
(1990) 08 GAU CK 0010
In the Gauhati High Court
Case No : Civil Rule No. 104 to 107 of 1983

Pioneer Enterprise

APPELLANT

Vs

State of Tripura

RESPONDENT

Date of Decision : 17-08-1990

Acts Referred:

Citation : (1990) 2 GLJ 424

Hon'ble Judges : J.M.Srivastava, J and B.P.Saraf, J

Bench : Division Bench

Advocate : M.Nath, R.Das Gupta, S.Deb, Advocates appearing for Parties

Judgement

Dr. B. P. Saraf, J.

The main question that falls for determination in these writ petitions is whether the contract between the petitioner and the Public Works Department were pure works contracts or composite contracts consisting of two contracts, one for sale of bricks and the other for work and labour.

The facts and questions of law involved in these writ petitions being identical, they were taken up together for hearing and are being disposed of by this common judgment.

The petitioner is a manufacturer of bricks. During the period 1st July 1976 to 31st March 1980 the petitioner entered into some contracts with the Public Works Department, Government of Tripura, hereinafter "PWD", for execution of certain items of work in connection with construction or improvement of roads. The item of works comprised of, inter alia, collection and stacking of over burnt bricks and jhama aggregate. The rate payable, in case of bricks was per thousand number of bricks. In case of jhama, it was per cubic meter. The petitioner submitted its returns of turnover showing the supply of bricks made to PWD in pursuance to the said contracts as "sales" and paid the tax due thereon under the Tripura Sales Tax Act, 1976, hereinafter referred to as "the Act". In regard to sales of jhama, it was claimed that the same was not taxable and as such, no tax was

paid in respect thereof. Assessments were made by the Superintendent of Taxes. In the said assessments, the Superintendent of Taxes did not accept the contention of the petitioner that jhama was not taxable and included the turnover of the same in the taxable turnover of the petitioner. He also did not allow deduction from the price of bricks on account of charges for carrying, loading, unloading etc. as claimed by the petitioner. Aggrieved, the petitioner preferred appeals before the Assistant Commissioner of Taxes. Two contentions were raised. Firstly, it was contended that the part of the turnover that can be attributed to carriage, loading, unloading charges etc. could not be termed as sale price of the bricks and, as such, should be deducted from the price for determination of the taxable turnover of bricks. This contention was rejected by the learned Assistant Commissioner of Taxes. It was held that, on the facts of the case, no such deduction could be allowed. The second objection of the petitioner was regarding levy of tax on supply of bricks, bats and jhama. This was allowed and it was held that sales of jhama were not taxable till 12.9.78. Accordingly, the cases were remanded to the Superintendent of Taxes for fresh assessment. Against the appellate order, further appeals were filed before the Tripura Sales Tax Tribunal which were numbered as Case Nos. 31, 32, 33, 34/ Rev/Com/TSTT/1982. All these appeals were heard together by the Tribunal and disposed of by a common order dated 25.7.83. Before the Tribunal, in addition to the claim for deduction of carriage, loading, unloading and stacking charges from the price of the bricks, a new point was raised that the contracts in question were works contracts and, as such, supplies of bricks made in execution thereof did not amount to sales and were not liable to tax.

Both the claims were rejected by the Tribunal. So far as the claim for deduction for carriage charges etc. from the price was concerned, the Tribunal held that the rate fixed was for supply of bricks at site. As such, there was no question of any charge for carriage etc. As regards the contention that the supply of bricks in pursuance of the contracts in question did not amount to "sale", the Tribunal, on consideration of the relevant contract agreements and the various clauses thereof, arrived at a conclusion that the contracts in question comprised of different parts some related to supply of materials and others to works contract. The item of work in question related to supply of materials only and, as such, it amounted to sale. Aggrieved by the aforesaid common judgment of the Tribunal the petitioner has approached this Court by filing the present writ petitions.

The first point for determination, therefore, is whether the supply of bricks in the instant case in pursuance of the contracts in question was sale.

There is no dispute in so far as the facts are concerned. It may be expedient to state briefly the same before proceeding to discuss the law on the subject. The contracts in the instant case, are for construction/improvement of certain portions of different roads. The works comprise of six items. The six items have been separately mentioned in the tender notice and the contract agreements. Against each item of work the quantity, rate, unit and amounts have been stated.

Persons interested in execution of the works might submit tender in respect of one or more or all the items of the works. The Department concerned had also the option to split up the work between two or more contractors or to accept it in part and not in entirety. Though the name of the contract is construction/improvement of roads specified therein, the six items of work for which tenders were called are completely independent items, some of which are purely job works whereas the others appear to be for supply of materials. Since the various agreements are substantially similar, we may refer to agreement No. 16/SE/197879. The six items of work specified therein, so far as relevant, are reproduced below :

"1. Preparation of subgrade excavating earth to an aggregate of 22.5 cm. depth dressing to camber and consolidation with road roller including making good the undulation etc. disposal of surplus earth lead upto 50 m. (a) Ordinary soil.

2. Collection and staking of over burnt bricks(picked jhama)at site.

3. Laying flat brick soling and consolidation with road roller including spreading and consolidation of blinding materials moorum, or earth etc. (Payment to be made of only brick soling and used excluding blinding materials).

4. First class brick edging in full brick width and half brick depth including excavation refilling and disposal of surplus earth lead upto 50 m.

5. Collection and stacking of jhama aggregate 40 mm nominal size at site of work.

6. Laying wearing course with brick aggregate including screening, sorting, spreading to templete and consolidation with power road roller of minimum 8 tonne complete including spreading and consolidation of blinding materials (Payment excluding blinding materials)."

Evidently, each item is separate and distinct. As earlier indicated, it had also been made clear to the tenderers that each of the aforesaid items of work is an independent items and tender may be submitted for any of the items or all the items. The petitioner, in the instant case, submitted tenders for all the items including items 2 and 5 which are the subject matter of controversy in the instant case. It appears that the offer made by the petitioner in regard to these two items was not accepted. There was negotiation between the petitioner and the Superintending Engineer of PWD in that regard and rates lower than those tendered were accepted by the petitioners. This is evident from the following letter dated 16.1.76 written by the petitioner to the Superintending Engineer :

"Sub : Tender for Improvement of Road from Damcberra to Phuldangsbi/SH. Providing soling and Metalling Group

II tender dt. 11/12/75.

Dear Sir,

In pursuance to your negotiation of date on the above noted subject, we hereby agree to execute the work at the following reduced rates against items of work as under ; Tendered Brief Description Unit of Mea Tendered Agreed

Item No. of Item surement Rate rate

SI. No 2 Collection & 1000 Nos. Rs. 228/ Rs. 226/ stacking of over burnt bricks (Rupees two hundred twenty six) only.

SI. No 5 Collection & sta Per cum Rs. 81/ Ri. 79/ cking of jhama aggregate. (Rupees seventy nine) only."

On these facts it has to be determined whether the supply of bricks by the petitioner amounted to sale or not. If it is held to be a sale, the next question that has to be decided is whether in determination of the turnover for the purpose of levy of sales tax any deduction has to be allowed on account of the supposed expenses incurred by the petitioner on account of carriage of bricks to the work site which was the place of delivery under the contract and for loading, unloading stacking etc. We may deal with the first question whether the supply of bricks amounted to sale or works contract.

Various tests have been laid down by the Supreme Court in a number of cases for determining when a contract can be said to be a contract for sale or a contract for work and labour. The primary test is whether the contract is one whose main object is transfer of property as chattels to the buyer. If the main object of a contract is transfer of property as a chattel to the buyer, it will be a contract for sale even though some work may be required to be done under the contract as ancillary or incidental to the sale. 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.

As observed by the Supreme Court in the Government of Andhra Pradesh vs. Gantur Tobaccos Ltd., (1965) 16 STC 240 at page 255, a contract for work in the execution of which goods are used may take one of the following three forms :

- 1) 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 ;
- 2) It may be a contract for work in which the use of materials is necessary or incidental to the execution of the work; or
- 3/) 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.

Whether a contract is of the first or the second category must depend upon the circumstances. If it is of the first, it is a composite contract for work and sale of goods if it is of the second category, it is a contract for execution of work not involving sale of goods. In the last class there is no sale because though property passes it does not pass for a price.

It is well settled that the form of agreement is not determinative of the nature of the contract it is the substance of the contract that matters. There may be one single instrument but the agreements embodied therein may be two or more distinct and separate one for supply of materials, and the other for work involving labour and services only. These two contracts may be separated for taxation. The following observation of the Supreme Court in *State of Madras vs. Gannon Duikerley & Company (Madras) Ltd.*, (1958) 8 STC 35 J (at page 387) is the authority for the aforesaid proposition j

"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 tender service and to impose a tax thereon cannot be questioned...".(emphasis supplied)

In *Sentinel Rolling Shatters & Engineering Company Pvt. Ltd. vs. The Commissioner of Sales Tax*, (1978) 42 STC 409 the Supreme Court, referring to the aforesaid three forms that works contract may generally take, observed that a contract for work to be done for remuneration and for supply of materials used in the execution of the work for a price is a composite contract consisting essentially of two contracts, one for the sale of goods and the other for the work and labour. Such contract is divisible and the contract for sale can be separated from the contract for work and labour and the amount payable under such composite contract can be apportioned between the two.

Applying the primary test of transfer of property as chattels to the buyer, in *Chandra Bhan Gosain vs. The State of Orissa*, (1963) 14 STC 766 the Supreme Court held that the assessee, a manufacturer of bricks, to whom land was given free for the manufacture and supply of bricks, was liable to pay sales tax on bricks delivered by him. In that connection, it was observed :

"...here the intention of the parties in making the contract clearly was that the company would obtain delivery of the bricks to be made by the appellant, it was a contract for transfer of chattels qua chattels. The essence of the contract was the delivery of the bricks, though no doubt they had to be manufactured to a certain specification. It would be absurd to suggest that the essence or the contract was the work of manufacture, and the delivery of the bricks was merely ancillary to the work of manufacture".

However, it was noticed that there are cases where application of the primary test of transfer of property as chattel to the buyer is beset with difficulty. To resolve the same certain subsidiary tests were evolved. One such test was formulated by the Supreme Court in *Commissioner of Sales Tax, Madhya Pradesh vs. Purshottam Premji*, (1970) 26 STC 38, where it observed :

"The primary difference between a contract for work or service and a contract for

sale of goods is that in the former there is in the person performing work or rendering service no property in the thing produced as a whole . In the case of contract for sale, the thing produced as a whole has individual existence as the sole property of the party who produced it, at some time before delivery, and the property therein passed only under the contract relating thereto to other party for price."

(Emphasis supplied)

The various tests, primary as well as subsidiary, are only illustrative and not exhaustive. No rigid or inflexible rule can be laid down which may be applicable alike to all transactions. There is no magic formula by the application of which one can say for certain in every case whether a contract is a contract for sale or a contract for work and labour. The various decisions and tests laid down therein, as observed by the Supreme Court in *Sentinel Rolling Shutters & Engineering Company*, (supra) merely focus on one or the other aspect of the transactions and afford some guidance in determining the question, but basically and primarily, whether a particular contract is one for sale of goods or for work and labour depends upon the main object of the parties gathered from the terms of the contract, the circumstances of the transactions and the custom of the trade.

As observed by the Supreme Court in *Vanguard Rolling Shutters & Steel Works vs. Commissioner of Sales Tax*, U. P. (1977) 39 STC 372 (at page 375) :

"The question as to under what circumstances a contract can be said to be a works contract is not free from difficulty and has to depend on the facts of each case. It is difficult to lay down any rule of universal application, but there are some well recognised tests which are laid down by decided cases of this Court which afford guidelines for determining as to whether a contract in question is a works contract or a contract for supply of goods."

The facts of the present case in the light of the aforesaid principles may now be considered.

From a perusal of the agreements in the instant case, the various items of works and the terms and conditions it is evident that there were six separate contracts or agreements for undertaking six different and distinct works though they were all embodied in one single instrument. This also gets support from the fact that the parties in the instant case were free to submit tenders for one or more items. It was not necessary to undertake all the six items. Nor was it obligatory for the PWD to offer all the items to one person. Even one item could be subdivided between more than one person. All these clearly go to show that the six items of works were really six agreements though there was a single agreement embodying them. That being the position, each item of work has to be examined independently. If that is done, there is no dispute that contracts in respect of items 2 and 5 are pure and simple contracts for sale. In that view of the matter, the supplies made in pursuance to the same by the petitioner to PWD will be sale subject to tax under the Act.

Having answered the first question against the petitioner, it has become necessary to decide the second question whether the petitioner is entitled to any deductions from the price on account of charges for carriage, loading, unloading, stacking etc. incurred by him. For that again we are to refer to items 2 and 5 of the contract. The work under these two items was collection and stacking of bricks of specified quality at the site of work. Rate was fixed per thousand number of bricks and per cubic meter of jhama. The claim of the petitioner is that the sale price should be reduced by the amount incurred by it in carrying the goods to the place of delivery etc. The question for consideration is whether such deduction can be allowed. We do not see any difficulty for we find that the answer to this question is available in the decision of the Supreme Court in *Hindustan Sugar Mills Ltd. v. State of Rajasthan*, (1979) 43 STC 13. The following illustration given by the Supreme Court (at page 29) in our opinion squarely applies to the present case :

"We may then take a i case where a dealer transports goods from his factory to his place of business and sells them at a price which is arrived at after taking into account "freight and handling charges" incurred by him in transporting the goods. The amount of ""freight and handling charges" included in the price would obviously be part of the "sale price", because it would be payable by the purchaser to the dealer as part of the consideration for the sale of goods."

The reasoning is that since "freight and handling charges" represent expenditure incurred by the dealer making the goods available to the purchaser at the place of sale, they, would constitute an addition to the cost of the goods to the dealer and would clearly be a component of the price charged to the purchaser. The amount of" freight end handling charges" would be payable by the purchaser as part of the consideration for the sale of the goods and it would, therefore, form part, of sale price.

In our opinion the aforesaid decision of the Supreme Court clearly applies to the instant case and following the same we held that the petitioner was net entitled to claim any deduction on account of expenditure incurred by it in carrying the goods to the place of delivery and loading, unloading etc. The total amount received by the petitioner from the PWD on account of supply of bricks will be the sale price for the purpose of taxation without any deduction therefrom on account of expenditure incurred on carriage etc. The taxing authorities were justified in refusing the claim of the petitioner on this count.

In view of both the points raised by the petitioner having been decided against it, these writ petitions do not have any merit and the same are dismissed. In view of the facts and circumstances of the case, we make no order as to costs.