary materials and charged the prices thereof. The sanitary materials supplied included earthenware pans and lavatory basins. In fact, the work of the appellant-firm was to fix the sanitary materials at their proper places. The nature of work necessarily required fixing some materials underground. The bills submitted were composite bills containing the prices of materials and labour charges. Those did not show separately the prices of the materials and the labour charges. The learned two forums below in the absence of any material on record held that 75 per cent, of the billed amounts represented the prices of the materials supplied and used. Those amounts were treated to be turnovers and have been taxed under the Orissa Sales Tax Act.

Almost in the same terms the facts have been narrated in the order of reference. The learned Advocate for both the parties do not dispute that the Tribunal has stated the facts more or less correctly both in its appellate and reference orders. A copy of the agreement between the petitioner (Messrs Auddy and Co.) and Hindustan Steel Ltd., Rourkela, was produced before the assessing authorities and the same was produced before us for a clear appreciation of the facts. By the very tender notice, tenders were invited for providing sanitary installation, water-supply and drainage to the dining room attached to the hostel in Sector V. The conditions of contract have been enumerated in the different Clauses of the agreement. There is no provision therein for separate payment for materials used in the construction. The payment contracted is a lump sum one for the entire work done. Clause 7 of the contract clearly states that even intermediate payments would be regarded as payments by way of advance against final payment only and not as payments for work actually done and completed. Such payments shall not preclude the requiring of bad, unsound and imperfect or unskilful work to be removed and taken away and re-constructed or re-erected. Such payments would not be considered as an admission of the due performance of the contract or any part thereof. It is not necessary to go into the larger details of the various terms of the agreement as the concurrent findings of all the assessing authorities clearly show that the work undertaken by the petitioner was an indivisible whole. Only by interpretation of law they have come to the conclusion that such agreement can be disintegrated into sale of materials and use of labour. It is on this basis that the assessing authorities taxed 75 per cent, of the billed amount though there was absence of materials on record as to the exact price of the materials used in the construction. Thus, the work entrusted to the petitioner was one and indivisible.

3. The question is whether such indivisible work can be disintegrated into sale of materials and use of labour. The law on the point is no longer in doubt after the pronouncement in *The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd.*, It was held therein that the conception of sale under the Sales Tax Act is the same as under the Sale of Goods Act. To constitute a sale there must be an agreement between the parties to transfer title to the goods which must always be movables. The transaction must be supported by money consideration and as a result of the transaction the property must actually pass in the goods. It

follows, as a necessary corollary, that even if title to the goods passes without any contract between the parties express or implied there is no sale. Similarly if, under the agreement of sale the title to the goods has not passed, there is no complete sale. The position was further clarified that a works contract cannot be broken into component parts. In such a case there is no agreement of sale of materials as such and property in the materials does not pass as movables. The property to be sold must be the identical property in respect of which the agreement has been entered into. In a building contract the agreement between the parties is that the contractors should construct the building according to the specifications contained in the agreement. In consideration thereof they receive payment as provided therein. In such an agreement there is neither a contract to sell materials used in the construction, nor does the property pass therein as movables. The materials used in the construction of a house are imbedded on the land. Title to such materials does not pass to the owner until they are so imbedded. The title to the materials does not pass as movables but as an accretion to the building which is immovable property. By the time of acquisition of title they have ceased to be movable property and have been converted into immovable property.

4. Applying the aforesaid tests to this case, there is no escape from the conclusion that there was no agreement between the petitioner and Hindustan Steel Ltd. for sale of materials. The agreement involved a pure works contract for providing sanitary installation, water-supply and drainage to different buildings in various sectors. The payment agreed to be made was a lump sum payment for the entire work. There is no provision for separate payment for sale of materials. The Tribunal seems to have been very much obsessed by the notion that the materials used did not lose their identity when fitted into the buildings and they can be removed from one place and fitted up at some other place and as such continued to be movables even after the fixing had been done to the buildings. This notion is contrary to law as enunciated above.

5. The view taken in *The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd.*, holds the field and not a single subsequent decision taking a contrary view has been brought to our notice. In all cases where the opposite view has been mooted it has been on the basis as enunciated in paragraph 48 of the aforesaid decision. Therein their Lordships observed thus :

To avoid misconception, it must be stated that the above conclusion has reference to works contracts, which are entire and indivisible, as the contracts of the respondents have been held by the learned Judges of the courts below to be. The several forms which such kinds of contracts can assume are set out in Hudson on Building Contracts at page 165. It is possible that the parties might enter into distinct and separate contracts, one for the transfer of materials for money consideration, and the other for payment of remuneration for services and for work done. In such a case, there are really two agreements, though there is a single instrument embodying them, and the power of the State to separate the

agreement to sell from the agreement to do work and render service and to impose a tax thereon cannot be questioned, and will stand untouched by the present judgment.

6. Thus, in each case the terms of the agreement should be closely scrutinised. If it is found that the works contract is one and indivisible whole no sales tax can be imposed on the materials used in the construction; if, on the other hand, the agreement shows that they are distinct contracts wherein there is a clear provision for sale of materials, tax can be imposed. If the agreement in its terms is not unambiguous then the subsequent conduct and the surrounding circumstances may be taken into consideration to determine the real nature of the agreement. There again the onus is on the taxing authorities to establish that under the agreement the materials used are taxable. In *Government of Andhra Pradesh Vs. Guntur Tobaccos Ltd.*, the majority of their Lordships observed thus :

It is true that in business transactions the works contracts are frequently not recorded in writing setting out all the covenants and conditions thereof, and the terms and incidents of the contract have to be gathered from the evidence and attendant circumstances. The question in each case is one about the true agreement between the parties and the terms of the agreement must be deduced from a review of all the attendant circumstances.

It was further observed :

Whether a contract for service or for execution of work involves a taxable sale of goods must be decided on the facts and circumstances of the case. The burden in such a case lies upon the taxing authorities to show that there was a taxable sale, and that burden is not discharged by merely showing that property in goods which belonged to the party performing service or executing the contract stands transferred to the other party.

7. In a large number of later Supreme Court decisions agreements of a similar nature have always been construed to be works contracts. *Arun Electrics, Bombay v. Commissioner of Sales Tax, Maharashtra*, 1966 17 S.T.C. 576 related to a case of electric installation. Their Lordships held that the agreement related to a works contract and the materials used therein were not sold and were not taxable. *Carl Still G.M.B.H. and Another Vs. The State of Bihar and Others*, was in connection with installation of coke oven battery; the agreement was held to be one relating to a works contract. *John Mowlem and Co. Ltd. v. Commissioner of Sales Tax, Orissa* [1967] 19 S.T.C. 59 SC was in respect of construction of a tunnel. That was held to be a works contract. In the latest decision of the Supreme Court, *State of Rajasthan v. Man Industrial Corporation*, [1969] 24 S.T.C. 349 SC (S.C.N. No. 135 dated 15th February, 1969), the primary undertaking was not merely to supply the windows but to "fix" them to a house and their Lordships held that the agreement related to a works contract and observed that it was only upon the "fixing" of the window leaves and when the window leaves had become a part of the building that the property in the goods

passed under the terms of the contract.

8. Thus there is no escape from the conclusion that the agreement involves a works contract and there is no agreement for sale of materials. The assessing authorities took a wrong view in assessing 75 per cent, of the billed amount.

9. We would answer the questions referred thus:

(1) In the facts and circumstances of this case the Tribunal was wrong in its view that the contracts in question are divisible contracts.

(2) In the facts and circumstances of this case the property in the goods supplied in the execution of the contracts in question passed by accession to immovable property and not by sale as movable goods.

The reference is answered accordingly. In the circumstances there will be no order as to costs. Reference fee deposited u/s 24(1) be refunded to the assessee.

B.K. Patra, J.

I agree.