

State Of Gujarat (Commissioner Of Sales ... vs M/S. Variety Body Builders on 26 April, 1976

Equivalent citations: 1976 AIR 2108, 1976 SCR 131, AIR 1976 SUPREME COURT 2108, 1976 3 SCC 500, 1976 TAX. L. R. 1928, 1976 7 STA 103, 1976 UPTC 548, 1976 SCC (TAX) 338, 38 STC 176

Author: P.K. Goswami

Bench: P.K. Goswami, Hans Raj Khanna

PETITIONER:

STATE OF GUJARAT (COMMISSIONER OF SALES TAX, AHMEDABAD)

Vs.

RESPONDENT:

M/S. VARIETY BODY BUILDERS

DATE OF JUDGMENT 26/04/1976

BENCH:

GOSWAMI, P.K.

BENCH:

GOSWAMI, P.K.

KHANNA, HANS RAJ

CITATION:

1976 AIR 2108 1976 SCR 131

1976 SCC (3) 500

CITATOR INFO :

RF 1977 SC 197 (6)

D 1977 SC 1537 (36)

RF 1984 SC 744 (25)

ACT:

Bombay sales Tax Act-Contracts for sale of goods and'
work contracts-Tests for deciding works contracts.

HEADNOTE:

The respondents entered into three written contracts with the Railways for the construction of railway coaches according to the design provided by them, on the under-frames supplied by the Railways. The contractor was required to make security deposit for the due fulfilment and completion of the contract which in the event of breach, was

liable to be forfeited and confiscated. Supply including manufacture, assembly, fitting, fixing and finishing of all constructional materials and fittings including timber was by the contractor. The Railways were required to supply electric fitting; Railway staff would work in association with the contractor's staff for installation of electrical equipment; Railway site was provided for the work and for no other purpose. The Railways had the right of inspection at all times and of maintenance of control over standard of workmanship requiring rectification of work and replacement of materials when ordered.

The Sales Tax officer, holding that the transactions were sales, charged them to tax. The respondents' appeal to the Assistant Commissioner of Sales Tax. as also a revision application before the Deputy Commissioner of Sales Tax and the Tribunal were unsuccessful. On reference, the High Court held that the contracts were works contracts.

Dismissing the appeals,

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HELD: (1) From the totality of the material terms and conditions in the agreement it is not possible to hold that the parties intended that the contractor transferred the property in the railway coaches to the Railways after its completion. The essence of the contract or the reality of the transaction as a whole indicates that the contract was a contract for work and labour. [139 F]

(2) The predominant element in the contract was the work and labour aspect and supply of materials was only accessory although the materials were definitely necessary for the execution of the work. The term that if the contractor died, his legal representatives would have no interest whatsoever in the agreement save in respect of a claim for the money due and for the return of the security deposit, clearly showed that the contract was a works contract. The unfinished work became the property of the Railways and the legal representatives were entitled only to claim for the value of the work done. In the event of the death of the contractor. there was no provision for the handing over of the unfinished coaches by the legal representatives to the Railways. In such an event the Railways automatically became the owner of the unfinished property. [140E-G]

T. V. Sundaram Iyengar & Sons v. The State of Madras (1975) 35 STC 24 and Patnaik and Company v. The State of Orissa, (1965) 16 STC 364, distinguished .

Commissioner of Commercial Taxes, Mysore v. Hindustan Aeronautics Ltd. (1972) 29 STC 438; State of Gujarat v. Kailash Engineering Co. (1967) 19 STC 13; State of Madras V. Richardson & Cruddas Ltd., (1968) 21 STC 245; Government of Andhra Pradesh: v. Guntur Tobaccos Ltd., (1965) 16 240 and 132

Commissioner of Sale Tax, M.P. v. Purshottam Premji, (1970) 16 STC 38, followed.

JUDGMENT :

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 1492 and 1493 of 1971.

Appeals by Special Leave from the judgment and order dated the 7th and 9th November, 1970 of the Gujarat High Court at Ahmedabad in Sales Tax Reference No. 5 of 1969 S. T. Desai and M. N. Shroff; for the Appellants. V. S. Desai, Vimal Dave, Ram Phal, Ganpat Rai, (Mrs.) Sheil Sethi and (Miss) Kailash Mehta: for Respondent.

The Judgment of the Court was delivered by GOSWAMI, J.-This judgment will govern both the appeals. These two appeals by special leave are directed against the common judgment of the Gujarat High Court in Sales Tax Reference No. 5 of 1969 relating to two periods, namely, (1) from 24th October 1955 to 31st March, 1956 and (2) from 1st April, 1956 to 31st March, 1957.

The Tribunal had earlier delivered a common judgment in two revision applications No. 121 and 122 of 1961 and made a composite reference to the High Court under the Bombay Sales Tax Act stating the following question for answer "Whether on the facts and in the circumstances of the case the three contracts for construction of coaches on the under-frames supplied by the Railway Administration, the contracts containing similar terms were contracts for sale of goods and not works contracts?" the facts appearing from the statement of case are as follows :-

The facts appearing from the statement of case are as follows:-

The respondent, M/s. Variety Body Builders, Baroda, entered into three contracts with the Western Railway Administration for construction of railway coaches on the under-frames supplied by the said railway Administration. The three contracts were reduced into writing and contained the terms and conditions under which the contracts were to be performed. The first agreement dated September 17, 1954 was for construction of 25 N.G. coaches. The second agreement dated July 11, 1955, was in respect of construction of 6 T.L.R. coaches. The third agreement dated January 14, 1956, was for construction of 25 N.G. coaches. The Sales Tax officer held that the transactions relating to the construction of the said coaches were transactions of sales of these coaches by the respondent. On that basis the respondent was assessed at Rs. 2,72,803/8/- for the first period and at Rs. 3,82,820/- for the second period. The respondent's appeals to the Assistant Commissioner of Sales Tax were unsuccessful. The revision applications of the respondent before the Deputy Commissioner of Sales Tax and later before the Tribunal met with the same fate. The Tribunal, however, referred the question of law as set out earlier to the High Court and the High Court answered the same in favour of the respondent and hence these appeals by special leave.

The only question with which we are concerned in these appeals is whether the contracts entered into by the respondent with the Railway Administration for construction of railway coaches are contracts for sale of goods or works contracts.

Since the three contracts are substantially similar the High Court and the authorities below took note of the recitals of the third contract dated January 14, 1965, and we will also take the same into consideration.

Mr. S. T. Desai appearing on behalf of the appellant and Mr. Ram Phal appearing on behalf of the respondent took us through all the clauses of the agreement and pressed their rival viewpoints. Mr. Desai submits that from the totality of the conditions laid down in the agreement the contract is one for sale, being transfer of property in the railway bogies as a unit of goods and, therefore, the transaction is liable to Sales Tax. Mr. Ram Phal on the other hand, relying on the same terms and conditions in the contract, submits that it is a pure and simple works contract and not a contract for sale of goods.

It is well-settled that when there is a written contract it will be necessary for the Court to find out therefrom the intention of the parties executing the particular contract. That intention has to be primarily gathered from the terms and conditions which are agreed Upon by the parties. We will, therefore, immediately turn our attention to the agreement in question.

The preamble of the agreement shows that it is all agreement entered into between the Railway Administration and the respondent described as "the contractor".

The first clause describes the "nature of work '. It states "the contractor hereby agrees to undertake the building of 25 Nos. Narrow Gauge Third Class Bogie Coaches . on I.R.S. under-frames to be provided by the Western Railway to the design indicated at the rate of Rs. 19141/- only. the said work of building bodies will be carried out by the contractor in the area of premises of the Western Railway Workshop at Pratapnagar, Baroda or at such other location as may be mutually agreed upon". It also appears in the second part of clause (1) that each employee working under the contractor "for this work" will have a gate pass issued in his favour on a deposit of Rs. 5/- for each gate pass. It is also stated in the second part of clause (1) that "all gate passes issued to the contractor are returnable within a week of termination of the contract".

Clause (3) provides for security deposit "for the due fulfilment and completion of this contract". Clause (3) further says that the security deposit will be retained by the Administration "for the due performance of and observance of the terms and conditions of this contract"

and the same is liable to forfeiture "in the event of any breach on the part of the contractor of the terms and condition of this contract".

Clause (4) provides for deduction of 10 per cent from each progressive bill submitted by the contractor and the security deposit shall be refunded to the contractor "only on successful completion or termination of this contract".

Clause (9) provides that constructional material and fittings must be supplied by the contractor which should be ordinarily as per the Railway's standard. "The provision of the hand-brake arrangements in the Guards compartment will be done by the Railway".

Clause (11) says that the contractor is required to supply carpentry labour for equipping coaches with electric lights, fans switches and regulators. The appropriate Railway staff will work in association with the contractor's staff to an extent required for the installation of electrical equipment and all electrical fittings will be supplied by the Railway. Clause (13) provides for removal of rubbish, debris or temporary structure at contractor's own cost on the expiration of the contract in the event of earlier termination of the contract.

Clause (14) says that the contractor shall provide all essential equipment, tools and plant for satisfactory execution of the work. By clause (15) "The contractor is required to deliver a minimum number of two coaches per month starting from the expiry of six months from the date of signing this agreement".

Clause (16) says that "in the event of the contractor failing to carry out and complete the work within the period stipulated as herein before provided the contractor shall be liable to pay to the Administration by way of ascertained and liquidated damages a sum equivalent one per cent of the value of the work arrears for each and every month or part of a month by which the contractor shall be in default upto a maximum of 20% of the value of the contract but the contractor shall not by reason of the recovery by any means by the Administration of such damages be relieved from his other obligations and liabilities under the contract. The recoveries may, be made from the security deposit or running bills or any sums due to the contractor" Clause (17) may be set out:

"The contractor shall be responsible for the safe custody of carriages under construction as well as of the material supplied by the Administration for the purpose. till the material or the carriages are taken over by the Administration. Dates of completion of the building work will be deemed to be the respective dates on which the Chief Mechanical Engineer or his authorised representative certifies each coach as having been built to his satisfaction"

Clause (18) provides that the Railway authorities are free. to inspect the work. "The Chief Mechanical Engineer or his authorised representative will be the sole judge to determine whether the standard of workmanship is according to the Railway's requirement and . whether any part or parts of the carriage require replacement due

to bad or indifferent workmanship."

Clause (19) provides that "the contractor shall not under any circumstances sub-let this contract either in part or in full without the previous consent in writing of the Chief Mechanical Engineer...."

Clause (20) provides for termination of the contract by giving one month's notice to the contractor "in the event of the contractor failing to execute the contractual duties with diligence, competence and expedition".

Clause (21) provides for the duration of the contract which in the normal course be in force for a period of 16 months from the date of signing of the same. There is also provision therein for allowing such additional time as the Administration may consider to be justified by the circumstances of the case.

Clause (22) provides for contractor's liability for damages in the event of failure to execute the work with diligence and expedition or in complying with any orders given by the Chief Mechanical Engineer or his authorised representative from time to time.

Clause (23) provides that "the contractor will present bill through District Mechanical Engineer, Partapnagar for payment on the basis of certified completion in terms of coaches completed and handed over to him".

Clause (25) states that "if during, the continuance of this agreement the contractor shall die or be adjudicated insolvent or if the contractor being a company shall enter into liquidation whether voluntary or compulsory.... this agreement shall absolutely cease and determine and the legal representative of the contractor or/his assignee in insolvency or (in the case of a company) the liquidators shall have no interest whatsoever under this agreement other than in respect of a claim for the money due for the work done under this contract and for the return of the security deposit subject to the provisions herein contained Clause (30) makes provision for fair wages to the labourers engaged by the contractor.

Clause (31) says that the contractor shall have to abide by safety rules.

Clause (32) provides that the contractor shall not employ children under 12 years of age.

Clause (33) says that the contractor shall comply with the provisions of the Payment of Wages Act and the rules made thereunder.

Clause (34) provides that "the contractor shall pay a nominal rent of Re. 1/- per mensem for the area which may be allotted to him for the purposes of building the coaches".

Clause (35) provides for water and conservancy charges to be paid by the contractor
Clause (36) provides for supply of electrical energy to the contractor on payment.

Clause (38) says that certain conditions of 'Tender shall be deemed to. be incorporated in the agreement. These tenders are, however. not before us.

Before we proceed further we may. Observe that for the meaning of` the expression "sale of goods" we will have to derive assistance for the legal connotation of those words from the provisions of the Sale of Goods Act? 1930. As has been held by a Constitution Bench of this Court in the State of Madras v Gannon Dunkerly & Co. (Madras Ltd') "that, both under the common law and the statute law relating to sale of goods in England and in India, to constitute a transection of sale there should be an agreement, express or implied, relating to goods to be completed by passing of title in those goods. It is of the essence of this concept that both the agreement and the sale should relate to the same subject matter on the true interpretation. Of the expression 'sale of Goods' there must be an agreement between the parties for the sale of the very goods in which eventually property passes".

Bearing in mind the above legal concept of the sale of goods we will have to consider whether the terms of the contract, which we have set out earlier, can be construed in favour of a contract for sale of the railway Coach which were constructed by the respondent.

Mr.Desai is right when he submits that the word contractor appearing." in the preamble is not decisive on the question. As we have stated earlier the entire document with all the relevant and material clauses throwing light upon the real intention of The parties and the real nature of the transaction must be given due weight in coming to a conclusion one way or the other.

The following material features in the agreement immediately draw our attention so far as may be relevant in considering whether the contract is one of sale or contract of work and labour:

- (i) Undertaking by the Contractor work of building bodies on under-frames supplied. by Railway, according to design provided by a Railway (Cl. 1a).
- (2) Security deposit by contractor for due fulfilment and completion of the contract (Clause 3).
- (3) Confiscation or forfeiture of security deposit in the event of any breach by the contractor of terms and conditions of the contract (Clause 3).

(1) 9 S.T.C. 353.

(4) Deduction of 10% from each progressive bill of contractor to cover any likely loss, damage etc. (Clause 4) .

(5) Import licence and foreign exchange arrangements by contractor (Clause 6). (6) Supply, including manufacture, assembly, fitting, fixing and finishing, of all constructional materials and fittings including timber by the contractor (Clause

9).

(7) Provision of hand-brake arrangements in the Guard's compartment by Railway (Clause 9). (8) Supply of electrical fittings by Railway (Cl.

11).

(9) Railway staff working in association with contractor's staff for installation of electrical equipment. (Clause 11) .

(10) Use of Railway site provided for the work and for no other purpose. (Clause 12).

(11) Removal of rubbish, debris or temporary structure at contractor's own cost. (Clause-

13).

(12) Earlier termination of contract also envisaged. (Clause 13) .

(13) Essential equipment to be provided by contractor. for execution of the work. (Clause 14).

(14) At least two coaches to be delivered per month after expiry of six months from the signing of the contract. (Clause. 15) . (15) Contractor's liability to pay liquidated damages in the event of failure to carry out and complete the work within stipulated period. (Clause 16).

(16) Provision for running bills. (Clause 16). (17) Responsibility of contractor for safe custody of carriages under construction as well as of the materials supplied by Railway till they are taken over by Railway. (Clause 17) . (18) Date of completion of binding work on the date of certification by Railway's representative to his satisfaction. (Clause

17).

(19) Right of inspection of the work by Railway at all times and of maintenance of control over standard of workmanship requiring rectification of work and re

placement of materials when ordered. (Clause 18). (20) No subletting of contract wholly or in part without the previous written consent of Chief Mechanical Engineer. (Clause 19).

(21) Authority to terminate contract by one month's notice in the event of the contractor's lack; of diligence, competence and expedition in executing contractual duties. (Clause 20).

(22) Any losses incurred by Railway and occasioned through failure of contractor to company with contractual obligations will be, deducted from security deposit. (Clause 20).

(23) Contract to be in force for 16 months unless extended on reasonable ground subject to waiver of loss or damage by Railway. (Clause

21).

(24) Contractor's liability for damage for failure to execute the work with diligence and expedition or to comply with orders of Railway Administration. (Clause 22). (25) Bills to be submitted by contractor on the basis of certified completion in terms of coaches completed. and handed over to the District Mechanical Engineer. (Clause 23).

(26) Contractor, his heirs, executors or
administrators to indemnify Railway

Administration, from and against all claims including claims under the Workmen's Compensation Act, Payment of Wages Act, Factory Act, etc. (Clause 24).

(27) In case of contractor's insolvency of death agreement shall absolutely cease and determine and the legal representatives of the contractor or the liquidators shall have no interest whatsoever under the agreement other than in respect of a claim for the money due for the for the work done under the contract and for the return of the security deposit subject to the provisions of the agreement (Clause 25) (28) Arbitration clause in the event of any dispute in connection with the contract. (Clause 28).

(29) Contractor to pay fair wages to labourers employed. (Clause 30).

(30) Contractor to abide by safety rules. (Clause

31).

(31) No employment of children under 15 years by contractor. (Clause 32).

(32) Responsibility of contractor under Payment of Wages Act. (Clause 33).

(33) Nominal rent of Re. 1/- per month for occupation of the Railway area for the purpose of building the coaches. (Clause 34).

(34) Contractor to pay to the Railway conservancy-

charges and for supply of electrical energy. (Clauses 35 and 36) .

Reading the agreement as a whole and bearing in mind the above features, is it possible to conclude that what is contracted is to sell the railway coach constructed by the contractor to the Railway ? In that event the railway coach when constructed by the contractor to the Railway? In that event the railway coach when constructed must be as a unit the property of the contractor. But has the assessee alone contributed to the result ? There were materials supplied by railway. There was labour supplied by Railway. It is different from the case of a bus-body fitted into the chassis with all materials supplied by the contractor and all skill and labour contributed by the contractor.

A contracts to sell a certain article to must be the owner of the article and B must be at the receiving end having no interest in the article prior to passing of. the property therein. Is the contractor owner of the railway coach when It was completed? the answer must be in the negative. Apart from the fact that the under frame is not of the contractor (which may in a given case be a neutral factor) not all his materials nor all his labour and skill contributed to the coach. The railway supplied men and materials although the substantial portion is for the contractor. This goes to bring out the intention of the parties in they were intent upon performance of the work the manner of the work the quality of the materials used in the work and upon completion of the work in the most efficient way resulting ultimately in a completed coach. The intention of the parties at the time of entering upon the contract was not to transfer any completed railway coach by the contractor to the Railway. The end-product, being the railway coach, is the result of work, labour and materials of the contractor as well as of the railway as also of the latter's constant supervision and control.

From the totality of the material terms, and conditions in the agreement set out above, it is not possible to hold that the parties intend that the contractor transfers the property in the railway. coach to the Railway after its completion. The essence or the contract or the reality of the transaction as a whole indicates that. the contract is a contractor work and labour.

Mr. Desai submits that clauses 15 ,17 and 23 in particular make it absolutely clear that the property in a unit in the shape of a completed railway coach passes only on handing over of the same to the District Mechanical Engineer after the same has been complete and the specified authority certifies the coach as having been built to his satisfaction. He particularly draws our attention to the word " deliver" in clause 15 and the words " taken over" in clause 17 and " handed over' in clause 23 . According to Mr. Desai these three clauses clearly disclose the intention of the parties that a railway coach as a unit after its completion, is contracted to the handed over by the respondent to the Administrating. The contract, therefore, that is entered in terms of the agreement is one of contract of sale of good and not a works contract says Mr. Desai.

Although the submission on the first blush is attractive and appears to be of some force, it will not bear close scrutiny. Perusal of clause 17 itself upon which great reliance has been placed by Mr. Desai shows that "dates of completion of the building work will be deemed to be the respective dates on which the Chief Mechanical Engineer or his authorised representative certifies each coach as having been built to his satisfaction". It is also apparent from the contract that the contractor has to complete two coaches each month after expiry of the first six months of the contract. It is also clear that the contractor has to get payment by submitting running bill; on completion of the coaches every month. In the above context when clause 17 refers to a fictional completion of the building work on the date of certificate by the Chief Mechanical Engineer or his authorised representative there is no requirement for a further ritual of delivery or handing over to which reference made in clauses 15 and 23 respectively. The work is undertaken in the Railway premises. People are admitted on gate passes for building the railway coaches on the under frames supplied by the Administration. Some materials such as electrical goods, were supplied by the Railway. Besides, there is cooperation of Railway's labour with the contractor's labour in construction of the coach the hand-rake arrangements in the Guard's compartment are also agreed to be done by the Railway. Regular inspection of the contractor's work is carried out at all times and instructions to rectify defects have to be carried out immediately. Unless a close inspection of the work is carried out from day to day, it may be difficult to rectify defects after the work progresses. All this would go to show that the predominant element in the contract is the work and labour aspect and supply of materials is only accessory although the materials were definitely necessary for execution of the work. There is yet another important clause which throws a flood of light on this issue. Clause 25 deals with the contractor's insolvency or death. It is agreed between the parties, as per clause 25, that if the contractor dies, his legal representatives shall have no interest whatsoever in this agreement save in respect of a claim for the money due for the work already done under the contract and for the return of the security deposit subject to other provisions. This would also clearly show that the contract is a works contract and unfinished work would become the property of Railway and the legal representatives will be entitled only to claim for the value of the work done. There is no provision in the agreement in that event for handing over of the unfinished railway coach by the respondent or his legal representatives or assignees to the Railway Administration. The Railway Administration automatically becomes the owner of the unfinished property which was lying in its premises. This is another reason why no exaggerated importance can be assigned to the words "delivery" and "handed over" in clauses 15 and 23 respectively as urged by Mr. Desai.

This is therefore, not a contract where it can be said that there is an agreement to supply a completed railway coach which when produced will be the property of the contractor. Along with those of the contractor's materials and labour of Railway are also required to be !THIS PAGE IS NOT WELL SCANNED the value of the materials is conclusive although such matters may be taken into consideration in determining in the circumstance of a particular case whether the contract is in substance one for work and labour or one for the sale of the chattel".

It can be treated as well-settled that there is no standard formula by which one can distinguish a contract of sale from a contract for work and labour. There may be many common features in both the contracts, some neutral in particular context and yet certain clinching terms in a given case may fortify a conclusion one way or the other. It will depend upon the facts and circumstances of each

case. The question is not always easy and has for all time vexed jurists all over.

In Commissioner of Commercial Taxes, Mysore v. Hindustan Aeronautical Ltd.(1) a bench of five Judges of this Court to which my learned brother was a party had to deal with a works contract With regard to manufacture and supply of railway coaches. This Court after consideration of all the facts In that case and the salient features of the contract came to the conclusion that it was a pure works contract with Court further held that the case was in line with the decision in State of Gujarat v. Kailash Engineering Co.(2). Indeed Kailash Engineering's case (supra) was relied upon by the respondent before us. It was held in that case that as the terms of the contract indicate that the respondent was not to be the owner of the ready railway coaches and that the property in those bodies vested in the Railway even during the process of construction, the transaction was clearly a works contract and did not involve any sale.

Mr. Desai strenuously contends that clause (29) of the contract in Kailash Engineering's case (supra) distinguishes that case from the case at hand Clause 29 was a specific provision for certain contingencies in case of loss theft or destruction of the materials or plant. This special provision was to the effect that the liability of the contractor was not to be diminished in any way notwithstanding the fact that the materials and plant became the property of the Railway as soon as they were brought to the Railway premises. We however do not see much point in this submission In that case since the plant and materials were brought on the site when the contract were to be constructed the ownership is said to have vested in the Railway. In the present case also substantially the same result follows. The agreement here shows that when the contractor dies his legal representatives or assignees have no interest in the contract which terminates and they will be only paid for the value of the work done. This would mean the property constructed upto that point was impliedly agreed upon to be vested in the Railway as and when materials were worked into the chassis. This is the implication of the agreement and not merely on the theory of accretion. At any rate the passing of property in this case is ancillary to the primary contract for execution of the work.

(1) (1972) 29 S. T. C. 438. (2) (1967) 19 S. T. C. 13 In the State of Madras v. Richardson & Cruddas Ltd(1) this Court was dealing with a contract for fabrication and installation of steel structure for sugar factory in the State of Mysore. In the course of the judgment this Court observed as follows:-

It had therefore to be established that the consideration was received under a contract to sell specific goods for a price and property in the goods contracted to be sold passed to the society when the goods were delivered in pursuance of the contract. If the contract was for completing the stipulated work and for that purpose to use materials belonging to the respondents in the performance or execution of the contract as accessory to 'work and labour' the contract must be regarded as a works contract and not a contract for sale even if the property in the goods ultimately passes as a result of the contract .

The Court further observed at page 252 as follows . The contract being one for supplying for an inclusive price a specially designed fabricated unit to be assembled and installed by specially trained technicians on the premises of the customer it was

not a contract for sale of a unit or different parts of the unit is special good but a works contract. In the Government of Andhra Pradesh. v. Guntur Tabaccos Ltd.(2) this Court dealing with an identical issue observed as follows at page 255:

The fact that in the execution of a contract for work some materials are used and property in the goods so used passes to the other party the contractor undertaking to do the work will not necessarily be deemed on that account to sell the materials. Again at page 258:

Whether a contract for service or for execution of work invokes a taxable sale of goods must be decided on the facts and circumstances of the case. The burden in such a case lies upon the taxing authorities to show that there was a taxable sale and that burden is not discharged by merely showing that property in goods which belonged to the party performing service or executing the contract stands transferred to the other party.

This Court in Commissioner of Sales Tax, M.P. v. Purshottam Premji(3) dealt with the difference between a contract of work or service and a contract for sale of goods in the following passage:

The primary difference between a contract for work or service and a contract for sale of goods is that in the former (1) (1968) 21 S. T. C. 215. (2) (1965) 16 S. T. C. 240.

(3) (1970) 26 S. T. C. 38.

there is in the person performing work or rendering service no property in the thing produced as a whole notwithstanding that a part or even the whole of 'the material' used by him may have 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 produced it at some time before delivery and the property therein passes only under the contract relating thereto to the other party for price. Mere transfer of property in goods used in, the performance of a contract is not sufficient; to constitute a sale there must be an agreement express or implied relating to the sale of goods and completion of the agreement by passing of title in the very goods contract to be sold. Ultimately the true effect of an ascertainment made pursuant to a contract has to be judged not by an artificial rule that the ascertainment may be presumed to have become by virtue of affixing to a chattel part of that chattel but from the intention of the parties to the contract.

We are fortified by all the above decisions of this Court in our conclusion in favour of the assessee.

We are therefore clearly of opinion that the contract in the present case is one of works contract and the High Court is not in answering the question in favour of the assessee. The appeals therefore fail and are dismissed with costs. One hearing fee for counsel.

P.B.R.

Appeals dismissed.