Sundaram Motors (Private) Ltd., 37 ... vs The State Of Madras, Represented By ... on 2 September, 1958

Equivalent citations: AIR1959MAD33, [1958]9STC687(MAD)

JUDGMENT

Ramachandra Iyer, J.

1. These tax revision cases are filed under Section 12-B (1). and Rule 13 (c) (1-A) of the Madras General Sales-tax Act. The assessee is the petitioner in all these cases and they relate to assessments in respect of years 1949-50 to 1952-53. Sundaram Motors (Private) Ltd., the assessee, is a private limited company incorporated under the Indian Companies Act, and it carries On business in selling and distributing motor vehicles. It also deals in motor parts and accessories and maintains a workshop where reconditioning or repairs of motor vehicles are undertaken. The turnover in the business of the company would therefore relate to the sales department, where the goods are sold, and also the works department, where the vehicles are repaired or reconditioned.

In the latter case the turnover would represent not merely the labour charges as such but the cost of spare parts or materials supplied or used in effecting the repairs. There is no controversy in regard-to the turnover in the sales department and these revision cases are concerned mainly with the transactions in the workshop department of the company.

2. Although the turnover for the various as sessment years vary, the nature of the business and the question to be decided in the cases are the same. It would be convenient for the purpose of deciding the question involved if the assessment for the year 1949-50 is taken as" a typical one. For that year the Deputy Commercial Tax Officer assessed the turnover of the company in a sum of Rs. 42,13,684/13/9.

Out of that sum the Officer allocated a sum of Rs. 2,63,462/6/9 as turnover In respect of works contracts referable to repairs of motor vehicles in the workshop. He deducted a sum of Rs. 46,874, therefrom on account of sums charged for services pure and simple. He held that the balance of Rs. 2,16,548/6/9 should be treated as turnover in respect of works contracts and levied a tax on 70 per cent, thereof as representing the sales of materials to the customers while executing the works, repairs etc. On appeal the Special Commercial Tax Officer held that out of the sum of Rs. 2,16,548/6/9 (1) Rs. 127765 would represent pure labour charges, (2) Rs. 73,627 would represent works involving transfer of property, and (3) Rs. 15158 would represent charges for the manufacture of spare parts. He taxed seventy per cent, of item 2 at 3 pies per rupee and the whole of item 3 at nine pics per rupee. The assessment was taken up on appeal to the Sales-tax Appellate Tribunal.

Substantially two questions were raised before the Tribunal and they Were : (1) in regard to the validity and proper rate of levying tax on the sales-tax collected by the asses-see and (2) the proper method of assessing workshop transactions. The Appellate Tribunal held that the assessee was liable to pay sales-tax on the sales-tax collected by them and that the rate of levy adopted by the department was correct.

On the second question it held that the department correctly assessed works contracts at 70 per cent, of the turnover. In the result the order of the Special Commercial Tax Officer was confirmed. Thereupon the assessee has preferred these tan revision cases in respect of the assessment lor the four years stated above.

3. The learned Advocate for the assessee did not contest the correctness of the finding of the Appellate Tribunal in regard to the tax liability on the sales-tax collected by the assessee and also as regards the rate of levy in view of the decisions reported in the State of Madras v. Bangalore Automo-biles, 1956-7 STC 537 : (AIR 1957 Mad 6821 (A) and Sundararajan and Co. Ltd. v. State of Madras, 1956-7 STC 105: ((S) AIR 1956 Mad 298) (B).

4. The only question argued before us related to the propriety of the assessment in regard to workshop transactions.

5. The validity of the provisions of the Sales-tax Act in regard to works contract has been considered by a judgment of this court to which one of us was a party, in Cannon Dunkerley and Co. v. State of Madras, 1955-1-Mad LJ 87 ; (AIR 1954 Mad 1130) (C). That judgment was taken up in appeal to the Supreme Court, which recently affirmed the correctness of the View taken by this court. The judgment of the Supreme Court is reported in the State of Madras v. Cannon Dunkerley and Co. Ltd., (D).

6. Under Section 2 (h) of the General Sales-tax (Amendment) Act, XXV of 1947, the definition of the word "sale" was enlarged so as to include transfer of property in the goods involved in the execution of a works contract. In the definition of the expression 'turn over' in Section 2(i) Explanation (I) stated that the amount for which goods arc sold in relation to a works contract shall be deemed to be the amount payable to the dealer for carrying out such contract less such portion as may be prescribed of such amount representing the usual proportion of the cost of labour to the cost of materials used in carrying out such contract.

The word "works contract" was also defined in Section 2 (i) (I) as meaning any agreement for carrying out for cash or for deferred payment or Other valuable consideration, the construction, fitting out improvement or repair of any building, road or Taridge or other immoveable property or the fitting out, improvement or repair of any moveable property.

Under the Turnover and Assessment Rules framed under the Act, Rule 4 (3) stated that the amount for which goods arc sold by a dealer shall in relation to a works contract be deemed to be the amount payable to the dealer for carrying out such contract less a sum not exceeding such percentage of the amount payable as may be fixed by the Board of Revenue from time to time. In pursuance of that

rule a notification has been issued fixing the cost of labour at 30 per cent., the cost of materials being thereby fixed at 70 per cent, in regard to all contracts except those for which the notification fixed a special percentage. Under that notification the assessment in the instant case would be on the basis of 70 per cent, of the value of the works.

7. The effect of the judgments in Cannon Dunkerley's case both here (C) and in the Supreme Court (D) was that the works contract as such cannot amount to a sale of the materials involved or absorbed in the execution of the work, and the Madras General Sales-tax Act, 1939, in so far as it purported to tax such works on the basis of a notional sale is ultra vires. In 1958-9 STC 353 : (AIR 195S SC 560) (D) the Supreme Court observed at p. 373 (of STC) : (at p. 571 of AIR) :

> "A power to enact a law with respect to tax on sale of goods under entry 48 must to be intra vires, be one relating in fact to sale of goods, and, accordingly, the provincial Legislature cannot, in the purported exercise of its power to tax sales, tax transactions which are not sales by merely enacting that they shall be deemed to be sales."

Although the effect of the judgment is to negative the power of the State to tax a works contract as such there is no impediment in the State levying a tax on the sale of goods property so called. If therefore a works contract includes sale of goods the levy would be proper. If on the other hand the contract is only a works contract with no element of sale of goods it would not be taxable.

8. Contracts which involve labour and work may relate to a chattel or to buildings or other fm-moveable property. As stated in 1955-1-Mad LJ 87 at p. 95 : (AIR 1954 Mad 1130 at p. 1137) (C):

> "A contract purely for the supply of labour and work is not a contract of sale of goods, as labour and work cannot be deemed to be goods in any sense of the term. In the case of a chattel it has to be produced by the labour and work of the contractor and also by the supply of the material necessary for producing the thing. In other words when the material is fixed to the corpus by the builder the property passes when the property in the larger corpus itself passes to the other party. This rule is, of course, subject to special stipulations in the contract."

In a building contract, for instance, there is no element of sale of materials used in the building separately, as the contract would be one in substance and in effect not a contract of sale of materials. It is now settled that in a case of a building contract the properly and the materials used do not pass to the other party to the contract as moveable property in the absence of any agreement between the parties relating thereto.

It may be in particular cases that even in regard to building contracts where the materials employed in tbe building cease to be moveable property there may be an agreement to pass the owner-ship in the materials for a price agreed upon between the parties, in which case the contract right contain an element of sale of goods. This was recognised in the judgment of this court in 1955-1-Mad LJ 87 at p. 96; (AIR 1954 Mad 1130 at p. 1138) (C) and by the Supreme Court in 1958-9 STC 353 at p. 385:

(AIR 1958 SC 560 at p. 577) (D). As regards works contract relating to move-able property the Supreme Court has observed at p. 386 (of STC) ; (at p. 577 of AIR):

> "It may be as was suggested by Mr. Sastri for the respondents that when the thing to be produced under the contract is moveable property then any material incorporated into it might pass as a move-able and in such a case the conclusion that no taxable sale will result from the disintegration of the contract can be rested only on the ground that there was no agreement to sell the materials as such."

If, for instance a car is sent to a motor workshop with instructions to fix up a carburettor, and the repairer who is a dealer in such parts supplies the carburettor, it will be a sale of the part; but such cases apart it cannot be held as a general proposition that in every case of a works contract there is necessarily implied a sale of the component parts which go to make up the repair. That question would depend on the facts of each case.

But the order of the Sales-tax Appellate Tribunal is based on the rules framed under the Act, which prescribed an artificial and fixed proportion of 30 per cent turnover as labour charges and 70 per cent as cost of materials used. The assessment was not made on the basis that there has been a sale as such of the materials used in the repairs or that the contract was a severable one in which the sales were singled out and taxed.

It proceeded to treat the contract as an integral one and levied a tax on 70 per cent thereof as representing the sale of materials. This was no doubt in accordance with the provisions of the Act and the rules and notifications thereunder. But in view of the decisions referred to above we have to hold that the State Government has no power to legislate and tax a works contract by treating it or a portion of it as sales, and that this method of assessment is illegal.

9. Before us, therefore, the learned Advocate-General put the case for the Slate on the footing that the works contract was really a combination or mix-ture of a contract of a sale of materials and a contract to pay the cost of labour, and that it is possible to separate the one from the other.

10. The question then is whether the transactions in the workshop business of the assesses should be deemed to be pure works contracts or contracts coupled with a series of sales of moveable property. To appreciate the nature of the transactions an illustration will be taken from the accounts of the company. A bill issued to one Mr. K. Narasimhalu on 5-4-1950 will be typical of the way in which the matter was treated by the assessee. That bill was in connection with the repair of a car owned by bim, and it runs thus :

> Sundaram Motors Ltd.
>
> 37 Mount Road, Madras S.S.Debit Note, 13609/13611 Date: 7-4-1950 Mr. K. Narasimhalu Naidu, Crown Talkies Madras.

Repair Oreder No. 7960 Registration No. M.D.K.1185

1. Brg. assay. front wheel Inner Rs.

29-12-0

2. King Pins 10-8-0

3.

Cleaning materials

0-8-0

4 to 12 x x x x
x
x x

Total of items 1 to 12

58-15-6

A.
To charges for renewing king pins and bushes.

15-0- 0

B.
To turning 4 king pin bushes

10-0-0

C.

To washing car by power, lubricating all points checking all oil levels cleaning

10-0-0

D.
To charge battery

2-8-0

E.
To examining stg. connections and checking toe in

3-8-0

103-1-3 or

103-1-0

The first 12 items of the bill amounting to Rs. 58-15-6 represent the charges for motor parts as such. These transactions though made in the course of executing the repairs were treated as sales, and the sales' tax was collected from the customer. Thereafter there are four items, namely, A and C to E which are obviously in the nature of labour charges (A and C to E are charges for renewing King Pin bushes, washing, lubricating etc., charging battery and examining steering connections etc.). Item B is mentioned as "To turning four king pin bushes Rs. 10." The total bill comes to Rs. 103-1-3.

In regard to this sum of Rs. 10, which was debited to the account of the owner of the car, further details are available in the books. The king pin bushes appear to have been "fabricated" out of a brass rod 7/8" thick. The books of the assessee give the details as to how the sum of Rs. 10 charged for the turning of the king pin bushes was arrived at. They run thus :

> Costs of brass rol 7/8" thick. 0-13-6 " cotton waste. ... 0-2-0 " Letinax ... 0-6-0 Totalling roughly Rs. 1-6-0 In another portion of the books this sum of Rs, 1-6-0 is shown as the cost of the material and the balance of Rs. 8-10-0 is clubbed with other labour charges. So that with respect to the fabrication and Supply of four king pin bushes only the cost of material and the labour charges are included. The books do not prove either that any profit was added to this amount or that the king pin bushes were manufactured on a commercial scale and four articles supplied therefrom.
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> 11. Reverting to the bill mentioned above one can classify it broadly into four items;
>
> 1. Sales of motor spare parts as such,
>
> 2. Labour charges debited as such,
>
> 3. Price of used up materials like polish, waste cotton for polishing, etc.

> 4. Cost of fabricated materials which included the cost of the raw material and the cost of labour. There is no controversy now in regard to items to 3 above. In regard to item 1 the assessee has treated the transactions as sales and has collected sales-tax from the customer, and the same has been paid to the State. The learned Advocate-General appearing on behalf of the State has stated before us that the State would not be entitled to levy any tax on the labour charges as also on the price of materials which got used up in the course of repairs, e.g., polish, cotton waste, etc. In the latter case there would be no transfer of property to the customer, and it is not possible to conceive that those materials were sold as such to him. What, therefore, remains is the fourth item, the charges in respect of the fabricated materials.
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> 12. If a car is sent to the assessee for repair and some spare parts have to he fitted and those spare parts are either available with them or in the market, such parts are supplied and sales-tax collected from the customer. Such a supply is treated by the assesse itself as a sale of those spare parts.

But if such spare parts are not available, the assessee manufactures those parts for the purpose of effecting repair in its, what is stated to be a well-equipped workshop. It would be convenient to refer to them as "fabricated parts". An illustration of this is the item in respect of which charges" for "turning four king pin bushes" Rs. 10 is made in the accounts. We have indicated already that the charges comprise the cost of material and labour. It is argued tor the Sta'te that in regard to this fabricated part it was really a sale of such part to the customer, and therefore the assessee would be liable to pay the tax thereon.

In the particular case referred to by way of illustration it is contended that Rs. 10 would represent the sale price of the four king pin bushes. It is therefore necessary to consider whether there has been a sale by the assessee to the customer of the fabricated materials, e.g., four king pin bushes. Neither the bill issued to the party nor the account books of the assessee support the case of a sale of the four king, pin bushes as such.

13. In order to constitute a sale it is necessary that there should be an agreement between the parties, on the part of the assessee to sell and on the part of the customer to purchase. In 1958-9 STC 353 at p. 365: (AIR 1958 SC 580 at p. 567) (D) the Supreme Court observed:

> "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 th'e goods".

It has been pointed out that a mere passing of the property in the particular chattel is not decisive of the question whether the component parts of that chattel were sold or not. That is to say if a particularmotor part (e. g.) king pin bushes is put in the car while reconditioning and repairing it, it is undoubted that title to that motor accessory passes when the repairer delivers the car to its owner;

but to constitute sale of that part it is necessary that there should have been an agreement between the parties for the sale of that accessory.

In the Cannon Dunkerley case (C) this court held that in the case of chattel which has to be produced by the supply of labour and work of the contractor and also by the supply of materials necessary for producing the thing, when the property in the larger corpus passes to the other party, the contract is one for the supply of the larger chattel, and that there was no contract for sale or purchase of the component materials "separatim". In the instant case there is no question of the transfer of property in the larger corpus, viz., car, as the car belonged to tile customer.

The contract was to execute works on the car of the customer, and in the course of such repairs certain new accessories or parts had to be put in.

There is no doubt that the property in those materials would eventually pass to the customer, but the question would be whether the agreement between the parties was that such parts should be treated as sold "separatim" or were they merely supplied in the course of carrying out a works contract of repair and charged as such.

14. Therefore whether in a particular case there is a contract of sale of materials as distinct from a pure works contract would depend upon the agreement between the parties and on proof of. an intention to sell the materials as such. This aspect of the case has been considered by the Supreme Court in the Judgment referred to above at page 377 fof STC): (at p. 573 of AIR) thus:

> "It has already been 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."

The Supreme Court then quotes with approval a passage from the judgment of Blackburn J. in Appleby v. Myers, (1867) 2 CP 651 (E), which is in these terms:

> "It is quite true that materials worked by one into the property of another become part of that property. This is equally true whether it is fixed or moveable property. Bricks built into a wall becomes part of the house; thread stitched into a coat which is under repair, or planks and nails and pitch worked into a ship under repair become

> part of the coat or the ship.' Two more elements at least are therefore necessary in addition to a transfer of a moveable property to constitute a sale. (1) There should be an agreement between the parties to sell and purchase and (2) that agreement should be with reference to die particular goods. A mere incorporation of a move-able thing into a larger property and transferred when the latter is delivered over to the customer cannot by itself amount to a sale.

15. In this connection reference was made by the learned Advocate General to the case in Love v. Norman Wright (Builders) Ltd.. 1944-1 KB 484 (F), That was a case where the defendants to the action had agreed with the Secretary of State to supply black-out curtains and curtain rails and fix them in a number of police stations. The defendants in their turn entered into a sub-contract with the plaintiffs that they should prepare those curtains and roils and erect them in the police stations. The question which arose for consideration was whether the sub-contract was one for sale of goods or for work and service, the supply of the material being only in connection with the work undertaken. It was held that it was for sale.

In coming to the conclusion that it was a sale it was observed by Goddard L. J.

> "On this point we agree with the learned Judge who has held that as the contract involved transferring to the defendants 'for a price chattels, namely curtains in which they had no previous property, it was a sale of goods. If one orders another to make and fix curtains at his house the contract is. one of sale though work and labour was involved in the making and fixing.....-"

16. It is clear from the facts of that case that the agreement was to supply curtains, and the mere fact that they were agreed to be prepared, supplied and fixed up would not deprive the contract of its essence, viz, a sale of the curtains. This rule cannot apply where the contract was to execute a work or repair which involved the supply of certain move-ables for effecting the repairs in respect of which moveables there was no specific intention either to sell or to purchase.

17. In the present case it cannot be said that the intention was to sell the king pin bushes as such.

18. Rarely customers know or even care to know anything about the parts to be replaced; the necessity for replacement is often discovered only during the process of repair. To them the transaction is very often an integral one; on the part of the assesses the parts were needed in the course of effecting repairs to the car and were fabricated ad hoc, J-e., for that purpose. It was a manufacture of the material occasioned by reason of the undertaking to repair the car and not one done as part of a commercial undertaking: to quote the words of the learned Advocate for the petitioners, it was "an ad hoc manufacture in connection with the repair of the car". The elements necessary for constituting a sale of tho part as such are therefore lacking in the case.

19. In this connection reference may be made to a Dassage in Benjamin on Sale (8th Edn.) at page 167:

> "Where a contract is made to furnish a machine or a moveable thing of any kind and before the property in it passes, to fix it to land or to another chattel it is not a contract for the sale of goods. In such contracts the intention is plainly not to make a sale of moveables as such but to improve" the land or other chattel, as the case may he. The consideration to be paid to the workman is not for a transfer of chattels but for work and labour done and materials furnished."

20. We are of opinion that the principle stated above would apply to the present case. If the essential intention of the parties was to have the car repaired, the manufacture of a particular chattel could only be incidental to the repair and not one for the sale of it.

21. In Banarasi Das Bhanot v. State of Madhya Pradesh (G), the Supreme Court has observed that the prohibition against imposition of tax is only in respect of contracts which are single and indivisible and not of contract which are a combination of distinct contracts for sale of materials and for work, and "that nothing shall prevent the sales-tax authorities from deciding whether a particular contract falls within tho category or another and imposing a tax on the materials where the contract belongs to the latter category."

22. In the present case there is no evidence of any anterior agreement between the parties in regard to the transaction. The only evidence available consists of the account books of the assessee as well as the bills issued by it to the customer. In the accounts the assessee has made a distinction between cases of sales as such and cases of charges, for labour and work. The entries in the books and the bills issued show that there was no agreement or intention to sell moveables, e.g., the king pin hushes ad such while charging for the repair of the car. In the circumstances it should be held that the charges fot the fabricated materials should be heated as charges in respect of the works contract end not independent sales of those materials. The result is that subject to the liability of the petitioner in regard to parts supplied and in respect of which tax was levied on the customers and the tax on such taxes collected, there is no other liability on, the part of the assessee in regard to the workshop transactions.

23. Thus in relation to the assessment year 1949-50 (T. R. C, No. 233 of 1956) no portion of the disputed turnover, Rs. 2,16,550, is liable to be taxed, neither Rs. 1,27,765, which represented only labour charges, nor Rs. 73,627, which represented contracts which did not involve any sale of spare parts separating nor Rs. 15,158, which represented die value of what has been referred to as the "fabricated" parts.

24. The assessments of the other years, 1950-51, 1951-52, and 1952-53 also will have to be revised by the Tribunal on the same lines.

25. The revision cases are allowed to the ex tent indicated above, with costs in one, T. R. C. No. 233 of 1956. Counsel's fee Rs. 250/-.