Patnaik & Company

Vs

State of Orissa

Civil Appeals Nos. 179 to 181 of 1964

(CJI P. B. Gajendragadkar, M. Hidyatullah, J. C. Shah, S. M. Sikri, R. S. Bachawat JJ)

19.01.1965

JUDGMENT

SIKRI, J. -

These three appeals by special leave are directed against the judgment of the Orissa High Court in three references made by the Orissa Sales Tax Tribunal under section 24(1) of the Orissa Sales Tax Act, 1947, in respect of assessments for three quarters ending June 30, 1957, September 30, 1957 and December 31, 1957. All these appeals raise a common question of law and it would be sufficient if facts relating to the assessment for the quarter ending June 30, 1957 alone are given.

For the quarter ending June 30, 1957, the appellant, M/s Patnaik & Co., claimed to deduct from their gross turnover receipts totaling Rs. 11,268.45 received from the State Government of Orissa for building bodies on the chassis supplied by the Government, during the quarter. The Sales Tax Officer refused to deduct this amount. On appeal, this claim was allowed by the Collector of Sales Tax, purporting to follow on earlier decision of the Orissa Sales Tax Tribunal. The Department appealed against this order to the Sales Tax Tribunal which, by its order dated June 2, 1961, affirmed the order of the Collector. The Tribunal, in brief, held that it was impossible to spell out a distinct and separate contract to sell any materials or chattels to the customers in the work of construction of the bodies on the chassis. On the application of the Department, the Sales Tax Tribunal referred to the High Court the following question :

> "Whether in the facts and circumstances of the case, the Tribunal is right in holding that the amounts received by the opposite party on the construction of bodies on chassis supplied by its customers under written contracts are not chargeable to the Orissa Sales Tax."

The High Court, in a short order, following its decision in The Commissioner of Sales Tax Orissa v. Patnaik & Co. (S.J.C. No. 77 of 1959 - Judgment delivered in the Orissa High Court on July 26, 1961.) answered the question in the affirmative, i.e., against the appellant. In that case, the High Court had construed a similar contract and had come to the conclusion that "the contract, therefore, as contemplated between the parties, is that the assessee was to deliver a specific goods, namely, a finished bus body built under the specifications prescribed by the Government for a fixed price. It cannot, therefore, escape from the position that the transaction was one for sale of some goods within the meaning of the Act." It further observed that "what exactly is the distinguishing feature or a sale from a works contract has been elaborately discussed in a case decided by this very Bench in S.J.C. No. 7 of 1959 (M/s. Thakur Das Mulchand v. The Commissioner of Sales Tax) on July 6, 1961 where it was held that a normal contract to make a chattel and deliver it when made includes a

contract of sale, but it may not be always so. The test would 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". The High Court distinguished Gannon Dunkerley's ([1959] S.C.R. 379.) case on the ground that as far as the terms of the contract between the parties were concerned, they clearly contemplated a case of sale of goods liable to sales tax under the Act, and it was not a works contract, as contended by the party. As stated above, the appellant having obtained special leave, the appeal is now before us.

Mr. Viswanatha Sastri, the learned counsel for the appellant, has addressed an elaborate argument to us and contended that the present case is not distinguishable from the decision of this Court in Gannon Dunkerley's ([1959] S.C.R. 379.) case. He has cited a number of authorities in support of this contention, but it will not be necessary to review all these authorities as we feel that the answer to the question referred must depend on the construction of the agreement regarding the building of bus bodies. As laid down by this Court in Chandra Bhan Gossain v. The State of Orissa, (14 S.T.C. 766.) "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."

The agreement was entered into an April 20, 1957, between the appellant, called in the agreement "the Body Builders" and the State of Orissa. The State had accepted the quotations and decided to place orders for construction of 4 (four) numbers of Bus Bodies on the Chassis namely 4 (four) numbers of 190" Wheel Base F.F.C. Dodge/Fargo Chassis supplied by the Governor. The relevant clauses are as below :

> "1.(a) That the Body Builders shall be responsible for the safe custody of the chassis as described in Schedule 'A' from the date of the receipt of the Chassis from the Governor (Supplier) till their delivery to the Governor and shall insure their premises against fire, theft, damage and riot at their cost, so that these chassis are covered by insurance against such risks.
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> (b) That while the works are in course of construction and until the Bus with Bodies built are taken over by the Governor, the Body Builder shall be responsible for the chassis and materials supplied to them and shall indemnify the Governor for any loss or damage to the said material.
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> (c) The completed Bus Bodies covered by this contract shall be delivered to the Governor on or before the May 28, 1957 for two and June 20, 1957 for the remaining two buses.
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> 2. That the passenger Bus Bodies shall be construction on the chassis in the most substantial and workmanlike manner, both as regards materials and otherwise in every respect in strict accordance with the specifications mentioned in Schedule 'B'.
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> 3. That if any additional work is considered necessary by the Transport Controller, Orissa (hereinafter called the 'Controller') for which no rate is specified in the contract, the Body Builder will immediately inform the Controller, in writing the rate which they intend to charge for such additional work. If the Controller does not agree to the rates the Body Builder will not be under any obligation to carry out such additional work.
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> Provided that the Body Builder will not be entitled to any payment for any additional

work unless they have received an order in writing from the Controller to that effect.

4. That the Body Builder will give a guarantee regarding the durability of the Body for a period of two years from the date of delivery to the Governor and if any imperfection or defective material became apparent within the guaranteed period the Body Builder shall rectify the defects at their own expenses.

5. That the time allowed for carrying out the work as entered in the contract shall be strictly observed by the Body Builder and shall be reckoned from the date of supply of Chassis to them. The work shall throughout the stipulated period of the contract be carried on with all due diligence time being deemed to be of the essence of the contract and the Body Builder shall be liable to pay to the Governor as liquidated damages an amount equal to 50% on the amount of the estimated cost of the whole work as shown in the contract for every day that the work remains unfinished after the date fixed and the Governor may deduct such sum or sums from any money due to the Body Builders under these presents or may recover it otherwise.

Provided that the work will not be considered as finished until the defects detected on inspection as provided by clause 6, are rectified, to the satisfaction of the Controller.

6. That all works under or in course of execution or executed in pursuance of this contract shall at all times be open to inspection by the Controller or officers authorised by him in this behalf and they shall have the right to stop by a written order any work which in the opinion of the Controller, is deemed to have been executed with unsound, imperfect, unskillful or bad workmanship or with materials of inferior quality. The Body Builder on receipt of such written order, shall dismantle or replace such defective work or material at their own cost. In the event of failure to comply with the order within 7 days from the date of receipt of the order, the Controller shall be free to get the balance of the work done by any other agency and recover the difference in cost from the Body Builder.

Provided that for this purpose the Controller shall be at liberty to enter upon the premises of the Body Builder and take delivery of the unfinished bodies.

7. That the Body Builder shall be paid 50% of the cost of body building at the time of delivery and the rest one month thereafter.

8. That the Body Builder will deliver the vehicles complete with bodies at the destination or the destinations to be named by the Controller at their own risk and shall be entitled to recover from the Governor the actual cost of transport by road or rail, transit insurance charges if any and other necessary incidental charges."

Schedule 'B' gives the various specifications for construction of composite bus bodies. Clause 9 of the Schedule provides the specifications of seat cushions for the upper class and lower class seats. Clause 11 provides for the fixing of two roof lamps and its necessary switches. Clause 14 provides for the fixing of luggage carrier on the top of the roof and an iron ladder up to luggage carrier at the rear. Various miscellaneous fittings are required to be fitted by clause 16, e.g., hand operated driver's traffic signal, nickel plated conductor's bell, wind screen wipers for the wind screen, tool box, box for First Aid equipment, etc.

Then, looking at the contract as a whole, what was the real intention of the parties ? It will be noticed that the bus bodies are throughout the contract spoken of as a unit or as a composite thing to be put on the chassis, and this composite body consists not only of things actually fixed on the chassis but movable things like seat cushions, and other thins though fixed but which can be very easily detached, e.g., roof lamps, wind screen wipers, luggage carrier, tool box, box for First Aid equipment, etc.

The next point to be noticed is that under the contract the property in the bus body does not pass to the Government till the chassis with the bus body is delivered at the destination or destinations to be named by the Controller except in the case contemplated in clause 6 of the agreement. That clause provides that if some work is not satisfactorily done and the Body Builder on receipt of a written order does not dismantle or replace such defective work or material at his own cost within seven days, the Controller would be entitled to get the balance of the work done by another agency and recover the difference in cost from the Body Builder. The Controller is entitled for this purpose to the take delivery of the unfinished body. But even in this case the property in the unfinished body would not pass to the Government till the unfinished body is seized.

Suppose a fire were to take place on the premises of the appellant and before delivery the bus bodies were destroyed or spoilt. On whom would the loss fall ? There can be one answer to this question and that is that the loss would fall on the appellant. Clause 1 of the agreement provides for insurance of the chassis but there is no provision regarding insurance of bus bodies. Therefore, it follows that till delivery is made, the bus bodies remain the property of the appellant. It could, if it chose to do so, replace parts or whole of the body at any time before delivery. It seems to us that this is an important indication of the intention of the parties. If the property passes at delivery, what does the property pass in ? Is is movable property or immovable property ? It will not be denied that the property passes in movable property. Then was this the very goods contracted for ? Here again the answer is plainly in the affirmative.

Mr. Sastri draws our attention to the following passage in Benjamin On Sales (8th Edition), p. 167 :

> "Where a contract is made to furnish a machine or movable thing of any kind and before the property in it passes, to fix it to land or to another chattel, it is not a contract for the sale of goods. In such contracts the intention is plainly not to make a sale of movables as such, but to improve the land or other chattel, as the case may be. The consideration to be paid to the workman is not for a transfer of chattel, but for work and labour done and materials furnished."

He says that here the bus body is being fitted to a chassis, i.e., another chattel, and if this passage lays down the law correctly - and according to him it does - the present contract is not a contact for the sale of goods.

The only case cited in the footnote relating to fixing of a chattel to another chattel is Anglo-Egyptian Navigation Co. v. Rennie ([1875] L.R. 10 C.P. 271.). That case would be relevant if the question in this case was whether property in the materials used in the construction of the body passed to the Government plank by plank, or nail by nail. The answer would be in the negative, according to the above decision. But we are not concerned with this question here. The facts in that case may be conveniently taken from the headnote. The defendants contracted with the plaintiff to make and supply new boilers and certain new machinery for a steamship of the plaintiffs and to alter the engines of such steamship with compound surface condensing engines according to a

specification. The specification contained elaborate provisions as to the fitting and fixing of new boilers and machinery on board the ship and the adaptation of the old machinery to the new. The boilers and other new machinery contracted for were completed, and ready to be fixed on board, and one installment of Pound 2000 had been paid under the contract, when the ship was lost by perils of the sea. A second instalment of Pound 2000 was subsequently paid. The plaintiffs claimed delivery of the boilers and other machinery completed under the contract, and this being refused, brought an action for the detention of the same, or to recover back the pound 4000 paid by them to the defendants. It was held that the contract was an entire and indivisible contract for work to be done upon the plaintiffs' ship for a certain price, from further performance of which both parties were released by the loss of the ship; that the property in the articles manufactured was not intended to pass until they were fixed on board the ship; and that consequently the plaintiffs were not entitled to the boilers and machinery, nor could they recover the pound 4000 already paid as upon a failure of consideration. Here the question was whether according to the contract, the property in each portion certified by the inspector as properly done passed to the plaintiffs as and when his certificate was given. This question was answered in the negative. This case is no authority for the proposition that whenever a contract provides for the fixing of a chattel to another chattel, there is no sale of goods. A few simple illustrations will show that this cannot be the law. A wants new motor tyres. He goes to a dealer and asks that these may be supplied fitted on the car. Is there a sale of motor tyres or not ? It is not an easy operation to fix new tyres; it needs an expert hand. But it will not be denied that it was in essence a contract for sale of goods. Take another illustration. A wants a luggage carrier to be fixed to his car. The carrier which B has needs to be altered a little. The contract is that he will alter it and fix it to the car. Has there been a sale of the luggage carrier or not ? The answer obviously is 'yes'.

Mr. Sastri further relies on a passage in Gannon Dunkerley's ([1959] S.C.R. 379.) case, at pp. 413-414 :-

> "It is of the essence of this concept that both the agreement and the sale should relate to the same subject-matter. Where the goods delivered under the contract are not the goods contracted for, the purchaser has got a right to reject them, or to accept them and claim damages for breach of warranty. Under the law, therefore, there cannot be an agreement relating to one kind of property and a sale as regards another. We are accordingly of opinion that on the true interpretation of the expression "sale of goods" there must be an agreement between the parties for the sale of the very goods in which eventually property passess. In a building contract, the agreement between the parties is that the contract should construct a building according to the specifications contained in the agreement, and in consideration therefor receive payment as provided therein, as will presently be shown there is in such an agreement neither a contract to sell the materials used in the construction, nor does property pass therein as movables. It is therefore impossible to maintain that there implicit in a building contract a sale of materials as understood in law."

We are, however, unable to appreciate how this passage assists the appellant. In this case both the agreement and sale relate to one kind property, namely, the bus body. The case of a contract to construct a building is quite different and, as held by this Court, the property there does not pass in the materials as movables; but under this contract the bus body never loses its character as movable property, and the property in the bus body passes to the Government as movable property. The following extract from the judgment in Dunkerley's case brings out the fact that the title in a case of building contract passes to the owner as an accretion thereto :

> "That exception does not apply to buildings which are constructed in execution of a work contract, and the low with reference to them is that the title to the same passes to the owner of the land as an accretion thereto. According, there can be to question of title to the materials passing as movables in favour of the other party to the contract."

As we have already said, it is clear on the terms of the contract in this case that the property in the bus body does not pass on its being placed or constructed on the chassis but when the whole vehicle including the bus body is delivered.

Mr. Sastri then relied on the decision of this Court in Carl Still v. The state of Bihar ([1962] 2 S.C.R. 81.). That case does not apply to the facts of the case because this Court came to the conclusion on a construction of the agreement in that case that the contract there was entire and indivisible for the construction of specified works including buildings for a lumpsum and not a contract of sale of materials as such.

Mr. Sastri then says that clause 3 is inconsistent with an agreement for sale of goods. This clause provides for addition work to be done for which no rate is specified in the contract. The clause, according to us, merely provides for extra payment if the Controller decided to order some additional things to be placed in the body. This is a neutral clause equally applicable to a contract for sale of goods or a contract for work and labour.

Mr. Sastri then points to clauses 5 and 6 and submits that these are totally inconsistent with an agreement for the sale of goods. But we are unable to assent to this. Clause 5 provides for a time schedule and ensures that the delivery of the bus body shall take place within the stipulated time. Clause 6 is designed to avoid disputes in the future as to the quality of the material used and ensures that proper material is used. A contract for the sale of goods to be manufactured does not cease to be a contract for sale of goods merely because the process of manufacture is supervised by the purchaser. For example, if in a contract for the manufacture and sale of military aircraft, a great deal of supervision is insisted upon by the purchaser, the contract would not become a contract for works and labour.

We may now notice some of the Indian cases in which a similar point arose.

In Commissioner of Sales Tax, U.P. v. Haji Abdul Majid, (14 S.T.C. 435.) the Allahabad High Court arrived at the conclusion that in the circumstances of the case transaction was a contract for the sale of bus bodies and net a contract for work and labour. Desai, C.J., rightly pointed out at p. 443 that "since it makes no difference whether an article is a ready-made article or is prepared according to the customer's specification, it should also make no difference whether the assessee prepares it separately from the think and then fixes it on it or does the preparation and the fixation simultaneously in one operation."

In Jiwan Singh v. State of Punjab (14 S.T.C. 302.) the High Court of Punjab also held that a contract by a firm for fitting and building motor bodies with its own materials on the chassis supplied by customers is a contract for the sale of goods.

In Kailash Engineering Co. v. The State of Gujarat (15 S.T.C. 574.) it was held that contract in that case for building, erecting and furnishing of third class timber coach bodies on broad gauge underframes to be supplied by the Railway administration was not a contract for the sale of goods.

The same conclusion was reached in Keys Construction Company v. The Judge (Appeals) Sales Tax, Allahabad. (13 S.T.C. 302.) We do not propose to say whether these cases were correctly decided on the facts for, as we have said in the beginning, in each case it is a question of the parties.

To conclude, we have come to the finding that the contract as a whole is a contract for the sale of goods. Agreeing with the High Court, we hold that the answer to the question referred is against the appellant. The appeal accordingly fails and is dismissed with costs.

In the other two appeals relating to assessments for the quarters ending September 30, 1957 and December 31, 1957, the agreements are similar and these also fail and are dismissed with costs. There will be one set of hearing fee in all the three appeals.

SHAH J. -

Whether a contract is one for execution of work or for performance of service, or is a contract for sale of goods must depend upon the intention of the parties gathered from the terms of the contract viewed in the light of surrounding circumstances. If the contract is one for work or for performance of service, the mere circumstance that the party doing the work or performing the service uses goods or materials belonging to him in the execution of the contract will not be of any importance in determining whether the contract is one for sale of goods. It is common ground that under the scheme of the Sales Tax Acts enacted by State Legislatures, if in its true nature the contract is one for performance of service or for work, consideration paid is not taxable, for the States have authority under the Constitution by Sch. VII to legislate on the topics of tax on sale or purchase of goods (other than newspapers) and have no power to tax remuneration received under contracts for work or service. 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 notwithstanding that a part or even the whole of the materials used by him may have been his property. In the case of a contract for sale, there is in the first instance a chatter which belongs exclusively to a party and under the contract property therein passes for money consideration. As observed in Halsbury's Laws of England (Third Edition) Vol. 34, pp. 6-7, Para 3 :

> "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 qua chattel, the contract is one for work and labour. The test is whether or not the work and labour bestowed end in anything that can properly become the subject of sale; neither the ownership of the materials, nor the value of the skill and labour as compared with the value of the materials, is conclusive, although such matters may be taken into consideration in determining, in the circumstances of a particular case, whether the contract is in substance one for work and labour or one for the sale of a chattel."

To constitute a sale there must therefore be an agreement and in performance of the agreement property belonging to one party must stand transferred to the other party for money consideration. Mere transfer of property in goods used in the performance of a contract is, however, not sufficient : to constitute a sale there must be an agreement - express or implied - relating to sale of goods and completion of the agreement by passing of title in the very goods contracted to be sold. It is of the

essence of the transaction that the agreement and sale should relate to the same subject-matter, i.e., the goods agree to be sold and in which the property is transferred.

To determine the liability of the appellants to pay tax under the Orissa Sales Tax Act on the consideration received by them under the terms of the contract, the true intention of the parties must be determined. The agreement which is the subject-matter of the dispute between the parties is executed on behalf of the Governor of Orissa and the appellants, for constructing "bus bodies" on the chassis supplied by the Governor of Orissa. In the second paragraph of the preamble it is recited that the Governor had accepted the quotation and had decided to place orders for construction of "bus bodies" on the chassis supplied by the Governor at the rates specified therein. The third paragraph recites that the appellants had agreed to construct "bus bodies" at the rate quoted and on the terms and conditions recited therein. The agreement then proceeds to set out the conditions of the contract. By the first condition the appellants are made responsible for safe Governor till delivery and are bound to insure their premises including the chassis against fire, theft, damage and riot at their own cost. By that condition the appellants are made "responsible for the chassis and materials supplied" to them and have undertaken to indemnify the Governor for any loss or damage to the said material. The clause also provides that the completed "bus bodies" shall be delivered to the Governor on or before the dates specified in the agreement. By cl. 2 it is stipulated that the "bus bodies" shall be constructed in the most substantial and workmanlike manner, both as regards materials and otherwise in every respect in strict accordance with the specifications in Sch. 'B' of the agreement. Clause 3 provides for payment for additional work as may be directed by the Transport Controller under an order in writing to that effect. By cl. 4 it is provided that the appellants shall guarantee the durability of the body for two years from the date of delivery and if any imperfection or defective material becomes apparent within the period of guarantee the appellants shall rectify the defects at their own cost.

These four clauses do not indicate any clear intention as to the nature of the contract : they are consistent with the contract being one for sale of "bus bodies" belonging to the appellants as well as to a contract for building bus bodies on chassis supplied. Liability impose by the contract requiring the appellants to indemnify the Governor for loss or damage to the chassis supplied and liability to carry out the work in the most substantial and workmanlike manner and to guarantee durability of the bodies are consistent with the contract being one of sale or of work and service. Clause 3 also does not indicate any definite intention. If the contract is one for sale of a "bus body", the agreement to pay extra for additional work to be done thereon is not also indicative of any definite intention. But by cls. 5 & 6 of the contract a definite intention that the contract is one for work and not sale is, in my judgment, indicated. By the fifth clause it is, inter alia, provided that the work shall throughout the stipulated period of the contract be carried out with all due diligence, time being deemed to be of the essence of the contract, and that the appellants shall be liable to pay to the Governor as liquidated damages an amount equal to 50% of the estimated cost of the whole work as shown in the contract for every day that the work remains unfinished after the date fixed. In a contract for sale of goods such a covenant is unusual. If a party to a contract fails to carry out his part within the period specified, unless the other party waives the breach the contract may be deemed to be broken. The other party is ordinarily not concerned with the method or manner of producing the chattel agreed to be sold, if the specifications relating thereto are otherwise complied with. Imposition of an obligation to carry out the work with due diligence is indicative of the contract being one for work. This inference is strengthened by the proviso to cl. 5 which imposes liability upon the appellants to pay damages until the defects detected on inspection are rectified. By the first part of cl. 6, all work under or in the course of execution or executed in pursuance of the contract shall at all times open to inspection by the Controller or officers authorised by him in that

behalf and that they shall have the right to stop by a written order any work which in the opinion of the Controller has been executed with unsound, imperfect, unskilful or bad workmanship or with materials of inferior quality. The appellants on receipt of a written order are obliged to dismantle or replace such defective work or material at their own cost. If the appellants fail to comply with order within seven days from the date of receipt of the order, the Controller is get free to get the work remaining to be done by any other agency and is entitled to recover the difference in cost from the appellants, and for this purpose the Controller is at liberty to enter upon premises of the appellants and take delivery of the unfinished vehicles. It is clear from the terms of cl. 6 that throughout the process of construction the appellants are under the supervision of the Controller, and it is open to the Controller to stop any work which is in progress and to call upon the appellants to rectify the work by dismantling or replacing the defective work. If the appellants fail to carry out the order of the Controller it is open to the Controller to take possession of the unfinished work and get the same done through any other agency and to recover the difference in cost from the appellants. The Controller is also given liberty to enter upon the premises of the appellants and to take over the unfinished vehicles. A party agreeing to purchase goods of certain specifications or description is entitled to insists that specifications or the description shall be strictly carried out, but he has ordinarily no right to supervise the production of the goods. Again the right which is conferred upon the Controller to take away the unfinished vehicles and to get them completed by some other agency is wholly inconsistent with the contract being one for purchasing an article belonging to the appellants. What one may ask would be the authority of the Controller under a contract of sale to take away unfinished vehicles from the person who owns them, have the work completed by another person and then ton claim the right to recover the difference in cost ? Paragraph 7 deals with the right to recover the consideration agreed to be paid to the appellants and the time at which it is to be paid. Paragraph 8 deals with the place at which the completed vehicles with bodies built thereon are to be delivered and till the date of the delivery the risk is with the appellants. Paragraph 9 deals with the settlement of any dispute which may arise between the parties on any question relating to the meaning of the specifications and drawings or as to the quality of the workmanship or materials used in the work. Paragraph 10 deals with the jurisdiction of courts in the event of a dispute between the parties. Paragraphs 7 to 10 are in their content neutral and may be consistent with the agreement being either one for sale or for work or service.

Schedule 'B' consists of the specifications for construction of the composite bodies. They set out the designs and the specifications of the underframe and floor, frame-work, roof, penelling, side windows, doors, seats, driver's can, roof lamps, grab rails, window guard rails, wind screens, luggage carriers, finish and miscellaneous fittings. It is true that the specifications contemplated that the appellants had to supply certain goods which are not fixed to the "bus bodies". There are also provisions for supply of additional equipment such as wind screen wipers, locking arrangements, boxes for first aid equipment and complain book. It is not, however, the case of the parties that the contract is a composite contract. It is part of a single contract that the "bus bodies" to be constructed has to conform to the specifications and in the manufacture of the completed bus body the equipment set out under the head 'miscellaneous fittings' and elsewhere has to be provided.

An elaborate argument was advanced before us by counsel for the State of Orissa suggestion that the "bus bodies" are separately built and are thereafter fixed to the chassis supplied by the State. The argument, however, does not appear to be correct in view of cls. 3,4,5,6,7,8 & 9 of the specifications. Again the right which is conferred by cl. 6 of the main agreement which enables the Controller to take possession of the unfinished vehicles indicates were not to be independently constructed. But this has, in my view, no decisive bearing. The parties may contract that on the chassis supplied by the State a body shall be built. If the true intention of the parties is that a body is

a chattel belonging to the builder and the property therein is to pass under a contract against price, it would be a contract for sale of the body notwithstanding the fact that it is built on the chassis.

Another question to which counsel devoted considerable argument was whether the maxim 'quicquid fixatur solo, solo credit' which is a rule of the common law of England is applicable under the India system to accretions to movables. Under the English common law a house is constructed being embedded in the land becomes an accretion to the land and (subject to a mass of exceptions in favour of tenants and in favour of trade fixtures) belongs to the person to whom the land belongs. But that rule has not been accepted in India : Thakoor Chunder Poramanick v. Ram Dhonde Bhuttacharji (6 Suth Weekly Reports 228) and Narayan Das Khettry v. Jatindra Nath Roy Chowdhury. (L.R. 54 I. A. 218). It is unnecessary to advert to the contention whether the rule applies to accretions to movables, for ultimately the true effect of an accretion made pursuant to a contract has to be judged, not by any artificial rule that the accretion may be presumed to have become by virtue of affixing to a chattel part of that chattel, but from the intention of the parties to the contract. In each case the Court must ascertain what the intention of the parties was when property in goods belonging to one person and affixed to the property of another person, passed to that other person. Whether pursuant to a contract, any movables fixed to another movable the property passed immediately to the person to whom the primary property belongs must depend upon the intention of the parties.

One strong test to ascertain whether a given contract is for work or for sale of goods is to ascertain whether the thing produced as a whole had 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 the other party for price. If the thing has no individual existence as the sole property of the party producing it, the contract will be one for work for service.

Under condition 6 of the contract unfinished goods may be taken possession of by the Controller and appropriated to himself notwithstanding the objections which the appellants may have to that course. If the chassis and the body were destroyed before delivery, as stipulated loss of the body would undoubtedly fall upon the appellants, for by cl. 1 of the agreement the appellant, are bound to indemnify the State of Orissa for any loss that may be suffered by the State. But this convenient is not decisive of the true nature of the contract. A bailee of goods under a works contract may undertake a more onerous liability than what is prescribed by section 151 of the Contract Act : see section 152 Contract Act. Undoubtedly before delivery of a complete chassis with "bus body" under the terms of the contract the appellants have no right to claim the consideration agreed to be paid to them. If, because of the loss of the chassis and the "bus Body" constructed by the appellants, the appellants are unable to deliver the vehicle, the liability to indemnify the State for loss of the chassis arises by express terms of the contract and their claim for recovery of the value of the materials used or the consideration agreed to be paid would fail, because they have failed to carry out their part of the contract.

It is unnecessary to refer to the large number of authorities to which our attention was invited by counsel. The question must be decided on a true interpretation of the terms of the contract in the light of surrounding circumstances. If, on a review of all the terms of the contract, it appears that the intention of the parties was that the appellants were to sell "bus bodies" to the State of Orissa the contract would clearly be one for sale and consideration paid would be taxable under the Orissa Sales Tax Act. If, however, the contract is one for securing a certain result namely the building of a body on the chassis supplied by the State with the materials belonging to the appellants, the contract would be one for work done and not liable to sales tax.

In my view the present contract is one for work and not a contract for sale, because the contract is not that the parties agreed that the "bus body" constructed by the appellants shall be sold to the State of Orissa. The contract is one in which the appellants agreed to contract "bus bodies" on the chasis supplied to them as bailees and such a contract being one for work, the consideration paid is not taxable under the Orissa Sales Tax Act.

In my view, therefore, the appeal should be allowed.

ORDER BY COURT

In accordance with the opinion of the majority, these appeals are dismissed with costs. One hearing fee.

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