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Bose J.

BOSE J.—I agree except that I prefer not to express an opinion about the validity of the power conferred on the State Government by s. 6(2) of the Central Provinces and Berar Sales Tax Act, 1947, to amend the schedule in the way in which it has been amended here. I would leave that open for future decision.

Appeals allowed.

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April 7.

FIRM OF M/S. PEARE LAL HARI SINGH

v.

THE STATE OF PUNJAB & ANOTHER.

(S. R. DAS C. J., VENKATARAMA AIYAR, S. K. DAS, A. K. SARKAR and VIVIAN BOSE JJ.)

Sales Tax—Building contracts—State's power of taxation on supply of materials in construction works—Whether building contract comprises a distinct agreement for sale of materials—East Punjab General Sales Tax Act, 1948 (East Punjab XLVI of 1948), ss. 2(d)(j), 4(1)—Government of India Act, 1935 (26 Geo. 5 Ch. 2), Sch. VII, List II, Entry 48.

The petitioners who were building contractors in the State of Punjab were assessed to tax by the sales tax authorities on the supply of materials in construction works treating it as a sale, acting under the provisions of the East Punjab General Sales Tax Act, 1948. The petitioners challenged the legality of the assessment proceedings on the grounds, inter alia, that the legislature of the Province of Punjab had, under Entry 48 in List II of Sch. VII to the Government of India Act, 1935, no power to impose tax on the supply of materials in construction works as there was no sale in fact or in law of those materials, and that the provisions of the Act which sought to do it were *ultra vires*. The assessing authorities contended that on a true construction of the building contract entered into by petitioners with the Government it comprised a distinct agreement for the sale of materials and particularly relied on r. 33 of the rules appearing in the printed General Conditions of Contracts issued by the Government:

Held, that there was no sale as such of the materials used in the constructions by the petitioners and that no tax could be levied thereon.

Rule 33 which provides that the materials brought to the site shall become the property of the Government but that when the works are finally completed the surplus materials shall revert and become the property of the contractor, has for its object that materials of the right sort are used in the construction and has not the effect of converting what is a lump sum contract for construction of buildings into a contract for the sale of materials used therein.

State of Madras v. *Gannon Dunkerley & Co. (Madras) Ltd.*, [1959] S.C.R. 379, followed.

Tripp v. *Armitage*, (1839) 4 M. & W. 687 and *Reid* v. *Macbeth & Gray*, [1904] A.C. 223, relied on.

ORIGINAL JURISDICTION: Petition No. 128 of 1957.

Petition under Article 32 of the Constitution of India for enforcement of Fundamental Rights.

Gopal Singh, for the petitioner.

N. S. Bindra and *T. M. Sen*, for the respondents.

1958. April 7. The Judgment of the Court was delivered by

VENKATARAMA AIYAR J.—This is a petition under Art. 32 of the Constitution, and the question that is raised therein for our decision is as to the validity of certain provisions of the East Punjab General Sales Tax Act, 1948 (East Pb. XLVI of 1948), hereinafter referred to as the Act, imposing a tax on the supply of materials in construction works treating it as a sale.

Venkatarama Aiyar J.

It will be convenient at this stage to refer to the relevant provisions of the Act. Section 2(c) defines "contract" as meaning,

"Any agreement for carrying out for cash or deferred payment or other valuable consideration—

(i) the construction, fitting out, improvement, or repair of any building, road, bridge or other immovable property; or

(ii) the installation or repair of any machinery affixed to a building or other immovable property ....."

"Dealer" is defined in s. 2(d) as any person engaged in the business of selling or supplying goods. Section 2(h) defines "sale" as meaning "any transfer

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of property in goods for cash or deferred payment or other valuable consideration, including a transfer of property in goods involved in the execution of a contract.....". "Turnover" is defined in s. 2(j) as including "the carrying out of any 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". Section 4(1) enacts that,

".....every dealer whose gross turnover during the year immediately preceding the commencement of this Act exceeded the taxable quantum shall be liable to pay tax under this Act on all sales effected after the coming into force of this Act."

Section 5 provides that the tax shall be levied every year on the taxable turnover of a dealer at such rates as the Provincial Government may by notification direct. Rule 28 prescribes the mode of computing the taxable consideration with reference to contracts as provided in sub-cl. (ii) of cl. (i) of s. 2.

The petitioners are a firm of building contractors. In December, 1956, they entered into a contract with the Military Engineering Services Department of the Government for the construction of certain buildings known as "Married accommodation" at Ambala Cantonment and received a sum of Rs. 32,000 on January 31, 1957, as advance. On February 14, 1957, the assessing authority, Jullundur District issued a notice intimating the petitioners that as they had failed to apply for registration under s. 7 of the Act assessment would be made under s. 18, sub-s. (2), for the periods commencing from April 1, 1955, onwards, and calling upon them to produce their account books and attend the hearing on February 16, 1957. Thereupon, the petitioners filed the present petition under Art. 32 of the Constitution challenging the legality of the assessment proceedings, the main ground of attack being that the legislature of the Province of Punjab had, under Entry 48 in List II of Sch. VII to the Government of India Act, 1935, no power to impose tax on the supply of materials in construction works as there was no sale in fact or in law of those

materials, and that the provisions of the Act which sought to do it were *ultra vires*. This question is now concluded by the decision of this Court in *The State of Madras* v. *Gannon Dunkerley & Co. (Madras) Ltd.* (1) wherein it has been held that the expression "sale of goods" in Entry 48 has the same import which it bears in the Indian Sale of Goods Act, 1930, that in a building contract there is no sale of materials as such, and that accordingly the Provincial Legislature had no power to impose a tax thereon under Entry 48.

In this view, we have now to consider the contention advanced by Mr. Bindra for the respondents that the building contract entered into by the petitioners with the Government was not an agreement *simpliciter* for the construction of works, but that on its true construction, it comprised a distinct agreement for the sale of materials. If that can be established, it is not disputed that the respondents would have a right to tax the transaction even apart from the impugned provisions. The question is whether the contract of the petitioners with the Government for construction was one and indivisible, or whether it was a combination of an agreement for sale of materials and an agreement for work and labour. The evidence placed before us leaves us in no doubt as to the true character of the contract. The tenders which where called for and received were for executing works for a lump sum, and in his acceptance of the tender of the petitioners dated December 15, 1956, the Deputy Chief Engineer stated:

"The above tender was accepted by me on behalf of the President of India for a lump sum of Rs. 9,74,961."

How this amount is made up is given in Annexure E to the reply statement. It will be seen therefrom that the petitioners were to construct nine blocks, and the amounts are worked out treating each of the blocks as one unit, and the figures are totalled up. It is impossible on this evidence to hold that there was any agreement for sale of the materials as such by the petitioners to the Government.

(1) [1959] S.C.R. 379.

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For the respondents reliance was placed on the rules appearing in the printed General Conditions of Contracts issued by the Government. Rule 33 which was particularly relied on provides:

"All stores and materials brought to the Site shall become and remain the property of Government and shall not be removed off the Site without the prior written approval of the G. E. But whenever the works are finally completed, the contractor shall at his own expense forthwith remove from the Site all surplus stores and materials originally supplied by him and upon such removal, the same shall revest in and become the property of the Contractor."

It is argued that the true effect of this provision vesting the materials in the Government is that those materials must be taken to have been sold to it. That this is not the true meaning of the rule will be clear when regard is had to other provisions in the rules. Thus, the materials which are used in the construction must be approved by the authorities as of the right quality, and they could be condemned even after the construction is completed if they are not according to contract or of inferior quality, in which case the contractor has to remove them and rebuild with proper materials. Terms such as these and those in r. 33 quoted above are usually inserted in building contracts with the object of ensuring that materials of the right sort are used in the construction and not with the intention of purchasing them. If r. 33 is to be construed as operating by way of sale of materials to the Government when they are brought on the site, it must follow that the surplus materials remaining after the completion of the work must be held to have been re-sold by the Government to the contractor, and that is not contended for.

In *Tripp* v. *Armitage* (1), a builder who had been engaged to construct a hotel became insolvent, and dispute arose between the assignees in bankruptcy and the proprietors of the hotel as to the title to certain wooden sash-frames which had been delivered by the insolvent on the premises of the hotel and had been

(1) (1839) 4 M. & W. 687; 150 E. R. 1597, 1603.

approved by the clerk and returned to the insolvent for the purpose of being affixed. The contention on behalf of the proprietors was that the goods having been approved by their surveyor, they must be held to have been appropriated to the contract and the property therein passed to them. In negativing this contention, Parke B. observed:

"It is said that the approbation of the surveyor is sufficient to constitute an acceptance by the defendants; but that approbation is not given eo animo at all; it is only to ascertain that they are such materials as are suitable for the purpose; and notwithstanding that approval, it is only when they have been put up, and fixed to the house, in performance of the larger contract, that they are to be paid for."

In *Reid* v. *Macbeth & Gray* (1), the facts were similar. The dispute related to certain plates which had been prepared by contractors to be fitted in a ship. These plates had been passed by the surveyor and were marked with the number of the vessel and with marks showing the position which each plate was to occupy in the vessel. The ship-owners laid claim to these plates on the ground that by reason of the approval by their surveyor and by the markings the property therein must be held to have passed to them, and that accordingly the assignees in bankruptcy of the contractors could not claim them. That contention was negatived by the House of Lords, who held that the facts relied on did not establish a contract of sale of the materials apart from the contract to construct the ship, and that the title to the materials did not as such pass to the shipowners. The position is the same in the present case. Rule 33 has not the effect of converting what is a lump sum contract for construction of buildings into a contract for the sale of materials used therein. It must therefore be held following the decision in *The State of Madras* v. *Gannon Dunkerley & Co. (Madras) Ltd.* (2) that there has been no sale of the materials used by the petitioners in their constructions, and that no tax could be levied thereon.

(1) [1904] A.C. 223. (2) [1959] S.C.R. 379.

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Counsel for the petitioners raised two other contentions, but they are unsubstantial and may be shortly disposed of. One was that in the definition of "turnover" in s. 2 (j), cl. (ii) which is what is applicable to the present case, there is no reference to sale of goods, and that, accordingly, even if Entry 48 in List II is to be interpreted in a wide sense, the provision as actually enacted does not, in fact, tax the supply of materials in works contracts, treating it as a sale. But the charging section is s. 4 (1), which makes it clear that the tax is on the gross turnover in respect of sales effected after the coming into force of the Act, and the obvious intention is to include the supply of materials in works contracts within the category of taxable turnover.

It was next contended that the definition of "dealer" in s. 2 (d) required that the person should be engaged in the business of selling or supplying goods, that the petitioners who were building contractors were not engaged in the business of selling or supplying goods but of constructing buildings, and that therefore they were not dealers within that definition, and that as under s. 4 the tax could be imposed only on a dealer, the petitioners were not liable to be taxed. But if the supply of materials in construction works can be regarded as a sale, then clearly building contractors are engaged in the sale of materials, and they would be within the definition of "dealers" under the Act. There is no substance in this contention either.

The petitioners, however, are entitled to succeed on the ground that the impugned provisions are not within the authority conferred by Entry 48, and a writ of prohibition should accordingly issue restraining the respondents from taking proceedings for assessment of tax in respect of materials supplied by the petitioners in construction contracts. We direct the parties to bear their own costs.

Petition allowed.