
(1968) 02 BOM CK 0007
In the Bombay High Court
Case No : Sales Tax Reference No. 24 of 1965

Mather and Platt Ltd.

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 05-02-1968

Acts Referred:

Bombay Sales Tax Act, 1959 — Section 52

Citation : (1969) 24 STC 496

Hon'ble Judges : Vimadalal, J;N.L. Abhyankar, J

Bench : Division Bench

Advocate : Y.B. Rege and R.N. Mathur, for the Appellant; H.D. Banaji and S.M. Naik, for the Respondent

Judgement

Vimadalal, J.—The proceedings from which this reference has arisen were initiated by the applicants by means of an application u/s 27 of the Bombay Sales Tax Act, 1953, before the Deputy Commissioner of Sales Tax for the determination of the question as to whether any tax was payable by the applicants on their contract dated 6th June, 1959, with Messrs Aryodaya Ginning and Manufacturing Co. Ltd., for the installation of their patented automatic plant for protection against fire. The Deputy Commissioner came to the conclusion that the transaction essentially consisted of two contracts one for the supply of materials for consideration, and the other for services rendered and labour done, and he, therefore, held that sales tax was payable to the extent to which the said contract involved the rule of materials. On the matter being taken up to the Sales Tax Tribunal, that view of the Deputy Commissioner was upheld, and the appeal before the Tribunal was dismissed. The applicants then applied to the Sales Tax Tribunal for referring several questions formulated by them to this court, but the Tribunal, by its order dated 23rd September, 1964, referred only the following two questions to this court for decision :

(1) Whether, having regard to the facts and circumstances of the case, the Tribunal was justified in law in coming to the conclusion that the contract in

question essentially consisted of two contracts, one for supply of materials for money consideration, and the other for service and labour done ? and

(2) Whether the Tribunal was justified in coming to the conclusion that the Deputy Commissioner of Sales Tax was competent to determine the question u/s 27 of the Bombay Sales Tax Act, 1953, on the application made u/s 52 of the Bombay Sales Tax Act, 1959 ?

2. It may be mentioned at the very outset that the second question set out above has not been pressed before us, and it is, therefore, unnecessary for us to answer the same.

3. The first question referred to us embodies a question which is of frequent occurrence, viz., whether the contract in the present case, which admittedly involved both work and labour as well as materials, was a contract which was intended by the parties to be divisible, as has been held by the Tribunal in the present case. It may be mentioned that it is not the contention of Mr. Banaji for the taxing authorities that it is a pure contract for the sale of goods. In order to determine that question, it will be necessary for us, in the first instance, to see what, on the documentary evidence, which is the only evidence in the present case, was the nature of the contract between the parties, and what was the intention of the parties in arriving at that contract.

4. There is no separate document which embodies the contract between the parties, but the terms of that contract are to be found in the correspondence and in the specification and estimate which was submitted by the applicants to the Aryodaya Ginning and Manufacturing Co. Ltd. (hereinafter referred to as "the Ginning Co.") together with a Block Plan in the course of that correspondence. In their letter dated 5th September, 1957, it was, *infer alia*, stated by the applicants that, in order to enable them to obtain the required materials for the said installation from their works in Manchester, it would be necessary for the Ginning Co. to apply for an import licence. After some further correspondence to which it is not really necessary to refer, the applicants forwarded with their letter of 14th March, 1959, to the Ginning Co. their specification and estimate for the installation of "Grinnell" Automatic Sprinkler and Fire Alarm System to protect their mills against fire, which contained, at the very outset, printed terms to the effect that no installation would be deemed to be complete so as to vest the same in the purchaser until fully paid for, that all risks from delivery of the constituent parts until payment were to be borne by the said Ginning Co, notwithstanding that the property therein would remain in the applicants until the whole of the purchase price had been paid, and that, in case of ire, the Ginning Co. would be bound to pay the contract price, less the cost of erection or completion. It was further stipulated therein that the applicants would be at liberty to cancel the contract and remove all the materials, plant and machinery if the price be not paid as stipulated. In the said specification and estimate, it is stated that, on the order being placed, the applicants would submit detailed plans for the approval of the said Ginning Co., and, in the event of any alteration

or modification being made to the buildings and/or plant and/or plans between the date of the estimate and the execution of the work, the contract price would be adjusted accordingly. Even a cursory look at the specification and estimate of the work in question would show that the installation work was of an elaborate and technical nature, and had to be carried out, as is stated, at more than one place therein, by the skilled fitters of the applicants themselves. The pipes feeding the sprinkler apparatus were to be fixed to the ceilings, and the sprinkler heads spaced in accordance with the regulations of the Fire Offices Committee, and the pipes had to be graded in size according to standard practice and insurance requirements and screwed to a special taper tested to 700 lbs. per square inch. The cast iron fittings were made of a special mixture of metal and tapped with a taper thread so as to make a metal joint with the piping without the use of any jointing material other than ordinary steam cement. Controlling valves had also to be fitted, and it was stated in the specification and estimate that the position suggested for them in the plan which was attached therewith might be modified to suit the requirements of the said Ginning Co. The work included the necessary suction piping between the reservoir and the pump and the delivery piping between the pump and the installation valves. The machinery included several articles like automatic electrically driven centrifugal are pump, automatic switch gear, automatic switch, isolator, auxiliary switch and other valves and accessories, as also an elevated tank with connections of the capacity of 7,500 gallons which would be constructed according to certain technical details mentioned therein. The summary of the said specification and estimate provided not only for the machinery and material but also for the work that was to be carried out in connection with the same, and the amounts quoted in respect of each of the four schemes included not only delivery of the material F.O.R. Bombay/Calcutta, but the erection thereof by "skilled fitters" of the applicants. A special sheet containing the terms and conditions is also to be found in the said specification and estimate, and the very first clause of it provides not only for delivery of the said material F.O.R. Bombay/Calcutta, but the erection thereof at site by the skilled fitters of the applicants who, as stated in term 2 thereof, would be responsible for the erection of the said installation. The special supplementary conditions which were attached to the said specification and estimate provided that the tender was based upon the then prevailing rates of labour and cost of materials and transport, and stipulated for an adjustment in the event of an increase or decrease therein coming into effect before the date of completion of the work.

5. The nature of the work that was to be carried out under the said contract, and which we are told has already been carried out, is also clear from the specimen sheet showing how the said plant is fitted and how it works. It shows that the sprinklers which are fitted on elaborate piping arrangement and connected to the water supply respond promptly to heat in the event of fire in its incipient stage, and on the sprinklers in the immediate vicinity operate, so that no damage is done to the remaining part of the mills. The operation of the sprinklers is also

accompanied by an automatic alarm which is fitted, and controlling valves are also installed which include a stop valve to cut off the supply of water to the installation, after the fire has been extinguished,

6. It is the contention of Mr. Rege for the applicants that this is one composite contract involving the supply of material as also the carrying out of work which, from its very nature, was never intended by the parties to be divisible. Mr. Banaji has, on the other hand, contended that, on a proper construction of the various terms of the specification and estimate through which he has taken us in detail, it is clear that, at several places, the materials have been mentioned separately from the work, that the contract in question is, therefore, a divisible contract, and that the part of it which relates to the sale of materials is liable to sales tax. Mr. Banaji has contended that the primary intention of the parties was the sale of standardised patented materials of which the applicants were the manufacturers, and he has stressed the fact that the work did not involve any fabrication of material for the particular use of the mills in question. In support of his contentions, Mr. Banaji has relied on the fact that the stipulation for the import of certain material from Manchester on an import licence to be obtained in the name of the said Ginning Co. showed that the materials were treated differently from labour, and that this was essentially a contract for the sale of materials. We do not think that the mere fact that provision was made in the contract for obtaining of certain material on an import licence to be obtained in the name of the said Ginning Co. leads to the conclusion which Mr. Banaji has urged upon us, as, in our opinion, it is merely in the nature of a stipulation for the working out of the contract in the light of the prevailing import restrictions. Mr. Banaji has then relied upon the reference to the delivery of the material which is to be found towards the end of the said letter dated 14th March, 1959, and also to the distinction which is made between delivery and erection in the printed term which is to be found at the very outset of the specification and estimate. He has further contended that the fact that the said term mentions that, in the event of destruction or damage of the material by fire, the contract price thereof was to be paid to the applicants, less the cost of erection or completion shows that the parties intended to make a distinction between the materials on the one hand, and work and labour on the other. He has also relied upon the provision for removal of the materials by the applicants if the price was not paid to them by the said Ginning Co. as indicating that the materials were clearly treated as divisible by the parties. In our opinion, these stipulations in the printed term at the outset of the specification and estimate cannot lead to the conclusion that the parties intended the said transaction to be divisible. The said stipulations provide for special contingencies in the nature of fire, or non-payment, but, in our opinion, they do not express the intention of the parties with regard to the carrying out of the said contract in its entirety. Mr. Banaji has also relied upon the fact that 100 spare sprinklers were to be furnished by the applicants to the Ginning Mills, but we fail to see how that can be of any assistance to the taxing authorities on this reference. The supply of the spare sprinklers was, as stated in

the applicants" said letter dated 14th March, 1959, necessitated by the insurance rules prevailing at the time. Moreover, on any view of the matter, the supply of spare sprinklers would be in the nature of service rendered in advance by the applicants to the said Ginning Mills, and merely because 100 spare sprinklers were supplied, it cannot lead to the conclusion that the contract was intended to be divisible in regard to materials as distinguished from labour and work. Mr. Banaji has also relied upon the fact that there is no provision in the contract for maintenance by the applicants after installation, but, we are afraid, whilst the presence of a provision for maintenance or service after installation would tend to show that the contract which was under consideration was a works contract, the absence of it would not necessarily show that it was a contract of sale. Mr. Banaji has also relied on the fact that delivery of the materials was stated to be F.O.R. Bombay/Calcutta, and he has contended that that would show that property in the said goods passed to the said Ginning Co. the moment the goods were put on rail, either at Bombay or at Calcutta. Whilst that may be a legitimate inference to draw in regard to the passing of property when there is no express stipulation in that behalf in the contract between the parties, where, as in the present case, it is expressly provided that property in the goods is not to pass till the entire purchase price is paid which, under the terms, would only be paid up after erection of the plant was complete, there is no scope for contending that the property in the goods would pass to the Ginning Co. as soon as the material was put on rail, either at Bombay or at Calcutta. There are references at other places also to the material in question being referred to by the applicants as "our material", and a repeated reference to the erection by "our skilled workmen", Mr. Banaji has relied on a note which is to be found at serial No. 4 in the Special Supplementary Conditions, which are part of the specification and estimate already mentioned by us, and in which it is provided that the clause to which it is appended applies only to contracts including delivery and erection on site. This was relied upon by Mr. Banaji to show that the applicants also sold materials, and did not merely enter into contracts for erection of their materials on site, but this clause is perfectly consistent with its being in the nature of a provision for cases in which replacements were made by the applicants to plants already erected by them for their customers, as Mr. Rege has stated before us. The mode of payment agreed to between the parties was, 10 per cent. with the order, 30 per cent on delivery of material, and the balance on completion of erection. The amount to be paid was, therefore, a composite amount, the mode or quantum of payment of which was not related to the value of the material used from time to time in the course of carrying out the work. Nor does the stipulation with regard to payment indicate that the material formed the major part of the consideration for the contract. It is unnecessary for us to consider the said specification and estimate, or the terms and conditions contained therein, in any further detail, as, in our opinion, it is quite clear, on a reading of the contract as a whole, that the predominant intention of the parties was to carry out the work of installation of the automatic sprinkler plant and the fire alarm system in the mills of the Ginning Co, and that the parties did not intend to enter into two contracts, one

for the materials and another for work and labour, as severable parts of the said transaction.

7. Turning to authorities, the leading case on the subject is the case of the State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd., [1958] 9 S.T.C. 353, which was a case of a building contract, but, in so far as the Supreme Court in the said case proceeded to some extent on the theory of accretion in regard to immovable property, and, in so far as the nature of a building contract is somewhat different from the contract in the present case, we do not think it necessary to discuss that case in detail. In our opinion, the present case falls more appropriately within another decision of the Supreme Court, and that is in the case of Carl Still v. State of Bihar [1961] 12 S.T.C. 449 in which the appellant entered into a contract with a company to set up a complete coke oven battery ready for production as well as by-products plants at Sindri in the State of Bihar, and to erect and construct the necessary buildings, plants and machineries. The sales tax authorities sought to impose sales tax on the appellant on the materials supplied in the execution of the said contract on the ground that such supply was a sale. The appellant filed a writ petition under Articles 226 and 227 of the Constitution of India, and the Supreme Court, which ultimately heard it, by a majority, held on a construction of the various clauses of the said contract (at pages 445-446). that the subject-matter of the agreement was installation of the coke oven battery and its accessories, that the sum of Rs. 2,31,50,000 was the price agreed to be paid for the execution of those works, and that there was no agreement for sale of materials as such by the appellant to the owner. The Supreme Court held, in other words, that the agreement in question was a contract entire and indivisible for the construction of specified works for a lump sum, and not a contract of sale of materials as such. The Supreme Court, therefore, issued the appropriate writs as prayed for by the appellant. It is pertinent to note that there is nothing in Carl Still's case ([1961] 12 S.T.C. 449.) to show that there was any fabrication of the particular plant to meet the requirements of the company in the said case, and, indeed, Mr. Banaji has been unable to distinguish the facts of that case from the facts of the present case.

8. There is also another and a later unreported decision of the Supreme Court in the case of the State of Madras v. Richardson & Cruddas Ltd. [1968] 21 S.T.C. 245. dated 5th May, 1967, in Civil Appeal No. 599 of 1966 on appeal from the decision of the Madras High Court reported in Richardson and Cruddas Ltd. Vs. The State of Madras, . The respondents in the said appeal before the Supreme Court were engineers and contractors, and they entered into two contracts which were the subject-matter of the said appeal. One of them was a contract for the fabrication, supply and erection of steel structures with a co-operative society which was setting up a sugar factory, and the other was for the fabrication and installation of bottle coolers under orders from customers at different places. In the course of its judgment, the Supreme Court observed that if the contract was for completing the stipulated work and for that purpose to use materials as necessary to work and labour, the contract must be regarded as a works

contract, and not a contract for sale, every if the property in the goods ultimately passed as a result of the contract. The Supreme Court referred in its judgment to a classic passage from Halsbury's Laws of England, Vol 34, page 6, para. 3, which has been cited in several judicial decisions, in which it is stated that a contract of sale is a contract whose main object is the transfer of the property in, and the delivery of the possession of, "a chattel as a chattel" to the buyer. The Supreme Court came to the conclusion that both the types of contracts before them in the said case were works contracts, the predominant idea underlying them being the bestowing of special skill and labour by the experienced engineers and mechanics of the respondents before them. Mr. Banaji has sought to distinguish the decision of the Supreme Court in Richardson & Cruddas case [1968] 21 S.T.C. 245 on the ground that, in the said case, the material had actually to be fabricated by the said company, both in the case of steel structures, as well as in the case of bottle coolers which, according to Mr. Banaji, is not the case as far as the contract in the present case is concerned. In this connection, it may be mentioned that the word "fabrication" does not, as a matter of plain language, mean only the manufacture of the plant or machinery in question. In Webster's 3rd New International Dictionary, the meaning of the word "fabricate" as a verb is "to form by art and labour; manufacture, produce; to form in to a whole by uniting parts; to build up into a whole by uniting interchangeable standardised parts; to make, shape or prepare (parts) according to standardised specification so as to be interchangeable." It is, therefore, clear that even the uniting of standardised parts for the purpose of the setting up of a plant could be said to be fabrication within the meaning of that term, and that was certainly required to be done in the present case. Moreover, the fact that certain parts of the machinery had actually to be imported by the applicants from Manchester for the purposes of the said mills would also show that the plant that had to be fitted up by the applicants was to be such as to suit the particular needs of the said mills. In any event, there is nothing which would distinguish the facts of the present case from the facts of Carl Stills' case [1961] 12 S.T.C. 449 cited above, in which there was no question of fabricating any part of the material required for carrying out the contract in the said case. Moreover, the fact that the plant in question in the present case was a patented product of the applicants themselves would also show that it could never have been intended that the said plant was to be sold as a chattel to be set up by any other agency, a process which might involve the disclosure of the applicants' own patented processes or trade secrets. Having considered the matter carefully, we have, therefore, come to the conclusion that it was never intended that the sprinkler installation was to be sold as a chattel by the applicants, nor was it intended that the transaction between the applicants and the Ginning Co. was intended to be divisible into two contracts, one for the sale of the materials, and the other for work and labour to be done, as Mr. Banaji has contended.

9. In the result, we answer question No. (1) in the negative. As already stated by us, question No. (2) has not been pressed before us, and we need not, therefore,

answer the same.

10. The respondents must pay the applicants' costs of this reference fixed at Rs. 250. We direct that the sum of Rs. 100 deposited by the applicants be refunded to them.

11. Reference answered accordingly.