Kailash Engineering Co. Vs. the State of Gujarat

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Court : Gujarat

Decided On : Dec-14-1962

Reported in : (1963)GLR726; [1964]15STC574(Guj)

Judge : K.T. Desai, C.J. and; P.N. Bhagwati, J.

Acts : Bombay Sales Tax Act, 1959 - Sections 2, 2(8), 6, 8, 9, 27 and 61; Bombay Sales Tax Act, 1953 - Sections 27 and 27(1)

Appeal No. : Sales Tax Reference No. 16 of 1961

Appellant : Kailash Engineering Co.

Respondent : The State of Gujarat

Advocate for Def. : J.M. Thakore, Adv. General, i/b.,; Bhaishanker Kanga and;Girdharlal

Advocate for Pet/Ap. : M.U. Shah, Adv.

Judgement :

Desai, C.J.

1. This is a reference purported to have been made under section 61 of the Bombay Sales Tax Act, 1959. Our attention has been drawn to the fact that this reference should really have been under section 34(1) of the Bombay Sales Tax Act, 1953. Both parties agree that we should proceed to deal with this reference as

if it was a reference under section 34(1) of the Bombay Sales Tax Act, 1953.

2. The applicants are an engineering concern having their workshop at Morvi on the meter gauge section of the Western Railway. The Western Railway administration invited tenders for construction of III class passenger coaches on certain conditions described as the conditions of tender. The applicant's tender was accepted by the Railway Administration and a contract in writing was entered into for the performance of the works of 'building, erecting and furnishing 99 non-vestibuled bogie III class timber coach bodies on broad gauge underframes', the underframes to be supplied by the Railway Administration. The applicants constructed three coaches in accordance with the terms of the contact and a bill containing the requisite certificates was prepared by the Railway on 4th October, 1958, showing the net value of the work done by the company, the amount certified being Rs. 1,22,035. The applicants made an application to the Additional Collector of Sales Tax under section 27 of the Bombay Sales Tax Act, 1953, for the determination of the question whether the case fell within the definition of 'sale' and whether they were liable to sales tax under the provisions of the Bombay Sales Tax Act, 1953. The Additional Collector of Sales Tax, by his order dated 29th June, 1959, held that the transaction covered by the aforesaid bill dated 4th October, 1958, was a sale and that tax was payable in respect of the same. The applicants preferred an appeal from that decision before the Sales Tax Tribunal. The Tribunal, by its judgment dated 16th December, 1960, dismissed the appeal. The matter has come up before us for the determination of the question following :

'Whether on a proper construction of the agreement as a whole and its general conditions and specifications, the work done and covered by contract certificate No. M/60/(1)1/PRTN, dated 4th October, 1958, the performance of the works of building, erecting and furnishing 3 B.G. coaches over the chassis supplied by the Railways is works contract not amounting to sale or whether it is a transaction of sale ?'

3. We shall first turn to the provisions of the Bombay Sales Tax Act, 1953. Section 6 of the Bombay Sales Tax Act, 1953, provides as under :-

'6. (1) Subject to any rules made under section 18-B there shall be paid by every dealer who is liable to pay tax under this Act -

(ia) Sales tax ...... on his sales ...... in accordance with the provisions of section 7-A.

(a) A sales tax on his sales levied in accordance with the provisions of section 8.

(b) A general sales tax on his sales levied in accordance with the provisions of section 9.

* * * *'

4. The question that we have to determine is whether there is any sale of goods so that the provisions of the Sales Tax Act may be extended thereto. Section 2, sub-section (13), defines a 'sale' to mean 'a sale of goods made within the Pre-Reorganisation State of Bombay, excluding the transferred territories for cash or deferred payment or other valuable consideration'. 'Goods' have been defined by section 2(8) to mean 'all kinds of movable property other than newspapers, actionable claims, stocks, shares and securities, and includes all materials, articles and commodities'. The term 'sale price' has been defined to mean 'the amount of valuable consideration payable to a dealer for the sale of any goods, less any sum allowed as cash discount according to trade practice, but including any sum charged for anything done by the dealer in respect of goods at the time of or before delivery thereof, other than the cost of freight or delivery or the cost of installation when such cost is was separately charged'. We will have to examine the terms of the contract between the parties in order to see whether there has been a sale of goods within the meaning of the Bombay Sales Tax Act, 1953.

5. The contract is preceded by a tender. The tender is for 'construction of 100 broad gauge III class timer coach bodies.' Clause 2 of the terms of the tender provides as under :-

'The tenderers are requested to quote the rate for undertaking the work of building, furnishing and erecting 100 (one hundred only) bogie III class timber coach bodies on broad gauge underframes in accordance with relative specifications and drawing No. CBP/2155 and related drawings.'

Clause 4 is as under :-

'The tenderer must state the country of origin and/or manufacture of the materials used in the manufacture of the articles.'

Clause 6 is as under :-

'The constructions, furnishing and erecting of 100 coaches are required to be completed within a period of 24 (twenty-four) months from the date of signing of agreement. The contractor shall be required to complete the building of a minimum number of four coaches per month following the initial preparatory period of four (4) months.'

Clause 17 of the tender provides as under :-

'The successful tenderer/tenderers shall be required to execute an agreement with the President of India acting through the Chief Mechanical Engineer, for carrying out the work in accordance with the relative specifications and drawings mentioned in para 2 above for the work and in accordance with the terms and conditions of the agreement, special conditions and tender conditions.'

6. The terms of the tender indicate that the tender is invited in connection with the construction of work therein mentioned and that the tenderers were required to quote the rates for undertaking such work. When we turn to the agreement in writing executed by the President of India on the one hand and the applicants on the other, there is a recital to the effect following :-

'Whereas the contractor has agreed with the railway for the performance of the works of 'building erecting and furnishing 99 (ninety-nine) non-vestibuled bogie III class timber coach bodies on broad gauge underframes' set forth in the schedule thereto annexed upon the tender conditions, general conditions of contract and the specification and drawing CBP/2155 and related drawings of the Western Railway and special conditions and special specifications and in conformity with the drawings hereunto annexed and whereas the performance of the said work is an act in which the public are interested.'

7. It is thereafter stated as follows :-

'For the said works of building, erecting and furnishing 99 (ninety nine only) BG non-vestibuled III class timber coach bodies complete in all respects but excluding electrical equipment the Railway agrees to pay to the contractor at the rate of Rs. 55,700 (rupees fifty-five thousand seven hundred only) per coach with exterior paneling with mild steel panel plates to IRS specification M. 22-50. The aforesaid rates shall be firm and inclusive of sales tax, general tax and octroi duty and should not be subject to variation due to fluctuation in the costs of materials or due to any other reason whatsoever.'

8. The operative part of the agreement provides as under :-

'...... in consideration of the payments to be made by the Railway, the contractor will duty perform the said works in the said schedule set forth ..... For this purpose 99 broad gauge underframes will be issued to the contractor at site of work in convenient lots. And the railway doth hereby agree that if the contractor shall duly perform the said work in the manner aforesaid and observe and keep the said terms and conditions the railway will pay or cause to be paid to the contractor for the said work on the final completion thereof the amount due in respect thereof at the rates specified above.'

9. The agreement refers to the applicants as the contractor and in express terms provides for the performance of the works therein mentioned. The general conditions of the contract annexed to the agreement define the term 'works' as meaning works to be executed in accordance with the contract. Clause 9 of the said general conditions provides that the contractor shall be entirely responsible for the timely procurement of all materials required for the construction of coaches. Clause 13 provides that no forwarding orders shall be issued for the conveyance of contractor's materials, tools and plants by rail which may be required for use in the works and the contractor shall pay full freight charges at public tariff rates therefor. Clause 20(4) provides as under :-

'The Railway shall have the right to let other contractors in connection with the works. The contractor shall afford other contractors reasonable opportunity for the storage of their materials and the execution of their work and shall properly connect and co-ordinate his work with theirs ......'

Clause 22(1) provides that the whole of the works shall be executed in perfect conformity with the specifications and drawings of the contract and that if the contractor performs any work in a manner contrary to the specifications or drawings or any of them and without such reference to the Engineer he shall bear all the costs arising or ensuing therefrom and shall be responsible for all loss to the railway. Clause 25 of the general conditions provides that the contractor shall at his own expense provide himself with sheds, storehouses and yards in such situation and in such numbers as in the opinion of the Engineer is requisite for carrying on the works and the contractor shall keep at each of such sheds, storehouses and yards a sufficient quantity of materials and plant in stock as not to delay the carrying out of the works with due expedition and the Engineer and the Engineer's representative shall have free access to the said sheds, storehouses and yards at any time for the purpose of inspecting the stock of materials and plant so kept in hand, and any materials or plant which the Engineer may object to shall not be brought upon or used in the works, but shall be forthwith removed from the sheds, storehouses or yards by the contractor. The contractor shall at his own expense provide and maintain any other equipment necessary for the execution of the works. Clause 29 of the general conditions runs as under :-

'The materials and pant brought by the contractor upon the site or on the land occupied by the contractor in connection with the works and intended to be used for the execution thereof shall immediately they are brought upon the site or the said land, be deemed to be the property of the Railway. Such of them as during the progress of the works are rejected by the Engineer, or are declared by him not to be needed for the execution of the works or such as on the grant of the certificate of completion remain unused shall immediately on such rejection declaration or grant cease to be deemed the property of the Railway and the contractor may then (but not before) remove them from the site or the said land. This clause shall not in any way diminish the liability of the contractor nor shall the

Railway be in any way answerable for any loss or damage which may happen to or in respect of any such materials or plant either by the same being lost, stolen, injured or destroyed by fire, tempest or otherwise'.

Clause 31 provides as under :-

'The rates entered in the agreement of the contract are intended to provide for works duly and properly completed in accordance with the general and special conditions of contract and the specifications and drawings together with such enlargements, extensions, diminutions, reductions, alterations or additions as may be ordered in terms of clause 38 of these conditions and without prejudice to the generality thereof and shall be deemed to include and cover superintendence, design of the scheme including the preparation of the drawings stipulated in the specifications, supply, including full freight of materials, or stores, profiles, moulds, fittings machinery, tools and all apparatus and plant required on the works, except such tools, plant or materials as may be specified in the contract to be supplied to the contractor by the Railway.'

Clause 33 provides that the contractor shall be bound to hand over the works executed under the contract to the Railway complete in all respects to the satisfaction of the Engineer and that the Engineer shall determine the date on which the work is considered to have been completed. Clause 43 provides that as soon as in the opinion of the Engineer the works shall have been substantially completed and shall have satisfactorily passed any final test or tests that may be prescribed the Engineer shall issue a certificate of competition in respect of the work and the period of maintenance of the works shall commence from the date of such certificate. By clause 45 it is provided that the contract shall not be considered as complete until a maintenance certificate shall have been signed by the Engineer stating that the works have been completed and maintained to his satisfaction. Clause 55 provides as under :-

'55 - (1) The Railway shall be entitled to determine and terminate the contract at any time should, in the Railway's opinion, the cessation of work becomes necessary owing to paucity of funds or from any other cause whatever, in which case the value of approved materials at site and of work done to date by the contractor will be paid for in full at the rates specified in the contract.'

10. The special conditions of the contract annexed to the agreement and forming part thereof provide inter alia as under -

'The contract work consists of -

1. Taking delivery of underframes at site of work and fitment of body brackets on them.

2. Supplying all timber, plywood, metallic fittings, ventilators, hardware etc., as indicated in schedule of drawings for building and furnishing the coach bodies.

* * * * * 8. Supplying and fitting roof tanks, filling pipes, filler fittings, water pipes and connections, push cocks, stainless steel latrine pans and wash basins, drain pipes and lavatory chutes, lavatory doors complete with hinges, knobs, towel bolts, and latches hand-holds, lotah push cocks and lotah brackets, etc.

9. All timber work and details connected with the electrical wiring, conducting and fixing of lamps, fans, switchgear and kent couplers, but excluding electrical fittings, conduits and switchgear.'

11. The contract between the parties is one entire and indivisible contract. It is a contract entered into between the Railway on the one hand and the applicants as contractors on the other for carrying out of the works specified in great details in the agreement between the parties. It cannot be regarded as an agreement to sell any materials as materials by the contractor to the Railway.

12. The test as to when an agreement for work and labour can be regarded as an agreement for the sale of gods and when it can be regarded as an agreement for the sale of work, has been succinctly set out in a passage in Halsbury's Laws of England, Third Edition, Volume 34, page 6, paragraph 3, which runs as under :-

'Contract of sale distinguished from contract for work and labour. 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 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.'

13. In Benjamin on Sale, 8th Edition, at page 167, it has been observed as under :-

'A contract whereby a chattel is to be made and affixed by the workmen to land to 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.'

14. The aforesaid tests for the purpose of regarding the contract in question as a contract for work and labour have been fully and completely satisfied in the present case. It is not possible for us to consider that there is a contract for the sale of any chattel as a chattel. The contract is for the carrying out of the whole work which has been undertaken by the applicants as contractors. The main object of the contract is one for work and labour. It is not possible to view the contract as a contract whose main object is the transfer of property in and delivery of possession of a chattel as a chattel to the railway. The learned Advocate-General, who appears on behalf of the opponent, urged that what was intended was the sale of railway bogies as bogies. We are unable to agree with this submission. The broad gauge underframes of the bogies were, under the teams of the contract, to be supplied by the Railway and these underframes at all times remained the property of the Railway. The bodies of the coaches had to be built upon these underframes. The contractors had to build and erect those bodies of coaches on the underframes and to furnish the same. The learned Advocate-General, in the alternative, contended that there was a contract for the sale of the materials which were utilized in the construction of the bodies of the coaches and

the furnishing thereof. He placed strong reliance upon the special conditions of the the contract wherein words have been used to the effect that the contract work consisted of supplying all timber, plywood, metallic fittings, ventilators, hardware etc., and the supplying of roof tanks, filling pipes, filler fittings water pipes and connections, push cocks, stainless steel latrine pans and wash basins, drain pipes and lavatory chutes, lavatory doors complete with hinges knobs and towel bolts and latches etc. Clause 2 of the special conditions of the contract which refers to the supplying of timber, plywood, metallic fittings ventilators, hardware etc., itself lays down that the same had to be done for building and furnishing the coach bodies. There is no contract for the sale of timber or plywood or metallic fittings etc., as such. In fact, for the purpose of building the bodies, a larger amount of timber would have to be used than the quantity of timber which ultimately found itself embedded in the framework. Reading the contract as a whole, it is not possible in our view to hold that there was a contract for the supply of any chattel as a chattel under the terms of the agreement between the parties.

15. The Supreme Court, in the case of State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd. ([1958] 9 S.T.C. 353) has laid down that in order to constitute a sale it is necessary that there should be an agreement between the parties for the purpose of transferring title to goods, which presupposes capacity to contract, that it must be supported by money consideration, and that as a result of the transaction property must actually pass in the goods. One of the tests laid down by the Supreme Court in that case for the purpose of considering whether there was a contract for the sale of goods or not is that there must be an agreement 'to sell the materials as such'. That test has not been satisfied in the present case.

16. We are supported in the conclusion which we have reached by a decision of the Allahabad High Court in Kays Construction Company v. The Judge (Appeals) Sales Tax, Allahabad and Another ([1962] 13 S.T.C. 302). In that case the petitioner, a contractor, undertook to build some passenger bogies for the Railway. Under the contract the underframes were to be supplied by the Railway, but the property in the frames was always to remain in the Railway. The superstructure over these underframes was to be constructed by the petitioner according to certain specifications and the petitioner was to be paid for the work at the rate of

Rs. 50,200 for each bogie and an additional sum of Rs. 400 for extra work. The contract provided that 'the rate at which the petitioner was to be paid for each bogie was to be inclusive of the cost of all stores and fittings, e.g., steel, wood and electrical fitment etc., requisite for body construction according to drawing and specifications and schedule which will be supplied by the contractors at their cost'. It was held that the contract between the petitioner and the Railway was one indivisible contract which could not be split up into two separate contracts, one for the construction of work and the other for the sale and supply of materials.

17. As against this decision, our attention has been called to a decision of the Bombay High Court in Mckenzies Limited v. The State of Bombay ([1962] 13 S.T.C. 602). In that case, the learned Judges observed that the question whether a contract is a contract of sale as distinguished from a contract for work must depend upon the terms of the contract and the intention of the parties. We are in respectful agreement with the above observations. The learned Judges have in that case set out the test to be applied pointed out in Halsbury's Laws of England and in the passage quoted by us from Benjamin on Sale. However, on the facts of that case, they came to the conclusion that the contract was a contract for the sale of goods. In that case, Mckenzies Limited had contracted to construct and supply to the Government of India several motor bodies fitted on the chassis supplied to them by the Government. The price was lump sum price per body. The materials for the body were to be supplied by and the work of construction and the fitting were all to be done by Mckenzies Limited who had to deliver to the Government the bodies completed on the chassis. The Court, after applying the test which we are applying in the present case, came to the conclusion that the contract was a contract for the sale of goods and observed that the mere circumstance that the chattel made was fitted on to another chattel belonging to the buyer under the terms of the contract would not of necessity make the contract one for work and not one of sale, that what was intended by the parties was the sale and purchase of the manufactured motor body as an article or chattel. Whatever view we may take of the decision on the facts appearing in that case, what we are concerned with now are the principles which have to be applied. There is no dispute as regards the principles which have to be applied in the present case. Applying those principles to the facts of the present case, we have no doubt in our minds

that the contract in the present case is not a contract for the sale of goods, but a contract for work and labour.

18. Our answer to the question is that it was a works contract not amounting to sale. The opponent will pay to be applicants the costs of the reference.

19. Reference answered accordingly.