

C. I. T., West Bengal-Iii and Others

Vs

Oriental Rubber Works

C. I. T., West Bengal and Others

Vs

Bhikam Chand Sethia

C. I. T., West Bengal and Others

Vs

C. K. Wadhwa

West Bengal and Others

Vs

Chandra Nath Banik and Others

Civil Appeal No. 1652

(V. B. Eradi, V. D. Tulzapurkar, D. P. Madon JJ)

15.11.1983.

JUDGMENT

TULZAPURKAR, J.-

1. All these appeal, at the instance of the Commissioner of Income Tax, raise a common question whether the Revenue is under a statutory obligation to communicate to the person [from whose custody books of account and documents have been seized under Section 132(1) of the Income Tax act, 1961] the approval obtained from the Commissioner of Income Tax and the recorded reasons of the Authorised Officer/Income Tax Officer on which such approval is based for the retention of the sized books of account and documents by the Department for a period proceeding 180 days from the date of seizure under Section 132(8) of the Income Tax Act, 1961 ?
2. Since in all these appeals the facts giving rise to aforesaid question are almost similar, it will suffice to indicate briefly the facts obtaining in M/s. Oriental rubber Work's case (Civil Appeal No. 1652 of 1973). Under a proper authorisation issued in that behalf under Section 132(1) of the Act, on February 17, 1965 a search was conducted by the Income Tax Department in the factory premised at Kantalia as well as the offices and godown at Mahatma Gandhi Road, Calcutta belonging to the respondent-assessee and various books of account and documents were seized from the aforesaid premises. After lawfully carrying out the aforesaid search and seizure, the respondent-assessee was given opportunity to inspect the seized books and documents as also to make copies of

the entries. The concerned Income Tax Officer then issued a notice to the respondent-assessee under Section 142(1) of the Act in connection with its assessment for the assessment year 1964-65 and after giving several hearings which were attended by the respondent-assessee or its representative the assessment for the said year was completed under Section 143(3) of the Act on February 5, 1969. Notwithstanding the passing of such assessment order on February 5, 1969, the respondent-assessee on February 27, 1969 moved the Calcutta High Court by way of a writ under Article 226 of the Constitution inter alia praying (a) for a direction to the Commissioner of Income Tax and the concerned Authorised Officer/Income Tax Officer to return forthwith the said books of account, documents and papers etc. seized as aforesaid and to cancel or rescind the warrant of authorisation issued under Section 132(1) of the Act and (b) for a mandamus commanding the concerned Income Tax Officer not to proceed with the assessment for the assessment year 1964-65 until the return of documents seized on February 17, 1965. The main submission of the respondent-assessee was that the retention of the seized books of account and documents beyond the period of 180 days from the date of the seizure (February 17, 1965) was illegal and invalid inasmuch as neither the approval accorded by the Commissioner of Income Tax for such extended retention nor the recorded reasons of the Authorised Officer/Income Tax Officer on which such approval was based had been communicated to the respondent-assessee and that without the return of the seized books of account and documents, no assessment for the concerned assessment year 1964-65 could be proceeded with or made. On behalf of the Revenue it was pointed out that the concerned Income Tax Officer for extended retention of the seized books of account and documents and had obtained approval of the Commissioner of Income Tax for such extended retention from time to time and therefore such retention of the seized books and documents beyond 180 days was perfectly legal and valid, that there was no obligation under Section 132(8) of the Act to communicate the Commissioner's approval for such extended retention or the recorded reasons of the Income Tax Officer therefor to the respondent-assessee and that in any event due inspection of the seized books and documents was afforded to the respondent-assessee who was also permitted to take copies of the entries in the books and after giving proper hearing to the respondent-assessee the assessment for the year 1964-65 had been validly completed on February 5, 1969 long before the respondent-assessee approached the Court and obtained a rule nisi. A learned single Judge of the High Court held that the seized books of account and other documents could not be retained beyond the period of 180 days without a complete and effective order of approval for such extended retention of the said books and documents and that since the approval of the Commissioner and the recorded reasons therefor had not been communicated to the respondent-assessee, the retention of the books and documents beyond 180 days was unlawful. The learned Judge, therefore, ordered the issuance of a mandamus directing the Commissioner and the concerned Income Tax Officer to return all the seized books and documents and he further ordered that the concerned Income Tax Officer shall be at liberty to complete the assessment for the year 1964-65 after the return of the said book and documents and after issuing afresh statutory notices under Section 142(1)/143(2) of the Income Tax Act to the respondent-assessee. In rendering the aforesaid decision, the learned Judge followed two earlier decisions of his own High Court in Mahabir Prosad Poddar's case decided by T. K. Basu, J. and his own decision in C. K. Wadhwa's case (which is the subject-matter of the companion Civil Appeal No. 760 of 1973 before us). At the instance of the Commissioner of Income Tax, an appeal was preferred to the Division Bench of the High Court being Appeal No. 233 of 1970. The self-same contentions were urged on behalf of the Revenue in the appeal and it was specifically submitted that the assessment for the assessment year 1964-65 having been completed on February 5, 1969 long before the rule nisi had been issued, the direction given by the learned single Judge with regard to the liberty to complete the assessment for the said assessment year had become infructuous. The Division Bench, however, negatived all the contentions and dismissed the appeal affirming all the

directions given by the learned trial Judge. The Revenue has come up in appeal to this Court.

3. Counsel for the Revenue urged two points before us in support of this appeal. In the first place, the counsel urged that Section 132(8) of the Income Tax Act, which deals with the extended retention of the seized books and documents in excess of the period of 180 days from the date of the seizure merely provided that for such extended retention the Authorised Officer/the concerned Income Tax Officer has to record his reasons in writing in that behalf and has to obtain the approval of the Commissioner of Income Tax for such extended retention and there is no obligation imposed by the said sub-section to communicate the approval of the Commissioner or the recorded reasons of the I.T.O. on which it is based to the person from whose custody the books and documents have been seized or to the person legally entitled to such books and documents and therefore the High Court erroneously held that such extended retention of the seized books and documents without communicating the Commissioner's approval and the reasons on which it is based was unlawful or illegal. Secondly, the counsel contended that in any event since proper opportunity to inspect the seized books and documents and to make copies of the entries was given to the respondent-assessee and since after issuing proper notices and giving hearing to the respondent-assessee, the assessment for the assessment year 1964-65 had been completed long before the issuance of the rule nisi, the same ought to have been upheld as binding on the respondent-assessee. In other words, according to the counsel for the Revenue, the unauthorised retention of the seized books and documents beyond 180 days, if any, could not render the assessment for the year 1964-65 properly made invalid. Counsel further pointed out that the respondent-assessee had even preferred appeals to higher authorities challenging the said assessment on merits. It may be stated that counsel for the respondent-assessee in this appeal conceded that in all the circumstances of the case the assessment already made on February 5, 1969 should be allowed to stand subject of course to the result of the appeals that have been preferred by the respondent-assessee against it. In this view of the matter, the second contention urged by counsel for the Revenue in this appeal has to be accepted and the assessment for the assessment year 1964-65 made on February 5, 1969 subject as aforesaid to be upheld. That leaves for consideration the first contention, which as we have indicted earlier, is common to all the appeals.

4. In order to decide the aforesaid contention it will be desirable to set out the material provisions of Section 132 of the Act, namely, sub-sections (8), (10) and (12) thereof, which run as follows :

132. (8) The books of account or other documents seized under sub-section (1) or sub-section (1-A) shall not be retained by the authorised officer for a period exceeding one hundred and eighty days from the date of the seizure unless the reasons for retaining the same are recorded by him in writing and the approval of the Commissioner for such retention is obtained :

Provided that the Commissioner shall not authorise the retention of the books of account and other documents for a period exceeding thirty days after all the proceedings under the Indian Income Tax act, 1922 (11 of 1922), or this Act in respect of the years for which the books of account or other documents are relevant are completed.

(10) If a person legally entitled to the books of account or other documents seized under sub-section (1) or sub-section (1-A) objects for any reason to the approval given by the Commissioner under sub-section (8), he may make an application to the Board stating therein the reasons for such objection and requesting for the return of the books of account or other documents.

(12) On receipt of the application under sub-section (10) the Board may after giving the applicant an opportunity of being heard, pass such orders as it thinks fit.

On a plain reading of the aforesaid provision it will be clear that ordinarily the books of account or other documents that may be seized under an authorisation issued under sub-section (1) of Section 132 can be retained by the authorised officer or the concerned Income Tax Officer for a period of one hundred and eighty days from the date of seizure, whereafter the person from whose custody such books or documents have been seized or the person to whom such books or documents belong becomes entitled to the return of the same unless the reasons for any extended retention are recorded in writing by the authorised officer/the concerned Income Tax Officer and approval of the Commissioner for such retention is obtained. In other words two conditions just be fulfilled before such extended retention becomes permission be in law : (a) reason in writing must be recorded by the authorised officer or the concerned Income Tax Officer seeking the Commissioner's approval and (b) obtaining of the Commissioner's approval for such extended retention and if either of these conditions is not fulfilled such extended retention will become unlawful and the concerned person (i.e. the person from whose custody such books or documents have been seized or the person to whom these belong) acquires a right to the return of the same forthwith. It if true that sub-section (8) does not in terms provide that the Commissioner's approval or the recorded reasons on which it might be based should be communicated to the concerned person but in our view since the person concerned is bound to be materially prejudiced in the enforcement of his right to have such books and documents returned to him by being kept ignorant about the factum of fulfillment of either of the conditions it is obligatory upon the Revenue to communicate the Commissioner's approval as also the recorded reasons to the person concerned. In the absence of such communication the Commissioner's decision according his approval will not become effective.

5. Moreover, sub-section (10) confers upon the person legally entitled to the return of the seized books and documents a right to object to the approval given by the Commissioner under sub-section (8) by making an application to the Central Board stating therein the reasons for such objection and under sub-section (12) it is provided that the Central Board may, after giving the applicant an opportunity of being heard pass such orders as it thinks fit. It is obvious that without the knowledge of the factum of the Commissioner's approval as also of the recorded reasons on the basis of which such approval has been obtained it will not be possible for the person to whom the seized books or documents belong to make any effective objection to the approval before the Board and get back his books or documents. In our view the scheme of sub-sections (8), (10) and (12) of Section 132 makes it amply clear that there is a statutory obligation on the Revenue to communicate to the person concerned not merely the Commissioner's approval but the recorded reasons on which the same has been obtained and that such communication must be made as expeditiously as possible after the passing of the order of approval by the Commissioner and in default of such expeditious communication any further retention of the seized books or documents would become invalid and unlawful. It is obvious that such obligation arises in regard to every approval of the Commissioner that might have been accorded from time to time.

6. In the result the orders passed by the High Court directing the return of the seized books of account and documents to the respondents in each of the appeals are confirmed and the appeals (subject to the directions given below in two of them) are dismissed with no order as to costs.

7. In Civil Appeal No. 1652 of 1973 the assessment order passed on February 5, 1969 is upheld subject to the result of the appeals that may have been preferred against it. In Civil Appeal No. 661 of 1975 it is directed that the assessment orders passed for the concerned assessment years would be

subject to the appeals already preferred if any or such as might be preferred in accordance with law, against the same.

HINDUSTAN AERONAUTICS LTD., APPELLANT v. STATE OF KARNATAKA,
RESPONDENT.

Civil Appeals Nos. 1386-91 (NT) of 1977 (Appeal by special leave Petitions from the Judgment and Order dated December 1, 1976 of the Karnataka High Court in S.T.R.P. Nos. 24-29 of 1975), decided on December 16, 1983.

JUDGMENT

The Judgment of the Court was delivered by

SABYASACHI MUKHARJI, J. - These appeals by special leave are from the judgment and decision of the High Court of Karnataka dated December 1, 1976 involving the questions of assessability of the appellant to sales tax, Central as well as State. While granting leave, this Court excluded the question whether the sales effected in the canteen by the appellant were assessable to sales tax. By the impugned judgment, the High Court of Karnataka had dismissed several writ petitions against several orders being S.T.R.Ps. Nos. 28, 27 and 29 of 1975 under the Karnataka Sales Tax Act, for the years 1960-61, 1961-62 and 1962-63 respectively and also three others namely, S.T.R.Ps. Nos. 25, 26 and 24 of 1975, under the Central Sales Tax act for the corresponding years respectively, at the instance of the present appellant. These involved common questions of law and facts and were disposed of by a common judgment. We also propose to do the same. As stated, one of the questions was about the taxability of the turnover in respect of the sales made in the canteen of the appellant company. This question is not before us. Before the Tribunal, the two following questions relevant for appeals before us were agitated, namely :

(i) Whether the turnover apportioned from the job works undertaken by the appellant related to the sales of materials by the appellant to the Indian Air Force or other private parties, as the case may be, and as such whether these were taxable as held by the lower appellate authority.

(ii) Whether, in the case of job works undertaken from the private parties mainly on quotation on inclusive-price-basis, the sales tax authorities were right in apportioning a portion of the turnover as attributable towards sales of materials.

2. In order to appreciate the controversy in these appeals, it is necessary to state certain facts. The appellant is a manufacturer of spare parts and accessories of various aircrafts and has also established facilities for assembling, serving, repairing, overhauling of aircrafts, their instruments and accessories. The sales tax authorities sought to subject to tax that portion of the total turnover of the appellant for the relevant years in question which was equivalent to the money value of the spare parts to the aircrafts which the appellant supplied to the Indian Air Force as a result of their use in the process of repairing, servicing and overhauling of the aircrafts, their instruments and accessories which were sent to the appellant for the aforesaid purposes during the relevant years in question.

3. At the outset, it is important to emphasise that the jobs done by the appellant were servicing, assembling, repairing and overhauling 'Air Force planes' entrusted to the appellant. In the second appeal being Civil Appeal No. 1387 (NT) of 1977, the main job done was assembling; sales tax was levied in respect of the turnover for doing the same job. These works were done on the basis of contracts or job orders issued from time to time. While no contract directly concerning the

repairing, servicing and overhauling of a specified aircraft, instrument or accessory in which the spare parts had been used in the execution of service contracts was on record, there is, however, a specimen contract that was entered into between the appellant and I.A.F. being agreement dated June 23, 1951, hereinafter referred to as "1951 contract". The agreement is described as "Contract for the flight servicing and maintenance of the H.Q. Training Command, I. A.F. Communication Flight". The agreement was between Hindustan Aircraft Limited, described in the agreement as the 'contractor' and the President of India, described in the agreement as the 'owner'. It may be mentioned that the Hindustan Aircraft Limited has later on become the appellant i.e. M/s. Hindustan Aircraft Limited. As the contentions of the parties in these appeals centered on the question whether the contracts in question, the income of which has been subjected to sales tax, were works contracts only or were agreements to sell spare parts, it would be relevant to refer in detail to some of the clauses of the "1951 contract".

4. The agreement states that the 'contractor' agrees to accomplish for the 'owner' the serving and maintenance of the H.Q. Training Command, I.A.F. Communication Flight, and works required on visiting aircrafts, to the standard as specified in the said agreement at Bangalore or at any other place required by the 'owner'. Then the specifications according to which the works had to be done were mentioned thereafter. The agreement also provides that the works would be carried out by the contractor, and payment made by the owner "at cost plus 10 per cent profit basis " or at the contractor's standard fixed rates, where applicable. Sub-clause (b) of Clause 1, items (a), (b) and (c), authorised by Air Headquarters should also be charged for separately as per sub-clause (a) of Clause 2 of the agreement.

5. As the question of the price of the spares and materials is involved, it is necessary to set out Clause 3 which deals with spares and materials :

Generally, the owner will provide the contractor with all the necessary spares and materials (other than expendable materials such as paints, dopes, cleaning rags etc.). Where, however, there is delay in the supply of essential items, the contractor will provide those wherever possible either by purchase or manufacture, within an expenditure authorised by the owner's Deputy Financial Adviser at the contractor's request from time to time. All items provisioned by the contractor will be the property of the owner, and will be issued on contract loan. The owner agrees to pay the contractor for provision of spares at the following rates :

(a) for items manufactured by the contractor - cost plus 10 per cent.

(b) for items purchased from indigenous and overseas sources - actual invoice price plus all other charges the contractor is called upon to pay, such as packing and shipping etc. plus 5 per cent.

6. Regarding technical advice and publications, Clause 4 of the 1951 agreement stipulated that all relevant service publications and manuals would be made available on loan to the contractor through I.A.F. Liaison Officer attached to the contractor's factory. Regarding delivery, it was provided by Clause 5 that subject to the owner's compliance with Clause 3, the contractor would keep ready for flight as many of the available planes as possible.

7. Clause 6 of 1951 agreement deals with terms of payment and stipulated that the contractor would submit to the owner monthly bills as per Clause 2(a) supported by cost analysis showing, inter alia, of certain details and the details are set out in different sub-Clauses 7 of the 1951 agreement dealt with indemnity for loss or damages which is not relevant for our purposed. Clause 8 dealt with right

to cancel the agreement. Clauses 9 and 10 provided for 'inspection'. Clause 11 prohibited the contractor, the appellant, from in any way assigning or transferring any rights or benefits under the agreement except with the previous consent of the owner in writing. Clauses 12, 13 and 14 are also not relevant for our purpose.

8. We may mention that reliance was also placed on behalf of the appellant on an affidavit by one Shri S. Krishna Murthy who was the Sales Officer of the Overhaul Division of the appellant company and which affidavit had been filed before the Sales Tax Tribunal in Mysore, Bangalore. In the said affidavit, he had described the nature of the works done by the appellant in connection with repairs and had mentioned that two types of works were done; one was overhaul of aircrafts, accessories and equipment thereof, and the other known as fixed quotation basis. It is not necessary to refer to the said affidavit in detail. He had mentioned in the said affidavit the procedure for preparing the bills and had stated that after the works were completed, a final inspection of the repairs done was checked by the Works Inspection Department, whereafter delivery orders were prepared and thereafter he described how bills were prepared thus :

After the work is completed, a final inspection of the repair done is checked by the Works Inspection Department, whereafter a delivery order is prepared and the billing section prepares the bill. As it is required by the Defence audit purposes, the labour charges and material charges are shown which is worked out on cost plus 10 per cent basis.

In the case of private aircraft owners and other airlines for a similar contract for repairs, we give a fixed price quotation unlike in the case of repairs to Defence aircraft which by virtue of the contract is on cost plus 10 per cent basis, wherein a break up had to be given as aforementioned for purposed of Defence audit.

9. The sales tax authorities sought to tax that portion of the total turnover of the appellant for the relevant years in question which was equivalent to the money value of the spare parts of the aircrafts which it has supplied to the Indian Air Force as a result of their use in the process of repairing, serving and overhauling of the aircrafts, their instruments and accessories which were sent to the appellant for the said purpose during the relevant years in question. The works undertaken and executed by the appellant in assembling, repairing, serving and overhauling were on cost plus 10 per cent profit basis as well on fixed inclusive quotation basis. The appellant with regard to the latter types of contracts succeeded before the Appellate Tribunal who held such contracts to be exclusively works contract. The controversy before the High Court and before us in these appeals is only with regard to the first category of contracts, which the Appellate Tribunal held to be composite contracts. The appellant contended that so far as the supply of spare parts to the Indian Air Force during the relevant period was concerned, there had been no sale of the spare parts to the I.A.F., for that spare parts in question were used during the course of and in the process of execution of the works contract relating to the serving, repairing and overhauling of the aircrafts, their instruments and accessories and that there was no sale contract as such in pursuance whereof, the spare parts in question could be said to have been to the I.A.F. The Tribunal had negated the contention of the appellant and the appellant had gone up in revision before the High Court. The High Court was of the view that whether the supply of the spare parts by the appellant would amount to sale or not would depend on the fact as to whether there was a sale contract between the appellant and the I.A.F. in that regard. The High Court was the view that, in the light of certain documents which we would also incidentally note, it could not be said that supply of spare parts and other materials was not in contemplation of the contracting parties and the spare parts in question became the property of the owner i.e. I.A.F. only by way of accretion to the aircrafts for being used

in the process of executing the contract and not as a result of the agreement between the contracting parties. The High Court referred to certain decisions and came to the conclusion that in the present case what was sought to be brought within the purview of Sales Tax Act was the cost to the vendees of the spare parts supplied by the appellant. In such a case, the High Court was of the view that the stage at which the property therein passed to the owner was not material. What was material was as to whether the goods in question were the property of the assessee before the same became the property of the President of India under the contracts.

10. Dealing with the contention of the parties, the High Court was of the view that in providing separately the basis of payment of spare parts in the contracts, the intention of the parties was clear and unambiguous i.e. the parties clearly agreed to the sale of spare parts according to the contract, the intention of the parties was clear and unambiguous i.e. the parties clearly agreed to the sale of spare parts according to the contract. Certain invoices were placed on record, namely, the invoice dated February 28, 1962 being Invoice No. HT2/CAT.B/F-1 which indicated separately the labour charges being Rs. 26,837.69 and materials and spares used by the appellant as per schedule attached as Rs. 32,187.92; reference was also made to another invoice dated March 31, 1962 which had also mentioned separately labour charges as well as the costs of the materials and spares. To the same effect was another invoice dated February 28, 1962. The Tribunal was of the view that these invoices supported the conclusion that the labour charges had been separately itemised from the price of the spare parts and whenever any spare parts had been provided by the I.A.F. authorities, the price thereof had been deducted indicating that the spare parts (sic were) supplied by the appellant. For the aforesaid reasons as indicated in the judgment of the High Court, the High Court was of the view that sale of spare parts was clearly in contemplation of the parties and the documents in question constituted composite contracts, one relating to the remuneration for the services rendered and the other for the sale of goods. In that view of the matter, the High Court was of the view that the Tribunal was right right in dismissing the appeals of the appellant on the particular turnover of the appellant.

11. The question before us, is, therefore, whether the payments made for spare parts in executing the contracts in question were sales contracts or were part of one contract of executing the works contracts.

12. On behalf of the appellant, it was urged before us referring to the terms of the contracts which are more or less in the form of "1951 contract" mentioned before that the contracts in question manifested the clear intention that in substance and reality these were agreements to carry out works of assembling, repairs, serving and overhauling of the aircrafts being the property of the Indian Air Force. We must emphasise that the property in such planes was and had all along continued to remain with the Air Force. Relevant contracts and the whole transactions between the parties indicate that the materials used in the process of such assembling, repairs, serving and overhauling were either supplied by the Indian Air Force or were of the appellant, the bulk was supplied by the Government. The question therefore is, was it the intention to do the works undertaken as one job or not. Counsel on behalf of the appellant contended that that was the intention and there was no intention whatever to pass any property in any chattel qua chattel.

13. It is well settled that the difference between contract of service and contract for sale of goods, is, that in the former, there is in the persons performing work or rendering service no property in the things produced as a whole notwithstanding that a part or even the whole of materials used by him had been his property. In the case of a contract for sale, the thing produced as a whole has individual existence as the sole property of the party who produce it some time before delivery and the

property therein passed only under the contract relating thereto to the other party for price. It is necessary, therefore, in every case for the courts to find out whether in essence there was any agreement to work for a stipulated consideration. If that was so, it would not be a sale because even if some sale may be extracted that would not affect the true position. Merely showing in the bills or invoices, it was contended on behalf of the appellant, the value of materials used in the job would not render the contract as one of sale. The nature and type of the transactions are important and determinative factors. What is necessary to find out, in our opinion, is that dominant object.

14. It was urged before us that contract of sale is one whose main object was to transfer property in and the delivery of the possession of a chattel to the buyer. If the principal object of works undertaken by the party was a transfer of a chattel qua chattel, the contract would be for sale. It is necessary to find out whether the contract was primarily a contract for supply of materials at a price agreed to between the parties and the work or service rendered is only incidental to the execution of the contract. Mere transfer of property in goods used in the performance of a contract was not sufficient. To constitute a sale, there must be an agreement expressed or implied relating to the sale of goods and the performance of the agreement by passing of title in those very goods.

15. On behalf of the respondent, counsel contended that the spare parts in question had been supplied by the appellant against payment of price in pursuance of specific stipulations in the contracts. He, therefore, urged that the transaction constituted sale which was liable to tax. It was highlighted that the appellant manufactured and did business in the sale of materials in question. The fact that the appellant was a dealer in the spare parts supplied to the I.A.F. against payment of price and it was submitted that it was not the case of the appellant nor there was any material on record, to suggest that the spare parts in question were either manufactured or supplied as being incidental to the work of servicing and maintenance entrusted to the appellant or were loaned to the I.A.F. It was urged on behalf of the Revenue that the correspondence on record and bills and invoices clearly demonstrated the intention of the parties to incorporate a separate agreement. According to counsel, the contract of 1951 consisted of two separate agreements. The parties had consciously treated the works and the supply of materials, separately and out attention was drawn to the clauses dealing with the same. It was urged that the contract contained separate stipulation for the work and for the supply of spare parts. It was also emphasised that the appellant was a regular manufacturer of the spare parts involved in the case of supply to the I.A.F.

16. As has been clearly stated in the Halsbury's Laws of England. Third Edition, Volume 34, 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 however the main object of work undertaken by the payee of the price was not the transfer of chattel qua chattel, the contract is one of 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 was in substance one for work and labour or one for the sale of a chattel.

17. In the case of Sentinel Rolling Shutters & Engineering Company Pvt. Ltd. v. C.S.T. (42 STC 409 : (1978) 4 SCC 260 : 1978 SCC (Tax), this Court reiterated that rests indicated in several decisions of this Court to distinguish between a contract for sales and a contract for work and labour were not exhaustive and did not lay down any rigid or inflexible rule applicable alike to all transactions. These did not give any magic formula by the application of which one could say in

every case whether a contract was a contract for sale or a contract for work and labour. These merely focussed on one or the other aspect of the transaction and afforded some guidance in determining the question, but basically and primarily, whether a particular contract was one for sale of goods or for work and labour depended 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. In that case, the assessee who was carrying on business as engineers, contractors, manufactures and fabricators had 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 or after erection were 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 transpiration 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 after completion of erection and handing over of the shutters to the satisfaction" of the company. The assessee had 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. On the question whether the contract was a contract for sale or a contract for work and labour, the High Court had held, agreeing with the Sales Tax Tribunal, that the contract was a divisible contract, which essentially consisted of two contracts, one for the supply of rolling shutters for money and the other for service and labour and that the amount payable at the stage of delivery represented the sale price of rolling shutters and it was liable to sales tax. On appeal, by special leave, this Court held that the contract was one single and indivisible contract and the erection and installation of the rolling shutters was, as much a fundamental part of the contract as the fabrication and supply. The contract was clearly and indisputably a contract for work and labour and not a contract for sale.

18. It cannot be said as general proposition that in every case of works contract, there is necessarily implied the sale of the component parts which go to make up the repair. That question would naturally depend upon the facts and circumstances of each case. Mere passing of property in an article or commodity during the course of performance of the transaction in question does not under the transaction to transaction of sale. Even in a contract purely of works or service, it is possible that articles may have to be used by the person executing the work, and property in such articles or materials may pass to the other party. that would not necessarily convert the contract into one of sale of those materials. In every case, the court would have to find out what was the primary object of the transaction and the intention of the parties while entering into it. It may in some cases be that even while entering into the contract of work or even service, parties might enter into separate agreements, one of work and service and the other of sale and purchase of materials to be used in the course of executing the work or performing the service. But, then in such cases the transaction would not be one and indivisible, but would fall into two separate agreements, one of work or service and the other of sale. These principles can be deduced from the decision of this Court in *State of H.P. v. Associated Hotels of India Ltd.* (29 STC 474 : (1972) 1 SCC 472) In the decision in the case of *The State of madras v. Gannon Dunkerlery & Co. (Madras) Ltd.* (9 STC 353 : 1959 SCR 379 : AIR 1958 SC 560), this Court had stated that according to the law, both of England and of India, in order to constitute a sale, it is necessary that there should be and agreement between the parties for the purpose of transferring title to goods, which of course pre-supposed capacity to contract, that it must be supported by money consideration that as a result of transaction, the property must actually pass in the goods. unless all these elements were present, there would be no sale.

19. In the instant case it is indisputable as we have referred to the "1951 contract" and the substance of the invoices and, it is not disputed that the other works orders were on the basis of the principles agreed by the 1951 agreement set out hereinbefore, that the transactions were as a result of composite contracts involving the execution of works viz. overhauling, repairing, servicing and in one year assembling, air force planes, entrusted to the appellant. The question is, whether this composite contract was divisible into one exclusively for work and labour and another for sale of materials. The fact that there is supply of materials for the purpose of execution of the work contracts undertaken by the appellant cannot be disputed. But the question then arises whether that can be taken as pursuant to a distinct contract with a view to execute the work undertaken. In this connection we have already mentioned the principles enunciated by the statement of Halsbury's Laws of England, Third Edition, Volume 34, pages 6 and 7, para 3.

20. It would be appropriate, in our opinion, because it clearly enunciates the principles, to refer to the statement of law in Benjamin's Treatise on the Law of Sale of personal property with reference to the French Code and Civil Law, Eighth Edition (1950) at pages 167-168 where the learned editor has deduced the principles that would be applicable in deciding the controversy before us. these principles are :

1. A contract whereby a chattel is to be made and affixed by the workman to land or to another chattel before the property therein is to pass, is not a contract of sale, but a contract for work, labour and materials, for the contract does not contemplate the delivery of a chattel as such.

2. When a chattel is to be made and ultimately delivered by a workman to his employer, the question whether the contract is one of sale or a bailment for work to be done depends upon whether previously to the completion of the chattel the property in its materials was vested in the workman or in his employer. If the intention and result of the contract is to transfer for a price property in which the transfer had no previous property then the contract is a contract of sale.

Where, however, the passing of property is merely ancillary to the contract for the performance of work such a contract does not thereby become a contract of sale.

3. Accordingly

(i) Where the employer delivers to a workman either all or the principal materials of a chattel on which the workman agrees to do work, there is a bailment by the employer, and a contract for work and labour, or for work, labour and materials (as the case may be), by the workman.

Materials added by the workman, on being affixed to or blended with the employer's materials. thereupon vest in the employer by accession, and not under any contract of sale.

(ii) Where the workman supplies either all or the principal materials, the contract is a contract for sale of the completed chattel, and any materials supplied by the employer when added to the workman's materials vest in the workman by accession.

21. The learned editor has emphasised that where passing of property was merely ancillary to the contract for the purpose of the work, such a contract does not thereby become a contract for sale. This principle can also be deduced from the observations of the decision of *Robinson v. Graves* ((1935) 1 KB 579).

22. Whether a given transaction is a works contract pure and simple or it involves sale of goods also

is of course a mixed question of law and fact depending upon the facts of each case. We have noted in the instant case the contracts in question. It is true, as was emphasised on behalf of the respondent and has been emphasised by the Tribunal as well as the Karnataka High Court, that it cannot be said that parties did not contemplate and apply their minds to the question of spare parts and other materials necessary for the execution of the works. It was emphasised on behalf of the respondent and on this aspect the question of the High Court of Karnataka as well as the decision of the Tribunal were relied upon to stress the point that the price separately provided as (sic was) cost plus 10 per cent. The bills and the invoices were also made separately indicating the prices involved in these transactions. But it is important to emphasised that Clause 1 of the contract was to accomplish for the owner the servicing and maintenance of the Headquarters Training Command, I.A.F. Communication Flight, and works required on visiting air-crafts, according to the standard as specified hereunder as these air-planes were necessary to be kept in readiness and that as there should be no delay in getting the materials, the contract in detail provided that the works would be carried out by the contractor and payment to be made by the owner at cost plus 10 per cent profit or at the contractor's standard fixed rates. The additional work that would be required as specified in Clause 1 in the different sub-clauses was also to be charged as in Clause 2(a). Regarding spares and materials, the idea was that the owner would provide to the contractor all the necessary spares and materials except expandable materials, such as paints, dopes, cleaning rage etc. and it may be mentioned that these were necessary tools in carrying out the works entrusted to the appellants. It also stipulated in order to ensure that there should be no delay in keeping the airplanes ready at all times, that in cases of delay in supply of materials, the contractor would provide those from wherever possible, either by purchase or manufacture but the expenditure to be incurred for the same should be authorised by the owner's Deputy Financial Advisor at the contractor's request from time to time. Therefore it emphasises that it was the expenditure limited not only for the jobs to be done but expenditure to be incurred for providing the materials for the jobs to be done were subject to the approval and sanction of the Government. The expressions following thereafter in Clause 3 are, in our opinion, significant and indicative of the real intention of the parties. These expressions are "All items provisioned by the contractor will be the property of the owner, and will be issued on Contract Loan. The expression "Contract Loan" is not an expression of art. It has no generally accepted meaning in dictionary, legal or otherwise, as such. There is no definition or meaning of this expression provided in the contract between the parties or in the correspondence between the parties in connection with the execution of the works. But in our opinion, these expressions indicate that the 'provisions' which would be required for carrying out the contracts, which could not be anticipated before the beginning or in execution of the contracts will be the property of the owner i.e. that though gathered and procured or manufactured by the contractor, the contractor will have no property in the said goods or spares or materials and would not be able to either dispose of or deal with those but these will be treated for the purpose of this contract to be the property of the owner and, then the contract stipulates that on fictional basis these will be lend out to the contractor for being used in the execution of the jobs entrusted to the contractor.

23. It was urged before us that the contractor in this case the appellants is also a dealer and manufacturer of these spare and materials, to emphasise that these materials were not prepared or produced or procured by the contractor on ad hoc basis for the purpose of execution of the jobs entrusted to the contractor. This position is indisputably true. But it has also to be emphasised that what spare parts or materials that would be required were not identified goods and it was submitted that these would be treated to be the goods of the owner and given on 'Contract Loan'. It appears to us that the idea was that the moment these spares and, materials were required for the jobs entrusted to the appellants and there was delay in supplying these spare parts and material, the contractor

would be free to procure or obtain these spares and materials either by manufacturing or by purchase from the market local or foreign, these goods to be identified and would be treated by the operation of the contract to be the goods of the owner of the planes. It is true as was emphasised that in order to be given out on loan by the 'owner' to the contractor, the 'owner' must have property in the spares and materials in question. But the 'owner', i.e. the Government, in our opinion, in the context of 1951 agreement, and it is indisputable that the transactions in this case were done on the basis of the agreement of 1951, became the owner of the property the moment the goods were identified and there was delay or inability on the part of the Government in supplying spares and materials. It was emphasised that not a consolidated price was contemplated but what was contemplated was separate price for the materials. Indeed the invoices relied upon by the parties in the specific works orders indicated those were charged for separately. The basis for this has been explained in the affidavit of Shri Krishna Murthy mentioned hereinbefore, The affidavit was before the authorities below as also before the High Court of Karnataka and there is no dispute as to the correctness of the statements made in the affidavit.

24. In the case of Commissioner of Commercial Taxes v. Hindustan Aeronautics Ltd. ((1972) 2 SCR 927 : (1972) 1 SCC 395 : 29 STC 438), this Court construed the correspondence between Railway Board and the respondent assessee, which correspondence to our opinion has a ring of similarity to the terms and conditions of the present transaction, for the manufacture and supply of railway coaches, and the indemnity bond in respect of the contract. It was held by this Court that the answer to the question whether a contract is a works contract or a contract of sale depends upon the construction of the terms of the contract in the light of surrounding circumstances. It was held that when all the materials used in the construction of a coach belonged to the Railways there could not be any sale of the coach itself. It was a pure works contract, and the difference between the price of a coach and the cost of materials being only the cost of service rendered by the assessee. This Court emphasised that whether the wheelsets and underframes were supplied free of cost or not made no essential difference. The material and wage escalator and adjustments regarding final price mentioned in the contract were neutral factors. The facts which should be emphasised in transaction in question with which we are concerned, are that the transactions related to the entrustment of the maintenance of the airplanes of the I.A.F. These had to be kept ready for all times to meet all situations. All avoidable and conceivable delays were planned to be eliminated and in the background of this second factor, it is further to be emphasised that for the bulk of the materials, the Government undertook to supply the spares and materials and it is only in those cases where these materials could not be supplied or provided for by the Government or there was delay, that it was stipulated that these could be procured or manufactured by the contractor within the prices sanctioned by the Government, and after being procured or manufactured by the contractor, these could not be used for any purpose except in the execution of the jobs entrusted to the contractor. The contractor had no disposing power or property in these spares and materials. The fact that these materials were separately placed (sic priced) at cost plus 10 per cent profit was to ensure quick and proper execution of the works and were like the Railway Coaches' case ((1972) 2 SCR 927 : (1972) 1 SCC 395 : 29 STC 438) neutral factors. This conclusion is strengthened by the expression we have extracted from the 1951 contract itself.

25. It is manifest in the instant case from the terms of the contracts and transactions, as in the Railway Coaches case ((1972) 2 SCR 927 : (1972) 1 SCC 395 : 29 STC 438) and as was emphasised by Sikri, C.J. that the property in the materials which are used in the execution of the jobs entrusted to the contractor in this case became the property of the Government before it was used. It is also manifest that there was no possibility of any other materials to be used for the construction as would be manifest from the affidavit and the correspondence and the invoices, and

works orders in these transactions. Emphasis was placed before the Tribunal as well as before the High Court of Karnataka on the case of State of Gujarat V. Variety Body Builders (38 STC 176 : (1976) 3 SCC 500 : 1976 SCC (Tax) 338) where the court was concerned with the 'bus bodies'. In the 'bus bodies' case, the assessee contractor had continued to have the ownership rights and it was held that the 'bus body' had to be transferred from the contractor to the other party as a result of contract for sale but in the instant case it is manifest that the specified spares and, materials were not the properties of the Contractor, in the sense that the contractor never had any ownership over these. The conclusion arrived at by us is in consonance with the principles laid down by this Court in the case of Ram Singh & Sons Engineering Works v. V.S.T. (43 STC 195 : (1979) 1 SCC 487 : 1979 SCC (Tax) 71)

26. For the reasons aforesaid, we are of the opinion that the High Court of Karnataka was not right in its conclusion on the taxability of the turnover of the spare parts and materials supplied in execution of appellant's job works. As a result except for the item on canteen sales which is not in dispute before us, these appeals are allowed. The necessary adjustments in the assessments should be made. In the facts and circumstances of these, the parties will bear their own costs throughout.

LT. COL. S. J. CHAUDHARY, PETITIONER v. STATE (DELHI ADMINISTRATION),
RESPONDENT.

Criminal Miscellaneous Petition No. 286 of 1984 in Special Leave petition (Criminal) No. 3000 of 1983, decided on January 17, 1984.

ORDER

1. By an order dated December 2, 1983, this Court while dismissing a petition for special leave to appeal filed against an order of the Delhi High Court refusing to grant bail to the petitioner until after examination of Rani Chaudhary as a witness, gave a direction that on the commencement of the trial, it should proceed from day-to-day. Alleging that his two Advocates are not prepared to appear in the case from day-to-day as the trial is likely to be prolonged, the petitioner has filed the present application for modification of the earlier order of this Court by the deletion of the direction that the trial should proceed from day-to-day.

2. We think it is an entirely wholesome practice for the trial to go on from day-to-day. It is most expedient that the trial before the court of Session should proceed and be dealt with continuously from its inception to its finish. Now only will it result in expedition, it will also result in the elimination of manoeuvre and mischief. It will be in the interest of both the prosecution and the defence that the trial proceeds from day-to-day. It is necessary to realise that Sessions cases must not be tried piecemeal. Before commencing a trial, a Sessions Judge must satisfy himself that all necessary evidence is available. If it is not, he may postpone the case, but only on the strongest possible ground and for the shortest possible period. Once the trial commences, he should, except for a very pressing reason which makes an adjournment inevitable, proceed de die in diem until the trial is concluded.

3. We are unable to appreciate the difficulty said to be experienced by the petitioner. It is stated that his Advocate is finding it difficult to attend the court from day-to-day. It is the duty of every Advocate, who accepts the brief in a criminal case to attend the trial from day-to-day. We cannot over-stress the duty of the Advocate to attend to the trial from day-to-day. Having accepted the brief, he will be committing a breach of his professional duty, if he so fails to attend. The criminal

miscellaneous petition is, therefore, dismissed.

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