
(1973) 06 GUJ CK 0004
In the Gujarat High Court
Case No : Sales Tax Reference No. 12 of 1970

Harish and Co.

APPELLANT

Vs

The State of Gujarat

RESPONDENT

Date of Decision : 28-06-1973

Acts Referred:

Citation : (1974) 33 STC 12

Hon'ble Judges : B.K. Mehta, J;A.D. Desai, J

Bench : Division Bench

Advocate : K.H. Kaji, for the Appellant; G.N. Desai, Govt. Pleader, instructed by M.I. Hava, of Bhaishanker Kanga and Girdharlal, Govt. Solicitors, for the Respondent

Judgement

Mehta, J.—Shortly stated the facts leading to this reference are as under :

The Tata Chemicals Limited (hereinafter referred to as "the company") has a factory at Mithapur for manufacturing soda-ash. The company requires for the purposes of manufacture limestone chips. In order to procure limestones, the company had obtained on 20 years" lease certain plots of land situated in different villages in Ranavav Mahal of Sorath District. The State Government has sanctioned the grant to the company of the mining lease for the aforesaid for limestones with an option of renewal for the further period not exceeding the duration of the original lease. The company instead of extracting limestone materials from the quarries entered into an agreement with M/s. Palanji Shapoorji & Co. (hereinafter referred to as "the contractors") for excavating, collecting and transporting limestone chips to the company from the leased land or from other sources. The contractors entered into a sub-contract in this behalf with the applicant-company (hereinafter referred to as "the sub-contractors"). It appears that this applicant-company has been assessed for the period from 1st November, 1960, to 30th June, 1963, as an registered dealer liable to pay tax on the materials excavated, collected and transported to the factory premises of the company, The sub-contractors went in appeal before the Assistant Commissioner

of Sales Tax, who confirmed the order of Sales Tax Officer and held that this was for all intents and purposes a contract for supply of materials and, therefore, a sale liable to tax under the Bombay Sales Tax Act, 1959. The sub-contractors, therefore, went in second appeal before the Gujarat Sales Tax Tribunal. The Tribunal, having regard to the various terms and conditions of the contract between the company and the contractors as well as that of between the contractors and sub-contractors, reached the conclusion that the transaction in its essence was a contract of sale. At the instance of the sub-contractors - the applicant-company herein - the following question has been referred to this court for its opinion :

"Whether, on the facts and in the circumstances of the case, the contract entered into between the applicant and M/s. Palanji Shapoorji & Co. was a contract for work and labour in respect of quarrying limestone chips from Ranavav quarry or was a contract for sale of limestone chips ?"

2. The sole question that arises for our determination in this reference is, whether the transaction between the sub-contractors and the company was a sale within the meaning of the Bombay Sales Tax Act, 1959, or whether it was merely a works contract. In Commissioner of Sales Tax M.P. Vs. Purshottam Premji, , the Supreme Court laid down the following test for answering the above question :

"In C.B. Gosain Vs. State of Orissa, , this court ruled that for finding out whether a contract is one of work done and materials found or one for sale of goods depends on its essence. If not of its essence that a chattel should be produced and transferred as a chattel, then it may be a contract for work done and materials found and not a contract for sale of goods.

The primary difference between a contract for work or service and a contract for sale of goods is that in the former there is in the person performing work or rendering service no property in the thing produced as a whole notwithstanding that a part or even the whole of the materials used by him may have been his property. In the case of a contract for sale, the thing produced as a whole has individual existence as the sole property of the party who produced it, at some time before delivery, and the property therein passes only under the contract relating thereto to the other party for price. Mere transfer of property in goods used in the performance of a contract is not sufficient; to constitute a sale there must be an agreement express or implied relating to the sale of goods and completion of the agreement by passing of title in the very goods contracted to be sold"

3. It is, therefore, clear to us that before the transaction can be considered as sale, there must be a transfer of property in goods. Without such a transfer there cannot be any sale.

4. The main features of the transaction in the instant case with which we are concerned are : (1) the company took the plots of land on long lease from the

Government, which granted the mining rights on the quarries situated therein on the terms and conditions contained in the indenture on lease passed between the parties thereto as prescribed under the Mineral Concession Rules, 1949; (2) the company entrusted to the contractors the work of excavating, collecting, resizing and loading the limestone chips in the railway wagons for purposes of carrying them to the factory site of the company from the quarries situated on the plots of land leased out to the company; (3) the contractors entrusted the same work to the sub-contractors; (4) the sub-contractors were to break the stones so excavated into required sizes and thereafter to load in wagons so as to carry them to the factory site of the company; (5) the royalty for mining those materials was to be paid by the company and for purposes of the work entrusted, the company has to pay a rate of 6.65 per ton to the contractors; (6) the contractors and, therefore, the sub-contractors were under an obligation to remove and clear the site of the rejected materials found by the company as not according to the specifications as agreed; (7) if the quantity finally rejected in a month exceeds 5 per cent of the receipt, the freight and the handling charges of the rejected materials were to be deducted from the bill of the contractors; and (8) the sub-contractors had no interest whatsoever either directly or indirectly in the working of quarries and despatching of limestone chips to any other concern, except the company from the said quarries and discovery of such interest of the sub-contractors was to entitle the contractors to terminate the sub-contract.

5. On consideration of the special features of the transaction, referred hereinabove, we do not think that the finding of the Tribunal can be sustained that the transaction amounted to sale within the meaning as given under the aforesaid Act. It appears that the Tribunal was impressed with the contention that the term relating to the right of the company to reject oversize or undersize limestone chips and the obligation of the contractors and the sub-contractors to remove the rejected materials at their cost strongly indicated that the transaction in question was not a contract for work and labour. In our opinion, the Tribunal has not addressed itself correctly to the real question, whether the property in the chattels, namely, the limestone, passed to the contractors or sub-contractors at any time. On the true construction of the relevant clauses, and those particularly referred to hereinabove, we are of the opinion that the essence of the transaction was that the limestones were produced and transferred as limestones and the property in limestones excavated or as lying buried in mines at no point of time passed to the contractors or sub-contractors. Neither the mining lease was assigned nor the rights and interest of the company was transferred so as to urge that the property in the "thing produced as a whole" was in the contractors or sub-contractors. Therefore, it was for all intents and purposes a contract for work done and materials found. It should also be noted that in the case of rejected materials neither the contractors nor the sub-contractors had any right or interest therein. They were at liberty to dispose of these materials with the consent of the company, provided they were in a position to find out the purchasers who might be prepared to pay the royalty for

those materials. In our opinion, therefore, the Tribunal has not properly considered the relevant terms and conditions nor addressed itself rightly to the real question which was at issue between the parties. In that view of the matter, we answer the question referred to us as under :

"On the facts and in the circumstances of the case, the contract entered into between the applicant and M/s. Palanji Shapoorji & Company was a contract for work and labour in respect of quarrying limestone chips from Ranavav quarry and was not a contract for sale of the same."

6. The State shall pay the costs of the assessee.

7. Reference answered accordingly.