
(1983) 09 AP CK 0006

In the Andhra Pradesh High Court

Case No : Tax Revision case No. 35 of 1981

P.S. and Company

APPELLANT

Vs

State of Andhra Pradesh

RESPONDENT

Date of Decision : 13-09-1983

Acts Referred:

Sales of Goods Act, 1930 — Section 4

Citation : (1984) 56 STC 283

Hon'ble Judges : Amareshwari, J;A. Seetharam Reddy, J

Bench : Division Bench

Advocate : T. Ramam, for the Appellant; The Government Pleader, for the Respondent

Judgement

Seetharam Reddy, J.—The sole, but important question is whether a contract for construction and supply of harbour ferry, constitutes a contract for sale or a contract for work and labour. The question of this nature has been defying easy adjudication since long by the courts of judicature of this country as well as abroad. The search and research in the forensic laboratory has not hitherto discovered a pigeon hole, fixing the given material into one or the other by a strait jacket formula. This search however will continue with the sanguineness that one day a solution will emerge, saving or smashing the sales tax payer.

2. Now the facts : The assessee-petitioner carrying on the business of builder and repairer of ships and ferries at Visakhapatnam, entered into an agreement with the Government of India for the "construction and supply of harbour ferry" capable of carrying 200 day passengers as per the specifications and technical particulars of tender at a cost of Rs. 30,60,000 as per the conditions set out in annexure-A of the agreement coupled with conditions of the contract as contained in form No. D.G.S. & D - 68 (Revised) including clause 24 thereof and D.G.S. & D - 72 as modified up to date will apply.

3. Date of delivery : 18 months from the date of order.

4. Terms of delivery : Free delivery to consignee at Port Blair.

5. Special instructions :

(a) Terms of payment :

(i) 15 per cent when keel is laid.

(ii) 15 per cent when vessel is framed.

(iii) 15 per cent when hull is completed.

(iv) 20 per cent when vessel is launched.

(v) 25 per cent when vessel is completed and accepted after final inspection for trial.

(vi) 10 per cent on the expiry of guarantee period of six months.

N.B. (i) For the above stage payments you shall have to furnish bank guarantee in the form enclosed as annexure "VI" and comprehensive insurance policy duly assigned to the President of India.

(ii) The ferry will be delivered afloat at your yard in Visakhapatnam and will be accepted by consignees after inspection and trials at Visakhapatnam and for the same provisional acceptance certificate will be issued so as to enable you to claim (v) stage payment of 25 per cent after provisional acceptance by the consignee at your yard but the final acceptance will be at consignee's end, i.e., at Port Blair. This will facilitate the consignee to get the rectifications or any improvement completed early if required. It will be very convenient to carry out the rectifications or any improvement that may be suggested by the consignee.

(iii) You are, however, responsible for delivery the craft to the consignee at Port Blair at an additional cost of Rs. 60,000 as already mentioned. This includes voyage insurance. Any damage incurred in transit will be rectified by you at your cost and guarantee period will commence from the date of physical delivery of craft to the consignee at Port Blair.

(b) Sales tax and excise duty : Sales tax and excise duty on completed ferry will be paid extra if legally payable.

(c)

(d) (e) The petitioner will have to take out a comprehensive insurance policy from United India Fire and General Insurance Company Limited, Indian Overseas Bank Building, 151, Mount Road, Madras-2, which should be assigned in favour of the President of India. The assignment should be by endorsement on the policy.

(f) Guarantee : The complete vessel with its fittings should be guaranteed for a period of six months from the date of handing over to the consignee against all defects due to inferior material/workmanship. Repairs of all defects under the

guarantee clause will have to be rectified at whatsoever place the vessel may be stationed and the supplier will have to guarantee the repairs so carried out for further period of six months from the date of repairs.

6. Before analysing the above, the case law cited may be adverted to.

7. In *Hindustan Ship Yard Ltd. v. Commercial Tax Officer* (1970) 1 An WR 197, the petitioner is a concern of the Government of India in the public sector carrying on the business of constructing ships for ship-owners under the contracts entered into between them as and when orders are placed. Under the terms of the contract the petitioner is called builders and the person for whose benefit the ships are built are the owners. The other terms of the contract are that the builders should build the ships according to the specifications given by the owners, that during the period the parts are assembled the owners are entitled to depute their own supervising staff, if anything had been omitted from the specification, then it has made at certain stages of the contract and the progress of the work, that the delivery is to be replaced at the expense of the builder, that the payment of the price has to be made at certain stages of the contract and the progress of the work, that the delivery is to be made either at Bombay or Calcutta or any port in India, that any materials unutilised shall be the property of the owners from the date of payment of the first instalment amount, that all the parts should bear the marks of the owner and all the parts which are intended to be appropriated to the contract should become the property of the owners. The question is whether the builder is liable to sales tax. Relying on the decisions in *State of Gujarat Vs. Kailash Engineering Co.*, and *Patnaik and Company Vs. State of Orissa*, this Court held :

"The builders have to carry on the construction of the vessels according to the specifications; that they have to do so under the supervision of the owners; that they have to comply with the directions given from time to time by the owners; remove or replace any parts or change the design as directed by them, to allow their crew to daily inspect the work that is being done and to mark each part, from the time the first instalment is paid, conspicuously with the name of the owners, as it became the property of the owners and was not within the ownership or disposition of the builders The materials and other things appropriated, but not used for the purpose of the contract shall, after completion of the vessels, revert to and become the property of the owners and this can only during the construction. The right which the builders have under the agreement over the property in the vessel and its engines, etc., further confirms that the property in them is vested in the owners. It is, therefore, clear that what the builders have to do under the contract is to complete a ship from out of the material belonging to the owners, under their supervision, according to their requirements, the building skill, the technical know-how and the manual labour being supplied by the builders."

8. In *State of Gujarat Vs. Kailash Engineering Co.*, , the respondent, an engineering concern, constructed three coaches over the chassis supplied by the

Western Railway Administration under a contract with the latter and received money therefor. It was provided in the contract that as soon as the plant and materials were brought on the site where the coaches were to be constructed, the ownership in them would vest in the Railway. The coach bodies were not separately described as units or components to be supplied by the respondent to the Railway. The duty of the respondent was described throughout the contract to be that of constructing, erecting and furnishing coach bodies on the underframes supplied : At no stage did the contract mention that ready coach bodies were to be delivered by the respondent to the Railway. In fact even from the earliest stage during the process of construction of the coach bodies, the unfinished bodies in the process of erection were treated, under the terms of the contract, as the property of the Railway. Since those unfinished bodies were to be in the charge of the respondent during construction, the respondent was made liable, under the contract, to reimburse the Railway for loss by fire, etc.

9. On the aforesaid material, the Supreme Court held, that "as the terms of the contract indicated that the respondent was not to be the owner of the ready coaches and that the property in those bodies vested in the Railway even during the process of construction, the transaction was clearly a works contract and did not involve any sale."

10. In *State of Gujarat (Commissioner of Sales Tax, Ahmedabad) Vs. Variety Body Builders*, the Supreme Court held, that "as there was a written contract it would be necessary for the court to find out therefrom the intention of the parties executing the contract. The intention of the parties at the time of entering into the contract was not to transfer any completed railway coach by the contractor to the railway. The end-product, being the railway coach, was the result of work, labour and materials of the contract as well as of the railway as also of the latter's constant supervision and control. From the totality of the material terms and conditions in the agreement, it was not possible to say that the parties intended that the contractor transferred the property in the railway coach to the railway after its completion. The essence of the contract or the reality of the transaction as a whole indicated that the contract was a contract for work and labour."

11. In *Union of India (UOI) Vs. The Central India Machinery Manufacturing Company Ltd. and Others*, , the Supreme Court held :

"The respondent-company entered into a contract with the Union of India through the Railway Board for the manufacture and supply of wagons to the railways for a price which was fixed taking the wagons as a unit. The contract was governed by the General Conditions of Contract in so far as they were not inconsistent with the Special Conditions attached as an annexure to a letter of the Railway Board. The Standard Condition regarding payment of the price provided that as soon as a vehicle had been completed the company would get it examined by the Inspecting Officer and submit to the purchaser an "on account" bill for 90 per cent of the value of the vehicle and within 14 days of the receipt of

such bill together with the certificate of the Inspecting Officer, the purchaser would pay 90 per cent of the bill, and on such payment, the vehicle would become the property of the purchaser. The balance of 10 per cent was to be paid after delivery of the vehicle. The Special Conditions of Contract provided, inter alia, that "on account" payment up to 90 per cent of the value of the "steel and other materials" procured by the company for the order would be made against such materials on production of a certificate from the Officer of the Inspection and Liaison Organisation and on furnishing the necessary indemnity bond to the paying authority. "On account" payment was not, however, permissible against steel procured by the company from a source other than the floating stock held by the railways, except when an offer to procure it from that source was refused. The company was to be supplied with wheel sets and axle-boxes free of cost f.o.r. against a proper undertaking for their safe custody. The company was obliged to hold as trustee for Government "any raw materials for the execution of the contract" procured with the assistance of Government either by issue from Government stock or purchase under arrangement made or permit or licence and to use such materials economically and solely for the purpose of the contract against which they were issued and not dispose of them without the permission of the Government. One of the clauses in the indemnity bond provided that the company should hold at its works the stores and articles of the railways in respect of which advantage might be made to the company. The Special Conditions also provided that "on account" payment was part of the "full contract price" for each completed wagon and that the Government had the pre-emptive right to purchase all surplus or unserviceable materials from the company on its being paid such price as the Government might fix with due regard to the condition of the materials. The clause relating to sales tax provided that if and when State and inter-State sales tax on the stock or order become payable under law such payments would be reimbursed by the Railway Board, but no sales tax on materials including steel or components would be reimbursed by the Railway Board."

12. After extracting the definition of "sale" u/s 2 of the Rajasthan Sales Tax Act, the Supreme Court held :

"Thus, transfer of property in goods for a price is the linchpin of the definition. u/s 4 of the Sale of Goods Act, 1930, also, in the definition of the term "sale" stress is laid on the element of transfer of property in the goods. According to the Roman jurists, also, the purport of a contract of sale is that the seller divests himself of all proprietary right in the thing sold in favour of the buyer. It is this requisite which often distinguishes a contract of sale of goods from a contract for work and services Difficulty has also been felt in England and other common law jurisdictions to the effect of a contract to make a chattel and deliver it when made. Generally, such a contract is one of sale of chattel, but not always. Jurists have differed much and striven much about the test for distinguishing between these two types of contracts. Since each contract presents its own features and imponderables it has not been possible to devise an infallible test of

universal application. According to Pollock & Mulla, "the test would seem to be whether the thing to be delivered has any individual existence before delivery as the sole property of the party who is to deliver it". If the answer is in the affirmative, it is a "sale" of the thing, otherwise not."

13. Further held :

"Another learned author enunciates that "the general rule deducible from the cases seems to be that if the main object of the contract is the transfer from A to B, for a price, of the property in a thing in which B had no previous property, then the contract is a contract of sale" (see Chalmers' Sale of Goods, 16th Edn., page 52). The broad criteria for distinguishing between these two types of contracts have been neatly summed up in Halsbury's Laws of England (3rd Edn., Vol. 34, page 6)."

14. Further held :

"A contract of sale of goods must be distinguished from a contract for work and labour. The distinction is often a fine one. 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. Where the main object of work undertaken by the payee of the price is not the transfer of a chattel quo 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 circumstances of a particular case, whether the contract is in substance one for work and labour or one for the sale of a chattel."

15. Also held :

"The upshot of the above discussion is that with the exception of wheelsets (with axle boxes and couplers), substantially all the raw materials required for the construction of the wagons before their use belong to the company and not to the President/Railway Board. In other words, with the exception of a relatively small proportion of the components supplied under Special Condition 6, the entire wagon including the material at the time of its completion for delivery is the property of the company. This means that the general test suggested by Pollock and Chalmers has been substantially, albeit not absolutely, satisfied so as to indicate that the contract in question was one for the sale of wagons for a price, the company being the seller and the President/Railway Board being the buyer. It is true that technically the entire wagon including all the material and components used in its construction cannot be said to be the sole property of the company before its delivery to the purchaser. But as pointed out by Lord Halsbury in the above-quoted passage from his renowned work neither the ownership of the materials nor the value of the skill and labour as compared with the value of the materials used in the manufacture is conclusive. Nevertheless, if

the bulk of the material used in the construction belongs to the manufacturer who sells the end-product for a price that will be a strong pointed to the conclusion that the contract is in substance one for the sale of goods and not one for work and labour."

16. Further held :

"Be that as it may clause (1) of Standard Condition 15 dispels all doubt with regard to the nature of the contract. This clause stipulates in unmistakable terms that as soon as a vehicle has been completed, the company will get it examined by the Inspecting Officer and submit to the purchaser an "on account" bill for 90 per cent of the value of the vehicle and within 14 days of the receipt of such bill together with a certificate of Inspecting Officer, the purchaser will pay 90 per cent bill and on such payment, the vehicle in question will become the property of the purchaser. There could be no clearer expression of the intention of the contracting parties than this clause that the contract was, in substance, one for the sale of manufactured wagons by the company for a stipulated price." [Cases referred : The Commissioner of Commercial Taxes, Mysore, Bangalore Vs. Hindustan Aeronautics Ltd., ; State of Gujarat (Commissioner of Sales Tax, Ahmedabad) Vs. Variety Body Builders, ; Patnaik and Company Vs. State of Orissa, .

In Sentinel Rolling Shutters and Engineering Company (Pvt.) Ltd. Vs. The Commissioner of Sales Tax, , wherein the petitioner-assessee carrying on business as engineers, contractors, manufacturers and fabricators entered into a contract with a company for fabrication, supply, erection and installation of two rolling shutters in two sheds belonging to that company for a price which was inclusive of charges for "erection at site", the contract provided, among others, that the delivery of the goods was to be ex-works and once the delivery was effected rejection claims would not be entertained. All masonry works required before and/or after erection was to be carried out by the company at its own cost. Payments were to be made on overall measurements which should be checked by the company before installation. The actual transportation charges were to be in addition to the price stipulated in the contract and the terms of payment provided "25 per cent advance, 65 per cent against delivery and remaining 10 per cent after completion of erection and handing over of shutters to the satisfaction" of the company. The assessee submitted the bill to the company after completion of the fabrication of the rolling shutters, but before they were erected and installed at the premises of the company. The Supreme Court held :

"Now the question whether a particular contract is a contract for sale or for work and labour is always a difficult question and it is not surprising to find the taxing authorities divided on it The distinction between a contract for sale and a contract for work and labour has been pointed out by this Court in a number of decisions and some tests have also been indicated by this Court, but it is necessary to point out that these tests are not exhaustive and do not lay down

any rigid or inflexible rule applicable alike to all transactions. They do not give any magic formula by the application of which we can say in every case whether a contract is a contract for sale or a contract for work and labour."

17. Further held :

"It may be pointed out that a contract where not only work is to be done but the execution of such work requires goods to be used may take one of three forms. The contract may be for work to be done for remuneration and for supply of materials used in the execution of the work for a price; 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 supply of goods where some work is required to be done as incidental to the sale. Where a contract is of the first type, it is a composite contract consisting essentially of two contracts, one for the sale of goods and the other for work and labour. The second type of contract is clearly a contract for work and labour not involving sale of goods, while the third type is a contract for sale where the goods are sold as chattels and some work is undoubtedly done, but it is done only as incidental to the sale. No difficulty arises where a contract is of the first type, because it is divisible and the contract for sale can be separated from the contract for work and labour and the amount payable under the composite contract can be apportioned between the two. The real difficulty arises where the contract is of the second or third type, because in such a case it is always a difficult and intriguing problem to decide in which category the contract falls. The dividing line between the two types of contracts is somewhat hazy and "thin partitions do their bounds divide". But even so the distinction is there and it is very much real and the court has to perform at times the ingenious exercise of distinguishing one from the other."

18. Further held :

"Now, it is clear that the contract is for fabrication, supply, erection and installation of two types of rolling shutters and not only are the rolling shutters to be manufactured according to the specifications, designs, drawings and instructions provided in the contract, but they are also to be erected and installed at the premises of the company. The price stipulated in the contract is inclusive of erection and installation charges and the contract does not recognise any dichotomy between fabrication and supply of the rolling shutters and their erection and installation so far as the price is concerned. The erection and installation of the rolling shutters is as much an essential part of the contract as the fabrication and supply and it is only on the erection and installation of the rolling shutters that the contract would be fully executed These component parts are fabricated by the manufacturer and taken to the site and fixed on the premises and then comes into existence a rolling shutter as an identifiable commercial article After fixing the clamps to the grouted portion of the wall, the same is plastered and then the iron curtain of the shutter is lowered through the guide channels to operate the shutter manually up and down. The rolling shutter is then "born" and it becomes a permanent fixture to

the premises All these operations take place at the site after despatch of the component parts of the rolling shutter It will, thus, be seen that the component parts do not constitute a rolling shutter until they are fixed and erected on the premises. It is only when the component parts are fixed on the premises and fitted into one another that they constitute a rolling shutter as a commercial article and till then they are merely component parts and cannot be said to constitute a rolling shutter. The erection and installation of the rolling shutter cannot, therefore, be said to be incidental to its manufacture and supply. It is a fundamental and integral part of the contract because without it the rolling shutter does not come into being. The manufacturer would undoubtedly be the owner of the component parts when he fabricates them, but at no stage does he become the owner of the rolling shutter as a unit so as to transfer the property in it to the customer. The rolling shutter comes into existence as a unit when the component parts are fixed in position on the premises and it becomes the property of the customer as soon as it comes into being. There is no transfer of property in the rolling shutter by the manufacturer to the customer as a chattel. It is essentially a transaction for fabricating component parts and fixing them on the premises so as to constitute a rolling shutter. The contract is thus clearly and indisputably a contract for work and labour and not a contract for sale."

19. In *Ram Singh and Sons Engineering Works Vs. Commissioner of Sales Tax, U.P.*, the assessee is a partnership firm carrying on the business inter alia, of manufacturing and erection of cranes. The contract in question entered into was for supply and erection of 3-motion electrical overhead travelling crane. On the basis of the material, the Supreme Court held :

"A contract for fabrication and erection of a 3-motion electrical overhead travelling crane is a contract for work and labour and not a contract for sale."

20. Further held :

"The fabrication and erection of a 3-motion electrical overhead travelling crane is a highly skilled and specialised job and the component parts have to be taken to the site and they are assembled and erected there and it is only when this process is complete that a 3-motion electrical overhead travelling crane comes into being. The process of assembly and erection of such a crane requires a high degree of skill and it cannot be said that its erection at the site is merely incidental to its manufacture and supply. The fabrication and erection is one single indivisible process and the crane comes into existence only when the erection is complete. The erection is thus a fundamental and integral part of the contract, because without it the crane does not come into being. The manufacturer would be the owner of the component parts when he fabricated them, but at no stage does he become the owner of the crane as a unit so as to transfer the property in it to the customer. The crane comes into existence as a unit only when the component parts are fixed in position and erected at the site, but at that stage it becomes the property of the customer, because it is

permanently embedded in the land belonging to the customer. The result is that as soon as the crane comes into being, it is the property of the customer and there is, therefore, no transfer of property in it by the manufacturer to the customer as a chattel. It is essentially a transaction for fabricating component parts and putting them together and erecting them at the site so as to constitute a 3-motion electrical overhead travelling crane."

21. The emerging guidelines, though they cannot be termed as infallible tests of universal application, on the above conspectus, are :

(1) The essence of the contract or the reality of the transaction as a whole has to be taken into consideration, in judging whether the contract is for a sale or for work and labour.

(2) If the thing to be delivered has any individual existence before the delivery, as the sole property of the party who is to deliver it, then it is a sale.

(3) If the main object of the contract is the transfer from A to B, for a price, of the property in a thing in which B had no previous property, then the contract is a contract of sale.

(4) Where the main object of work undertaken by the payee of the price is not the transfer of a chattel quo chattel, the contract is one for work and labour.

(5) If the bulk of the material used in the construction belongs to the manufacturer who sells the end-product for a price that will be a strong pointer to a conclusion that the contract is in substance one for the sale of goods and not one for work and labour.

(6) A contract where not only work is to be done but the execution of such work requires goods to be used, may take one of three forms :

(a) the contract may be for work to be done for remuneration and for supply of materials used in the execution of the work for a price;

(b) it may be a contract for work in which the use of materials is accessory or incidental to the execution of work; or

(c) it may be a contract for supply of goods where some work is required to be done as incidental to the sale;

22. Where a contract is of the first type, it is a composite contract consisting essentially of two contracts, one for the sale of goods and the other for work and labour.

23. The second type of work is clearly a contract for work and labour not involving sale of goods.

24. While the third type is contract for sale where the goods are sold as chattels and some work is undoubtedly done, but it is done merely as incidental to the sale.

25. The contract for fabrication, supply, erection and installation of, say, rolling shutters, where the rolling shutters are not only to be manufactured according to the specifications, designs, drawings and instructions provided in the contract, but they are also to be erected and installed at the premises of the company and the price stipulated in the contract is inclusive of erection and installation charges, is a contract for work and labour, because the erection and installation is a dominant and integral part of the contract and without it the rolling shutter does not come into existence.

26. The fabrication and erection of, say, a 3-motion electrical overhead travelling crane, which is a highly skilled and specialised job and the component parts have to be taken to the site for assemblage and erection, is also one for contract of work and labour. The fabrication and erection is one single indivisible process and the crane comes into existence only when the erection is complete.

27. Conversely, where manufacture or fabrication is a highly specialised and skilled job and the assemblage is not correspondingly highly specialised job, the assemblage being merely incidental or accessory to the end-product, then it becomes a sale.

28. The features of the case on hand are : The petitioner is a builder of ships and ferries. The agreement entered into is for the construction and supply of ferry for a price of Rs. 30,60,000. The construction, no doubt, is to be supervised and inspected by the men of the respondent. The ferry has to be delivered within 18 months from the date of the order to the consignee at Port Blair. Payment of price is in six instalments, but this would be against the bank guarantee. At the end of every stage payment, the work, as finished by them, will have to be ensured by the builder and then to be assigned by endorsement in favour of the respondent. The ferry will have to be delivered afloat for provisional acceptance after inspection at the builder's yard at Visakhapatnam and then for final acceptance at Port Blair, will fully covered insurance at the instance of the builder as any damage during the passage from Visakhapatnam to Port Blair (was) to be recompensed by the builder, though at an additional cost of Rs. 60,000. The complete vessel should be guaranteed for a period of six months from the date of handing over to the respondent against all defects due to inferior quality of material or workmanship.

29. Clause 18 of D.G.S. & D - 72 reads :

"18. Insurance of materials :- The contractor shall immediately upon the granting by the Inspector of his certificate that the contractor is entitled to the first instalment and before payment by the purchaser of the first instalment of the contract sum, at his own cost and expense insure (in a company approved by the Inspector) against loss or damage by fire and accident, in the name of the purchaser the vessel and also the engines, boilers, machinery, and fitting thereof, for the full term of the contract, and until delivery at destination, in some one or more of the most respectable offices in India to be approved of by the purchaser

to the full value thereof and when the work shall be so advanced as to entitle the contractor to payment of the subsequent instalments, then and previously to receive each such instalment the contractor shall insure in like manner the works and materials for the full term of the contract on the additional amount of each such instalment. The contractor shall immediately after any of the said insurances, whether against loss by fire or accident, have been effected, and previously to the payment to him of any part of the said contract sum, produce to and lodge with the purchaser the policy or policies of every such insurance, and shall from time to time pay or cause to be paid the premium or premia in respect of every such policy or policies and the said policy or policies shall during the period of this contract remain with the purchaser as a security in the case of loss or damage by fire or accident for any moneys which may have been paid by him to the contractor for or on account of the said vessel under this contract.

If the contractor shall at any time, fail, to effect or keep in force any such insurance or insurances as aforesaid or to produce to or lodge with the purchaser the policy or policies of such insurance or insurances to pay the premia which shall from time to time become payable in respect thereof respectively, then and in any or either of the cases aforesaid, it shall be lawful for, but not imperative upon, the purchaser to effect and keep in force, so long as he shall think fit, any such insurance or insurances either against loss or damage by fire or accident, and to pay any premium or premia that may be necessary for that purpose, and the contractor will on demand pay to the purchaser any sum or sums which may at any time be expended by him or by his directions for such purposes, or the purchaser may at his discretion deduct any such sum or sums from any money which may at any time or times become payable by him to the contractor under this or any other contract."

30. Clause 22 reads thus :

"22. Ownership of materials on payment of first instalment. - Upon payment of the first instalment of the contract price, the vessel so far as then constructed and all machinery and materials either wholly or partially constructed or in preparation and set apart from time to time for the purpose of the contract shall become and shall, with all additions thereto, respectively continue to be the property of the purchaser subject to the purposes of the contract; but the purchaser shall not be liable for any loss or damage by theft, fire, stress of weather or otherwise howsoever. Upon the due completion of contract all such materials which have not been actually used for the purpose of contract shall become the property of and be relinquished to the contractor."

31. It may also be stated that the raw material, viz., iron and steel, required for the construction of the craft would be purchased on the basis of the essentiality certificate issued by the respondent; though it was open to the builder to purchase the same from the open market.

32. The question now is, whether the above ingredients would constitute a

contract for sale or contract for work and labour.

33. True, the construction at every stage of the craft will be under the supervision of the respondent so that the defects, if any, to be pointed out, may be made up, then and there, by builder's men. Further, the vessel constructed up to a certain stage and all machinery and materials either wholly or partially constructed, and set apart from time to time for the purpose of the contract, will be the property of the purchaser; but, however, this will be subject to the purpose of the contract and also the purchaser shall not be liable for any loss or damage. There is nothing in the agreement also to show that the materials remaining at the end, after the completion of the contract, shall be the property of the purchaser. In fact, under the terms (on the contract) it will become the property of the contractor-builder. Even the insurance policy will have to be taken out by the builder and then to be assigned in favour of the purchaser. Clause 18 of D.G.S. & D - 72 will not override the special condition stated in the contract under the maxim, *generalia specialibus non derogant*. Even the title of D.G.S. & D - 72 is : "The conditions of contract governing supplies of sea and river craft."

34. It is, therefore, clear that what the builder has to do under the contract is to complete the ferry from out of the material belonging to himself and by his own men; though under the supervision of the purchaser and also subject to the terminal payments to be made by him. This means the general test suggested by Pollock and Chalmers has been substantially satisfied indicating that the contract was one for the sale of ferry for a price. However, it is the responsibility of the builder to deliver the vessel at his own cost and expense, being obligated in terms of the contract to keep the vessel insured, till the completion of the contract. The property at the completion of the stage craft is said to be the property of the purchase, but all through, till the completion of the vessel any damage caused to it will be at the risk of the builder. Even the stores bought by the purchaser, though said to become his property after being inspected by the buyer, it would nevertheless be in the custody of the builder till the completion of the vessel and on completion the remaining property will revert to the builder.

35. The learned counsel for the petitioner-assessee laid heavy stress on the Supreme Court decision in *Ram Singh and Sons Engineering Works Vs. Commissioner of Sales Tax, U.P.*, and argued that since the features are akin to the case on hand, the ratio is beneficial to the assessee. We apprehend, the ratio will not be of much assistance to the assessee. The nature of the contract and so the ingredients of it are at variance. The contract in the cited case is for fabrication and erection of 3-motion electrical overhead travelling crane and therefore, in the circumstances of that case it was rightly held attaching great significance and importance to the erection aspect of the contract wherein the essential components already being ready and being brought on to the site, the erection was effected which involved expertise and great specialisation. Whereas in the case before us the raw materials belonging to the builder, was taken to the yard and then the various components were manufactured at the site and then

the end-product emerged out of mere assemblage of the various components, which aspect did not involve much of expertise.

36. Indeed, the dominant factor was the manufacture or fabrication of the vessel and not erection or installation of the ultimate end-product demanding high magnitude of expertise. In this view of the matter, we unhesitatingly hold that the salient features of this contract would lend support to hold that the contract is one for sale and not for work and labour.

37. To our mind, neither the instalment payment nor the constructive ownership over the end-product, at each stage being made over in favour of the buyer including the material, even assuming that clause 22 of D.G.S. & D - 72 comes into play, though already held that it cannot override the specific clause of the agreement, will not militate against the transaction being held as sale. It is not the case that at each stage the end-product being actually delivered physically to the purchaser. It is a continuous process, the physical possession at each stage being in the hands of the builder; and so it cannot be said to be a case of satisfying the test : "the thing to be delivered has any individual existence before delivery."

38. In our judgment the main object of the contract is the transfer from builder to buyer, for a price, of the property in the ferry in which buyer had no previous property. The ferry as a whole now has individual existence ready to be delivered and therefore on delivery the seller becomes entitled to the remaining payment of 25 per cent of cost price and on such payment, the transaction becomes complete. The aforesaid process is a strong pointer in favour of the contract being one for sale and nothing else. Hence, it is a contract of sale for transfer of the property, and the delivery of possession with title to the buyer, which is the essence of contract of sale.

39. Further, the stage payments are made on furnishing bank guarantees and also on the coverage of insurance policy by the builder to be assigned in favour of the respondent. At the end the ferry will be delivered afloat provisionally at Visakhapatnam yard and finally at Port Blair by the builder to the buyer, voyage insurance being on the builder.

40. Judged from any angle the totality and the cumulative effect of the circumstances constitute the contract in question a sale and not a contract for work and labour.

41. The question, therefore, framed at the outset is accordingly answered, as has been done by the Tribunal and so, the revision is dismissed. No costs. Advocate's fee Rs. 250.