Variety Body Builders vs Commissioner Of Sales Tax, Gujarat on 9 November, 1970

Equivalent citations: [1971]28STC339(GUJ)

JUDGMENT

Mehta, J.

1. The only question which is involved in this reference is whether the contracts for body-building of railway coaches executed

2. The short facts of the case are that Messrs Variety Body Builders, Baroda, who are the assessees in this case, have entered into three contracts for the construction of railway coaches on the underframes supplied to them by the railway. The first contract is dated 17th September, 1954, and is for the construction of 25 N. G. Coaches. The second contract is dated 11th July, 1956, and is for the construction of 6 T.L.R. Coaches and the third contract is dated 14th January, 1956, and is for the construction of 25 M.G. Coaches.

3. The assessment relates to two periods, namely (1) from 24th October, 1955, to 31st March, 1956, and (2) from 1st April, 1956, to 31st March, 1957.

4. During the course of the assessment, the Sales Tax Officer found that the applicants had received some amounts on account of the above contracts for building coaches and that these amounts were not accounted for by the applicants for the purpose of computing their total turnover. The Sales Tax Officer was of the view that the contracts in question amounted to the sale of the coaches in question and, therefore, they were all contracts for sale of goods liable to be taxed under the provisions of the Sales Tax Act. He, therefore, carried out the assessment accordingly by adding the turnover represented by these three contracts. It is found that the assessment for the first period was of Rs. 2,72,803-8-0 while for the second period it was of Rs. 3,82,820.

5. At this stage, it would be necessary to make some general reference to the terms of contracts, which are to be considered for the purpose of this reference. It is an admitted position that all the three, contracts mentioned above contain similar terms. Under the circumstances, the third contract which is dated 14th January, 1956, is taken by the lower authorities and the Tribunal as a standard contract and the parties also have addressed their arguments before us on this basis. A reference to this contract shows that it contains 38 clauses embodying different terms. The main features of this contract can be stated as under :-

> (1) By these contracts, the assessees have undertaken to "build" railway coaches according to the drawings and specifications supplied to them by the railway

administration on the underframes which are also supplied by the railway administration. None of these contracts makes any reference to "sale" of the coaches as such. However, a lump sum amount, to be paid per unit of coach, is mentioned in each of the contracts.

(2) The work of constructing the coaches is required to be carried out either at the railway premises or at any other premises mutually agreed upon.

(3) This work is agreed to be carried out under the close supervision of railway administration and in accordance with the instructions issued by the Mechanical Engineer of the railway.

(4) These contracts contain clauses about security deposit to be made by the contractor as well as deduction of 10 per cent. of the amount of the running bills with a view to secure expeditious execution of the work and to cover possible losses and damages caused to the railway administration.

(5) The contractor is supposed to use materials of a particular standard as approved by the railway administration during the course of the construction of these coaches.

(6) The electric materials to be used during the course of the construction are agreed to be supplied by the railway and the railway staff is also supposed to contribute their labour with a view to co-operate in fitting the electrical installations in coaches.

(7) The contracts stipulate that two coaches every month should be prepared by the contractor but if he fails to do so, damages counted on the basis of the value of work in arrears are stipulated to be given to the railway administration.

(8) The contractor is made responsible for the safe custody not only of the materials supplied by the railway administration for the purpose of constructing the coaches but also of the coaches under construction.

(9) Sub-letting of the contract by the contractor is prohibited and it is further stipulated that in case of insolvency or death of the contractor, the contract shall be determined and no legal representatives of the contractor shall be entitled to claim any benefits under the contract. However, such legal representative would be entitled under the terms of the contract to the value of the "work already done" together with the refund of security deposit.

(10) All the contracts further stipulate that the contractor should pay fair wages to the labour employed for the purpose of construction of the coaches, that no children should be employed, and that the railway administration would not be liable for the payment under the Payment of Wages Act or for compensation under the Workmen's Compensation Act, 1933.

These are the main features of the contracts, which are under consideration in this reference. These contracts further mention that the conditions of the tender should form part of the contract but we find that in the record of the case, the conditions which are embodied in tenders, are not produced by either of the parties. We have, therefore, to spell out the intention of the parties only from that part of the written contract which is found in the record of the case.

6. As said above, the Sales Tax Officer has construed these contracts as contracts for sale of goods and not as works contracts. The assessees, therefore, preferred two appeals before the Assistant Commissioner for the two periods in question but failed. It is found that revision applications were thereafter preferred before the Deputy Commissioner of Sales Tax but they also failed. The assessees thereafter approached the Tribunal but even the Tribunal took a view that the contracts were not works contracts but contracts for the sale of goods and for this decision, the Tribunal principally relied upon the Supreme Court decision given in the case of Patnaik and Company v. The State of Orissa ([1965] 16 S.T.C. 364 (S.C.)). Being aggrieved by this decision of the Tribunal, the assessee has preferred this reference in which the Tribunal has referred to this court the following question for opinion :

> "Whether on the facts and in the circumstances of the case the three contracts for construction of coaches on underframes supplied by the railway administration (the contract containing similar terms) were contracts for sale of goods and not works contracts ?"

We find that the question is not happily framed and, therefore, we reframe the same as under :

> "Whether on the facts and in the circumstances of the case the three contracts for construction of coaches on underframes supplied by the railway administration were contracts for sale of goods and not works contracts ?"

7. From the above facts of the case it is apparent that the real question which falls to be decided is whether the contract, envisaged by each of the three contracts, is essentially a contract for execution of work, i.e. for performance of service that required skill, or is a contract for sale and purchase of wagons of a particular type. The answer to this question must depend upon the real intention of the parties as gathered principally from the terms of the contract itself viewed in the light of surrounding circumstances of the case. If, after scrutinising the terms of the contract, and the manner in which the contract is required to be executed, it is found that the real object was the employment of a particular type of skill and labour with a view to obtain a desired result, then there should be no difficulty in reaching a conclusion that it is a works contract and not a contract to purchase a chattel. If ownership of a chattel having a desired description and design is eventually obtained as a result of such a contract, the contract would not be converted into a contract of sale and purchase of the goods because what is sold and purchased in such a contract is not a chattel but is the labour and skill of a particular type, which results in producing that chattel. The underlying principle is that in an agreement to purchase one kind of property, there cannot be a sale of a different kind of property. If a different kind of property is eventually acquired in execution of an agreement to purchase the intended property, that acquisition is merely incidental. Title to such a

property is acquired not as a result of any contract between the parties because what the parties actually intended to agree upon was altogether a different thing. It is thus first necessary to decide what was really and actually the subject-matter of contract between the parties. If after scrutinising the different terms of the contract between the parties it can be conveniently said that it was essentially a contract for labour and supply of goods for achieving the desired result, then it does not matter whether eventually title to some property passes from one of the parties of the contract to the other party. It is with this view in mind that we presently propose to scrutinise in detail the different terms of the contract between the parties.

8. In the foregoing discussion, we have already mentioned the main features of these contracts. We shall now refer specifically to different relevant terms of this contract.

9. As already stated above the contract nowhere makes any specific mention of "sale" of the wagons which are contemplated to be prepared. Clause 1(a) of the contract, however, specifically describes "the nature of work", which the contractor is expected to carry out. It is in the following terms :

> "The contractor hereby agrees to undertake the building of 25 Nos. narrow gauge third class bogie coaches 34'-6" long 7'-6" wide on I.R.S. underframes to be provided by the Western Railway to the design indicated in Chief Mechanical Engineer Western Railway's drawing No. CBP/1705 at the rate of rupees nineteen thousand one hundred and forty-one only, Rs. 19,141 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.
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> This clause reveals four important features. (1) It stipulates an agreement for work and labour. (2) It does not mention any separate price for the materials to be used in execution of the work. (3) It, however, mentions a lump sum price for unit of work, and (4) It contemplates that the work should be carried out either at the railway premises or at any other place which is agreed upon. These four features of this clause indicate that the nature of the work, which the contractor was expected to carry out, was mainly the supply of labour. The insistence in the contract that the work should be carried out only at the railway premises or at any other agreed place, assumes good deal of importance in view of the subsequent provisions which provide for close supervision and issuance of instructions by railway authorities as to the manner and method in which the work should be executed. In our opinion, all the four features of this clause emphasise the work aspect of the contract. Shri Shah, who appeared on behalf of the department, contended that the amount of Rs. 19,141 which prescribes the rate at which the payment per coach is to be made, is indicative of the sale price of the wagon and is more consistent with the notion of sale of goods than with a works contract for obtaining work. We are of the opinion that such a mention of a specific rate at which unit of work is to be supplied may be consistent even with an agreement to sell goods but it cannot be said that it is inconsistent with cases where only labour is agreed to be supplied, for the simple reason, that at the end of

the contract, some valuation is required to be put even on labour which brings about the desired result. Thus taking the broad view of the four main features of this clause, we are of the opinion that this clause leans more in favour of a contract which was intended for procuring a particular type of work or labour.

10. Proceeding further, clause No. 2 says that the work should be executed only in accordance with the lay out drawing including the drawings for components to be supplied by the administration. This again shows that the execution of the work was to be made only in the manner desired by the railway administration.

11. Then we find clauses Nos. 3 and 4 which make stipulations about the security deposit of Rs. 8,000 by the contractor and deduction of 10 per cent. of the amount from each of the progressive running bills submitted by the contractor. Both these clauses should be read together with the clauses Nos. 20, 21 and 23. Clause 20 contemplates that the contractor has to discharge his contractual duties with "diligence, competence and expedition" and that if the railway administration incurs any loss through the failure of the contractor to comply with the contractual obligations, then such a loss shall be liable to be deducted either from the contractor's bills or from the security bills, mentioned in clauses Nos. 3 and 4. Clause 21 provides that the contractor should complete the work within the stipulated time, unless, on a reasonable ground being shown, the railway administration gives an extension. Clause 22 fixes the contractor with liability for damages on his failure to execute the work with due "diligence and expedition". All these clauses, therefore, are found to have been inserted in the contract with a view to see that the contractor executes the work with due diligence and expedition. This again emphasises the work aspect of the case and shows that the parties have taken great care in seeing to it not only that the work of a desired design and specifications is obtained but also that it is executed within the stipulated time. Reference to clause 3 further shows that the security deposit of Rs. 8,000 which the contractor is supposed to make is made liable to be confiscated or forfeited to the railway administration in part or as a whole in the event of any breach on the part of the contractor of the terms and conditions of the contract or "in the event of anything being payable by the contractor to the administration". The forfeiture or the confiscation of this security deposit is obviously more consistent with works contract than with a contract for the sale of a chattel as chattel. In our opinion, the different terms of the contract as embodied in clauses 3, 4, 20, 21 and 22 are not usually found in a simple contract for the sale of goods but they are usual in cases where a works contract is intended to be carried out.

12. Proceeding further, we find clauses 7 to 10, which speak about the use of the materials of a particular standard and type as approved by the Chief Mechanical Engineer of the railway or his representatives. These clauses prescribe in great detail the manner in which different component parts of the body of the coaches are required to be prepared. The clauses further show that every step taken in the utilisation of these different parts during the course of construction should be approved by the appropriate officer. The clauses, therefore, make it clear not only that the materials of a particular specification, as required by the railway administration, had to be utilised, but also specify the manner in which the construction of the body was expected to be carried out. This again emphasises the work aspect of the contract.

13. Proceeding further we find that the materials required for electrical fittings in the coaches are stipulated to be supplied by the railway administration. This particular condition is found in clause No. 11 of the contract. Further the last portion of clause No. 9 provides that provision for the hand brake arrangements in the guard's compartment should be done by the railway administration itself and not by the contractor. Again according to clause No. 11, an appropriate railway staff is expected to work in association with the contractor's staff for the purpose of installation of electrical equipment. These provisions of the contract, therefore, show that apart from the underframes, which were initially supplied by the railway administration, the administration was also expected to supply electrical fittings and some labour for the purpose of the installation of electrical equipment and hand brake arrangements to be made in the guard's compartment. These features clearly emphasise the fact that so far as a part of the construction of the coaches is concerned, the railway administration was particular in insisting that only the administration was primarily responsible for the same. Clause No. 11 makes special provisions for battery boxes to be manufactured according to the railway specifications. All these facts also emphasise the work aspect of the contract.

14. Proceeding further we find clause No. 14 which says that the contractor shall provide all essential equipment, tools and plant for satisfactory execution of the work. Such a stipulation is not generally expected in the case of a contract for the sale of a chattel as chattel because in such contracts it is always presumed that the equipment, tools and plant required for manufacturing an article, should be arranged for by the suppliers themselves.

15. Then coming to clause No. 16 we find that it provides for contractor's liability in the event of his failure to carry out the work. This clause stipulates that in that event the contractor shall be liable to pay to the administration by way of ascertained and liquidated damages a "sum equivalent to one per cent. of the value of the work in arrears for each and every mouth or part of a month by which the contractor shall be in default up to a maximum of 20 per cent. of the value of the contract."

Even this clause is found to have been inserted in the contract with a view to see that complete work is carried out within the stipulated time. It is obvious from this term of the contract that damages are agreed to be calculated on the value of "the work in arrears". In our opinion, this method of calculating damages again emphasises the fact that what was agreed upon between the parties was the execution and the manner of work in question. Shri Shah contended that it would not be unusual to find such a clause even in contracts of sale of goods. We find that even if it is believed that such stipulations would be found even in contracts for sale of goods, the question is whether such stipulations are inconsistent with the contract which is in substance a contract for procuring the work of a particular type. If the answer is in the negative then even this clause can be appreciated along with other terms and conditions of the contract.

16. Then coming to clause 17, it says that the contractor shall be responsible for the safe custody of the carriages under construction as well as of the materials supplied by the administration for the purpose till the carriages are "taken over" by the railway administration. It should be noted here that in spite of the fact that it is the contractor, who is supposed to bring materials for the construction of the bodies on the underframes, this term of the contract emphasises the fact that the contractor is responsible for the "safe custody" of the carriages under construction. Obviously, the expression

"safe custody" emphasises the fact that the construction, which is so far carried out under the supervision of railway, should be preserved in the same condition. In our opinion, the expression "safe custody" and "taken over" reveal that what the parties wanted to emphasise was that work of a particular type, which is carried out, should be preserved and not mutilated even before the carriage is complete and is "taken over" by the administration.

17. Clause 18 provides for the inspection of work under progress and further stipulates that the Chief Mechanical Engineer would be authorised to issue necessary instructions to rectify immediately the defect found in the work. It further stipulates that the costs of all extra materials supplied by the contractor or the administration for such rectification of work shall be borne by the contractor. According to this clause, the sole judge to determine whether the standard of workmanship is according to the railway's requirements and whether any part or parts of the carriage require replacement due to bad or indifferent workmanship, is the Chief Mechanical Engineer or his authorised representative. All these provisions of this clause leave no doubt in our mind that the dominant idea in the mind of the parties in the execution of this contract was that the work of a specific kind should be carried out by the contractor. The provisions as regards the rectification of works even when it is in progress, and about the costs of extra materials required for the purpose of rectification to be borne by the contractor clearly emphasise this aspect of the contract

18. Then we come to other clauses of the contract which, in our opinion, are very important in emphasising the personal or subjective element which is stipulated by the parties in the execution of the work. These clauses are clauses Nos. 19 and 25. According to clause No. 19, 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, Western Railway. Clause No. 25 says that in the event of insolvency or death of the contractor, the contract "shall absolutely cease and determine". And in that event, neither the legal representatives nor the liquidators of the contractor, who has either died or is declared an insolvent shall have any interest whatsoever in the execution of the contract. In our opinion, both these clauses emphasise the personal aspect of the contract. Now such clauses are generally not found in contracts for sale of goods because in contracts for sale of goods the purchaser is interested only in a chattel of a required specification or quality. He is not concerned as to how and who brings about that chattel and in what manner. Even in case of death of a manufacturer if any one of his legal representatives is able to comply with the quality and the specification required by the purchaser, the purchaser would not generally insist that only a particular person should comply with its specifications and quality. Therefore, in our opinion, clauses 19 and 25 are such that they should conclude the question as to whether this contract was a works contract or a contract for the purchase and sale of a chattel as a chattel. Moreover, by reference to clause No. 25 we find that in case of death or insolvency of the contractor, the legal representatives or the liquidators of the contractor would be entitled only for the return of the security deposit and money due for the "work done" in the contract, The expression "money due for the work done" under the contract clearly emphasises the work aspect of the contract and shows that what the parties were interested in was principally the "work done" in execution of the contract, and not the "chattel" which would eventually emerge as a result of the total execution of the work.

19. Then we get another group of clauses, namely, clauses Nos. 24, 30, 32 and 33. Clause No. 24 is with regard to the indemnity to the railway administration from and against all the claims arising under the Workmen's Compensation Act. Clause 30 provides that the contractor shall not pay "less than the fair wages to the labourers engaged by him on the work". This clause further provides that the labour wages and allowances shall not be less than those which are prescribed by any provincial law, if applicable to the contract labour engaged on railway in the locality in which the labour works. According to this clause, if the railway administration, at any time, considered that the method of paying his workmen adopted by the contractor is objectionable, then it shall have the power of requiring a change in the system of that payment after giving to the contractor a notice in writing. If the contractor failed to comply with the said notice all payments to the contractor are made liable to be withheld during the period of non-compliance. Clause No. 32 makes a prohibition against the employment of children and clause No. 33 says that the contractor shall be responsible for complying with the provisions of the Payment of Wages Act and Rules made thereunder. In our opinion, all these clauses show that the railway administration has preferred to insist upon imposing the terms even as regards the matters which regulate the relations between the contractor and the labour employed by him. We have never come across a contract which is a simple contract for the sale of goods containing such terms. Generally, the purchaser of a chattel is interested in the quality of that chattel which he wants to purchase. He is not concerned with how the seller has treated his labour at the time of producing the chattel in question. Since in this case the dominant idea in the minds of the parties was that the wagons in question should be brought out only in a particular manner and by a particular method, they have made provisions even with regard to the contractor's relation with his labour.

20. Taking, therefore, the total view of the matter and considering the special features of the different terms of the contract between the parties, we have no doubt in our mind that the real intention of the parties at the time of making this contract was to provide for the services which the assessees were able to render in bringing about the desired result, namely, the construction of wagons as per the railway's requirements and specifications.

21. In determining the true nature of a transaction it is permissible to consider how the contract was intended to be performed. It is not the letter of a document but its spirit and essential character which would help us to ascertain whether the transaction evidenced by the document partakes of the nature which renders it liable to the tax in question. Analysis of the different terms of the contract between the parties shows that what was intended to be purchased was labour and skill of the contractor so that the wagons of a desired design and pattern can be obtained. It was, in our opinion, only for this purpose that not only the specifications of the different parts to be utilised in body-building but also the manner and method of executing the contract have been provided for in the agreement.

22. One basic difference between a contract for sale of goods and a works contract is that while in the former the goods are sold as goods without the purchaser bothering in the least about the manner and method of employment of labour in producing these goods, in the latter, the emphasis is mainly on the manner, method and skill with which the labour is employed in producing the goods. In a works contract, the person executing the same has to use his own materials partly or

even wholly but when he uses these materials, he does it not with an idea to sell them "for there is no agreement for purchase or sale of these specific materials", but with an idea to render his services for bringing about the desired article. This distinction between a works contract and a contract for sale of goods is pointed out in Halsbury's Laws of England, Third Edition, Volume 34, at pages 6 and 7 in para. 3 as under :

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

We find that these observations have been quoted with approval in many decisions including some decisions given by the Supreme Court.

23. Thus, the real test is whether the main object of the contract was "transfer of a chattel qua chattel" or whether it was to procure a particular type of labour and skill which would give the desired result. On consideration of the various terms of the contract as discussed above, we find it impossible to avoid the conclusion that the contracts between the applicant and the railway administration were for obtaining work and that the test supplied by Halsbury in the above quotation is satisfied.

24. If once it is found that the contracts between the parties were works contracts, the next question would be how far passing of title over a property which is produced or a part of that property would make any difference. We find that this question was considered by the Supreme Court in The Government of Andhra Pradesh v. Guntur Tobaccos Ltd. ([1965] 16 S.T.C. 240 (S.C.)). In this case, three forms of such a contract are pointed out by the Supreme Court. So far as the principle is concerned, it is not necessary to state the facts of that case. But we find that at page 255 of the report, their Lordships have discussed these three forms of such works contracts. This would be apparent from the following observations :

> "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. A contract for work in the execution of which goods are used may take one of three forms. The contract may be for work to be done for remuneration and for supply of materials used in the execution of the work for a price; it may be a contract for work in which the use of materials is accessory or incidental to the execution of the work;

> or it may be a contract for work and use or supply of materials though not accessory to the execution of the contract is voluntary or gratuitous. In the last class there is no sale because though property passes it does not pass for a pride. Whether a contract is of the first or the second class must depend upon the circumstances; if it is of the first, it is a composite contract for work and sale of goods; where it is of the second category, it is a contract for execution of work not involving sale of goods."

From these observations it is clear that if the contract under consideration is of the first or the second type, it would be a contract for the execution of work not involving a sale of goods even though during the course of the execution of such contracts, some goods have been utilised by the contractor and the property in those goods is ultimately transferred to the other party. While explaining why in such cases no sale of goods is involved, their Lordships have further observed that the question in each case is one about the true agreement between the parties and that the terms of the agreement must be deduced from a review of all the attendant circumstances. However, as observed by their Lordships, one fundamental fact has to be borne in mind that from the mere passing of title to goods either as integral part of or independent of goods it cannot be inferred that the goods were agreed to be sold, and the price was liable to sales tax.

25. In this connection Shri Shah, who appeared on behalf of the department, contended that the contracts between the parties in this case amount to sale of future goods to be put in deliverable state. He also drew our attention to Chapter III of the Sale of Goods Act and especially to section 23 as well as the definition of the expression "future goods" as given in section 2(16) of that Act and further contended that what has happened in this case is that as a result of the building of the coach body, the ownership thereof was transferred by the assessee to the railway administration. According to him, therefore, the contract between the assessee and the railway department amounted to sale of future goods after those goods are put in a deliverable state. We find that this argument presupposes a contract for sale of goods qua goods. We have already discussed how on consideration of the terms of the contract, this argument is not acceptable. In our opinion, the contract was only to obtain work and since section 23 of the Sale of Goods Act presupposes the contract for sale of goods, it is futile to say that this case is covered by the provisions of that section. Shri Shah has put much emphasis on the fact that on execution of this contract, a specific property, namely, the body built on the underframe supplied happened to pass to the railway department and since title over this property was to pass on consideration of the payment of Rs. 19,141 in lump, it became a contract for the sale of that property. Even this argument is not acceptable because as stated above, if the real nature of the contract was to obtain labour which would result in the manufacture of a particular property, it is the labour and not that property, which forms the subject-matter and, therefore, the transfer of property which eventually takes place is not qua property. We further find that this aspect of the case is considered at length by the Supreme Court in The State of Madras v. Gannon Dunkerley and Co. (Madras) Ltd. ([1958] 9 S.T.C. 353 (S.C.)). At page 377 of the report, we find that a contention almost similar to the one raised by Shri Shah was urged on behalf of the department even in that case. The contention was that even if it is held that an agreement between the parties was necessary to constitute a sale, that agreement need not relate to the goods as such, and that it would be sufficient if there is an agreement between the parties and in carrying out of that agreement there is transfer of title in movables belonging to one person to

another for consideration. The Supreme Court rejected this contention in the following words :

> "We are unable to agree with this contention, If the words 'sale of goods' have to be interpreted in their legal sense, that sense can only be what it has in the law relating to sale of goods. The ratio of the rule of interpretation that words of legal import occurring in a statute should be construed in their legal sense is that those words have, in law, acquired a definite and precise sense, and that, accordingly, the Legislature must be taken to have intended that they should be understood in that sense. In interpreting an expression used in a legal sense, therefore, we have only to ascertain the precise connotation which it possesses in law. It has been already stated that, both under the common law and the statute law relating to sale of goods in England and in India, to constitute a transaction 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. Where the goods delivered under the contract are not the goods contracted for, the purchaser has got a right to reject them, or to accept them and claim damages for breach of warranty. Under the law, therefore, there cannot be an agreement relating to one kind of property and a sale as regards another. We are accordingly of opinion that 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."

A view similar to this is taken by the Supreme Court in another case of Carl Still G.m.b.H. and Another v. State of Bihar and Others ([1961] 12 S.T.C. 449 (S.C.)) wherein a contract to set up a complete coke oven battery ready for production and to erect buildings, plants and machineries, was held to be an entire and independent contract for construction of specified works for a lump sum and not a contract of sale of materials as such.

26. The fact that as a result of the contract, title to a particular property passes from one person to the other person, may be taken as one of the factors which would indicate the real nature of a contract. But it cannot be taken as the only factor which would finally determine the true nature and character thereof. This is evident by a reference to the following observations made by the Supreme Court in the above referred case of Gannon Dunkerley and Co. ([1958] 9 S.T.C. 353 (S.C.)) :

> "Thus, 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 presupposes capacity to contract, that it must be supported by money consideration, and that as a result of the transaction property must actually pass in the goods. Unless all these elements are present, there can be no sale. Thus, if merely title to the goods passes but not as a result of any contract between the parties, express or implied, there is no sale."

Even in the case of Guntur Tobaccos Ltd. ([1965] 16 S.T.C. 240 (S.C.)), observations on the same lines are found at page 256 of the report :

> "In order that there should be a sale of goods which is liable to sales tax as part of a contract for work under a statute enacted by the Provincial or State Legislature, there must be a contract in which there is not merely transfer of title to goods as an incident of the contract, but there must be a contract, express or implied, for sale of the very goods which the parties intended should be sold for a money consideration, i.e., there must be in the contract for work an independent term for sale of goods by one party to the other for a money consideration."

Later on, in the same judgment, the Supreme Court has observed in this connection as under :

> "Whether a contract for service or for execution of work involves 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."

These observations, therefore, conclusively show that the mere fact that as a result of the execution of a particular contract there is a transfer of property from one party to the other, is not conclusive of the question whether the contract amounts to a works contract or a contract for sale of goods.

27. Shri Shah, however, put great reliance upon the decision given by the Supreme Court in the cases, namely, (1) Patnaik and Company v. State of Orissa ([1965] 16 S.T.C. 364 (S.C.)) and (2) McKenzies Ltd. v. The State of Maharashtra ([1965] 16 S.T.C. 518 (S.C.)). Since heavy reliance was placed on behalf of the department on these two decisions of the Supreme Court, we propose to deal with them at some length. The principal judgment is recorded by the Supreme Court in Patnaik's case ([1965] 16 S.T.C. 364 (S.C.)) and since McKenzies' case ([1965] 16 S.T.C. 518 (S.C.)) came to be decided practically at the same time, it does not elaborately deal with either the facts of the case or the points for determination involved therein. Now, in Patnaik's cases ([1965] 16 S.T.C. 364 (S.C.)), the assessee, Patnaik and Co., entered into an agreement with the State of Orissa for the construction of bus bodies on the chassis supplied by the Government. The agreement contains certain terms to which a specific reference is found in the judgment itself. The question which arose to be considered was whether the contract was a contract for work or a contract for sale of goods. By a majority decision, the Supreme Court decided that the contract as a whole was a contract for sale and, therefore, the taxing provisions of the sales tax were attracted. It was pointed out by Shri Shah by reference to the terms of the contract between the parties in that case that these terms are mostly similar to the terms found in the contract between the assessee and the railway department in the case before us. Shri Shah contended that even in Patnaik's case ([1965] 16 S.T.C. 364 (S.C.)), chassis were supplied to the assessee and it was the assessee who constructed body on these chassis by utilising its own materials and labour. It was further pointed out that the price was stipulated to be paid as per unit of the body so built and the property in that unit ultimately passed from the assessee to the State of Orissa on payment of the stipulated amount. Shri Shah also argued that reference to the decision recorded by the Supreme Court shows that their Lordships held that the liability to sales tax was attracted because the transaction amounted to sale inasmuch as eventually

the property in the unit, which was produced by the assessee in that case ultimately passed from the assessee to the State of Orissa. It was, therefore, contended that passing of eventual title in the property from one party to the contract to the other, is treated as determinative factor by the Supreme Court in this case. Shri Shah pointed out to us that so far as the case under our consideration is concerned, it was the assessee who was the owner of the body which was built with the help of his own materials and labour and since the property in the form of coaches eventually passed to the railway administration on payment of the agreed amount of Rs. 19,141 per unit, it should be held, on the ratio of the decision of the Supreme Court in Patnaik's case ([1965] 16 S.T.C. 364 (S.C.)), that the contract between the parties, before us, was a contract for sale of goods qua goods and not a contract for work. We find that it cannot be disputed that in both the cases which are relied upon by Shri Shah, the contracts were found to be contracts for selling goods and it is also not possible to dispute that the main aspect, which has weighed with the majority of the learned Judges, who have decided this case, is that property in the goods passed from the assessee to the State only at the end of the execution of the work undertaken by the assessee and on payment of the consideration of the amount, as stipulated in the contract. But so far as the facts are concerned, the contractual term which the Supreme Court considered in Patnaik's case ([1965] 16 S.T.C. 364 (S.C.)), were not the same as the terms of the contract before us and there are many important features of the contract under our consideration, which would distinguish the facts of this case from the facts of Patnaik's case ([1965] 16 S.T.C. 364 (S.C.)). At this stage, we would enumerate these distinguishing features which, in our opinion, are as under :

(1) If a reference is made to the important terms of the contract, which were considered in Patnaik's case ([1965] 16 S.T.C. 364 (S.C.)), it would be found that there was no stipulation about the site at which the work was expected to be carried out. In fact, it appears that the work was carried out in the premises belonging to the assessee in that case.

(2) In Patnaik's case ([1965] 16 S.T.C. 364 (S.C.)), there were no stipulations as regards security deposit and 10 per cent deduction as found in the contract before us.

(3) In Patnaik's case ([1965] 16 S.T.C. 364 (S.C.)), there was no prohibition against the assignment of the contract and there was nothing to suggest the personal and objective character of the contract as found in clauses 19 and 25 of the contract before us.

(4) Provisions as regards supervision were undoubtedly there in Patnaik's case ([1965] 16 S.T.C. 364 (S.C.)), but the provisions as regards rectification of defects and cost of the extra materials required to rectify the defective work as found in clause 18 of the contract before us were absent in the contract considered in Patnaik's case ([1965] 16 S.T.C. 364 (S.C.)).

(5) In Patnaik's case ([1965] 16 S.T.C. 364 (S.C.)), there does not appear to be any stipulation about the manner and method of making payment to the workmen and from the reported judgment, we do not find anything to suggest that there was any

stipulation between the parties in that case, regulating the contractor's relations with his workmen as found in the contract before us.

(6) Unlike this case, there was no stipulation in Patnaik's case ([1965] 16 S.T.C. 364 (S.C.)) that electric materials should be supplied by the State or any other assistance should be rendered by the State in completion of the contract.

In our opinion, these distinguishing features are very important and they do make a difference and take out this case from the purview of the above-referred Supreme Court decisions on which the department has put reliance. In view of this difference between the facts of this case and the facts of the decision of the Supreme Court relied upon, we cannot say that the Supreme Court would have taken the same view of the matter if the terms of agreement, which are found in this case, were also found in Patnaik's case ([1965] 16 S.T.C. 364 (S.C.)). In our opinion, therefore, Patnaik's case ([1965] 16 S.T.C. 364 (S.C.)) would not be furnishing any guidance so far as this reference is concerned.

28. So far as McKenzies' case ([1965] 16 S.T.C. 518 (S.C.)) is concerned the terms and conditions which governed the contract in that case are not found from the reported decision and, therefore, we cannot say whether that case can govern the facts of the present case.

29. The third decision of the Supreme Court on this point is found in the case of Chandra Bhan Gosain v. The State of Orissa and Others ([1963] 14 S.T.C. 766 (S.C.)). The facts of that case were that the assessee was manufacturing and supplying large quantities of bricks to a company under a contract. The assessee was assessed to sales tax under the Orissa Sales Tax Act, 1947, on the basis that these supplies were sales. One of the clauses of the contract provided that the land would be given free by the company. The contention of the assessee was that the contract was only for labour and that there was really no sale of any goods on which the tax could be levied. On these facts, the Supreme Court held that under the contract there was a transfer of property in the earth to the assessee by the company concerned and that the essence of the contract was the delivery of the bricks and, therefore, it amounted to a contract for transfer of chattel qua chattel. It is obvious that this case was decided on its own facts. In this reference we are considering a case in which the contract between the parties contains various clauses going to show that it was a contract mainly for labour. In our view, therefore, even this decision given by the Supreme Court in Chandra Bhan Gosain ([1963] 14 S.T.C. 766 (S.C.)), would not be of any help to the department.

30. The ratio of these decisions of the Supreme Court is not that where the title to property passes from one party to the other, the contract must necessarily be that of sale of goods. These decisions are based on their own peculiar facts but if any guiding principle is to be adduced from them, it is that at the time of considering the real nature and character of a transaction, one question which may be inquired into is whether title to the subject-matter of contract passes from one party to the other and whether it does so on payment of consideration as stipulated in the contract. This was also the ratio of the decision given by the Supreme Court in Kailash Engineering Works ([1967] 19 S.T.C. 13 (S.C.)) on which the assessee has put reliance. Bound as we are by this view, we may as well apply this test to the facts under our consideration.

31. While applying this ratio to the facts of the case under our consideration, the first question which would arise for consideration is whether the commodity which the assessees have produced in execution of the contract was their sole property which they could have transferred as such. One test which is accepted by the Supreme Court in the case of Commissioner of Sales Tax, M.P. v. Purshottam Premji ([1970] 26 S.T.C. 38 (S.C.)), to ascertain whether a given contract is for work or for sale of goods, is to ascertain whether the thing produced as a whole had 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. If the thing has no independent existence as the sole property of the party producing it, the contract would be one for work and service. This becomes clear from the following observations of Hegde, J., in the above referred case of Purshottam Premji ([1970] 26 S.T.C. 38 (S.C.)) :

> "The primary difference between a contract for work or service and a contract for sale of goods is that in the former 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 materials 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 contracted to be sold. Ultimately the true effect of an accretion made pursuant to a contract has to be judged, not by an artificial rule that the accretion 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."

Applying these tests to the facts of the case under our consideration, the pertinent question which requires a satisfactory answer is whether the railway coaches when produced as a whole were the sole property of the assessee who produced them before they were delivered to the railway administration. In this connection, the important aspect of the matter which should be borne in mind is that the contract is for delivery of the whole of a railway coach including underframes and electrical equipments. At no stage it was the intention of the parties to give and take delivery of anything except the whole unit of railway coach. The body over the underframe which was built by the assessee was not the subject-matter of the contract and was at no stage contemplated to be delivered by the assessee to the railway department. Under the circumstances, the unit of delivery, which is contemplated by the contract, is the one integrated railway coach in its individual existence, meaning thereby that it was the coach built on the underframe supplied by the railway. If this be so, could it be said that such a coach was, in the words of the Supreme Court as used in the case of Purshottam Premji ([1970] 26 S.T.C. 38 (S.C.)), "the sole property of the party who produced it". We have no doubt about the correct answer to this question because it cannot be disputed that not only the underframes but also electrical equipments used in building of these coaches were provided by the railway administration. Over and above these materials the railway administration was also expected to supply some labour for providing hand brake arrangements in the guard's compartment

and also for fitting the electrical equipments (vide clauses 9 and 11 of the agreement). In this view of the matter, it is evident that the coach, as a whole, was not the sole property of the assessee who produced it and if that is so, this case would be completely covered by the above-quoted observation of Hegde, J., in the case of Purshottam Premji ([1970] 26 S.T.C. 38 (S.C.)).

32. We further find that the facts of the present case are completely covered by the ratio of two other decisions of the Supreme Court, one given in the case of The State of Madras v. Richardson & Cruddas Ltd. ([1968] 21 S.T.C. 245 (S.C.)), and the other in the case of State of Rajasthan v. Man Industrial Corporation Ltd. ([1969] 24 S.T.C. 349 (S.C.)). In Richardson & Cruddas Ltd. ([1968] 21 S.T.C. 245 (S.C.)), the assessee who worked as engineers, contractors and dealers in iron and steel as well as refrigerating and cooling units, entered into a contract with a co-operative society for fabrication, supply and erection of steel structures for a sugar factory in the State of Mysore. On execution of this contract, the assessee received the sum of Rs. 3,26,075.20 which was included in the turnover for the assessment to Central sales tax. There was no formal contract but the agreement between the parties had to be ascertained from the correspondence between them and on consideration of the correspondence between the parties the High Court of Madras concluded as under :

> (a) There was a stipulation for a consolidated lump sum payment of Rs. 1,160 per ton for fabrication, supply and erection at site of all steel work etc.;
>
> (b) there was no provision for the passing of property in the goods to the factory before the actual completion of the erection work;
>
> (c) there was no provision under the contract for dissecting the value of the goods supplied and the value of the remuneration for the work and labour bestowed in the execution of the work;
>
> (d) the respondent was not a dealer carrying on business in the steel and component parts required for the erection work and the component parts had to be specially fabricated so as to be suitable for particular erection work; and
>
> (e) the predominant idea underlying the contract was the bestowing of special skill and labour by the experienced engineers and mechanics of the respondent-assessee.

These findings of the High Court were confirmed by the Supreme Court relying upon the English decision of Clark v. Bulmer ((1943) 11 M. & W. 243), where the plaintiff had entered into a contract to build an engine and send the same to the colliery of the defendant where the engine was erected. The court took the view that the engine was not contracted to be delivered as an "engine" and that there was no sale of the engine as an entire chattel. The facts of the case of Richardson & Cruddas Ltd. ([1968] 21 S.T.C. 245 (S.C.)) further show that there was also a contract for installation of "bottle cooling equipment". The assessee in that case fabricated the component parts of this equipment according to the requirements and specifications of the customer and then despatched the component parts to the site and installed the same on a suitable base and foundation at the

premises of the customer. On these facts the Supreme Court held that the contract being one for supply for an inclusive price a specially designed fabricated unit to be assembled and installed by specially trained technicians in the premises of the customer, it was not a contract for sale of a unit or different parts of the unit as specific goods, but a works contract. This decision of the Supreme Court was subsequently followed in a later decision given in the case of Man Industrial Corporation Ltd. ([1969] 24 S.T.C. 349 (S.C.)). There, pursuant to an invitation of the Executive Engineer, the respondent-assessee submitted its tender for fabricating and fixing certain windows in accordance with the specifications, designs, drawings and instructions. The windows were to be fixed to a building. On these facts the Supreme Court held that the contract undertaken by the respondent-assessee was to prepare window-leaves according to the specifications and to fix them to the building, and therefore, window-leaves did not pass under the terms of the contract as window-leaves. In the opinion of the Supreme Court, therefore, the contract was for execution of work not involving sale of goods. While giving this decision, Shah, J., has observed that the test in each case is whether the object of the party sought to be taxed is that the chattel as chattel passes to the other party and the services rendered in connection with the installation are under a separate contract or are incidental to the execution of the contract of sale. We have already applied these tests to the facts of the present case. We, therefore, find that we are fortified even by the view taken by the Supreme Court in a series of cases.

33. We have to consider two cases of this court on this point before completing this judgment. They are : (1) A. A. Jariwala and Bros. v. State of Gujarat ([1965] 16 S.T.C. 942) and (2) Sarvodaya Motor Works v. The State of Gujarat ([1966] 17 S.T.C. 261). In Jariwala's case ([1965] 16 S.T.C. 942), customers sent saris to the assessees for getting embroidery work on the saris with instructions regarding the designs required on those saris. During the execution of the work, the assessees used their own jari materials which they gave to workers doing the embroidery work in their own houses and also gave them piece rates according to the work done by them. After completion of the embroidery work on the saris, the assessees returned the said saris to the customers along with a consolidated bill for the entire work done by them. The question arose whether the contract between the assessees and the customers was a works contract or was a composite agreement, one for the sale of the jari materials and another for doing work. This court held that the contract was one and indivisible and was not separable into two contracts, one for service and the other for the sale of the jari materials. This court further observed that the contract essentially was one of work and labour and the supply of jari materials in the execution of the embroidery work was merely ancillary. In substance, the contract was for skill and labour. This case is obviously in favour of the applicant-assessee of this reference. In the other case, namely, Sarvodaya Motor Works ([1966] 17 S.T.C. 261), the facts were that the assessee carried on business of body-builders on motor chassis supplied by customers. They entered into a contract with a firm for the construction of the body of a truck belonging to that firm. The assessees agreed to construct the body of the truck in accordance with the specifications mentioned in the contract for a lump sum payment and undertook to deliver the truck on or about a certain day. The assessees prepared two bills, one in respect of the materials used for building the body and another for labour charges. On these facts the assessees contended that the contract was not a contract for sale of goods but was either a purely works contract or a composite agreement consisting of two distinct and separate contracts, one for the supply of materials and the other for doing the work. This court held that on the facts and in the

circumstances of the case, the assessees' contract with the customer was one and indivisible contract for sale of goods and not a contract of work and labour. While coming to this conclusion, this court has observed that the test in each case is that if the work and labour is of the essence of the contract it would be contract of work, but if on the contrary the substance of the contract is the production of something to be sold to the customer, it would be a contract for sale of goods. It is thus apparent that the test applied by this court in the case of Sarvodaya Motor Works ([1966] 17 S.T.C. 261) is the same which we apply to the facts of the case before us. Therefore, the decision of the case should necessarily turn on its own peculiar facts and circumstances. The facts of the case under our consideration are already discussed by us in detail and, therefore, we find, that the decision given by this court in Sarvodaya Motor Works ([1966] 17 S.T.C. 261) cannot help the department in any manner.

34. We find that the decision concerning the facts, which are almost similar to the facts of the present case, is the one given by the Allahabad High Court in Commissioner of Sales Tax, U.P. v. Noorullah Ghazanffurullah ([1970] 26 S.T.C. 100). In that case the assessee was a firm of contractors, which had entered into a contract for building railway coaches for North Eastern Railway on the underframes supplied by the railway. The coaches were to be built according to the specifications and drawings annexed to the agreement on a siding within the railway yard for which the assessee had to pay a nominal rent of one rupee per month, as is the case even of the assessee before us. The assessee was to receive for each coach lump sum payment plus another sum for fixing dynamo, suspension, gear etc. The lump sum was inclusive of the cost of all materials and labour charges for building, furnishing, finishing and polishing. The contract was to be completed within the stipulated time but was liable to be determined if the execution was inefficient or the progress of the work was so slow that the work would not be completed in time. The Chief Mechanical Engineer of the railway had also a right to vary or alter the specifications at any time and the assessee was bound to carry out that order. The said engineer could also suspend the work for such period as he thought fit, and the contract was liable to determination if the assessee became insolvent or suspended payment or compounded with its creditors, as is the case before us. On these facts, both the learned Judges of a Division Bench of the said High Court have taken a view that the contract was not a contract for sale of goods but was a works contract and was therefore not liable to sales tax. By reference to the separate judgments recorded by both the learned Judges of the said Division Bench, we find that most of the important clauses of the contract, which they considered were quite similar to the important clauses of the contract before us. On a consideration of these clauses, the learned Judges have come to the conclusion as stated above. On the question whether the whole of the coach including the underframe would at any time become the sole property of the assessee-contractor, we find the following pertinent observations made by Pathak, J., in his separate judgment :

> "Significantly, the underframes remain throughout the property of the railway. The contract provides that when underframes are supplied to the assessee they will be supplied only after the assessee executes an indemnity bond for their safe custody. The property in the underframes does not pass to the assessee and it cannot be said, therefore, that when the assessee completes the coach what it delivers to the railway is an article in which it held the entire property. What it delivers to the railway is a

> coach, an essential part of which has always been railway property. It cannot, therefore, be said to sell the coach to the railway."

We are in respectful agreement with these observations and we find that they completely cover the facts of the case under our consideration.

35. In this view of the matter, we are of the opinion that the view taken by the Tribunal about the nature of the contract is not correct and that the three contracts in question were really works contracts and not contracts for sale of goods. We accordingly answer the question which is referred to us by the Tribunal and dispose of this reference. The costs of this reference shall be borne by the Commissioner of Sales Tax who is the opponent.

36. Reference answered accordingly.