State Of Punjab vs M/S. Associated Hotels Of India Ltd on 4 January, 1972

Equivalent citations: 1972 AIR 1131, 1972 SCR (2) 937

Author: J.M. Shelat

Bench: J.M. Shelat, S.M. Sikri, I.D. Dua, Hans Raj Khanna

PETITIONER:
STATE OF PUNJAB

Vs.

RESPONDENT:
M/S. ASSOCIATED HOTELS OF INDIA LTD.

DATE OF JUDGMENT04/01/1972

BENCH:
SHELAT, J.M.
BENCH:
SHELAT, J.M.
MITTER, G.K.
SIKRI, S.M. (CJ)
DUA, I.D.
KHANNA, HANS RAJ

CITATION:
1972 AIR 1131 1972 SCR (2) 937
1971 SCC (1) 472
CITATOR INFO :
D 1974 SC2309 (110)
RF 1977 SC1642 (6)
RF 1978 SC 621 (28)
R 1978 SC1591 (3,6,7)
R 1980 SC 674 (4)
E 1984 SC 744 (18)
F 1989 SC 285 (10)

ACT:
Sales tax-Sale and contract of Work and service-Distinction and tests.

HEADNOTE:
The respondent-company was running the business of a hotelier and was registered as a dealer under the Punjab

General Sales Tax Act, 1948. It applied for a declaration that it was not liable to sales-tax in respect of meals served to the guests staying in the hotel on the grounds that : (1) the hotel receives guests primarily for the purpose of lodging; (2) when so received the management provides him with a number of amenities including meals at fixed hours, incidental to such lodging and with a view to render hi-, stay comfortable; (3) the transaction between the respondent and the guests is one for the latter to stay and not one of sale of food stuffs supplied; (4) the bill given by the respondent and paid by the guest is one and indivisible, being a fixed amount per day during his stay in the hotel and does not consist of separate items in respect of the several amenities furnished to him, and (5) the transaction does not envisage any sale of food since the guest cannot demand a rebate or deduction if he were to miss a meal or meals nor is he entitled to carry away or deal with, in any manner, the food served on his table if a part of it is not consumed.

The department rejected the company's application but the High Court allowed its writ petition.

Dismissing the appeal to this Court,

HELD : The transaction is one essentially of service in the performance of which and as part of the amenities incidental to that service, the hotelier serves meals at stated hours. The Revenue, therefore, was not entitled to split up the transaction into two parts one of service and the other of sale of food stuffs and to split up the bill charged as consisting of charges for lodging and charges for food stuffs served with a view to bring the latter under the Act. [947 F-G]

The distinction between a contract of sale and a contract of work and service is fine especially when the contract is a composite one involving both. In considering whether a transaction is a sale falling within the purview of sales-tax it is necessary to determine the nature of the contract involved on the facts of each case. A contract of sale is one whose main object is the transfer of property and delivery of possession of a chattel to the buyer; but the mere passing of property in an article or commodity during the course of the performance of a transaction does not render it a transaction of sale when there is no intention to sell and purchase. When the principal object of work undertaken by the payee of the price is not the transfer of a chattel qua chattel the contract is one of work and labour. The test is whether or not the work or labour bestowed ends in anything that can properly become the subject of sale; neither the ownership of the materials nor the value of the skill

938

and labour as compared with the value of materials is conclusive, although such matters may be taken into consideration. In every case the court would have to find

out what is the primary object of the transaction and the intention of the parties while entering into it. [942 D-G: 944 F-G. H]
The transaction in the present case is one and indivisible, namely, one of receiving a customer in the hotel to stay. The bill is not capable of being split up into one for residence and another for sale of meals. Amenities including meals, are part and parcel of the service which, in reality, is the transaction between the parties. Even if it was to be disintegrated the supply of meals during such stay does not constitute a separate contract of sale, since no intention on the part of the parties to sell and purchase the food stuffs supplied during meal time can be spelt out. [945 G-H; 946 A-C]
Madras v. Gannon Dunkerley & Co. Ltd., [1959] S.C.R. 379, Mohanlal Jogani Rice & Atta Mills. v. Assam [1953] 4 S.T.C. 129, Masanda & Co. v. Commissioner of Sales-tax, [1957] 8 S.T.C. 370, United Bleachers Ltd. v. Madras, (1960) 9 S.T.C. 278, Krishna & Co. Ltd. v. Andhra Pradesh, [1956] 7 S.T.C. 26, Patnaik & Co. v. Orissa, [1965] 16 S.T.C. 364, Andhra Pradesh v. Guntur Tobaccos Ltd. [1965] 2 S.C.R. 167 and English Law and United States Law, referred to.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1207 of 1968. Appeal by special leave from the judgment and order dated May 10, 1967 of the Punjab and Haryana High Court in Letters Patent Appeal No. 159 of 1966.

V. C. Mahajan and R. N. Sachthey, for the appellants. M. C. Setalvad, M. C. Bhandare, Rameshwar Nath, T. R. Bhasin and Lalit Bhasin, for the respondent. The Judgment of the Court was delivered by Shelat, J. The respondent-company carries on business as hoteliers and conducts several hotels including the 'Cecil Hotel' at Simla. Besides conducting hotels, it also carries on restaurant business. As part of its business as hoteliers, the company receives guests in its several hotels to whom, besides furnishing lodging, it also serves several other amenities, such as public and private room, bath with hot and cold running water, linen, meals during stated hours etc. The bill tendered to the guest is an all inclusive one, that is to say, a fixed amount for the stay in the hotel for each day and does not contain different items of each of the aforesaid amenities. That is, however, not the case in its restaurant business where a customer takes his meal consisting either of items of food of his choice or a fixed menu. The primary function of such a restaurant is to serve meals desired by a customer, although along with the food, the customer gets certain other amenities also, such as service, linen etc. The bill which the customer pays is for the various food items which he consumes or at a definite rate for the fixed menu, as the case may be, which presumably takes into account service and other related amenities.

The respondent-company, as such hoteliers, has been registered as a dealer under the Punjab General Sales Tax Act, XLVI of 1948 and has been filing quarterly returns and paying sales tax under

that Act.

On September 2, 1958 the company applied for a declaration that it was not liable to pay sales tax in respect of meals served in the said Cecil Hotel to the guests coming there for stay. In support of its plea, the company raised the following contentions : (1) that the, hotel receives guests primarily for the purpose of lodging, (2) that when so received, the management provides him with a number of amenities incidental to such lodging and with a view to render his stay in the hotel comfortable including meals at fixed hours, (3) that the transaction between the company and such a guest is one for the latter to stay and not one of sale of food stuffs supplied as one of the incidental amenities, (4) that the bill given by the company and paid by the guest is one and indivisible, that is, a fixed amount per day during his stay in the hotel and does not consist of separate items in respect of the several amenities furnished to him including meals served to him, and (5) that the transaction so entered into does not envisage any sale of food since the guest cannot demand a rebate or deduction if he were to miss a meal or meals, nor is he entitled to carry away or deal with in any manner the food served at his table, if a part of it remains unconsumed. It is, on the other hand, the management which has the right to deal with such unconsumed remainder as it likes. Such a position, therefore, is inconsistent with a sale under which the property in the whole must pass to the purchaser, and who can deal with the remainder in any manner he likes. The Sales Tax Officer rejected the company's application on the ground that the transaction Which takes place between the management and a resident guest takes in both lodging and boarding and the hotel charges include consideration for both. A revision under S. 21 of the Act by the company to the Commissioner met the same fate. The company then filed a writ petition for an order quashing the said decision as also the notices issued by the Sales Tax authorities under the Act. The grounds put forward in the writ petition were almost the same which the company had previously urged in its application for declaration.

There was no dispute regarding the facts stated in the writ petition and particularly with regard to the fact that the transac-

tion which a visiting resident enters into with the management is one and indivisible, that the bill charged on him is likewise one and indivisible, that the charges are for each day of stay, and that that being so, the bill was incapable of being split up into separate charges for each of the amenities furnished and availed of by such a visiting resident. The dispute was as to the nature of the transaction and whether such transaction included sale of food stuff supplied at various meals supplied to such a customer.

The High Court, on a consideration of the arguments urged before it and relying mainly upon the decision of this Court in Madras v. Gannon Dunkerley and Co. Ltd.(,'), to the effect that where a transaction is one and indivisible it cannot be split up so as to attract the Sales Tax Act to a part of it , allowed the writ petition. It held that a transaction between a hotelier and his resident visitor did not involve a sale of food when the former supplied meals to the latter as one of the amenities during his residence, and that if there was one inclusive bill, it was incapable of being split up in the absence of any rates for the meals agreed to between the parties as part of the transaction between the two. The High Court also held that the transaction was primarily one for lodging, that the board

supplied by the management amounted to an amenity considered essential in these days in all properly conducted hotels, and that when so supplied, it could not be said to constitute a sale every time a meal was served to such a resident visitor. This appeal, by special leave, is filed against this view of the High Court.

The question in this appeal, it would appear, arises in the present form for the first time. There are, therefore, no previous decisions to guide its determination. It would, however, be helpful to consider certain decisions both of this Court as also of the High Courts, in which different types of transactions which came up before them for consideration in sales tax cases have been dealt with and which might throw some light upon the problem before us. In a case arising under the Assam Sales Tax Act, 1947 though there was no express sale in respect of gunny bags in which rice, an exempted commodity, was supplied to Government, they were held to form assessable turnover. There was, however, in that case evidence that the assessees had charged the Government for those bags (Mohanlal Jogani Rice & Atta Mills V. Assam) (2).

In D. Masanda and Co. v. Commissioner of Sales Tax(3), the question was whether photographic materials imported and (1) [1959] S.CR. 379.

(3) [1957] 8 S.T.C. 370.

(2) [1953] 4 S.T.C. 129.

used in the process of manufacturing photographic work, copies of which were supplied by the assessee to a customer, was a transaction involving sale of those materials. The High Court held that such a transaction did not cease to be a sale merely because the materials were not sold directly in their original form but in another form, forming the, components of the finished product, namely, the copies of the photograph, and that the transaction was not merely the performance of skilled services but the supply of finished goods. This was, however, a border line case. The transaction might well be considered as one of service, during performance of which, a transfer of certain materials, in respect of which there was no contract for sale, either express or implied, may be said to have taken place. An illustration of such a kind is furnished by the case of United Bleachers Ltd. v. Madras(1). In that case the assessee bleached and dyed, calendered, pressed and folded unbleached yarn and cloth manufactured by his custo- mer textile mills. The bills issued by the assessee contained, (a) bleaching charges, and (b) charges for stitching, folding, stamping, baling etc., but did not contain separately charges for the materials used for those' purposes. The Revenue contended that there was transfer of those materials and separately assessed the charges of those materials holding that though the assessee did not specifically deal in those materials, a portion of the profit earned in the business of bleaching and calendering could legitimately be attributed to the packing materials and the transaction involved a sale of them for consideration. On a reference, the High Court held that the case was one of contract of service as distinguished from a sale of a principal commodity, such as rice in Assam case (supra) and salt in Varasuki and Co. v. Madras(1) On the other hand, where a contract is to supply such commodity in a packed condition, it could be inferred, though the contract might not be express that the intention of the parties was to give and accept delivery of the goods in a packed condition and not to take the principal commodity alone so

that in the contract of sale of such a commodity there was implicit the sale of packing material as well. Even in a contract of service such as bleaching and calendering where the goods after such processing are delivered packed a sale of packing, materials is possible, quite apart from the contract of service. The question in such cases would be one of evidence, whether there is such a contract beside the one of service. Where however there are no such distinct contracts and the contract is one and indivisible, the essential part of which is one of service, packing would be part of or incidental to the service, and unless an intention to charge for the materials used in the packing can be spelt out, the Revenue would not be (1) [1960] 9 S.T.C. 278.

(2) [1950] 2 S.T.C. 1.

entitled to split up the contract, estimate approximately the charges for such materials and treat them as chargeable on the mere ground that the transaction involved transfer of packing materials, whose value must have been taken into consideration while fixing charges for the service. Such an implied contract of supply of packing materials was inferred in a contract of service, namely, drying raw tobacco in Krishna and Co. Ltd. v. Andhra Pradesh But the decision in that case did not rest on there being a transfer of packing materials in favour of the customer. There was evidence that such a transfer was for consideration, inasmuch as the amounts charged as remuneration for service also contained charges for the packing materials though such charges were not separately shown in the assessee's accounts. In such a state of evidence it would be possible for the Court to infer a separate implied contract of sale of packing materials and not as part of the service of drying raw tobacco and delivering it in packed condition. The difficulty which the Courts have often to meet with in construing a contract of work and labour, on the one hand, and a contract for sale, on the other, arises because the distinction between the two is very often a fine one. This is particularly so when the contract is a composite one involving both a contract of work and labour and a contract of sale. Nevertheless, the distinction between the two rests on a clear principle. A contract of sale is one whose main object is the transfer of property in, and the delivery of the possession of, a chattel as a chattel to the buyer. Where the principal object of work undertaken by the payee of the price is not the transfer of a 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 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(1).

In Patnaik and Co. v. Orissa (3), a difference of opinion arose because of the fine distinction between the two types of contract. The contract there was for constructing and fixing bus bodies on the chassis supplied by the Orissa Government. The contract, infer alia, provide that the appellants were to construct the bus bodies in the most substantial and workmanlike manner (1) [1956] 7 S.T.C. 26. (2) Halsbury's Laws of England, 3rd Ed. Vol. 34, 6-7.

(3) [1965] 16 S.T.C. 364.

both as regards materials and otherwise in every respect in strict compliance with the specifications and should deliver them to the Governor on or before the dates specified therein. The majority rejected the contention that that was a contract of work and labour and held that the transaction was one of sale. The question primarily was one of construction of the contract, and the majority held that both the agreement and the sale related to one kind of property, namely, the bus bodies. The reason for so. holding was stated to be that it was clear from the contract that the property in the bus bodies did not pass on their being constructed on the chassis, but only when the vehicles including the bus bodies were delivered. Such a contract was unlike a building contract or a contract under which a movable is to be fixed on to another chattel or on the land, where the intention plainly is not to sell that article but to improve the land or the other, chattel and the consideration is not for the transfer of the chattel but for the work and labour done and the materials furnished. The contract in question was to manufacture a bus body and fix it on the chassis supplied and transfer the bus body so constructed for consideration.

In Madras v. Gannon Dunkerley and Co. Ltd.(1) the main question was as regards the vires of the Madras General Sales. Tax Act, 1939, as amended by Madras Act XXV of 1947 which widened the definition of 'sale' by including, inter alia, in it a transfer of property in the goods involved in the execution of a works contract. Under this definition, the Sales Tax authority brought into chargeable turnover the materials used in the constructiOn works carried out by the company. This Court held that a power to enact a law with respect to tax on sale of goods under entry 48 of List 11 in the 1935 Constitution Act must, to be intra vires, be one relating in fact to a sale of goods and that a Provincial Legislature could not, in the purported exercise of its power, tax transactions which were not sales, by enacting that they should be deemed to sales, that to construe a transaction as sale there should be an agreement relating to goods to be supplied by passing title in those goods, and that it was of the essence of such a concept that both the, agreement and the sale should relate to one and the same subject matter. The conclusion arrived at was that in a building contract, even if it were to be disintegrated, there was no passing of title in the materials as movables in favour of the other party of the contract. The contract was one and indivisible, there was no sale of materials, and consequently, there was no question of title to the materials used by the builders passing to the other party to the contract. Even where the thing produced under a contract is movable property, the materials in- (1) [1959] S.C.R. 379.

corporated into it might pass as a movable. But there would be no taxable sale if there was no agreement to sell the materials as such. In arriving at this conclusion, the Court relied upon Appleby v. Myres(1) and the observations of Blackburn, J., at 659-660 of the report to show that thread stitched into a coat which is under repair becomes part of the coat, but in a contract for repairing the coat the parties surely did not enter into an agreement of sale of that thread. In Andhra Pradesh v. Guntur Tobaccos Ltd.(2), the transaction was for redrying tobacco entrusted to the respondent-company by its customers. The process involved the keeping of the moisture content of tobacco leaf at a particular level and for that purpose the leaf had to be packed in bales, in water-proof packing material, as it emerged from the reconditioning plant. The tobacco was then returned to the customer packed in costly packing material. In the, company's charges for redrying there was no separate charge for the value of such packing material. It was held that the redrying process could not be completed without the use of the packing material, that packing formed an

integral part of that process, and that although the redried tobacco was returned together with the packing materials there was no sale of those materials as there was no intention on the part of the parties to enter into any transaction of sale as regards those materials. The mere fact that in such a contract of work or service property in goods which belonged to the party performing service or executing the work stands transferred to the other party is not enough. To constitute a taxable sale, the Revenue has to establish that there was a sale, distinct from the contract of work or service, of the property so passing to the other party.

Thus, in consider whether a transaction falls within the purview of sales tax it becomes necessary at the threshold to determine the nature of the contract involved in such a transaction for the purpose of ascertaining whether it constitutes a contract of sale or a contract of work or service. If it is of the latter kind it obviously would not attract the tax. From the decisions earlier cited it clearly emerges that such determination depends in each case upon its facts and circumstances. Mere passing of property in an article or commodity during the course of the performance of the transaction in question does 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 these materials. in ,every case the Court would have to find out what was the primary (1) [1867] L.R.2C.P.651.

(2) [1965] 2 S.C.R. 167.

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 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. What precisely then is the nature of the transaction and the intention of the parties when- a hotelier receives a guest in his hotel ? Is there in that transaction an intention to sell him food contained in the meals served to him during his stay in the hotel ? It stands to reason that during such stay a well equipped hotel Would have to furnish a number of amenities to render the customer's stay comfortable. In the supply of such amenities do the hotelier and his customer enter into several contracts every time an amenity is furnished ? When a traveler, by plane or by steam-ship, purchases his passage-ticket, the transaction is one for his passage from one place to another. If, in the course of carrying out that transaction, the traveler is supplied with drinks or meals or cigarettes, no one would think that the transaction involves separate sales each time any of those things is supplied. The transaction is essentially one of carrying the passenger to his destination and if in performance of the contract of carriage something is supplied to him, such supply is only incidental to that services, not changing either the pattern or the nature of the contract. Similarly, when clothes are given for washing to a laundry, there is a transaction which essentially involves work or service, and if the laundery man stitches a button to a garment which has fallen off, there is no sale of the button or the thread. A number of such cases involving incidental uses of materials can be cited. none of which can be said to involve a sale as part of the main transaction.

The transaction in question is essentially one and indivisible. namely, one of receiving a customer in the hotel to stay. Even if the transaction is to be disintegrated, there is no question of the supply of meals during such stay constituting a separate contract of sale. since no intention on the part of the parties to sell and purchase food stuff supplied during meal times can be realistically spelt out. No doubt, the customer, during his stay, consumes a number of food stuffs. It may be possible to say that the property in those food stuffs passes from the hotelier to the customer at least to the extent of the food stuffs consumed by him. Even if that be so, mere transfer of property, as aforesaid, is not conclusive and does not render the event of such supply and con-

sumption a sale, since there is no intention to sell and purchase. The transaction essentially is one of service by the hotelier in the performance of which meals are served as part of and incidental to that service, such amenities being regarded as essential in all well conducted modem hotels. The bill prepared by the hotelier is one and indivisible, not being capable by approximation of being split up into one for residence and the other for meals. No doubt, such a bill would be prepared after consideration of the costs of meals, but that would be so for all the other amenities given to the customer. For example, when the customer uses a fan in the room allotted to him, there is surely no sale of electricity, nor a hire of the fan. Such amenities, including that of meals, are part and parcel of service which is in reality the transaction between the parties. Even in the case of restaurants and other such places where customers go to be served with food and drink for immediate consumption at the premises, two conflicting views appear to prevail in the American courts. According to one view, an implied warranty of wholesomeness and fitness for human consumption arises in the case of food served by a public eating place. The transaction, in this view, constitutes a sale within the rules giving rise to such a warranty. The nature of the contract in the sale of food by a restaurant to customers implies a reliance, it is said, on the skill and judgment of the restaurant-keeper to furnish food fit for human consumption. The other view is that such an implied warranty does not arise in such transactions. This view is based on the theory that the transaction does not constitute a sale inasmuch as the proprietor of an eating place does not sell but "utters" provisions, and that it is the service that is predominant, the passing of title being merely incidental(','). The two conflicting views present a choice between liability arising from a contract of implied warranty and for negligence in tort, a choice indicative of a conflict, in the words of Dean Pound, between social interest in the safety of an individual and the individual interest of the supplier of food. The principle accepted in cases where warranty has been spelt out was that even though the transaction is not a sale, the basis for an implied warranty is the justifiable reliance on the judgment or skill of the warrant or and that a sale is not the only transaction in which such a warranty can be implied. The relationship between the dispenser of food and one who consumes it on the premises is one of contractual relationship, a relationship of such a nature that an implied warranty of wholesomeness reflects the reality of the transaction involved and an express obligation understood by the parties in the sense that the customer does, in fact, rely upon such dispenser (1) Corputs Juris Section, Vol 77,1215-1216.

of food for more than the use of due care. (see Cushing v- Rodman(1). A representative case propounding the opposite view is the case of F. W. Woolworth Co. v. Wilson(2), citing Nisky v. Childs Co.(3), wherein the principle accepted was that such cases involved no sales but only service and that the dispenser of food, such as a restaurant or a drug store keeper serving food for

consumption at the premises did not sell and warrant food but uttered and served it and was liable in negligence, the rule in such cases being caveat emptor.

In England, a hotel under the Hotel Proprietors Act, 1956 is an establishment held out by the proprietor as offering food, drink, and if so required, sleeping accommodation, without special contract, to any traveller presenting himself and who appears able and willing to pay a reasonable sum for the services and facilities provided. This definition, which is also the definition, of an inn, still excludes, as formerly, boarding houses, lodging houses and public houses which are merely alehouses and in none of which there is the obligation to receive and entertain guests. An innkeeper, that is to say, in the present days a hotel proprietor, in his capacity as an in keeper is, on the other hand, bound by the common law or the custom of the realm to receive and lodge in his inn all comers who are travellers and to entertain them at reasonable prices without any special or previous contract unless he has some reasonable ground of refusal (4) . The rights and obligations of hotel proprietors are governed by statute which has more or less incorporated the common law. The contract between such a hotel proprietor and a traveller presenting himself to him for lodging is one which is essentially a contract of service and facilities provided at reasonable price.

The transaction between a hotelier and a visitor to his hotel is thus one essentially of service in the performance of which and as part of the amenities incidental to that service, the hotelier serves meals at stated hours. The Revenue, therefore, was not entitled to split up the transaction into two parts, one of service and the other of sale of food stuffs and to split up also the bill charged by the hotelier as consisting of charges for lodging and charges for food stuffs served to him with a view to bring the latter under the Act.

The conclusion arrived at by the High Court is one with which we agree. Consequently, the appeal fails and is dismissed with costs.

V.P.S. Appeal dismissed.

(1) 104 American L.R. 1023; 82 T.R. 2nd Srs. 864, 868. (2) 74 F.R. 2nd Srs. 439.

(3) 103 N.J. Law 464.

(4) Halsbury's Laws of England, 3rd Ed., Vol. 21, 445-446.