
(1962) 03 BOM CK 0001

In the Bombay High Court

Case No : Sales Tax Reference No. 3 of 1959

Mckenzie's Limited

APPELLANT

Vs

The State of Bombay

RESPONDENT

Date of Decision : 20-03-1962

Acts Referred:

Bombay Sales Tax Act, 1953 — Section 34

Citation : (1962) 13 STC 602

Hon'ble Judges : Y.S. Tambe, J; V.S. Desai, J

Bench : Division Bench

Advocate : S.B. Donde, for the Appellant; B.A. Palkhiwala, for the Respondent

Judgement

Desai, J.—Two questions have been referred to us by the Sales Tax Tribunal in this reference u/s 34 of the Bombay Sales Tax Act of 1953, which are as follows :-

"1. Whether on the facts and in the circumstances of this case the applicants were dealers within the meaning of the Bombay Sales Tax Act, 1953, in respect of their activities as body-building contractors, and

2. Whether the transaction referred to in bill dated 29th June, 1955, is liable to the sales tax under the Bombay Sales Tax Act, 1953."

2. The applicants Messrs Mckenzie's Limited execute engineering jobs such as building structures and body-building on motor chassis. They entered into a contract for the construction of 218 bodies with the Government of India. Under this contract the bodies were agreed to be supplied at the rate of Rs. 1,730 per body. In pursuance of this contract the applicant presented a bill for the five bodies supplied by them on the 29th June, 1956, for Rs. 8,650. u/s 27 of the Bombay Sales Tax Act of 1953 the applicant applied to the Collector for the determination of three questions : firstly, whether they were dealers within the meaning of that word as given in section 2(6) in relation to their activities as body-building contractors; secondly, whether the body-building contracts constituted sales and thirdly, whether the receipts from body-building contracts

were liable to sales tax under the Act of 1953. All these three questions were answered by the Additional Collector of Sales Tax in the affirmative. Against the said decision, the applicant appealed to the Sales Tax Tribunal. The Tribunal took the view that the second of the three questions, being of a general nature, did not come within the scope of clause (b) of section 27 of the Act and should have been rejected by the Additional Collector of Sales Tax. The Tribunal accordingly set aside the answer given by the Additional Collector to that question. With regard to the other two questions, the Tribunal agreed with the decision of the Additional Collector of Sales Tax. At the instance of the applicant, it then referred the two questions, which we have already set out, u/s 34 of the Act to this Court. The first question is with reference to the contracts of the applicant with the Government of India in respect of the building of bodies to motor chassis, which we have already referred to above. The view of the Tribunal was that looking to the terms of the contract between the parties, the intention of the parties was to sell and purchase manufactured motor-bodies. According to the Tribunal the contract between the parties was, therefore, a contract for the sale of goods and the applicants, therefore, were dealers within the meaning of the Bombay Sales Tax Act of 1953 in respect of their activities as body-building contractors in the contracts concerned. On the second question, the view of the Tribunal was that the transaction referred to in the bill of the applicants dated 29th June, 1956, being a transaction of sale of goods was liable to sales tax under the Bombay Sales Tax Act, 1953.

3. Mr. Donde, the learned Advocate, who appears for the applicants, has contended that the view taken by the Tribunal is erroneous. According to him the contract between the parties in the present case was not a contract for the sale of goods, but was a contract for construction, although the applicants as contractors were also to supply certain material for the construction undertaken by them. The material, which the contractors supplied for the construction work undertaken by them, did not pass on to the other party to the contract as sale of goods but as an accretion to the construction. Moreover he contended that the contract was one and indivisible and the amount agreed to be received by the contractors in respect of the work undertaken could not be split as in part for the material supplied and in part for the labour and work done. According to Mr. Donde, the principle to be applied in the present case would be the same as was enunciated in the Supreme Court decision of *The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd.*, . Relying on the said decision he has argued that the contract in the present case between the parties could not be regarded as a contract for the sale of goods and consequently the applicants were not dealers within the meaning of section 2(6) of the Bombay Sales Tax Act of 1953 nor was the transaction evidenced by the bill dated 29th June, 1956, liable to sales tax under the said Act. In addition to the Supreme Court case cited by him Mr. Donde has also referred to us the case of *Anglo-Egyptian Navigation Co. v. Rennie & Another* (1874) L.R. 10 C.P. 271 and *Carl Still G.m.b.H. and Another v. State of Bihar and Others* [1961] 12 S.T.C. 449.

4. Now the question whether the contract is a contract of sale as distinguished from a contract for work must depend upon the terms of the contract and the intention of the parties. As pointed out in Halsbury's Laws of England, 3rd Edn., Vol. 34, page 6, a contract of sale is a contract whose main object is the transfer of property in, and the delivery of the possession of, a chattel as a chattel to the buyer. Where the main object of work undertaken by the payee of the price is not the transfer of a chattel qua chattel, the contract is one for work and labour. The test is whether or not the work and labour bestowed end in anything that can properly become the subject of sale; neither the ownership of the materials, nor the value of the skill and labour as compared with the value of the materials, is conclusive, although such matters may be taken into consideration in determining in the circumstance of a particular case whether the contract is in substance one for work and labour or one for the sale of a chattel. As pointed out by Halsbury the test is whether or not the work and labour bestowed end in anything that can properly become the subject of the sale and what must be seen is as to what is the result obtained on applying this test to the contract in question. Now the contract in the present case is that the applicants by their tender contracted to construct and deliver to the Government of India 218 bodies on the dates as specified in the contract. It was agreed under this contract that the applicants will first submit pilot bodies for approval within 45 days from the date of receipt of the accepted tender or chassis, whichever was later, and they would commence delivery of the bodies contracted to be built 45 days after the approval of the pilot bodies. In the column for the description of the articles ordered, it was stated that the item ordered was construction of G.S. Composite Bodies on Chassis 3 to 4 x 4 Dodge with/without winch with canvass components. The number of bodies ordered was stated as 218 and the price was stated as Rs. 1,730 per body Ex Works Bombay. The total price was stated as Rs. 3,77,140. Mr. Donde has contended that what has been stated in the contract is the construction of the bodies and the contract, therefore, is one for work and not for the sale of any chattel. It appears, however, on reading the terms of the contract that what was intended between the parties was that the applicants should manufacture and sell to the Government of India 218 motor-bodies fitted on to the chassis, which were supplied to them by the Government of India. The material for the body, the work of construction and the fitting were all to be done by the applicants and they were to deliver to the Government of India the completed articles. In other words, applying the test which we have quoted from Halsbury's Laws of England, the work and labour was to end in the finished articles, viz., the completed body, which was to be delivered as an article under the contract for the price to be paid for it. It would thus appear to us that on the terms of the contract in the present case what was intended to by the parties was, as held by the Tribunal, a contract for the sale of goods. The Supreme Court case to which Mr. Donde has referred us was a case of a building contract. It was observed by their Lordships of the Supreme Court that a works contract would not be regarded as capable of being broken up into the component parts and treated as a sale with regard to the parts of it. Their Lordships observed :

"The theory that a works contract can be broken up into its component parts and as regards one of them it can be said that there is a sale must fail both on the grounds that there is no agreement to sell materials as such and that property in them does not pass as movables, as under the law there cannot be an agreement relating to one kind of property and sale as regards another."

5. For the sale of goods there must be an agreement between the parties for the sale of the very goods in which the property eventually passes. In a building contract the agreement between the parties is that the contractor should construct a building according to the specifications contained in the agreement and in consideration thereof receive a payment as provided therein. In such an agreement there is neither a contract to sell the materials used in the construction nor does the property pass there as movables. Their Lordships have further observed :

"When the work to be executed is a house, the construction imbedded on the land becomes an accretion to it on the principle *quicquid plantation solo, solo cedit*, and it vests in the other party not as a result of the contract but as the owner of the land. Accordingly, there can be no question of the title to the materials passing as movables in favour of the other party to the contract."

6. It would appear from the observations of their Lordships that in a building contract there is no intention between the parties to the contract either to purchase or sell the material to be used in the construction and the agreement is not between the parties for the sale of the very goods in which the property eventually passes. In the present case, however, the agreement between the parties was for the sale of the very goods in which the property eventually passed, viz., the constructed bodies. Mr. Donde relied on the Supreme Court case for the proposition, which he submitted, viz., that in no contract in which construction work was involved there was a passing of property as in the sale of goods. The Supreme Court decision, however, does not lend support to the said proposition.

7. The next case to which Mr. Donde has invited our attention is an English case, *Anglo-Egyptian Navigation Co. v. Rennie and Another* (1874) L.R. 10 C.P. 271. In that case the defendants had contracted with the plaintiffs to make and supply new boilers and certain new machinery for a steamship of the plaintiffs, and to alter the engines of such steamship into compound surface condensing-engines, according to certain specifications. The engines, boilers and connections were, by the contract, to be completed in every way ready for sea so far as specified, and tried under steam by the engineers previous to being handed over to the company; the result of such trial to be to the satisfaction of the company's inspector. The price of the work so undertaken was to be Pounds 5,800 and was to be paid as the work progressed, viz., Pounds 2,000 when the boilers were plated, and Pounds 2,000 when the whole of the work was ready for fixing on board, and the balance of Pounds 1,800 when the work was fully completed and tried under steam. The boilers and the new machinery contracted for were

completed and ready to be fixed on board and one instalment of Pounds 2,000 had been paid under the contract, when the ship was lost by perils of the sea. The value of the work actually done by the defendants under the contract amounted to Pounds 4,118. The second instalment of Pounds 2,000 was subsequently paid, at the time of which payment the plaintiffs knew of the loss of the ship, but the defendants did not. The plaintiffs then claimed delivery of the boilers and other machinery completed under the contract but the defendants refused to deliver the same to them. The plaintiffs consequently brought an action for the detention of the same or to recover back Pounds 4,000 paid by them to the defendants. The question that arose for determination was as to whether the property in the manufactured articles had passed on to the plaintiffs so as to entitle them to detain the goods. It was held that it had not so passed, since the contract was an entire and indivisible contract for work to be done upon the plaintiffs' ship for a certain price and the property in the manufactured articles was not intended to pass until they were fixed on board the ship. In our opinion, this case does not lend any assistance to Mr. Donde. The contract in that case was in essence a works contract, which was one and indivisible and it could not, on the contract between the parties, be claimed that any title in goods was intended to be passed as on sale of goods between the parties. As we have already pointed out, the position in the case before us is different, for what was intended to be passed in the case before us was the article which was the result of the work undertaken by the applicants. Mr. Donde has argued that just as in the construction of a building, the materials go as an accretion to the work of construction, which is the subject-matter of the contract between the parties, in the present case also the material used in the construction of the body should go as an accretion to the work of construction of the body, which is the subject-matter of the contract between the parties. We do not think that this submission of Mr. Donde is right. We find, as held by the Tribunal in the present case, that what was contracted between the parties was the sale of the body built on the chassis supplied to the applicants as an article or item of goods sold.

8. The next case referred to by Mr. Done is *Sundaram Motors v. State of Madras* [1958] 9 S.T.C. 687. That was a case of a contract for the repairs of motor-cars where the repairs had to supply certain spare parts for effecting repairs. It was held in that case that the contract in question was a works contract. It was observed by the learned Judges who decided the case as follows :-

"It cannot be held as a general proposition that in every case of a works contract there is necessarily implied a sale of the component parts which go to make up the repair. That question would depend on the facts of each case."

9. It was further observed :-

"To constitute a sale of goods, in addition to a transfer of movable property, two more elements at least are necessary : (1) There should be an agreement between the parties to sell and purchase, and (2) that agreement should be with reference to the particular goods."

10. It was pointed out that in the case of a repair of a motor-car, if a motor part is put in the car while reconditioning and repairing it, title to that motor accessory passes when the repairer delivers the car to its owner; but to constitute a sale of that part it is necessary to have an agreement between the parties for the sale of that accessory. Therefore, whether in a particular case there is a contract of sale of materials as distinct from a pure works contract would depend upon the agreement between the parties and on proof of an intention to sell the materials as such. If the essential intention of the parties was to have the car repaired, the manufacture of a particular chattel can only be incidental to the repair and not one for the sale of the material. In the case of the repairs of the motor-car there is ordinarily no intention to buy separately the part which is necessary for the repairs. The said part is used by the repairer as incidental to the work undertaken by him, unless of course there is a specific contract for the purchase of the spare parts as distinct from the price of the purely repairing work. In the present case, however, the agreement between the parties was to sell and purchase the particular body which was required to be constructed under the contract between the parties, and fitted on to the chassis supplied by the Government to the applicants. The two things, therefore, which were stated in the decision referred to above as necessary to constitute a sale of goods, were present in the case before us, viz., an agreement between the parties to sell and purchase and that agreement being with reference to the particular goods. In our opinion, therefore, this case referred to by Dr. Donde does not support him.

11. Another case to which reference has been made by Mr. Donde is *Carl Still G.m.b.H. and Another v. State of Bihar and Other* [1961] 12 S.T.C. 449. The contract in this case was for setting 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 buildings, plants and machineries and deliver and supply accessories and articles and render services described in the schedule for an all-inclusive price. The Sales Tax Authorities sought to impose sales tax on the materials supplied in the execution of the contract on the ground that such supply was a sale. It was held that a contract in the said case was one and indivisible for the construction of specified works for a lump sum and not a contract of sale of materials; as such the Sales Tax Authorities had no right to impose a tax on the materials supplied in the execution of that contract. It was found on the terms of the contract in that particular case that the contract was for the construction of specified works for a lump sum and the supply of materials etc. was incidental to the said contract of construction and not as a separate and distinct contract for the sale of goods. The case, however, does not lend any support for the proposition that any contract in which construction of an article is involved becomes thereby a works contract, and although the property in the article constructed is intended to pass on its completion it does not amount to a sale of the finished article but is still a works contract.

12. Finally, Mr. Donde has referred us to a passage of Benjamin on Sale, 8th

Edn., at page 167, where it is observed :

"A contract whereby a chattel is to be made and affixed by the workman to land or to another chattel before the property therein is to pass, is not a contract of sale, but a contract for work, labour and materials, for the contract does not contemplate the delivery of a chattel as such."

13. The authority in support of this proposition is the case *Anglo-Egyptian Navigation Co. v. Rennie* (1874) L.R. 10 C.P. 271, to which we have already made reference. The case to which reference is made was essentially a works contract and the delivery of the articles required to be made in connection with the said works contract was not intended to pass as on sale of chattels. The proposition stated by the learned author would undoubtedly apply to such class of cases, but we do not think that it can be argued on the basis of the said proposition that even in a case where an article is intended to be bought and sold and where it is first to be manufactured or prepared by the seller before it is delivered to the buyer, the contract has got to be considered to be a contract of work and not a contract of sale of goods. The mere circumstance that the chattel made is fitted on to another chattel belonging to the buyer under the terms of the contract will not of necessity make the contract one of work and not one of sale. It will depend upon whether the intention is to improve the chattel to which the chattel made is affixed as incidental to improvement as in the case of a contract for repairs of a motor-car or to make the sale of movables such as in the case of a contract to make and fit plastic covers to the seats of a motor-car. As we have already observed earlier whether a contract in a given case is one of work or of sale of goods must depend upon the facts and circumstances of each case. On the facts of the present case the Tribunal has found that what was intended by the parties was the sale and purchase of the manufactured motor-body as an article or chattel. In our opinion, the said finding of the Tribunal is correct on the construction of the contract between the parties and consequently the contract between the parties in the present case was a contract for the sale of goods. There is no dispute that if the contract under consideration is regarded as a contract for sale, the applicants would be dealers within the meaning of section 2(6) of the Bombay Sales Tax Act, 1953.

14. The result, therefore, is that both the questions which have been referred to us by the Tribunal in the present case must be answered in the affirmative. We answer them accordingly. The applicants will pay the costs of the opponent. The costs are quantified at Rs. 250.

15. Reference answered in the affirmative.