M/s. N. M. Goel and Co.

Vs

Sales Tax Officer, Rajnandgaon and Another

Civil Appeal No. 340 of 1988

(Sabyasachi Mukharji, K. Jagannatha Shetty JJ)

28.10.1988

JUDGMENT

SABYASACHI MUKHARJI, J. –

1. This appeal by special leave is from the judgment and order of the Full Bench of the Madhya Pradesh High Court, dated December 8, 1986.

2. The writ petition in question out of which this judgment arose, had been referred to the Full Bench by the Division Bench on the question whether the petitioner-appellant could be said to have effected entry of the goods in the local area and thereby made it liable for payment of entry tax under Section 3 of the M.P. Sthaniya Kshetra Me Mal Ke Pravesh Par Kar Adhiniyam, 1976 (hereinafter called 'the Act'). There was conflict between the Division Benches of the Madhya Pradesh High Court and as a result the matter was referred to the Full Bench. In order to appreciate the controversy and the question, it is necessary to state a few facts.

3. The appellant-company is a building contractor at Rajnandgaon in Madhya Pradesh and is registered as a dealer under the Madhya Pradesh General Sales Tax Act. The appellant's tender for construction of foodgrains godown and ancillary buildings at Rajnandgaon was accepted by the Central Public Works Department. It was an item rate tender. In the tender so submitted by the appellant, the prices of the materials to be used for the construction including cost of iron, steel and cement were included. The PWD, however, had agreed to supply from its stores the said iron, steel and cement for the construction work and to deduct the prices of materials so supplied and consumed in the construction from the final bill of the appellant. Clause 10 of the contract is relevant and was as follows :

> 10. If the specification or schedule of terms provides for the use of any special description of materials to be supplied from Engineer-in-charge's Stores, or if it is required that the contractor shall use certain stores to be provided by the Engineer-in-charge as shown in the schedule of materials hereto annexed, the contractor shall be bound to procure and shall be supplied such material and stores as are from time to time required to be used by him for the purposes of the contract only, and the value of the full quantity of materials and stores to supply at the rates specified in the said schedule of materials may be set-off or deducted from any sums then due or thereafter to become due to the contractor under the contract or otherwise, or against or from the security deposit, or the proceeds or sale thereof if the same is held in government securities, the same or a sufficient portion thereof being in this case sold for the purpose. All materials so supplied to the contractor shall remain the absolute

> property of government and shall not be removed on any account from the site of the work, and shall be at all times open to inspection by the Engineer-in-charge. Any such materials remaining unused and in perfectly good condition at the time of the completion or determination of the contract shall be returned to the Engineer-in-charge at a place directed by him, if by a notice in writing under his hand he shall so require; but the contractor shall not be entitled to return any such materials unless with such consent and shall have no claim for compensation on account of any such materials so supplied to him as aforesaid not being used by him or for any wastage in or damage to any such materials. Provided that the contractor shall in no case be entitled to any compensation or damages on account of any delay in supply or non-supply thereof all or any such materials and stores. Provided further that the contractor shall be bound to execute the entire work if the materials are supplied by the government within the scheduled time for completion of the work plus 50 per cent thereof scheduled time plus 6 months if the time of completion of the work exceeds (12 months) but if a part only of the materials has been supplied within the aforesaid period. Then the contractor shall be bound to do so much of the work as may be possible with the materials and stores supplied in the aforesaid period. For the completion of the rest of the work, the contractor shall be entitled to such extension of time as may be determined by the Engineer-in-charge whose decision in this regard shall be final.

4. As mentioned hereinbefore, under the said clause, all materials supplied to the contractor remained the absolute property of the government and could not be removed on any account from the site of the work and were at all times open to inspection by the Engineer-in-charge. Any such materials remaining unused and in perfectly good condition at the time of completion or determination of the contract were to be returned to the Engineer-in-charge at a place directed by him by a notice in writing in his hand if he so required but the contractor was not entitled to return any such material unless he was required to do so. There was no dispute that for the construction the appellant was supplied iron, steel and cement by the PWD and it had purchased other materials from the market. The prices of iron, steel and cement supplied to the appellant for the work were deducted from its final bill.

5. On September 22, 1982 the appellant was assessed by the respondent for entry tax for the period June 7, 1979 to March 31, 1980 to a tax of Rs. 11,292 including penalty of Rs. 2000 and by an order dated October 5, 1982 the appellant was assessed for the period from April 1, 1980 to March 31, 1981 for the entry tax of Rs. 23,393 including penalty of Rs. 4500. The appellant was a registered dealer under the Madhya Pradesh General Sales Tax Act and had been assessed to purchase tax under Section 7(1) of the Act and was as such liable for payment of entry tax for iron, steel and cement, the entry for the same having been effected at the instance of the appellant because it had ultimately used the materials for the construction work.

6. The appellant filed revisions before the Deputy Commissioner of Sales Tax who affirmed the assessment orders. The appellant then filed a writ petition challenging the assessment of purchase tax under Section 7(1) of the Madhya Pradesh General Sales Tax Act and assessment of entry tax under Section 3(1) of the Act saying that the entry of the materials so supplied by the PWD was effected by it and not by the appellant and it further contended that as there was no sale of these materials and that as these materials were used for construction of the building, there was no sale as such and so no entry tax could be levied. It was contended that since the appellant had purchased the iron, steel and cement from the PWD and not from the market as per the contract the prices of

which had been deducted from its final bill, the entry of material could be presumed to have been made at the instance of the appellant who had ultimately used the materials for the construction work, and since these materials were purchased from the unregistered dealer, i.e. the PWD, the appellant was held liable for payment of purchase tax and entry tax.

7. Section 3 of the Act is the charging section. Under this, entry tax is levied on the entry in the course of business of a dealer of goods in local area specified in Schedule II for consumption, use and sale therein and on the entry of the goods specified in Schedule III for consumption, use of such goods as raw materials or as packing materials or in the execution of work contracts but not for sale therein. Iron and steel are in Schedule II and cement is in Schedule III and these are assessable to entry tax at the rate of 1.5 per cent and 1 per cent respectively. Under Section 6(c) of the Act where a dealer purchases goods specified in Schedule II and Schedule III in a local area from a person or a dealer who is not a registered dealer, it is presumed, unless the contrary is proved by him, that the entry of such goods had been effected by him into such local area before they were purchased by such dealer. It was, in those circumstances, presumed that the appellant had effected the entry of iron, steel and cement which were supplied by the PWD for the construction of work in the local area for consumption, use and sale therein. This position was conceded on behalf of the appellant before the Full Bench of the High Court. The PWD is not a registered dealer, and therefore, Section 6(c) of the Act applied to the appellant. Under Section 13 of the Act, certain provisions of the M.P. General Sales Tax Act applied mutatis to a dealer in respect of entry tax payable under the Act. The question, therefore, was whether there was sale of iron, steel and cement by the PWD while supplying those materials for the construction work undertaken by the appellant. If supply of these materials is sale within the meaning of Section 2(n) of the M.P. General Sales Tax Act then the appellant would be liable for payment of entry tax as it has been assessed. The question, therefore, is whether there was sale and whether the property in the goods in question passed to the appellant or continued to remain with the PWD although the PWD had in the final bill debited the prices of the goods so supplied to the appellant under Clause 10 of the contract. The Full Bench found that there was sale and as a result of that the duty was leviable.

8. The question, therefore, is whether there was sale of goods in view of the contract between the parties whereunder the custody and control of the goods remained with the PWD and goods were only used in the construction under the contract. This question has been considered by this Court in Government of Andhra Pradesh v. Guntur Tobaccos Ltd. (16 STC 240 : AIR 1965 SC 1396) There, the majority of the judges in a Bench of three learned Judges, viz., Justice Shah and Justice Sikri held that although in the execution of a contract for work some materials were used and property in the goods so used passed to the other person, the contractor undertaking the work would not necessarily be deemed, on that account, to sell the materials. This Court observed that a contract for work in the execution of which goods were used might take one of the three forms. It was indicated that the contract might be for the work to be done for remuneration and for supply of materials used in the execution of the works for a price; it might be a contract for work in which the use of the materials was necessary and incidental to the execution of the work or it might be a contract for work and used and supply of materials, though not accessory to the execution of the contract, was voluntary or gratuitous. In the last class there was no sale because though the property passed, it did not pass for a price. Whether a contract was of the first or the second class must depend upon the circumstances; if it was of the first class, it was composite contract for work and sale of goods; where it was of the second category, it was a contract for execution of work not involving sale of goods. The majority of the learned Judges was of the view that in order that there should be a sale of goods which was liable to sales tax as part of a contract for work under a statute enacted by the Provincial or State legislature, there must be a contract in which there was not merely transfer of

title to goods as an incident of the contract, but there must be a contract, express or implied, for sale of the very goods which the parties intended should be sold for a money consideration, i.e., there must have been in the contract for work an independent term for sale of goods by one party to the other for a money consideration. The question in each case was one about the true agreement between the parties and the terms of the agreement must be deduced from a review of all the attendant circumstances. But from the mere passing of title to goods either as integral part of or independent of goods, it could not be inferred that the goods were agreed to be sold, and the prices was liable to sales tax. Whether a contract for service or for execution of work involved a taxable sale of goods must be decided on the facts and circumstances of each case. The burden in such a case lay upon the taxing authorities to show that there was a taxable sale, and that burden was not discharged by merely showing that property in the goods which belonged to the party performing service or executing the contract stood transferred to the other party. In that case, the assessee-company was a dealer carrying on the business of re-drying in its factory raw tobacco entrusted to it by its customers. The assessee redried the tobacco, packed it in packing materials purchased from the market and delivered it to the customers. For re-drying each bale of tobacco the assessee had charged the customers a certain sum but there was no separate charge for the value of the packing materials used. The assessee was assessed to sales tax under the Madras General Sales Tax Act, 1939, on the value of the packing materials on the ground that there was a sale of the packing materials. The High Court found that the packing of the redried tobacco and its storage for the requisite period was an integral part of the re-drying process and held that there was no sale of packing materials. On appeal in that case, this Court by majority held on the finding recorded by the High Court that it was intended by the parties that the "packing material" should form an integral part of the process of re-drying and without the use of the "packing material" re-drying process could not be completed, and that there was no independent contract for sale of "packing material". It was only as an incident of re-drying process and as a part thereof that the assessee had to seal up the package of tobacco, after it had emerged from the reconditioning chamber, with a view to protect it from atmospheric action. In the absence of any evidence from which contract to sell "packing material" for a price might be inferred, the use of the "packing material" by the assessee must be regarded as an execution of the works contract and the fact that the tobacco delivered by the constituent was taken away with the "packing material" would not justify an inference that there was an intention to sell the "packing material". Mr. Justice Subba Rao, as the Chief Justice then was, held, however, that all the ingredients of the charging section read with the definition of "sale" were satisfied. He observed that unless it could be said that the material used for packing was transformed into some other commodity not covered by the definition of "goods", it could not be held that there was no sale of the material. The packing material remained distinct from the dried tobacco. Property in it passed to the customer, who had paid for it. On the basis of the practice prevailing in the factory of the assessee, contracts for sale arose easily by implication and therefore the sales tax authorities had rightly assessed the turnover in regard to the packing materials.

9. In Hindustan Steel Ltd. v. State of Orissa ((1969) 2 SCC 627 : 25 STC 211), this Court was concerned with Section 9(1) read with Section 25(1)(e) of the Orissa Sales Tax Act, 1947. Penalty was imposed therein for failure to register as a dealer. But the liability to pay penalty did not arise merely upon proof of default in registering as a dealer. An order imposing penalty for failure to carry out a statutory obligation was the result of a quasi-criminal proceeding and penalty would not ordinarily be imposed. Between 1954 and 1959, the appellant-company was erecting factory buildings for its steel plant, residential buildings for its employees and ancillary work such as roads, water supply and drainage. Some construction work was done departmentally and the rest through contractors. The company supplied to the contractors for use in construction bricks, coal, cement,

steel etc. for a consideration which in addition to the cost price of the appellant-company included some additional amounts which were charged by the appellant. The question was whether the supply of building materials amounted to "sale" and the appellant-company was a dealer for the purposes of sales tax under the Orissa Sales Tax Act, 1947. It was held that the supply constituted "sale". It was further held that, however, the company had charged a fixed percentage above its cost price only for storage, insurance and rental or other incidental charges, it could not be said that the company was carrying on business of supplying materials and it would not be a "dealer". In other words, it is clearly held by this Court in the Hindustan Steel Ltd. case ((1969) 2 SCC 627 : 25 STC 211) that where company supplies to the contractor for use in its construction coal, steel and cement etc. for a consideration, it amounts to a "sale" and the company becomes a "dealer" for the purpose of sales tax. The provisions were similar to that of the present Act. In Brij Bhushan Lal Parduman Kumar v. CIT ((1979) 3 SCC 14 : 1979 SCC (Tax) 197 : 115 ITR 524), the question arose in the context of income tax. The appellant therein, a registered firm, was a Military Engineering Services contractor carrying on the business of executing contracts and works on behalf of the government. For the execution of the works undertaken by the appellant, certain materials, such as cement, coal, steel etc. were supplied by the government at the fixed rates specified in the respective contract. Such materials, though in the custody of the appellant, remained the property of the government and any surplus had to be returned to the government, and the government was to give credit therefor at fixed rates at which they were supplied by the government. After rejecting the book results, the Income Tax Officer sought to estimate the profits of the appellant at a percentage of the net cash payments received by the appellants against the contracts as well as the cost of the materials supplied by the government. The Appellate Tribunal, however, held that the cost of the materials supplied by the government could not be added to the figure of cash payments received by the appellant as no profits could have arisen therefrom. On a reference, the High Court held that the cost of materials was liable to be included before applying a flat rate to the appellant's receipts. On appeal, this Court reversing the decision of the High Court held that since in substance and in reality the materials supplied by the government always remained the property of the government and the appellant merely had custody and fixed or incorporated them into the works, there was not even a theoretical possibility of any element of profit being involved in the turnover represented by the cost of such materials. Though, ordinarily, when a works contract was put through or completed by a contractor, profit from the contract was determined on the value of the contract as a whole and not by considering the several items that would go to form such value of the contract, where, as in that case, materials were supplied at fixed rates by the government to the contractor solely for being used, fixed or incorporated in the works on the terms that they would remain the property of the government and any surplus should be returned to the government, and the real total value of the entire contract would be the value minus the cost of such materials so supplied. Since no element of profit was involved in the turnover represented by the cost of the materials supplied by the government to the appellant, the income or profits derived by the appellant from such contracts had to be determined on the basis of the value of the contracts represented by the cash payments received by the appellant from the government exclusive of the cost of the materials received for being used, fixed or incorporated in the works. There the question was whether there was profit taxable to income tax on the sale of the materials. There was none and it was so held.

10. This Court again examined the question in the context of a sale of meals and amenities by a hotelier in the case of State of Himachal Pradesh v. Associated Hotels of India Ltd. ((1972) 1 SCC 472 : 29 STC 474), where this Court reiterated that mere passing of property in an article or commodity during the course of the performance of a transaction did not render it a transaction of sale. For, even in a contract purely of work 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 has to find out 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 a 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 of performing the service. In such cases the transaction would not be one and indivisible, but would form two separate agreements - one of work or service and the other of sale.

11. Therefore, from the above decisions it follows that in order to be sale taxable to duty, not only the property in the goods should pass from the contractor to the government, or the appellant in this case but there should be an independent contract - separate and distinct - apart from mere passing of the property where a party purchases or procures goods from the government. Mere passing of property from the contractor to the government would not suffice. There must be sale of goods. The primary object of the bargain judged in its entirety must be viewed. In the instant case, Clause 10 is significant as we have set out hereinbefore. For the purpose of performance, the contractor was bound to procure materials. But in order to ensure that quality materials are procured, the PWD undertook to supply such materials and stores as from time to time required by the contractor to be used for the purpose of performing the contract only. The value of such quantity of materials and stores so supplied was specified at a rate and got set-off or deducted from any sum due or to become due thereafter to the contractor. Mr. Virmani, appearing for the appellant submitted before us that in the instant case, there was no such independent and separate sale. But we are unable to accept. Though, in a transaction of this type there is no inherent sale; a sale inheres from the transaction. Clause 10 read in the proper light indicates that position.

12. Our attention was drawn to a Bench decision of the Kerala High Court in Construction Company, Changanacherry v. State of Kerala (36 STC 320 (Ker HC)), wherein on a consideration of the contract the court came to the conclusion that the consideration stipulated to be paid to the petitioner in that case for the work which the petitioner had undertaken to perform and not by way of sale price of the poles to be produced and delivered by the petitioner. Therefore, it was held that the petitioner was not liable to sales tax. Mr. Virmani also drew our attention to a Division Bench decision of the Calcutta High Court in Cementation Patel (Durgapur) v. CCT (47 STC 385 (Cal HC)). There, on consideration of the transaction entered into between the parties the court came to the conclusion that the property in the materials all along remained with the Government of India and whatever was the nature of the transaction involved between the assessee on the one hand and the other members of the consortium or the sub-contractors on the other, the same did not and could not amount to sale as the assessee could not in the facts of that case transfer the property therein. In the instant case, by use or consumption of materials in the work of construction, there was passing of the property in the goods to the assessee from the PWD. By appropriation and by the agreement, there was a sale as envisaged in terms of Clause 10 set out hereinbefore. Therefore, in our opinion, there was a sale which was liable to tax.

13. The Full Bench was right in its conclusion. The appeal, therefore, fails and is accordingly dismissed. There will be no order as to costs.

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