

(1968) 01 BOM CK 0014

In the Bombay High Court

Case No : Sales Tax Reference No. 5 of 1965

Otis Elevator Company (India) Ltd.

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 22-01-1968

Acts Referred:

Bombay Sales Tax Act, 1953 — Section 27

Citation : (1969) 24 STC 525

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

Bench : Division Bench

Advocate : S.P. Mehta and V.H. Patil, for the Appellant; P.P. Khambatta, for the Respondent

Judgement

Abhyankar, J.—This is a reference at the instance of the applicants referring certain questions to the High Court for decision.

2. An appeal was filed before the Tribunal against the order passed by the Deputy Commissioner of Sales Tax, Bombay City Division (Adm.) I, Bombay, determining a disputed question, u/s 27 of the Bombay Sales Tax Act, 1953. The applicants applied to the Commissioner of Sales Tax by their application dated 30th May, 1962, that in response to the letter dated 7th April, 1958, by Messrs T. Manek & Co., they had addressed a letter to that company on 18th April, 1958, submitting their quotations for supply and installation of two passenger lifts, one at Block No. 9, Colaba Causeway, Bombay, and the other at Block No. 10, Colaba Causeway, Bombay. Subsequently, a contract was arrived at between the parties on 10th June, 1958, for supply and installation of the said two lifts. The letter stated that the contract was for furnishing and erecting the elevator installation outlined in the specification for the price of Rs. 57,000. The application stated that the applicants duly erected and installed the said two lifts in accordance with the terms of the contract and the lifts were handed over to the customer. The question posed for determination was whether sales tax was payable by the applicants in respect of the said contract. It was contended on their behalf that it

was an entire and indivisible contract for the erection and installation of two lifts, and that the materials furnished were only in execution of the works contract and there was no sale of any goods and materials by the applicants. In case the determination was that it was not an entire and indivisible contract but constituted two separate contracts, one for the sale of materials, and the Other for erection and installation of lifts, the applicants invited the learned Commissioner to apportion the amount of price and the amount of service charges from the total amount of Rs. 57,000. The application was sent by the Commissioner to the Deputy Commissioner for disposal.

3. The learned Deputy Commissioner heard both the parties and came to the conclusion that the contract was one and indivisible contract of lump sum value, but according to him, its essence was the transfer of property in the goods for money consideration, and so the contract involved a sale of lifts.

4. It was argued before the Deputy Commissioner by the applicants that the contract entered into and executed by them was an indivisible lump sum contract for the supply and installation of the lifts and that, although the word "supply" had been used, the intention was not to supply the material for consideration separately, but as an integral part of the same contract. It was the applicants' case before the Deputy Commissioner that, having regard to the fact that the contract was entire and indivisible, there had been no sale of materials as it was a works contract, and no tax was attracted under the Bombay Sales Tax Act, 1953, According to the Deputy Commissioner, the contract was one and indivisible contract of lump sum value, but its essence was transfer of property in the goods for money consideration, and so the contract involved a sale of lifts. Since the execution of the contract was admittedly done in the applicants' normal course of business, the Deputy Commissioner held that the applicants were liable to pay tax. On the question as to what part of the amount of Rs. 57,000 was liable to tax, the learned Deputy Commissioner declined to give his decision, since, according to him, section 27 of the Bombay Sales Tax Act, 1953, did not permit him to give any such determination.

5. When the matter came up before the Tribunal it was argued for the applicants that since the learned Deputy Commissioner of Sales Tax held that it was one and indivisible contract, the logical conclusion to which he should have come on that finding was that it was a contract for execution of the work of installation of two passenger lifts. The Tribunal observed that the question whether the contract was one and indivisible, or whether it was a composite contract of sale of goods and of labour or service charges, would depend on the terms of the contract between the parties, and the conduct of the parties vis-a-vis that contract. In other words, the intention of the parties would be the criterion that would decide whether the contract was one and indivisible, or whether it was a composite contract. The Tribunal remarked that, having regard to the finding arrived at by the learned Deputy Commissioner, he would have been more correct if he had expressed his conclusion on the point of the character of the contract that,

though the instrument happens to be one, according to the intention of the parties, it was a composite and divisible contract. On the question as to what part of the amount of Rs. 57,000 was liable to tax, it was held by the Tribunal that the learned Deputy Commissioner rightly declined to give his decision because section 27 of the Bombay Sales Tax Act, 1953, did not permit him to make any such determination.

6. Various cases were discussed by the Tribunal in its judgment, and it was held that the decision of the Deputy Commissioner of Sales Tax was correct. It is observed by the Tribunal that, in the present case, not only the test that the amount of price of the material supplied is overwhelming as compared to the amount agreed upon for labour or service, but there is a further test also applicable. The price of the material supplied was subject to adjustment. It was pointed out for the applicants that the contract sum is also subject to variation due to change in freight and labour conditions. It is said by the Tribunal that that is no doubt true, but if the contract were essentially for the installation of the materials supplied and the installation operation was of the essence of the contract, the condition that the price of the goods supplied was subject to variation in the price of those goods ordinarily could not have been there. In the present case, the value of the two lifts as indicated by the applicants was 80 per cent., while the labour charges or expert services accounted for 20 per cent only. So far as the intention of the parties is concerned, it was held by the Tribunal that the intention of the parties was that there was to be a sale of two lifts qua lifts for money consideration, and there was also to be the installation of those lifts made by the applicants. According to the applicants, they are doing the business of manufacturing and installing passenger and freight lifts, and consequently those two lifts could have been installed only by the applicants, and nobody else. The Tribunal did not see any warrant for drawing such inference from the correspondence between the parties. The Tribunal observed that it was open to the customer to purchase the two lifts from the applicants who are manufacturers of lifts and to commission some other experts to install them on his blocks.

7. As a result, the view of the Deputy Commissioner was upheld by the Tribunal, and the appeal was dismissed.

8. The following two questions are referred to the High Court for decision :

"(1) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the contract dated 10th June, 1958, between the applicants and Messrs T. Manek & Co. was a composite and divisible contract, one for the sale of goods in which the property has passed, and the other for labour and service charges for installation of the goods so sold ?

(2) Whether the said contract was one and indivisible contract for work and labour ?"

9. The above two questions which have been referred to the High Court at the

instance of the assessee, as seen from the statement of the case, were answered against the assessee's contentions before the Deputy Commissioner of Sales Tax as well as the Sales Tax Tribunal.

10. On the 7th of April, 1958, T. Manek & Co., who were builders and contractors, made an inquiry from the applicants to give their quotations, complete in every respect, and time of delivery and other terms, because they required two lifts at Plots Nos. 9 and 10 at Colaba Causeway. On receipt of this inquiry, the applicants wrote by their letter dated 18th April, 1958, that they had prepared their estimate for two Otis passenger lifts as per estimate and specification sheets attached to the letter after gathering information from the office of the building contractors. In paragraph 47 of this letter, the applicants stated that they had quoted a complete price for supply, delivery and erection of the lifts at site, including three months free maintenance of the installation, They also informed that they would import these lifts on their own import licence, provided the licence remained unused at the time of the receipt of the order, and that delivery period for these lifts for importing on their licence would be 12/16 weeks ex-works, Bombay, from the date of the receipt of the order and approval of layout drawings by the building; contractors. In the last paragraph of this letter, the applicants stated that they appreciated the privilege of quoting to the building contractors, and looked forward to be honoured to carry out the installation of the lifts by them. Thereupon the specifications, and the terms and conditions on which they, i.e. the applicants, were prepared to do the work have been elaborately drawn up. They form part of the contract and have been included in the paper book.

11. It is now well-settled that where in a contract of this type it is claimed on behalf of the assessee, on the one hand, that the contract is an indivisible works contract in which is not involved any agreement for sale or purchase of chattel as such, and, on the other hand, the contention of the revenue is that the contract is divisible into an agreement of sale of chattel coupled with an agreement for labour or services to be rendered, it is essential to find out the intention of the parties from the tenor and the terms of the contract between the parties and the surrounding circumstances. It would be useful in this case to notice some of the salient features of the contract between the parties in order to appreciate the rival contentions. It has been specifically pointed out on behalf of the applicants that they had quoted specifications for "Otis electric traction elevator installation", and not merely for the supply and sale of these lifts as chattels or movable property. The very opening words of the contract indicate what the applicants had agreed to do. The contract terms are elaborately drawn up. Detailed provisions are given regarding the dimensions and travel of the car, the load and speed of the elevator, the type of the platform and the car enclosure, and what the car is to consist of, as also of the place where the machine is to be located, viz., above the hoist way upon rolled steel joists to be provided to the elevator. The car-frame is to be made of structural steel and equipped with suitable guides and an Otis car safety device. The counterbalance is also to be of

a suitably guided structural steel frame with appropriate filler weights which will be furnished to promote smooth and economical operation. Terminal limit switches are to be provided to slow down and stop the car automatically at the terminal landings and final limit switches are to be furnished to automatically cut off the power and apply the brake, should the car travel beyond the terminal landings. Then there is a reference to terminal buffers. Otis spring buffers are to be installed as a means for stopping the car and counterweight at the extreme limits of travel. Then there are provisions regarding the machine, brake and motor. The motor is to be of Otis design and manufacture, or equivalent suited to the service proposed and arranged for ample lubrication. There are also provisions regarding sheaves and beams. The contract also makes provisions for a special operating device in the car and at hoist way landings. As regards the actual operation of the car, a provision is made for the car door or gate, hoist way doors and alarm bell. The contract specifically provides for the item of maintenance. It says that Otis maintenance will be furnished on each elevator provided for under this contract for a period of three months commencing on the date the elevator is turned over to the company for use. In order to enable the applicants to carry out the installation work, the building contractors are required to do some preparatory work, such as furnishing a properly framed and enclosed legal elevator hoistway, an elevator pit of proper and legal depth below the lowest landing, a properly lighted and ventilated fire-proof machine room or penthouse of sufficient size to accommodate the equipment, installation of necessary gate frame at all landings, and a continuous still bearing area for each hoist way entrance of the requisite construction. The building contractors are also required to furnish and install the hoist way structure required to withstand the forces and loads resulting from the use of elevator. They are also required to do all cutting of walls, floors or partitions together with any repairs made necessary thereby, and to install power signal and lighting connections specified and several similar items. Then a provision is made in detail about the adjustment of price which is quoted. In paragraph 1, it is stated that the price set forth in the contract is based on the cost of materials and the average hourly straight time base rate of hourly paid employees in the manufacturing plants. The contract price is made adjustable to reflect the increased or decreased cost of the items. In paragraphs 3, 4 and 5, a provision is made for price adjustment according as the material scheduled for shipment by the works is or is not made available within one year or a longer period. In paragraph 7, a provision is made for adjustment in price for installation costs, shipping costs and other costs as detailed elsewhere in the contract when final payment is to be made. Then follows an important paragraph in the agreement which is to the following effect :

"We propose to furnish and erect the elevator installation outlined in the foregoing specifications for the sum of price of two passenger lifts as above duly delivered and erected at site @ Rs. 28,156 each." As to how the price is arrived at, a clarification is given in clause 3 which states that the price quoted is based on the ocean freight rates, marine insurance rates, customs duties and other

importation charges, local erection labour rates, local material costs, local social security and employee benefit laws in effect on the date of this proposal, and that the price is subject to adjustment for the amount of increased or decreased costs resulting from any cost changes in these items. It is also provided in this clause that the resulting adjustment in price shall be made with the final payment. Under clause 4 of this part regarding payment of price, it is provided that payment shall be made pro rata per elevator as follows :-

"30 per cent within thirty days of the builders accepting the proposal; 60 per cent on receipt of shipping documents from the applicants" factories; and the remaining 10 per cent, plus or minus any adjustments required on completion of erection, or in any case within six months of delivery of equipment."

12. It is also provided in this clause that if erection is delayed due to reasons beyond control of the applicants, right is reserved to discontinue the work at any time until payments shall have been made. Then follows clause 7 which has been the subject of contentious interpretation. That clause is to the following effect :-

"You agree that in case you do not take delivery of the machines and material at the building when we notify you they are ready, you will immediately make the payment due when the machine is ready for shipment as provided above, and designate some local point where you will take delivery. Upon your failure to designate within two weeks such point of delivery, we are authorised to warehouse machines and material within our factory or elsewhere at your risk and expense." Under paragraph 10 in this part, the applicants have reserved the right to cancel the order without payment of damages if they cannot manufacture the equipment covered by the order within nine months of the date they receive the order.

13. Under this paragraph an option is given to the building contractors to cancel the order if the applicants are unable to ship the goods covered by the order within twelve months from the receipt of the order. Then follows another important paragraph which has been the subject of rival interpretations. That is paragraph 11 which runs as follows :-

"It is agreed that all the apparatus furnished hereunder can be removed without material injury to the freehold, and we retain title thereto until final payment in cash is made, with the right to retake possession of the same or any part thereof at your cost if default is made by you in any of the payments irrespective of the manner of attachment to the reality, the acceptance of notes, extension of time payment, or the sale, mortgage or lease of the premises."

14. It is urged on behalf of the applicants that the view taken by the Sales Tax Tribunal mainly by reference to the Bill dated 8th July, 1959, reproduced in the order of the Sales Tax Tribunal that the contract represented two composite agreements, one for the sale of the lifts and the other for labour charges, and, therefore, attract the liability for payment of sales tax, is not justified. The bill on which strong reliance was placed before us on behalf of the revenue is in the

following terms :-

"Messrs T. Manek & Co., 757 12, Alli Chambers, Meadows Street, 267648/9 Fort, Bombay-1. July 8, 1959. Contract price of Rs. 57,000 for two passenger lifts installed at Plots Nos. 9 & 10 at Colaba Causeway, Bombay, in accordance with our contract No. 267648/9 Materials. Rs. 45,600 Labour Rs. 11,400 ----- Rs. 57,000 Add. S.T. at 7 per cent., on materials Rs. 3,192 G.S.T. at 3 per cent. Rs. 1,368 ----- Rs. 61,560 * Less billed as per our S.A. 538 dated 11-6-58 Rs. 16,275 S.A. 620 dated 17-12-58 Rs. 32,550 Rs. 478,825 ----- Balance now due and payable Rs. 12,735 (Rupees twelve thousand seven hundred and thirty-five only). * Bill for Rs. 17,500 Less credit note 8-47-58 Rs. 825 Rs. 16,675 net".

15. The Tribunal has referred to a decision of this court In the case of Commissioner of Rules Tax, Maharashtra State v. Arun Electrics, [1965] 16 S.T.C. 385 in distinguishing the decision of the Madras High Court in the case of The State of Madras v. Voltas Ltd., [1963] 14 S.T.C. 446, which was relied upon on behalf of the applicants before the Tribunal. After referring to condition No. 7 regarding delivery of machines and materials, and condition No. 11 regarding the time when the title was to pass, the Tribunal observed that the intention of the party appeared to be clear that the two lifts were treated as movables which can be supplied and installed for the owner of the blocks if the payment was made as stipulated, but which could be removed even after they were installed if there was failure on the part of the owner of the blocks to comply with the terms of payment. With this observation, the Tribunal distinguished the case of the applicants from the case of Voltas Ltd. 1963] 14 S.T.C. 446 decided by the Madras High Court. The Tribunal referred to the bill which we have set out above, and held that, on these facts, it was not possible to hold that the parties did not intend that there was to be a sale of the material by the appellants to the owner of the blocks. The Tribunal was also impressed with the contention that the value of the materials and the cost of labour had to be taken into account as stated in the bill, and if the value of the two lifts as indicated in the bill was 80 per cent while the labour charges or charges for expert services were 20 per cent., the Tribunal held that not only the test that the amount of price of the materials supplied is overwhelming as compared to the amount agreed upon for labour or service is satisfied but is more or less decisive.

16. It may be mentioned that the decision of this court in Sales Tax Reference No. 247 of 19621 was challenged before the Supreme Court, and that decision has been vacated mainly on the ground that there was no evidence before the court or the Tribunal to indicate what were the terms of the contract between the parties and that the terms could not be inferred merely from the bill which was the only material available for answering the question referred to the High Court. That decision of the Supreme Court is reported in the case of Arun Electrics, Bombay v. Commissioner of Sales Tax, Maharashtra State. [1966] 17 S.T.C. 576. The learned counsel for the applicants relies on the following observations in the

judgment of the Supreme Court in the case :

"The invoice merely sets out the amount chargeable to the customer for "supplying and affixing" certain electric fittings and equipment, and it throws no light on the nature of the contract. In a contract for supply of electric equipment and a separate contract for labour, an invoice in the form tendered by the appellants may appropriately be issued. An invoice may also, with equal propriety, be issued in the same form where under the terms of the contract the appellants have undertaken to install electrical fixtures in the building of the customer."

17. It is, therefore, argued on behalf of the applicants that the decision of the Tribunal, founded as it apparently is mainly on the basis of the final bill in the form in which it was issued in this case is not decisive, and what the court has to find out is what the contract between the parties was after examination of the terms of the contract and the surrounding circumstances. The applicants have submitted in support of their contention that it is an indivisible works contract from which an agreement for sale of chattel and an agreement for work and services cannot be spelt out, because the intention of the parties was that the contract was to be not only for sale of lifts as if it were movable property, but for the supply, erection and installation of the lifts. Referring to the decision of the Supreme Court in *The State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd.* [1958] 9 S.T.C. 353 it is argued that, in order that a transaction may be treated as a transaction of sale of movable property or goods, there must be an agreement between the parties in respect of the goods in which property eventually passes. They also placed reliance on the English case of *Tripp v. Armitage* 150 E.R. 1597 noticed in the judgment of the Supreme Court, in which the agreement provided, inter alia, that the articles which were to be used for the structure had to be approved by the trustees. If the contract is to make up materials, and to fix them, then, until they are so fixed, by the nature of the contract, the property will not pass. If the contract is not merely for sale of particular chattel, but if it is part of a larger contract relating to the erection and installation of some machinery like a lift which is to be fixed in the building, it cannot be said that it is intended by such a contract that the article to be fixed should become the property of the other party until it is so fixed. In a works contract, there is no agreement for sale of the materials as such, and if an action is not maintainable for the value of those materials as for price of goods sold and delivered, then even a disintegration of the building contract cannot yield any sale which can be taxed under the Sales Tax Act of the State. The learned counsel appearing for the revenue relies on the observations at page 387 of the judgment in *Ganon Dunkerley & Co.'s case*, [1958] 9 S.T.C. 353., where their Lordships have said that, to avoid ally misconception, it must be stated that their decision in this case applies to a contract which is entire and indivisible. They have also observed that contracts can take several forms, and 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 impose tax thereon cannot be questioned.

18. Reliance was also placed on other decisions on behalf of the applicants, which involve contracts not only for supply of specific goods but work and services necessarily involved in installation of machinery or manufactured goods. The learned counsel for the applicants relied on a decision in the case of *Carl Still v. The State of Bihar and Others*. [1961] 12 S.T.C. 449. In that case, the preamble to the agreement states that the owner had agreed with the contractor that the latter was to set up a complete coke oven battery ready for production as well as by-products plants according to specifications given therein, that the installation was to be made at a site selected by the owner and that the contractor was to "erect and construct buildings, plants and machineries and deliver and supply accessories and articles from Germany and also locally from India and render services fully described in the First Schedule for an all-inclusive price of Rs. 2,31,50,000." 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 learned counsel for the revenue distinguishes this case on the ground that the contract therein involved erection and construction of machinery and building and then delivery and supply of accessories of articles from Germany and local manufacturers in India.

19. The applicants also relied on the decision of the Madras High Court in the *Voltas* case. [1963] 14 S.T.C. 446. In this case, the company had agreed under a contract to provide the entire building with a system of air-conditioning. The contract contained detailed particulars of the work that had to be done by the assesseees and the different types of machinery that would be utilised in the fabrication of the air-conditioning unit. In addition to designing the machinery, the assesseees had to set it up in a particular manner, insulate the air passages carrying dehumidified and chilled air to the various parts of the building, provide false ceilings specially designed for each floor and design the passages in such a manner that the entire volume of the building would receive the advantage of the air-conditioning. This case is also distinguished on the ground that one of the important features of the agreement was that, in carrying out the contract, the assessee had to supervise the construction of the building itself in order that the air-conditioning of the building as a whole was efficiently designed and erected. It is, however, pertinent to note the mode of payment provided for in the contract of the *Voltas* : 10 per cent with order; 20 per cent on intimation of the receipt of import licences; 50 per cent against delivery, pro rata of the value of the goods delivered at site. After examining each of the terms of the contract, the court held that there was no indication that there was any agreement between the contracting parties that there was to be a sale of any part of the machinery as such.

20. The next decision relied upon on behalf of the applicants is the one in the case of the Government of Andhra Pradesh v. Guntur Tobaccos Ltd. [1965] 16 S.T.C. 240. In this case, the assessee-company was a dealer carrying on business of re-drying in its factory raw tobacco entrusted to it by its customers. The assessee re-dried the tobacco, packed it in packing materials purchased from the market and delivered it to the customers. For retiring each bale of tobacco, the assessee charged the customers a certain sum but there was no separate charge for the value of the packing materials used. It was found that the packing of the re-dried tobacco and its storage for the requisite period was an integral part of the re-drying process, and this decision of the High Court was affirmed by a majority. It was held that there was no sale of the packing materials in this type of work. It has been observed that the contract may be for work to be done for remuneration and for supply of materials used in the execution of the works for a price or it may be a contract for work in which the use of materials is accessory or incidental to the execution of the work, or it may be a contract for work and use or supply of materials though not accessory to the execution of the contract is voluntary or gratuitous. The court observed that in the last class there is no sale because though property passes it does not pass for a price. Whether a contract is of the first or the second class must depend upon the circumstances; if it is of the first, it is a composite contract for work and sale of goods; where it is of the second category, it is a contract for execution of work not involving sale of goods. We have to find in which of these three categories the contract entered into by the applicants in this case would properly fall.

21. The next decision relied on on behalf of the applicants is in the case of Richardson and Cruddas Ltd. v. The State of Madras, [1965] 16 S.T.C. 827 now affirmed by the Supreme Court in Civil Appeal No. 599 of 1966 decided on 5th May, 1967. A copy of this judgment has been made available to us at the hearing. In this case, the assessee-company doing business as engineers and contractors and as dealers in iron and steel goods and refrigerating and cooling units, entered into a contract for the fabrication, supply and erection of steel structures with a co-operative society, and for the fabrication and installation of "bottle coolers" under orders from customers. In respect of both these types of contracts, it was held that the contract was a single composite works contract and not a contract for supply of goods and for sale of goods and also for supply of labour and services. This case is significant, because one of the points at issue was an inference to be drawn from the nature of the bills which were presented. In that case, in those bills, charge was made under the head "Fabrication and Supply of Steel Work" at the rate of Rs. 1,100 per ton, and the quotation submitted by the assessee was at the rate of Rs. 1,160 per ton, and, therefore, it was argued that the balance of Rs. 60 represented the remuneration for the work of erecting the steel parts supplied. With respect to this contention, the Supreme Court observed that there is no warrant for assuming from the preparation of the bills at the rate of Rs. 1,100 portion in respect of the materials under the head

"Fabrication and Supply of Steelwork" that there were two contracts. Even more significant is the decision of the Supreme Court in that case in respect of the supply and erection of bottle coolers, where an inclusive price was charged by the assessee for the work of fabrication and installation of the bottle cooling equipment required in the premises of the customer. Under the terms of the contract, the assessee had undertaken to install bottle cooling equipment, i.e., to fabricate different parts of the unit according to the special requirements of the customer. Each bottle cooler equipment required special fabrication. This contract was construed as being one of an all-inclusive price as specially designed fabricated units had to be assembled and installed by the specially trained technicians and experts and, therefore, was not a contract of sale of the unit or different parts of the unit. Strong reliance is placed on behalf of the applicants on this decision of the Madras High Court which has been finally approved by the Supreme Court.

22. As against this contention, the learned counsel for the revenue has submitted that on a proper construction of the contract between the parties, it cannot be said that the identity of the goods, viz., the two lifts which were intended to be supplied, has altered as a result of the working of the contract, and if the identity of the goods continues then this test should go a long way in determining the true nature of the agreement between the parties. Emphasis was placed on behalf of the department on the fact that the buyers, i.e., the building contractors, wanted the lifts to be installed in the premises, and that was patent as a result of the contract entered into between the parties. It was also contended that the final bill specifically showed separate prices for the materials and labour and, the before, the case was analogous to the case in one of the later decisions of the Supreme Court in the *Government of Madras v. Simpson and Co. Ltd.* [1968] 21 S.T.C. 21. In that case, a dealer in motor cars, motor parts and accessories, also dealt with the sale of Perkins Diesel Engines. The assessee did not manufacture or fabricate Perkins Engines, but fitted the engines to the vehicles of the customers and charged a consolidated amount in the bill. From the sample of the bill which is produced in the report, it would seem that the bill showed "To cost of supplying and fitting to the car of the customer one new Perkins Engine complete with one set model conversion kit and flywheel including labour and batteries" for which were charged Rs. 9,505, and from this amount was deducted 5 per cent, discount on the engine price of Rs. 7,215. The bill was interpreted as evidencing an agreement to sell a particular diesel engine, the price of which was separately mentioned in the bill, and to fit it in the customer's vehicle.

23. The learned counsel appearing for the department also contended that an intention to sell the lifts must be attributed to the parties because of the condition regarding delivery of materials in the contract document. We have already shown that, under clause 7, the contract required the building contractors to take delivery of the machines and materials when the applicants informed them that they were ready, and that payment was to be made when

the machines were ready for shipment and the building contractors designated some local point at which delivery was to be taken. If delivery was not taken within two weeks at the point of delivery, then the applicants were authorised to warehouse the machines and materials within their factory or elsewhere at the risk and expenses of the building contractors. It is the contention of the respondents that this condition showed that the property in the goods passed as soon as the machines and materials were delivered, and at that stage the property having been passed, there was a complete sale of the machines and materials. Reliance is placed on the decision of the Supreme Court in the case of *Patnaik and Co. v. The State of Orissa* [1965] 16 S.T.C. 364, in support of the argument that one of the tests that should be applied is whether the thing to be delivered as the property of the party delivering it had any existence before its delivery, and it is said that this test is satisfied in the instant case because the property to be delivered were the lifts, and the property in the lifts was in the applicants before they were delivered. The parties having treated the materials separately from the services or the labour connected with the installation, it is urged that the view taken by the departmental authorities that there were two contracts, one for the sale of the goods and the other for services for erection and installation of the lifts, should be accepted. We have already referred to the contention of the department that in view of the proportion of costs separately indicated for the material as against labour, and the use of the word "price" in describing the consideration for the supply, erection and installation of the lifts, the intention of the parties was to sell the goods.

24. In our opinion, no such tests can be said to have been satisfied. The question to be determined is whether the contract between the parties of this nature is a composite contract or one divisible contract under which, over and above the supply of goods, something more is done. In the ultimate analysis in this case the form in which services are rendered does not permit its severance into two compartments. In this connection, there are certain factors which have relevance in determining the intention of the parties. The time-limit fixed for doing the work, the mention of an all-inclusive price for the totality of the materials and services rendered, the absence of an agreement for the sale of chattel, as chattel, the point of time when the property in the goods passed from the applicants to the opposite party, the nature of the contract undertaken by the applicants, and the indivisibility of the contract, are all factors which would indicate what should be the proper construction of the contract entered into between the parties.

25. It is, therefore, necessary to examine the terms of the contract and the surrounding circumstances in this case. The applicants' contention is that they secured the works contract which is not severable in parts. To begin with, so far as the applicants are concerned, the correspondence and the agreement emphasise that the contract is for "Otis Electric Traction Elevator Installation" which is to be carried out according to the details that follow. At several places in the contract, the parties have used the words "furnishing, fixing, installing and

rendering various kinds of services". It is to be remembered that, though the applicants are themselves manufacturers of the special type of lifts in which they claim to have certain special safety devices, there is no evidence on record that the applicants are engaged in the business of merely selling lifts manufactured or fabricated by them. It is also necessary to point out that the specifications were given only after obtaining information regarding the needs of the building contractors, and in particular, the premises in which the lifts were to be fitted and installed. It is not as if lifts from the stock are sent to the premises of the purchaser and installed there. We have repeatedly asked whether the applicants have at any time done the business of merely selling their lifts, but we have not been able to gather any information, and there is no evidence on record that the applicants are engaged in the business of only selling their goods. There is a reference to the layout drawings which were required to be approved by the building contractors before the lifts could be ordered and before they could be manufactured, or imported on the basis of the import licence of the applicants. In the letter accepting the offer, the applicants have said that they would be happy to carry out the installation of the lifts. Thus, *ex facie*, the contract is not for the sale of lifts, but for erection and installation of lifts in the building of the building contractors. We may also point out that one of the important terms of the contract is the acceptance of the liability for maintenance of the elevators for a period of three months commencing from the date they are turned over to use. The learned counsel for the department suggested that the building contractors themselves were expected to do some preparatory work, and this was not a case where the applicants themselves were required to do any work. In our opinion, this contention loses sight of the various terms in the agreement under which the applicants are required to do several items of work in the erection and installation of the lifts; It was also urged that, in determining the cost of materials, the cost of labour in fabricating the lifts in the manufacturing plant, as well as other costs, such as cost of shipment and cost of installation, have been separately calculated in arriving at the price to be charged, and, therefore, this would indicate that the intention was to sell separately the materials and the fabricated lifts and charge separately for the labour or services rendered. We do not think this interpretation of the terms of the price adjustment provision is permissible. The price adjustment provision has been made specially in order to ensure certain fluidity permissible in the final billing for the work done on account of variation in the several factors which should be taken into consideration in determining the costs but that does not alter the fact that an all inclusive price has been charged for the work of supply, erection and installation of the two lifts. The term of the contract regarding delivery of machines and materials does not, in our opinion, lead to the inference that the property in the materials and machines passed from the applicants to the building contractors by mere delivery. A special clause clearly pointing out the intention of the parties as to the time when the property in the goods was to pass has been incorporated, and we have reproduced above its full text. A bare perusal of the clause will show that, till the last paisa of the payment due is paid to the applicants, the title

in the materials and equipment is retained by the applicants. It is difficult to hold in the face of this clause that the intention of the parties was that the property in the materials supplied was to vest in the building contractors, except on the occurrence of the event mentioned in the agreement, viz., the final payment being made to the satisfaction of the applicants. In this connection, the mode of payment set out in clause 47 is also pertinent. Under that clause 30 per cent of the price was to be paid within 30 days from the date of the acceptance of the proposal, 60 per cent was to be paid on receipt of shipping documents from the factories, and the remaining 10 per cent, had to be paid, subject to adjustments required, on completion of the erection, or, in any case, within 6 months of the delivery of the equipment, if the erection was delayed due to reasons beyond their control. This is more consistent with an all-inclusive price being fixed irrespective of the materials supplied from time to time to the building contractors.

26. There is one more aspect which has also to be taken into account, viz., that the title was to pass in respect of the materials supplied (i.e. the two lifts and their appurtenances) to the building contractors after payment was made, i.e., after the lifts were properly erected and installed. It is not seriously disputed that the contraption by which lifts are fixed in buildings makes them permanent fixtures of the premises. In other words, they become part of the buildings. It is on that account that a special right is carved out in favour of the applicants in clause II wherein it is said that the right to retake possession of the same or any part of the apparatus furnished will be irrespective of the manner of attachment to the reality. Thus, the point of time when the property or apparatus was to pass in favour of the building contractors is the payment in full and completion of the erection and installation of the lifts. In our opinion, this term in the agreement is also indicative of the fact that the whole contractual obligation is not divisible in parts, and is intimately connected with the labour and services undertaken by the applicants in erecting and installing the apparatus.

27. In fact, we see no difference between this case and the Richardson & Cruddas case ([1968] 21 S.T.C. 245.), where a bottle cooling equipment was required to be fitted or installed in the premises of the customer. There is another case which has come to our notice, and that is the decision of the Rajasthan High Court in *Man Industrial Corporation Ltd. v. The State and Another* [1966] 17 S.T.C. 152. In that case before the Rajasthan High Court, the assessee carried on the business of fabricating steel doors, windows and works of allied nature, and entered into a contract with the Government of India for providing and fixing special type steel windows of four different specifications in the buildings constructed to house a Central office. The question was whether the assessee was liable to pay sales tax on the amount received by him on this contract. The court came to the conclusion that, on a true construction of the terms of the contract, it was an indivisible contract of work and not of sale, and the assessee was, therefore, not liable to sales tax.

28. The fact that the materials used in execution of the work had been the property of the person who undertook the contract, in our opinion, is not decisive of the matter. In all cases where any apparatus or any article is to be fabricated or prepared for being used in execution of the work in the contract undertaken by the fabricator or manufacturer, it is inevitable that the goods or materials or articles to be used will be pre-existing. But the question is whether it is a sale of those goods as such which is intended by the contract, or whether the article is required to be used in execution of the contract which involves considerable amount of labour and services. Now, it seems to us that the work of erection and installation of an apparatus like the lift in a huge building which has to carry passengers to several floors, is a type of work which calls for considerable skill and experience. Technical skill and precision in execution of the work is absolutely essential if satisfactory services are to be rendered by the person who undertakes such work. It is not, therefore, as if, along with the supply of goods, a comparatively unimportant or insignificant service had to be rendered, as in Simpson & Co.'s case [1968] 21 S.T.C. 21. Where the service rendered and the work undertaken in execution of the contract is of a complicated and highly technical nature requiring considerable experience, and in execution of such contract any apparatus or article manufactured by the works contractor is used, we find it difficult to hold that the mere use of the material, or the ultimate passing of property in the article or apparatus as a result of the execution of the contract, will make it possible to sever the agreement into two parts, one for the sale of goods, and the other for services rendered. The two are so intimately connected that severance is not possible in such cases. In our opinion, this is a case of that type, and differs from the facts in Simpson & Co.'s case [1968] 21 S.T.C. 21 cited above. We have come to the conclusion that the contract between the parties in the present case was indivisible, that it was not capable of severance, that there was no separate contract for sale of the lifts as such and that being a composite contract which was not severable, no liability for payment of sales tax on the price in respect of the goods used in the execution of the contract could arise.

29. In the result, we answer the questions referred to us as follows :-

Question No. (1) in the negative.

Question No. (2) in the affirmative.

30. We hold that the contract dated 10th June, 1958, between the applicants and T. Manek & Co. was a composite but indivisible contract for work and labour, and that no sale of goods can be spelt out of the contract.

31. As the applicants succeed, they will be entitled to the costs of the reference fixed at Rs. 250.

32. The applicants will also be entitled to refund of the deposit amount of Rs. 100.

33. Reference answered accordingly.