Supreme Court of India
Hindustan Aeronautics Limited vs State Of Karnataka on 16 December, 1983
Equivalent citations: 1984 AIR 744, 1984 SCR (2) 248
Author: S Mukharji
Bench: Mukharji, Sabyasachi (J)

PETITIONER:
HINDUSTAN AERONAUTICS LIMITED

Vs.

RESPONDENT:
STATE OF KARNATAKA

DATE OF JUDGMENT16/12/1983

BENCH:
MUKHARJI, SABYASACHI (J)
BENCH:
MUKHARJI, SABYASACHI (J)
TULZAPURKAR, V.D.
PATHAK, R.S.

CITATION:
1984 AIR 744 1984 SCR (2) 248
1984 SCC (1) 706 1983 SCALE (2)1090
CITATOR INFO :
R 1989 SC 962 (24,25)

ACT:
Sales Tax Law-Karnataka Sales Tax Act-Exigibility to tax-Contracts for servicing reassembling I.A.F Planes which includes supply of materials by the "contractor" if the "owner" did not supply them, and only if the owners Dy. Financial Advisor authorises them-Whether the contracts in question were sales contract or were part of one contract of executing the works contracts not attracting Sales Tax.

HEADNOTE:
The appellant is a manufacturer of spare parts and accessories of various aircrafts and has also established facilities for assembling, servicing, repairing, overhauling of aircrafts, their instruments and accessories. The job done by the appellants were servicing, assembling, repairing and overhauling "Airforce planes" entrusted to them. These works were done on the basis of contracts or job orders issued from time to time. While on contract directly concerning the repairing servicing and overhauling of a specified aircraft, instrument or accessory in which the spare parts had been used in the execution of service

contracts was on record, there was an agreement dated 23rd June 1951 described as "contract for the flight servicing and maintenance of the H.Q. Training Command I.A.F Communication Flight, "wherein the President of India has been described as the "owner" and the appellant as the contractor. The agreement provided that the works would be carried out by the contractor and payment made by the owner "at cost plus 10% profit basis or at the contractor's standard fixed rates, where applicable. Under clause 3, the owner will provide the contractor with all the necessary spares and materials (other than expendable materials such as paints, dopes, cleaning rages etc.) and where however there was delay in the supply of the essential items, the contractor will provide those whenever possible by purchase or manufacture within expenditure authorised by the owner's Deputy Financial Adviser at the contractor's request from time to time.

The Sales Tax authorities sought to tax that portion of the total turnover of the appellant for the relevant years in question which was equivalent to the money value of the spare parts of the air-crafts which it had supplied to the Indian Air Force as a result of their use in the process of repairing, servicing and overhauling of the aircrafts, their instruments and accessories which were sent to the appellant for the said purpose. The Appellate Tribunal and the High Court held these to be composite contracts. The High Court was of the view that sale of spare parts was clearly in contemplation of the parties and the documents in question constituted composite contracts, one relating to the remuneration for the services rendered and the other for the sale of goods. Hence the appeals by special leave.

Allowing the appeal, the Court

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HELD : 1:1 It is well settled that the difference between contract of

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service and contract for sale of goods, is, that in the former, there is in the person performing work or rendering service no property in the things produced as a whole notwithstanding that a part or even the whole of materials used by him had been his property. In the case of a contract for sale, the thing produced as a whole has individual existence as the sole property of the party who produced it some time before delivery and the property therein passed only under the contract relating thereto to the other party for price. [257 D-E]

1:2 It is necessary, therefore, in every case for the courts to find out whether in essence there was any agreement to work for a stipulated consideration. If that was so, it would not be a sale because even if some sale may be extracted that would not affect the true position. Merely showing in the bills or invoices, the value of materials used in the job would not render the contract as one of

sales. The nature and type of the transactions are important and determinative factor. What is necessary to find out, is the dominant object. [257 F-G]

1:3 A contract of sale of goods must be distinguished from a contract for work and labour. The distinction is often a fine one. A contract of sale is a contract whose main object is the transfer of the property in, and the delivery of the possession of, a chattel as a chattel to the buyer. Where however the main object of work undertaken by the payee of the price was not the transfer of chattel qua chattel, the contract is one of work and labour. The test, is, whether or not the work and labour bestowed end in anything that can properly become the subject of sale; neither the ownership of the materials, nor the value of the skill and labour as compared with the value of the materials, is conclusive, although such matters may be taken into consideration in determining, in the circumstances of a particular case, whether the contract was in substance one for work and labour and one for the sale of a chattel. [258 G-H; 259 A-B]

2:1. The tests indicated in several decisions of this Court to distinguish between a contract for sale and a contract for work and labour were not exhaustive and did not lay down any rigid or inflexible rule applicable alike to all transactions. These did not give any magic formula by the application of which one could say in every case whether a contract was a contract for sale or a contract for work and labour. These merely focussed on one or the other aspect of the transaction and afforded some guidance in determining the question, but basically and primarily, whether a particular contract was one for sale of goods or for work and labour depended upon the main object of the parties gathered from the terms of the contract, the circumstances of the transactions and the custom of the trade. [259 C-D]

Sentinel Rolling Shutters & Engineering Company Pvt. Ltd. v. The Commissioner of Sales Tax, 42 Sales Tax Cases 409; referred to.

2:2 It cannot be said as a general proposition that in every case of works contract, there is necessarily implied the sale of the component parts which go to make up the repair. That question would naturally depend upon the facts and circumstances of each case. Mere passing of property in an article or commodity during the course of performance of the transaction in question does not render the transaction to be transaction of sale. Even in a contract purely of works or service, it is possible that articles may have to be used by the person executing the work, and property in such articles or materials may pass to the other party. That would not necessarily convert the contract into one of sale of those materials.

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In every case, the Court would have to find out what was the primarily object of the transaction and the intention of the

parties parties while entering into it. It may in some cases be that even while entering into the contract of work or even service, parties might enter into separate agreements, one of work and service and the other of sale and purchase of materials to be used in the course of executing the work or performing the service. But, then in such cases the transaction would not be one and indivisible, but would fall into two separate agreements, one of work or service and the other of sale. 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 of course pre-supposed capacity to contract, that it must be supported by money consideration that as a result of transaction, the property must actually pass in the goods. Unless all these elements were present, there would be no sale. [260 C-H]

State of Himachal Pradesh & Others v. Associate Hotels of India Ltd, 29 Sales Tax Cases 474; State of Madras v. Gannon Dunkerley & Co., Madras Ltd, 9 Sales Tax Cases 353 [1959] S.C.R. 379; Robinson v. Graves, [1935] 1 K.B. 579; referred to.

2:3 Whether a given transaction is a works contract pure and simple or it involves sale of goods also is of course a mixed question of law and fact depending upon the facts of each case. It is true, that it cannot be said that parties did not contemplate and apply their minds to the question of spare parts and other materials necessary for the execution of the works. [262 F-H]

3:1 The High Court of Karnataka was not right in its conclusion on the taxability of the turnover of the spare parts and materials supplied in execution of appellant's job works. [266 D]

3:2 It is clear from clause 3 that it was the expenditure to be incurred for providing the materials for the jobs to be done were subject to the approval and sanction of the Government. The expressions "All items provisioned by the contractor will be the property of the owner and will be issued on contract loan." are significant and indicative of the real intention of the parties. [263 F]

3:3 "The expression "contract loan" is not an expression of art. It has no generally accepted meaning in dictionary, legal or otherwise, as such. There is no meaning of this expression provided in the contract between the parties or in the correspondence between the parties in connection with the execution of the works. But these expressions indicate that the `provisions' which would be required for carrying out the contracts, which could not be anticipated before the beginning or in execution of the contracts will be the property of the owner i.e. that though gathered and procured or manufactured by the contractor, the contractor will have no property in the said goods or spares or materials and would not be able to either dispose of or deal with those but these will be treated for the purpose of

this contract to be the property of the owner and, then the contract stipulated that on fictional basis these will be lent out to the contractor for being used in the execution of the jobs entrusted to the contractor. [263 G-H; 264 A]

3:4 The idea was that the moment these spares and materials were required for the jobs entrusted to the appellant and there was delay in supplying these spare parts and materials, the contractor would be free to procure or obtain these spares

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and materials either by manufacturing or by purchase from the market local or foreign, these goods to be identified and would be treated by the operation of the contract to be the goods of the owner of the planes. It is true that in order to be given out on loan by the 'owner' to the contractor, the owner must have property in the spares and materials in question. But the 'owner' i.e. the Government in the context of 1951 agreement, and it is indisputable that the transactions in this case were done on the basis of the agreement of 1951, became the owner of the property the moment the goods were identified and there was delay or inability on the part of the government in supplying spares and materials. [264 C-F]

In the instant case, the property in the materials which are used in the execution of the jobs entrusted to the contractor became the property of the Government before it was used. Further there was no possibility of any other materials to be used for the contract. [265 H; 266 A]

Commissioner of Commercial Taxes, Mysore v. Hindustan Aeronautics Ltd, [1972] 2 SCR 927; Ram Singh & Sons Engineering Works v Commissioner of Sales Tax, U.P. 43 Sales Tax Cases 195; followed.

State of Gujarat v Variety Buildings, 38 Sales Tax Cases 176 distinguished.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 1386-91 of 1977 Appeals by Special leave Petitions from the Judgment and Order dated 1st December, 1976 of the Karnataka High Court in S.T.R.P. Nos. 24-29 of 1975.) S.T. Desai, S.J. Chandran & Mrs. A.K. Verma for the Appellant.

S.S. Javali and Swaraj Kaushal for the Respondent. The Judgement of the Court was delivered by: SABYASACHI MUKHARJI, J. These appeals by special leave are from the judgment and decision of the High Court of Karnataka dated 1st December, 1976 involving the questions of assessability of the appellant Sales Tax, Central as well as State. While granting leave, this Court excluded the question whether the sales effected in the canteen by the appellant were assessable to Sales Tax. By the impugned judgment, the High Court of Karnataka had dismissed several Writ Petitions against several orders being S.T.R.Ps. Nos. 28, 27 and 29 of 1985 under the Karnataka Sales Tax Act, for the year 1960-61, 1961-62 and 1962-63 respectively and also three others namely; S.T.R. Ps. Nos. 25, 26

and 24 of 1975, under the Central Sale Tax Act for the corresponding years respectively, at the instance of the present appellant. These involved common questions of law and facts and were disposed of by a common judgment. We also propose to do the same. As stated, one of the questions was about the taxability of the turn-over in respect of the sales made in the canteen of the appellant company. This question is not before us. Before the Tribunal, the two following questions relevant for appeals before us were agitated, namely;

> (i) Whether the turnover apportioned from the job works undertaken by the appellant related to the sales of materials by the appellant to the Indian Air Force or other private parties, as the case may be, and as such whether these were taxable as held by the ower appellate authority.
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> (ii) Whether, in the case of job works undertaken from the private parties mainly on quotation on inclusive price-basis, the Sales Tax authorities were right in apportioning a portion of the turnover as attributable towards sales of materials.

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

At the outset, it is important to emphasise that the jobs done by the appellant were servicing, assembling, repairing and overhauling 'Airforce Planes' entrusted to the appellant. In the second appeal being Civil Appeal No. 1387 (NT) of 1977, the main job done was assembling; sales tax was levied in respect of the turnover for doing the same job. These works were done on the basis of contracts or job orders issued from time to time. While no contract directly concerning the repairing, servicing and overhauling of a specified aircraft, instrument or accessary in which the spare parts had been used in the execution of service contracts was on record, there is, however, a specimen contract that was entered into between the appellant and I.A.F. being agreement dated 23rd June, 1951, hereinafter referred to as '1951' Contract'. The agreement is described as "Contract for the flight servicing and maintenance of the H.Q. Training Command I.A.F. Communication Flight". The agreement was between Hindustan Aircraft Limited, described in the agreement as the 'Contractor' and the President of India, described in the agreement as the 'Owner'. It may be mentioned that the Hindustan Aircraft Limited has later on become the appellant i.e. M/s Hindustan Aeronautics Limited. As the contentions of the parties in these appeals centered on the question whether the contracts in question, the income of which has been subjected to sales tax, were works contracts only or were agreements to sell spare parts, it would be relevant to refer in detail to some of the clauses of the "1951 Contract".

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

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

> "Generally, the owner will provide the contractor with all the necessary spares and materials (other than expendable materials such as paints, dopes, cleaning rages etc.). Where, however, there is delay in the supply of essential items, the contractor will provide those wherever possible either by purchase or manufacture, within an expenditure authorised by the owner's Deputy Financial Adviser at the Contractor's request from time to time. All items provisioned by the contractor will be the property of the owner, and will be issued on Contract Loan. The owner agrees to pay the contractor for provision of spares at the following rates:-
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> (a) for items manufactured by the contractor-Cost plus 10%
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> (b) for items purchased from indigenous and overseas sources-actual invoice price plus all other charges the contractor is called upon to pay, such as packing and shipping etc. plus 5%."

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

Clause 6 of 1951 agreement deals with terms of payment and stipulated that the contractor would submit to the owner monthly bills as per clause 2(a) supported by cost analysis showing, inter alia, of certain details and the details are set out in different sub-clause mentioned in clause 6 of the agreement. The other incidental provisions of clause 6 are not relevant for the controversy in question. Clause 7 of the 1951 agreement dealt with indemnity for loss or damage which is not relevant for our purposes. Clause 8 dealt with right to cancel the agreement, Clauses 9 and 10 provided for 'inspection". Clause 11 prohibited the contractor, the appellant, from in any way assigning or transferring any rights or benefits under the agreement except with the previous consent of the owner in writing. Clauses 12, 13 and 14 are also not relevant for our purpose.

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

> "After the work is completed, a final Inspection of the repair done is checked by the Works Inspection Department, whereafter a delivery order is prepared and the billing section prepares the bill. As it is required by the Defence Audit purposes, the labour charges and material charges are shown which is worked out on cost plus 10% basis.
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> In the case of private Aircraft owners and other airlines for a similar contract for repairs, we give a fixed price quotation unlike in the case of repairs to Defence Aircraft which by virtue of the contract is on cost plus 10% basis, wherein a break up had to be given as aforementioned for purposes of defence audit."

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

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

Dealing with the contention of the parties, the High Court was of the view that in providing separately the basis of payment of spare parts in the contracts, the intention of the parties was clear and unambiguous i.e. the parties clearly agreed to the sale of spare parts according to the contract. Certain invoices were placed on record, namely, the Invoice dated 28.2.1962 being Invoice No. HT2/CAT.B/F-1 which indicated separately the labour charges being Rs. 26,837.69 and materials and spares used by the appellant as per schedule attached as Rs. 32,187.92, reference was also made to another Invoice dated 31.3.1962 which had also mentioned separately labour charges as well as the costs of the materials and spares. To the same effect was another Invoice dated 28-2-1962. The Tribunal was of the view that these Invoices supported the conclusion that the labour charges had been separately itemised from the price of the spare parts and whenever any spare parts had been provided by the I.A.F. authorities, the price thereof had been deducted indicating that the spare parts supplied by the appellant. For the aforesaid reasons as indicated in the judgment of the High Court, the High Court was of the view that sale of spare parts was clearly in contemplation of the parties and the documents in question constituted composite contracts, one relating to the remuneration for the services rendered and the other for the sale of goods. In that view of the matter, the High Court was of the view that the Tribunal was right in dismissing the appeals of the appellant on the particular turnover of the appellant.

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

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

It is well settled that the difference between contract of service and contract for sale of goods, is, that in the former, there is in the person performing work or rendering service no property in the things

produced as a whole notwithstanding that a part or even the whole of materials used by him had been his property. In the case of a contract for sale, the thing produced as a whole has individual existence as the sole property of the party who produced it some time before delivery and the property therein passed only under the contract relating thereto to the other party for price. It is necessary, therefore, in every case for the courts to find out whether in essence there was any agreement to work for a stipulated consideration. If that was so, it would not be a sale because even if some sale may be extracted that would not affect the true position. Merely showing in the bills or invoice, it was contended on behalf of the appellant, the value of materials used in the job would not render the contract as one of sale. The nature and type of the transactions are important and determinative factors. What is necessary to find out, in our opinion, is the dominant object.

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

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

As has been clearly stated in the Halsbury's Laws of England, Third Edition, Volume 34, a contract of sale of goods must be distinguished from a contract for work and labour. The distinction is often a fine one. A contract of sale is a contract whose main object is the transfer of the property in, and the delivery of the possession of, a chattel as a chattel to the buyer. Where however the main object of work undertaken by the payee of the price was not the transfer of chattel qua chattel, the contract is one of work and labour. The test, is, whether or not the work and labour bestowed end in anything

that can properly become the subject of sale neither the ownership of the materials, nor the value of the skill and labour as compared with the value of the materials, is conclusive, although such matters may be taken into consideration in determining, in the circumstances of a particular case, whether the contract was in substance one for work and labour and one for the sale of a chattel.

In the case of Sentinel Rolling Shutters & Engineering Company Pvt. Ltd. v. The Commissioner of Sales Tax,(1) this Court reiterated that tests indicated in several decisions of this Court to distinguish between a contract for sales and a contract for work and labour were not exhaustive and did not lay down any rigid or inflexible rule applicable alike to all transactions. These did not give any magic formula by the application of which one could say in every case whether a contract was a contract for sale or a contract for work and labour. These merely focused on one or the other aspect of the transaction and afforded some guidance in determining the question, but basically and primarily, whether a particular contract was one for sale of goods or for work and labour depended upon the main object of the parties gathered from the terms of the contract, the circumstances of the transactions and the custom of the trade. In that case, the assessee who was carrying on business as engineers, contractors, manufacturers and fabricators had entered into a contract with a company for fabrication, supply, erection and installation of two rolling shutters in two sheds belonging to that company for a price which was inclusive of charges for "erection at site". The contract provided, among others, that the delivery of the goods was to be ex-works and once the delivery was effected, rejection claims would not be entertained. All masonry works required before or after erection were to be carried out by the company at its own cost. Payments were to be made on overall measurements which should be checked by the company before installation. The actual transportation charges were to be in addition to the price stipulated in the contract and the terms of payment provided "25 per cent advance, 65 per cent against delivery and remaining after completion of erection and handing over of the shutters to the satisfaction" of the company. The assessee had submitted the bill to the company after completion of the fabrication of the rolling shutters, but before they were erected and installed at the premises of the company. On the question whether the contract was a contract for sale or a contract for work and labour, the High Court had held, agreeing with the Sales Tax Tribunal, that the contract was a divisible contract, which essentially consisted of two contracts, one for the supply of rolling shutters for money and the other for service and labour and that the amount payable at the stage of delivery represented the sale price of rolling shutters and it was liable to sales tax. On appeal, by special leave, this Court held that the contract was one single and indivisible contract and the erection and installation of the rolling shutters was as much a fundamental part of the contract as the fabrication and supply. The contract was clearly and indisputably a contract for work and labour and not a contract for sale.

It cannot be said as a general proposition that in every case of works contract, there is necessarily implied the sale of the component parts which go to make up the repair. That question would naturally depend upon the facts and circumstances of each case. Mere passing of property in an article or commodity during the course of performance of the transaction in question does not render the transaction to be transaction of sale. Even in a contract purely of works or service, it is possible that articles may have to be used by the person executing the work, and property in such articles or materials may pass to the other party. That would not necessarily convert the contract into one of sale of those materials. In every case, the Court would have to find out what was the

primary object of the transaction and the intention of the parties while entering into it. It may in some cases be that even while entering into the contract of work or even service, parties might enter into separate agreements, one of work and service and the other of sale and purchase of materials to be used in the course of executing the work or performing the service. But, then in such cases the transaction would not be one and indivisible, but would fall into two separate agreements. One of work or service and the other of sale. These principles can be deduced from the decision of this Court in The State of Himachal Pradesh and Others v. Associated Hotels of India Ltd.(1) In the decision in the case of The State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd.,(2) this Court had stated that according to the law, both of England and of India, in order to constitute a sale, it is necessary that there should be an agreement between the parties for the purpose of transferring title to goods, which of course pre- supposed capacity to contract, that it must be supported by money consideration that as a result of transaction the property must actually pass in the goods. Unless all these elements were present, there would be no sale.

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

It would be appropriate, in our opinion, because it clearly enunciates the principles, to refer to the statement of law in Benjamin's Treatise on the Law of Sale of Personal Property with reference to the French Code and Civil Law,(1) where the learned Editor has deduced the principles that would be applicable in deciding the controversy before us. These principles are:-

> "1. A contract whereby a chattel is to be made and affixed by the workman to land or to another chattel before the property therein is to pass, is not a contract of sale, but a contract for work, labour and materials, for the contract does not contemplate the delivery of a chattel as such.
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> 2. When a chattel is to be made an ultimately delivered by a workman to his employer, the question whether the contract is one of sale or of a bailment for work to be done depends upon whether previously to the completion of the chattel the property in its materials was vested in the workman or in his employer. If the intention and result of the contract is to transfer for a price property in which the transferee had no previous property then the contract is a contract of sale.

> Where, however, the passing of property is merely ancillary to the contract for the performance of work such a contract does not thereby become a contract of sale.
>
> 3. Accordingly
>
> (i) Where the employer delivers to a workman either all or the principal materials of a chattel on which the workman agrees to do work, there is a bailment by the employer, and a contract for work and labour, or for work, labour and materials (as the case may be), by the workman.
>
> Materials added by the workman, on being affixed to or blended with the employer's materials thereupon vest in the employer by accession and not under any contract of sale.
>
> (ii) Where the workman supplies either all or the principal materials, the contract is a contract for sale of the completed chattel, and any materials supplied by the employer when added to the workman's materials vest in the workman by accession."

The learned Editor has emphasised that where passing of property was merely ancillary to the contract for the purpose of the work, such a contract does not thereby become a contract for sale. This principle can also be deduced from the observations of the decision of Robinson v. Graves.(1) Whether a given transaction is a works contract pure and simple or it involves sale of goods also is of course a mixed question of law and fact depending upon the facts of each case. We have noted in the instant case the contracts in question. It is true, as was emphasised on behalf of the respondent and has been emphasised by the Tribunal as well as the Karnataka High Court, that it cannot be said that parties did not contemplate and apply their minds to the question of spare parts and other materials necessary for the execution of the works. It was emphasised on behalf of the respondent and on this aspect the decision of the High Court of Karnataka as well as the decision of the Tribunal were relied upon to stress the point that the price separately provided as cost plus 10%. The bills and the invoices were also made separately indicating the prices involved in these transactions. But it is important to emphasise that clause I of the contract was to accomplish for the owner the servicing and maintenance of the Headquarters Training Command I.A.F. Communication Flight, and works required on visiting aircrafts according to the standard as specified hereunder as these air-planes were necessary to be kept in readiness and that as there should be no delay in getting the materials, the contract in detail provided that the works would be carried out by the contractor and payment to be made by the owner at cost plus 10% profit or at the contractor's standard fix-rates. The additional work that would be required as specified in clause 1 in the different sub-clauses was also to be charged as in clause 2(a). Regarding spares and materials, the idea was that the owner would provide to the contractor all the necessary spares and materials except expendable materials, such as paints, dopes, cleaning rages etc. and it may be mentioned that these were necessary tools in carrying out the works entrusted to the appellant. It also stipulated in order to ensure that there should be no delay in keeping the air-planes ready at all times, that in cases of delay in supply of materials, the contractor would provide those from wherever possible, either by purchase or manufacture but the expenditure to be incurred for the same should be authorised by the owner's

Deputy Financial Adviser at the contractor's request from time to time. Therefore it emphasises that it was the expenditure limited not only for the jobs to be done but expenditure to be incurred for providing the materials for the jobs to be done were subject to the approval and sanction of the Government. The expressions following thereafter in clause 3 are, in our opinion, significant and indicative of the real intention of the parties. These expressions are "All items provisioned by the contractor will be the property of the owner, and will be issued on Contract Loan." (Emphasis supplied).

The expression "Contract Loan" is not an expression of art. It has no generally accepted meaning in dictionary, legal or otherwise, as such. There is no definition or meaning of this expression provided in the contract between the parties or in the correspondence between the parties in connection with the execution of the works. But in our opinion, these expressions indicate that the 'provisions' which would be required for carrying out the contracts, which could not be anticipated before the beginning or in execution of the contracts will be the property of the owner i.e. that though gathered and procured or manufactured by the contractor, the contractor will have no property in the said goods or spares or materials and would not be able to either dispose of or deal with those but these will be treated for the purpose of there contracts to be the property of the owner and, then the contract stipulates that on fictional basis these will be lent out to the contractor for being used in the execution of the jobs entrusted to the contractor.

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

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

It is manifest in the instant case from the terms of the contracts and transactions, as in the railway coaches case and as was emphasised by Sikri, C.J. that the property in the materials which are used in the execution of the jobs entrusted to the contractor in this case became the property of the Government before it was used. It is also manifest that there was no possibility of any other materials, to be used for the construction as would be manifest from the affidavit and the correspondence and the invoices, and works orders in these transactions. Emphasis was placed before the Tribunal as well as before the High Court of Karnataka on the case of State of Gujarat v. Variety Buildings(1) where the court was concerned with the 'bus bodies'. In the 'bus bodies' case, the assessee contractor had continued to have the ownership rights and it was held that the 'bus body' had to be transferred from the contractor to the other party as a result of contract for sale but in the instant case it is manifest that the specified spares and materials were not the properties of the contractor, in the sense that the contractor never had any ownership over these. The conclusion arrived at by us is in consonance with the principles laid down by this Court in the case of Ram Singh & Sons Engineering Works v. Commissioner of Sales Tax, U.P.(2) For the reasons aforesaid, we are of the opinion that the High Court of Karnataka was not right in its conclusion on the taxability of the turnover of the spares parts and materials supplied in execution of appellant's job works. As a result except for the item on canteen sales which is not in dispute before us, these

appeals are allowed. The necessary adjustments in the assessments should be made. In the facts and circumstances of these cases, the parties will bear their own costs throughout.

S.R. Appeal allowed.