C. B. Gosain

Vs

State of Orissa

Civil Appeals Nos. 41 to 49 of 1962

(M. Hidayatullah, S. K. Das, A. K. Sarkar JJ)

05.04.1963

JUDGMENT

SARKAR J. –

The appellant had entered into a contract with a company called the Hindusthan Steel Private Ltd., for the manufacture and supply of bricks at Rourkela in Orissa. Large quantities of bricks were manufactured and supplied under the contract and the appellant received payment for them. The respondent State assessed the appellant to sales tax under the Orissa Sales Tax Act, 1947 on these supplies on the basis that they were sales. The appellant contended that the contract was only for labour or for work done and material found, and that there was really no sale of any goods on which the tax could be levied. He moved the High Court of Orissa for a write of mandamus directing the respondent State not to assess or levy the tax. The application was rejected in limine by the High Court. The appellant has now come to this Court in further appeal.

Now a sale which can be taxed under the Act has been defined as "Any transfer of property in goods for cash or deferred payment or other valuable consideration." The point at issue is whether the contract was for a transfer of property in the bricks from the appellant to the Company for a consideration.

It is said that the bricks were made out of earth belonging to the Company and, therefore, the bricks had all along been its property and there could be no transfer of property in them to it. This contention is founded on a clause in the contract which says, "land will be given free" and which was apparently intended to make the earth available to the appellant for making the bricks.

We are unable to agree that this clause proved that the earth all along continued to belong to the Company. It seems to us that when the clause said, "land will be given", it meant that the property in the earth to be dug out for making the bricks would be transferred to the appellant. It may be presumed that it was understood that in quoting his rate for the bricks, the appellant would take into account the free supply of earth for making the bricks. Again what was supplied to the Company by the appellant was not the earth which he got from it but bricks, which, we think, are something entirely different. It could not have been intended that the property in the earth would continue in the Company in spite of its conversion into such a different thing as bricks. Further we find that the contract provided that the bricks would remain at the appellant's risk till delivery to the Company. Now, obviously bricks could not remain at the appellant's risk unless they were his property. Another clause provided that the appellant would not be able to sell the bricks to other parties without the permission of the Company. Apparently, it was contemplated that without such a provision the appellant could have sold the bricks to others. Now he could not sell the bricks at all

unless they belonged to him. Then we find that in the tender which the appellant submitted and the acceptance of which made the contract, he stated, "I/we hereby tender for the supply to the Hindusthan Steel Private Ltd. of the materials described in the undermentioned memorandum." The memorandum described the materials as bricks, and also stated the "Quantities to be delivered" and the "Rate at which materials are to be supplied". All these provisions plainly show that the contract was for sale of bricks. If it were so, the property in the bricks must have been in the appellant and passed from him to the Company. The same conclusion follows from another provision in the contract which states that if bricks are stacked in a specified manner "then 75% of the value of the bricks at kiln site will be measured and paid..... The balance of 25%... will be paid finally when all the bricks have been delivered.... Only full bricks as finally delivered..... will be taken into account....."

Before we leave this part of the case we have to notice the decision in P. A. Raju Chettiar v. The State of Madras [[1955] 6 S.T.C. 131.], to which learned counsel for the appellant referred. We do not think however that it is of any assistance. That was a case in which a merchant had delivered silver to workmen for manufacture of utensils and the workmen returned the manufactured utensils. It was held that there was no sale of the silver by the merchant to the workmen. It was so held because the weight of the silver had been debited to the workmen on delivery and credited to them on the manufactured goods being made over to the merchant and the price of the silver had never been debited or credited to them. Furthermore, the workmen had been paid only the charges for their labour. On these facts it could not be said that the property in the silver had ever passed to the workmen. The facts in the present case are different and for the reasons earlier mentioned, justify the view that here there was a transfer of the property in the earth to the appellant by the Company.

Learned counsel stressed the fact that the contract nowhere used the word sale in connection with the supply of the bricks, in support of his argument that there was no sale. But it is not necessary that to constitute a sale, the word 'sale' has to be used. We have said enough to show that under the contract there was a transfer of property in the bricks for consideration and, therefore, a sale notwithstanding that the word 'sale' was not used.

The other argument of learned counsel for the appellant was that even if the earth of which the bricks had to be made to be taken to have been transferred under the contract to the appellant, this was not a contract for scale of goods but one of work done and materials found. A contract of this kind is illustrated by the case of Clay v. Yates [(1856) 1 H & N 73.]. There the contract was to print a book, the printer to find the materials including the paper. Robinson v. Graves [(1935) 1 K.B. 579.], was also referred to. There a person had commissioned an artist to paint the portrait of a lady and it was held that the contract was not for sale of goods though the artist had to supply the paint and canvas and had to deliver the completed picture. In these cases in arriving at the view that the contract was not for sale of goods the test that was applied is, what was the essence of the contract ? Was it the intention of the parties in making the contract that a chattel should be produced and transferred as a chattel for a consideration ? This test has now been accepted as of general application to decide whether a contract was for sale of goods or for labour supplied and materials found : see Benjamin on Sales (8th ed.) p. 161 and Halsbury's Laws of England (3rd ed.) vol. 34, P. 6.

It is true that the test will often be found to be difficult of application. But no such difficulty arises in the present case. 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 the 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 of the contract was the work of manufacture and the delivery of the bricks was merely ancillary to the work of manufacture, in the same way as the delivery of the paint and the canvas were held to be ancillary to the contract to paint the portrait in Robinson v. Graves [(1935) 1 K.B. 579.].

The fact that under the contract the bricks had to be manufactured according to certain specifications, and, therefore, the appellant had to bestow a certain amount of skill and labour in the manufacture of the bricks, does not affect the question. That was not the essence of the contract. The object of the contract nonetheless remained the delivery of bricks. It has never been doubted that "the claim of a tailor or a shoemaker is for the price of goods when delivered, and not for the work or labour bestowed by him in the fabrication of them" : see Grafton v. Armitage [(1845) 2 C.B. 336.] and J. Marcel (Furriers) Ltd. v. Tappear [(1953) 1 All. E.R. 15.]. The present case, therefore, must a fortori be one of sale of goods.

It remains now to notice a preliminary objection to this appeal raised by the respondent. It was said that before the High Court was moved under Art. 226 for the writ, the appellant had filed appeals against the orders of assessment to the Sales Tax Appellate Tribunal. These appeals failed and the appellant's application for an order on the Tribunal to refer to the High Court the question of law raised in this appeal was also rejected by the High Court. It is, therefore, said that this appeal is concluded by the order of the High Court last mentioned. But it appears the this Court had granted leave to appeal from the High Court's order refusing to issue the writ before the appeal to the tribunal had been dismissed. The appellant could have appealed from the High Court's order refusing to direct a reference of the question but he chose to prosecute the appeal against the order in the petition for the writ which would have given him the same relief. Either remedy was open to him and neither can be said in the circumstances to be barred by the other.

The appeal however fails on the merits and it is dismissed with costs.

Appeal dismissed.

</html