

A COMMISSIONER OF SALES TAX, GUJARAT

v.

M/S. SABARMATI RETI UDYOG SAHAKARI MANDALI LTD.

April 26, 1976

B [H. R. KHANNA AND P. K. GOSWAMI, JJ.]

*Sales Tax—Works contract for manufacture and supply of kiln burnt bricks—Bricks manufactured and supplied according to contract and payment received—Contract whereby land is given free and the right to sell to third parties is subject to restrictions—Whether there is a transfer of chattel for consideration—Contract whether liable to sales tax on bricks supplied—Bombay Sales Tax Act, 1959.*

C *Contract of sale and contract for work and labour—Distinction—Beneficial welfare features in a contract do not negate the concept of a contract of sale.*

D The respondent manufactured and supplied kiln burnt bricks to the appellant as per the works contract dated 8/9th December, 1970, which provided (i) that land would be given free; (ii) that the material shall remain at the contractor's risk till the date of final delivery; and (iii) that the contractor had a right to sell to the third parties bricks subject to payment of 10% of the value of materials at the tender rates of the appellant. The respondent was assessed to sales tax under the Bombay Sales Tax Act, 1959, on the basis that these supplies were sales. The Deputy Commissioner of Sales Tax on an application under s. 52 of the Bombay Sales Tax Act held the supplies as sales. On appeal the Sales Tax Appellate Tribunal confirmed it, following the ratio of the decision in 1964 (2) SCR p. 879 (*C. B. Gosain v. State of Orissa and Ors.*) But, the High Court, on a reference answered it in favour of the assessee and against the revenue.

E Allowing the Revenue's appeal by special leave the Court,

F HELD: (1) It is well settled that whether a particular transaction is a contract of sale or a works contract depends upon the true construction of the terms and conditions of the document, when there is one. The question will depend upon the intention of the parties executing the contract. There is no standard formula by which one can distinguish a contract of sale from the contract for work or labour. The question is not always easy and has always vexed jurists all over. The distinction between contract of sale of goods and a contract for work and labour is often a fine one. A contract of sale is a contract whose main object is the transfer of property in and the delivery of the possession of, a chattel as a chattel to the buyer. [160 E-G]

*State of Gujarat v. Variety Body Builders*, [1976] (3) SCR 131 applied.

Halsbury's Laws of England, referred to.

G (2) As per terms and conditions of contract, the land was given free for manufacture of bricks; the materials remained at the risk of the contractor till the date of final delivery; the respondent could not sell the bricks to third parties but could do so under certain restrictions; the contracting parties have used the words as sale, purchase, delivery or rates of supply etc., in the contract. All these terms and conditions are almost identical to the conditions in *Chandra Bhan Gosain's case* and hence the decision in that case will govern the present case as well. The various other terms in the contract, namely, maintenance of a qualified executive engineer for supervision of work, restriction on employment of children under 12 years of age, labour welfare provisions regarding wages, workmen's compensation etc., provision relating to cruelty to animals, non-payment of royalty for excavating earth etc. relate to

a process of proper and efficient manufacturing of bricks and are not inconsistent in a contract of sale. These terms do not appear to impinge on the character of the contract as one for sale of bricks manufactured. The Government in its overall interest and anxiety could insist on compliance of certain beneficial legal measures. Provision against sub-letting when the land was given free by the Government was also understandable. All these features do not negate the concept of a contract of sale of bricks that are ultimately manufactured. The true test in this case is whether in making the contract, brick produced was transferred as a chattel for consideration and this has taken place in this case. The essence of the contract was, therefore, the delivery of the bricks after manufacturing. [164 A-H, 165 A-D]

(3) The contract in this case is contract of sale and not a works contract and the assessee is liable to sales tax. [165E]

*C. B. Gosain v. State of Orissa and Ors.* [1964] (2) SCR 879, followed.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1512 of 1971.

Appeal by Special Leave from the Judgment and Order dated the 8th/9th December, 1970 of the Gujarat High Court in Sales Tax Reference No. 3/70.

*S. T. Desai* and *M. N. Shroff* for the Appellant.

*V. S. Desai, Vimal Dave* and *Miss Kailash Mehta*, for the Respondent.

The Judgment of the Court was delivered by

GOSWAMI, J, This is an appeal by special leave against the Judgment of the Gujarat High Court dated 8th/9th December, 1970.

The respondent (hereinafter to be described as the assessee) entered into a contract with the Public Works Department of the Government of Gujarat on September 6, 1965 for manufacture and supply of kila-burnt bricks to the said Department for the construction of the Capital Project, Gandhinagar. Large quantities of bricks were manufactured and supplied under the contract and the applicant received payment for the same in accordance with the agreed rates. The assessee made an application under section 52 of the Bombay Sales Tax Act, 1959, on November 19, 1967, to the Deputy Commissioner of Sales Tax, to determine the question whether the said supplies of bricks by the assessee to the Public Works Department were sales or works contract. The Deputy Commissioner held the supplied of bricks by the assessee as sales. The assessee then appealed to the Tribunal against that order. The Tribunal following the ratio of the decision of this Court in *Chandra Bhan Gosain v. The State of Orissa and others*(<sup>1</sup>) came to the conclusion that the supplies of bricks were sales. At the instance of the assessee, the Tribunal referred the following question of law to the High Court :—

“Whether on the facts and in the circumstances of the case the transaction envisaged by the contract entered into by the applicant with the Public Works Department of the Govern-

(1) 14 S.T.C. 766 : [1964] 2 S.C.R. 879.

A ment of Gujarat on 6th September, 1965, for the manufacture and supply of kiln-burnt bricks to the said Department and the supply of bricks to the said Department in terms of their running Bill No. XI dated 28th October, 1967, is a sale or a works contract?"

B The High Court answered the question in favour of the assessee holding that the transaction was a works contract. In coming to that conclusion the High Court held as follows :—

C "In our opinion, the decision of the Supreme Court in *Chandra Bhan Gosain's* case (supra) is clearly distinguishable on facts. The contract in that case, though prima facie worded as regards the relevant clauses in similar fashion as the contract in the instant case, is in fact cast in a different mould and it would be difficult to hold in the light of the special features and characteristics of the contract with which we are concerned that the decision of the Supreme Court in that case would completely govern the facts of this case."

D Mr. S. T. Desai, the learned counsel for the appellant, submits that the present case is squarely governed by the decision in *Chandra Bhan Gosain's* case (supra) and the High Court is wrong in holding to the contrary.

Mr. V. S. Desai, learned counsel appearing on behalf of the assessee, on the other hand, submits that the High Court is right in distinguishing the present case in view of certain distinguishing features of the contract with which we are concerned.

E It is well-settled that whether a particular transaction is a contract of sale or works contract depends upon the true construction of all the terms and conditions of the document, when there is one. The question will depend upon the intention of the parties executing the contract. As we have observed in our judgment in *State of Gujarat v. Variety Body Builders*(1) which we have just delivered there is no standard formula by which one can distinguish a contract of sale from a contract for work and labour. The question is not always easy and has for all time vexed jurists all over. The distinction between a contract of sale of goods and a contract for work and labour is often a fine one. A contract of sale is 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. (Halsbury's Laws of England, Third Edition, Volume 34, page 6.)

G The contract with which we are concerned in this appeal is found in a tender "for the supply of materials" containing a memorandum of the conditions. The nature of work is described as "manufacturing and supplying kiln-burn bricks for construction of gandhinagar". The question will depend upon the true construction of the tender which, on acceptance, is treated here as the contract containing all the terms and conditions agreed upon between the two parties. In the tender the assessee stated "I/We chairman Sabarmati Rati Udyog Sahakari Mandli

(1) [1976] 3 S.C.R. 131

Ltd., the undersigned do hereby tender for the supply of the materials described in the Schedule attached herewith subject to the conditions annexed. The schedule described materials as bricks and also stated "quantities to be delivered", and "rate at which to be supplied". The tender is described as "Supply of Materials Tender". Although the above nomenclature, by itself, is not decisive, we find that the same is justified by the principal terms governing the contract to which we will presently refer.

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"Clause 6 : The contractor shall give notice to the Executive Engineer or his Assistant of his intention of making delivery of materials and on the materials being approved, a receipt shall be granted to him by the Executive Engineer or by his Assistant and no materials which is not so approved shall be considered to have been delivered.

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Clause 7 : On the completion of the delivery of materials, the contractor shall be furnished with a certificate to that effect, but the delivery shall not be considered to be complete until the contractor shall have removed all rejected materials, and shall have the approved materials, stacked or placed in such position as may be pointed out to him.

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Clause 8 : The materials to be supplied shall be of the best quality and in strict accordance with the specification and the contractor shall receive payment for such materials only as are approved and passed by the Executive Engineer or his Assistant. Should the Executive Engineer consider that any of the materials delivered are not of the best quality are not in strict accordance with the specification but that they may be accepted and made use of it shall be within his full discretion to accept the same at such reduced rates as he may fix thereon.

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Clause 9 : In the event of the material being considered by the Officer in the charge of the work to be inferior to that described in the specifications, the contractor shall on demand in writing, forthwith to remove the same at his own cost and in the event of his failure to do so, within such period as may be named by the Executive Engineer or his Assistant, the said Officer may have such rejected material removed at the contractor's risk and expense, the expense so incurred being deducted from any sums due or which may become due to the contractor.

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- A      Clause 11 : The contractor shall supply at his own expense all tools, plants and implements required for the due fulfilment of his contract, and the materials shall remain at his risk till the date of final delivery, except such portion as shall have been in the meantime removed for use by the Executive Engineer or his Assistant.
- B      Cause 13 : This contract shall not be sublet without the written permission of the Executive Engineer. In the event of the contractor subletting his contract without such permission he shall be considered to have thereby committed a breach of the contract and shall forfeit his security deposit, and shall have no claim for any compensation for any loss that may accrue on account of the collection of the materials or engagements entered into.
- C      Clause 16 : No guarantee can be given that the total number of quantities of material indicated in the Schedule of the contract will be ordered during the period of the contract. But, the Executive Engineer shall purchase from the contractor all such materials as are detailed in the Schedule which he may require to purchase during the period of the contract.
- D      Clause 17 : No claim or claims made by the contractor for increased rates on the grounds that the market or other rates included in the contract, have risen during the period of his contract, will be recognised, that is to say, the contractor is bound to complete the work and or to supply materials at the rates mentioned in the contract.
- E      Clause 22 : All rates quoted by the contractors are inclusive of sales tax and the contractor will pay the same himself.
- F      Clause 24 : The contractor hereby declares that the articles sold to the buyer under this contract shall be of the best quality (and workmanship) and shall be strictly in accordance with the specifications and particulars contained in the Schedule and accompaniments hereof and the contractor hereby guarantees that the said articles would continue to conform to the description and quality aforesaid for the period shown in the Schedule from the date of delivery of the said articles to the purchaser and that notwithstanding that fact that
- G      Clause 24 : The contractor hereby declares that the articles sold to the buyer under this contract shall be of the best quality (and workmanship) and shall be strictly in accordance with the specifications and particulars contained in the Schedule and accompaniments hereof and the contractor hereby guarantees that the said articles would continue to conform to the description and quality aforesaid for the period shown in the Schedule from the date of delivery of the said articles to the purchaser and that notwithstanding that fact that
- H      Clause 24 : The contractor hereby declares that the articles sold to the buyer under this contract shall be of the best quality (and workmanship) and shall be strictly in accordance with the specifications and particulars contained in the Schedule and accompaniments hereof and the contractor hereby guarantees that the said articles would continue to conform to the description and quality aforesaid for the period shown in the Schedule from the date of delivery of the said articles to the purchaser and that notwithstanding that fact that

the purchaser may have inspected and approved the said articles if during the aforesaid period stated in the Schedule the said articles be discovered not to conform to the description and quality aforesaid or have deteriorated and the decision of the purchaser in that behalf shall be final and conclusive. The purchaser will be entitled to reject the said articles on such portion thereof as may be discovered not to conform to the said description and quality on such rejection the articles will be at the 'Sellers' risk and all the provisions herein contained relating to rejection of goods, etc. shall apply. The contractor shall if so called upon to do, replace the articles etc. or such portion thereof as is rejected by the purchaser otherwise the contractor shall pay to the purchaser such damages as may arise by any of the breach of the condition herein contained, nothing herein contained shall prejudice any other right of the purchaser in that behalf under this contract or otherwise."

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Amongst some of the general conditions of the contract, we find the following :

"Clause 3 : All the necessary arrangements of raw materials, equipment water, coal, labour etc. required for supply and manufacture of bricks shall have to be made by the contractor at his own cost. The Government shall give only land for excavating soil for manufacture of bricks to the contractors free of rent from the land reserved by the Government for this purpose. The land shall have to be handed over back to the Government after the manufacturing of the brick work is completed."

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Clause 10 : The contractor shall have no right to sell these bricks, brick bats, chharas or any other materials manufactured on this site to any other private parties. If, however, it is found that the materials have been sold by him to private parties or other bodies, he shall have to pay to Department at the rate of 10% of the value of materials at the tender rates."

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While giving the specifications Item No. 1 herein refers to "manufacturing and supplying of 1 Class kiln-burnt bricks of standard size including stacking in regular consignments etc. camp. as directed".

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- A Mr. V. S. Desai brings to our notice the common as well as the distinguishing features of this case and of *Chandra Bhan Gosain's* case (supra). According to him the common features are the following:—

- B The land was given free for manufacture of bricks in both the cases. The materials shall remain at the contractor's risk till the date of final delivery. In *Chandra Bhan Gosain's* case (supra) the contractor could not sell the bricks to third parties without previous permission of the company. Here also the contractor has no right to sell the bricks etc. but if he does sell he will have to pay 10 per cent of the value of the materials at the tender rates. Both the clauses are, therefore, permissive clauses and are substantially the same. In both the contracts the contracting parties have used the words such as sell, purchase, deliver or rate of supply etc. in the contract.

- C In *Chandra Bhan Gosain's* case (supra) dealing with those very common features this Court observed as follows :—

- D "It may be presumed that it was understood that in quoting his rate for the bricks, the appellant would take into account the free supply of earth for making the bricks. Again what was supplied to the company by the appellant was not the earth which he got from it but bricks, which, we think, are something entirely different. It could not have been intended that the property in the earth would continue in the company in spite of its conversion into such a different thing as bricks. Further we find that the contract provided that the bricks would remain at the appellant's risk till delivery to the company. Now, obviously bricks could not remain at the appellant's risk unless they were his property. Another clause provided that the appellant would not be able to sell the bricks to other parties without the permission of the company. Apparently, it was contemplated that without such a provision the appellant could have sold the bricks to others.
- E Now he could not sell the bricks at all unless they belonged to him. Then we find that in the tender which the appellant submitted and the acceptance of which made the contract, he stated, "I/we hereby tender for the supply to the Hindusthan Steel Private Ltd. of the materials described in the undermentioned memorandum. The memorandum described the materials as bricks, and also stated the 'quantities to be delivered' and the 'rate at which materials are to be supplied'.
- F All these provisions plainly show that the contract was for sale of bricks. If it were so, the property in the bricks must have been in the appellant and passed from him to the subject-matter.

- H From the above extract, it is clear that the decision in *Chandra Bhan Gosain's* case (supra) will govern the present case where terms and conditions are almost identical so far as relating to the relevant subject-matter.

Mr. Desai, however, took pains to point out certain distinguishing features of the present case such as maintenance of qualified Executive Engineer for supervision of work subject to removal at the instance of the Government; restriction on employment of children under 12 years; labour welfare provisions regarding wages; workmen's compensation, etc.; provisions in relation to prevention of cruelty to animals; non-payment of royalty for excavating earth; use of tube-wells standing on the Government site manner of execution of the work regarding moulding and drying and provision against subletting which shall constitute a breach of the contract resulting in forfeiture of security deposit.

All the above terms relate to a stage in the process of proper and efficient manufacturing of bricks and are not inconsistent in a contract of sale. These terms do not appear to impinge on the character of the contract as one for sale of the bricks manufactured. The Government in its overall interest and anxiety for general welfare could insist on compliance with certain beneficial legal measures. It could also insist on certain terms which will ensure efficient production of the material. Provision against subletting when the land was given free by Government is also understandable. All the above features do not negate the concept of a contract of sale of the bricks that are ultimately manufactured. The true test in this case is whether in making the contract to brick produced was transferred as a chattel for consideration and we are clearly of opinion that this has taken place in this case. The property in the bricks was entirely of the assessee. He had not only to manufacture that but also to stack them for facilitating delivery. The essence of the contract was, therefore, the delivery of the bricks after manufacture. The present case cannot be distinguished from the decision of the *Chandra Bhan Gosain's* case (*supra*).

We are, therefore, clearly of opinion that the contract in this case is a contract of sale and not a works contract. The assessee is, therefore, liable to sales tax. The question is answered accordingly. The High Court was not right in answering the question in favour of the assessee. The decision of the High Court is set aside. The appeal is allowed with costs.

S.R.

*Appeal allowed.*