

(1956) 07 PAT CK 0010

In the Patna High Court

Case No : Misc. Judl. Case No. 404 of 1954

Damodar Valley Corporation

APPELLANT

Vs

State of Bihar

RESPONDENT

Date of Decision : 13-07-1956

Acts Referred:

Bihar Sales Tax Act, 1947 — Section 2
Sales of Goods Act, 1930 — Section 4(3), 4(4)

Citation : AIR 1957 Patna 194 : (1957) 8 STC 47

Hon'ble Judges : Ramaswami, C.J.; Raj Kishore Prasad, J

Bench : Division Bench

Advocate : Kanhaiya Ji and Ramanandan Prasad No. II, for the Appellant; Govt. Advocate and Lakshman Saran Sinha, for the Respondent

Judgement

Raj Kishore Prasad, J.—This is a reference u/s 25 (1) of the Bihar Sales Tax Act, 1947 (Bihar Act XIX of 1947), hereinafter mentioned as "the Act".

2. The assessee is a Corporation established and incorporated under Damodar Valley Corporation Act, 1948 (Act XIV of 1948). It was assessed to Sale-tax, by the Sales Tax Officer, Hazaribagh, for the period from the 1st of April 1950, to the 31st of March, 1952, by an order dated the 12th August, 1952, u/s 13, Clause (5) of the Act appeal, against this assessment, u/s 24 of the Act, was dismissed by an order dated the 5th May, 1963, except for the remand on one point, by the Deputy Commissioner of Sales Tax, Bihar. A revision to the Board of Revenue was also unsuccessful, as it was rejected on the 1st October 1953. The Board, however, was moved u/s 25 (1) of the Act for making a reference to the High Court, and, accordingly, the Board of Revenue, by its order dated the 27th of May, 1954, has referred the following question of law for the decision of this Court:

"Whether in the facts and circumstances of the case it can be held that property in the goods included in Schedule A did pass to the contractors, and the transaction amounted to sale?"

In order to decide the above question, it is necessary to know the nature of the transaction, which is the subject-matter of the present controversy.

3. The Corporation on the 24th of May, 1950 entered into an agreement with (1) Hindu Construction Ltd. and (2) Patel Engineering Co., Ltd., for the construction of Konar Dam in the Hazaribagh district. This agreement was subsequently modified on the 10th March, 1951, by a Supplementary agreement, entered into between the parties as a result of a change in the design of the dam. The original Clause (8) of Part II of the agreement of 1950 was substituted by a fresh Clause (8) in the Supplementary agreement. I may at this stage reproduce the relevant portions of the substituted Clause (8), of the Supplementary agreement, which have been relied upon by the parties before this Court:

"Part II -- Special Conditions":

"The Corporation may hire or make available such of its equipment as is suitable for construction for the use of the contractor. The actual prices paid by the Corporation for the equipment thus made available, inclusive of freight, insurance and customs duties, if any, and the cost of its transport to site, but excluding such tax as Sales tax whether local, municipal, State or Central, shall be charged to the Contractor and the equipment, shall remain the property of the Corporation until the full prices thereof have been realised from the Contractor. Equipment lent for the Contractor's use, if any, shall be charged to him on terms of hiring to be mutually agreed upon; such terms will, cover interest on capital cost and the depreciation of the equipment."

"The Corporation will supply to the contractor the machinery mentioned in Schedule No. 2 Group A and Group B below.

* * * *

In respect of Equipments included in Group A:

"The Corporation will take over from the contractor items 1 & 14 on the completion of the work at a residual value calculated on the basis of the actual number of hours worked assuming the total life to be. 30,00,0 hours and assuming that the machinery will be properly looked after during the period of its operation. The remaining items of this group will be taken over by the Corporation at their residual value taking into account the actual number of hours worked and the standard life of such machinery for which Schedule F, at last revised, of the U.S. Bureau of Internal Revenue, on the probable useful life and depreciation rates allowable for income tax purposes (vide Engineering News-Record dated March 17, 1949) will serve as a basis, provided that the machinery shall be properly looked after by the Contractor during the period of its operation. Provided further, that such residual value of the machinery shall be assessed jointly by representatives of the Corporation and of the Contractor and that in case of difference of opinion between the two parties the matter shall be settled through arbitration by a third party to be agreed to both by the

Corporation and the Contractor.

The items included in this group will be taken over by the Corporation from the Contractor either on the completion of the work or at an earlier date if the Contractor so wishes, provided that in the latter case the equipments will be taken over by the Corporation only when they are declared surplus at Konar and such declaration is duly certified by the Consulting Engineer, within a Period of 15 days of such declaration being received by the Corporation.

In respect of the machinery which shall have been delivered to the Contractor on or before the 31st of December, 1950, their cost shall be recovered from the Contractor in eighteen equal instalments beginning with January, 1951, and in respect of the remaining items included in this group of machinery, their cost will be recovered from the Contractor in eighteen equal instalments beginning with July, 1951, provided that these remaining items shall have been delivered to the Contractor prior to this last specified date. Provided --

(a) that the total actual price for these equipments, which has been provisionally estimated at Rs. 42,63.305, will be chargeable to the Contractor as per first para of Clause 8 above:

(b) that after approximately two-thirds of the total cost, or an amount of Rs. 28,43,000/- (Rupees twenty-eight lakh forty-three thousand) approximately has been recovered from the Contractor on account of these equipments the Corporation will consider the date or dates when it could take over the equipments still under use by the Contractor, assess the extent to which they have already been depreciated and thereby arrive at their residual value; and

(c) That the recovery or refund of the amount payable by or to the Contractor on account of these equipments will be decided only if the Corporation is fully satisfied that their residual life at the time of their being finally handed over to the Corporation shall under no circumstances fall below one-third of their respective standard life as agreed upon by the Corporation and the Contractor."

In respect of Equipments included in Group B above

* * *

"As per Sub-para 1 of this clause the actual prices paid by the Corporation on account of these equipments inclusive of freight insurance, custom duty up to the point of their delivery at site, which has been provisionally estimated at Rs. 25,11,748 given above shall be recovered from the Contractor in fifteen equal instalments beginning with the 1st of October, 1951. On condition that all these items shall have been delivered to the Contractor prior to this last specified date and that only after the full amount payable by the Contractor on account of these items has been recovered from him they will become the property of the Contractor."

In respect of Equipments whether in Group A or B made available by the

Corporation to the Contractor.

The following conditions shall apply to all equipments, i.e., those included in Groups A & B above and others, if any:

"(a) The contractor shall continuously maintain proper machine cards separately in respect of each item of equipment, clearly showing therein, day by day, the number of actual hours the machine has worked together with the dates and other relevant particulars.

(b) The Contractor shall maintain all such equipments in good running condition and shall regularly and efficiently give service to all plant and machinery, as may be required by the Corporation's Chief Engineer who shall have the right to inspect, either personally or through his authorised representatives, all such plant and equipment and the machine cards maintained in respect thereof at mutually convenient hours,

(c) No item of equipment, made available by the Corporation on loan or hire shall at any time be recovered from the work site under any circumstances until the full cost thereof has been recovered from the Contractor by the Corporation and thereafter only, if in the opinion of the Consulting Engineer the removal of such item or items is not likely to impede the satisfactory prosecution of the work.

Similarly no item of equipment Or material belonging to the Contractor but towards the cost of which money has been advanced by the Corporation, shall at any time be removed from the work site under any circumstances until the amount of money so advanced has been recovered from the Contractor by the Corporation and thereafter if in the opinion of the Consulting Engineer the record of such item or items is not likely to impede the satisfactory prosecution of the work.

(d) The Corporation shall supply to the Contractor whatever spares have been procured or ordered for the equipment already supplied or to be supplied by the Corporation to the Contractor under the terms of this Agreement and that thereafter the "replenishment of the stock or spares" shall be entirely the responsibility of the Contractor who shall therefore take active steps in time to procure fresh spares so as to maintain a sufficient reserve.

The spares to be supplied by the Corporation will be issued to the Contractor by the Corporation Engineer, Konar, as and when required by the Contractor against indent accompanied by a Certificate that the spares previously issued to him have been actually used up on the machines for which they were intended.

(e) Whenever spares are issued to the Contractor in accordance with this provision, their actual prices inclusive of freight, insurance and customs, but excluding storage and handling charges shall be debited against him and recovered from his next fortnightly bill.

(f) In order to enable the Contractor to take active steps for planning the

procurement of additional spares in advance, the Corporation shall forthwith (sic) furnish to him a complete list of all the spares which it has procured or ordered for the equipment to be supplied to the Contractor."

4. It will appear from the above terms of the agreement that the machineries to be supplied by the Corporation were classified in Group A and Group B. The machineries in Group B were to become the property of the Contractor after their full price had been paid by him. Those in Group A were to be taken over from the contractor after the completion of the work at their "residual value" which was to be calculated in the manner indicated in the agreement. There is no dispute here with regard to the machineries in Group B, because the petitioner had accepted that the machineries in Group B had been sold to the contractor. The dispute, therefore, is only with regard to the supply of machineries in Group A. According to the assessee the machineries mentioned in Group A had only been hired to the contractor, who was required to pay certain amount by way of depreciation, and, therefore, the transaction did not amount to a "sale" within the meaning of the Act. The Sales Tax Department, however, took the view that these equipments had been sold to the contractor on what is known as "instalment system of payment", and, therefore, the transaction was a "sale" within the meaning of the Act, and, that as the contractor was not entitled to purchase these machineries free of sales-tax, the Corporation was liable to pay the tax on their sale.

5. The only question for our determination is, whether the transaction, mentioned above, amounts to a "sale" under the Act.

6. "Sale" has been defined in section 2, clause (g) of the Act, in these terms:

"Sale" means with all its grammatical variations and cognate expressions, any transfer of property in goods for cash Or deferred payment other valuable consideration, including a trailer of property in goods involved in the execution of contract but does not include a mortgage, hypothecation, charges or pledge:

Provided that a transfer of goods on hire purchase or other instalment system of payment shall, notwithstanding the fact that the seller retains a title to any goods as security for payment of the price, be deemed to be a sale: Provided further"

Mr. Kanhaiyaji appearing for the assessee, has contended that the impugned transaction cannot be treated as a "salt". The machineries supplied to the contractor were neither given on hire-purchase system, nor on other instalment system of payment, as provided by the proviso to Section 2 (g) of the Act; but they were only hired to the contractor, and, as such, the assessee was not liable to pay any sales tax on the amount of the instalments realised by the assessee from the contractor as sale price for the machineries mentioned in Group A.

7. Mr. Lalnarain Sinha, the learned Government Advocate, appearing for the State, has, however, contended, relying on the proviso to Section 2 (g) of the Act

that the supply of the machineries to the contractor was on a hire purchase system and as such the transaction amounted to a "sale" within the meaning of the proviso to Section 2 (g) of the Act.

8. Mr. Kanthaiyaji, in support of his contention that the agreement amounted to a "hire", and not to a "hire-purchase," has relied on the case of Bhimji N. Dalal Vs. The Bombay Trust Corporation Ltd., . This case, however, does not help him because in the present case what the Court has to consider is whether the transaction amounts to a "sale" within the meaning of Section 2 (g) of the Act, even if it does not amount to a "sale" under the general law.

9. "Sale" and "an agreement to sell" have been defined, in Section 4 of the Indian Sale of Goods Act, 1930 (Act III of 1930) thus:

"(1) XX XX

(2) xx xx

(3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled the contract is called an agreement to sell.

(4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred."

10. Reading the two definitions of "sale" as given in Section 2 (g) of the Act, and Section 4(3) of the Indian Sale of Goods Act, it is manifest that the word "sale" has been given an extended meaning in the Bihar Sales Tax Act,

11. The word "sale" in its legal sense imports, passing of the property in the goods, and, it is in this sense that the word is used in the Sale of Goods Act. Under the Sale of Goods Act, a sale of goods and an agreement for sale of the goods are treated as two distinct and separate matters, the vital points of distinction between them being that whereas in the sale there is a transfer of property in the goods from the seller to the buyer, there is none in an agreement to sell. In the Bihar Sales Tax Act the definition of sale has been enlarged and extended so as to include even a "hire-purchase or other instalment system of payment", although title in the goods is to pass at a future date on the full payment of the instalments.

12. According to this definition, if the goods are transferred on "hire-purchase or other instalment system of payment", even though (i) there is no transfer of property in the goods at the time of the actual transfer of such goods, (ii) the transfer of the property in the goods is to take place at a future date on the payment of the instalments agreed upon and (iii) the seller retains a title to the goods as security for payment of the price such a transaction would be deemed to be a "sale" within the meaning of the proviso to Section 2 (g) of the Act.

13. In the case relied upon by Mr. Kanhaiyaji Wadia, J., observed as follows:

"There are certain broad principles on the subject which can be, deduced from a consideration, of all the English and Indian authorities I have referred to above. Firstly, the substance of the agreement must be considered as a whole, not the substance apart from the language used, nor the mere words divorced from the substance, but the substance which must be, gathered from the true meaning of the language in which it is sought to be expressed, The true effect of an instrument depends upon the intention of the parties as gathered from the terms and in construing the terms it is the duty of the Court to regard the intention rather than the form and to give effect to the whole instrument. Secondly, where the agreement imposes an obligation upon the "hirer" to buy the chattel mentioned therein from the other party, such obligation attaches on the execution of the agreement, and the agreement is really an agreement of sale, notwithstanding the use of words such as hire purchase agreement, lessor and lessee, hiring rent, tenancy etc. Thirdly such an obligation arises when it is clear from the agreement that the party taking the chattel, called the hirer or lessee, has to pay the full amount of the consideration mentioned in the agreement, even though the payment is by instalments and that amount is sufficient to cover the purchase price of the chattel or when it is clear from the agreement that the hirer or lessee cannot at any time during the period mentioned in the agreement return the chattel to the other party called the owner or lessor, and absolve himself from his obligation to make further payment.

"Fourthly, it would follow from the above that if the hirer is not bound to pay the full amount of the purchase price, or if he can terminate the hiring at any time by delivering the Chattel to the other party, the agreement is in fact as well as in form a true agreement for hire, and all that the hirer has obtained is an option to purchase".

14. I respectfully agree with the above principles. If the agreement, in the present case, is construed, even in the light of the above principles it will be manifest that the transaction in the present case partook the nature of a hire-purchase system and, therefore, amounted to a "sale" within the meaning of the proviso to Section 2 (g) of the Act.

15. Under the agreement, Clause (8) clearly, provides that the actual price paid by the Corporation, for the equipments made available to the contractor, shall be charged to the contractor and the equipments will remain the property of the Corporation until the full prices thereof have been realised from the contractor. True, in respect of the equipments included in Group B, it is specifically provided that only after the full amount payable by the contractor on account of these items mentioned in Group B has been recovered from him, the equipments "will become the property of the contractor," and there is no such specific mention in respect of the equipments mentioned in Group A. But in Clause (c) of the agreement "In respect of Equipments whether in Group A or B made available by the Corporation to the contractor", it is specifically provided that no item of equipment made available by the Corporation shall at any time be removed from

the work site under any circumstances until the full cost thereof has been recovered from the Contractor by the Corporation and, thereafter, only if in the opinion of the consulting Engineer the removal of such item or items is not likely to impede the satisfactory prosecution of the work. This clearly indicates that the title in the equipments was to pass to the contractor after the full payment of the total cost which included the actual price of the equipments made available for the contractor. The transaction, therefore, partakes the nature of a hire-purchase system in which the title to the goods transferred passed only on the payment of the entire price of the equipments. If the equipments had been "hired" or lent to the contractor on terms of hiring, there would have been terms of hiring to be mutually agreed upon as contemplated by the first part of the agreement of Clause (8), but no such agreement was produced at any stage. On the other hand, the agreement specifically provides that the contractor was liable to pay the total actual price of these equipments. This could happen only if the transaction was a "sale". Under the agreement, the contractor has been made responsible for maintaining the equipments in Group A also at his own cost, and he has been made to pay for the spares supplied to him by the Corporation, and he was required to arrange for and procure at his cost sufficient additional stock of these equipments. The contractor could not have been saddled with the responsibility of maintaining the equipments, in good and sufficient condition, and be made to pay for the repairs required for them if he had not, for all intents and purposes, purchased the equipments. It was argued with vehemence on behalf of the petitioner that the fact that the Corporation agreed to take over the equipments on the completion of the work Of even earlier, if they were not required by the contractor at Konar, clearly shows that the equipments had been hired to the contractor. The equipments were no doubt to be taken over by the Corporation on their "residual value" which was to be worked out jointly by the representatives of the Corporation and the contractor, and in Case of difference of opinion through arbitration by a third party, but that would not mean that the equipments had been only hired to the contractor. They had been sold to him with an understanding in order, possibly, to lighten the financial burden in the undertaking, in the interest of the contractor that the equipments should be taken over on the completion of the work at their "residual value" by the Corporation, in essence, this term amounted to a repurchase at a price which would depend upon the extent to which the machineries had depreciated in course of their operation and at their residual life. This taking over of the machineries would not, however, affect the nature of the original transaction which in my opinion, amounts to a "sale" of the machineries mentioned in Group A by the Corporation to the contractor. The courts below, therefore; have taken a correct view of the law, and rightly held that the transaction constituted a "sale" within the meaning of the Act.

For the reasons given, above I would answer the reference in the affirmative, in favour of the Department and against the assessee, by saying that: the property in the goods included in Group A mentioned as Schedule A in the reference, did

pass to the contractor, and the transaction amounted to a "sale" within the meaning of Section 2 (g) of the Act; and, therefore, the petitioner was liable to be taxed to Sales tax on this transaction, and the assessment against him is correct. The State of Bihar will be entitled to costs from the petitioner; hearing fee Rs. 250/-.

Ramaswami, C.J.

16. I agree.