

(1999) 03 KL CK 0018

In the High Court Of Kerala

Case No : W.A. No's. 776, 800 and 820 of 1999

Ajanta Colour Laboratory

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 26-03-1999

Acts Referred:

Constitution of India, 1950 — Article 265, 366
Kerala General Sales Tax Act, 1963 — Section 2, 5C

Citation : (1999) 03 KL CK 0018

Hon'ble Judges : G. Sasidharan, J;A.R. Lakshmanan, J

Bench : Division Bench

Advocate : K.I. Mayankutty Mather, for the Appellant; K. Muraleedharan, Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

1. Heard Mr. K.I. Mayankutty Mather for the respective Appellants and Mr. R.K. Muraleedharan, (Additional Government Pleader for Taxes for the Respondents-State, Appellants are the Assesseees in all the three appeals.

W.A. No. 776 of 1999:

2. The Petitioner in O.P. 3173 of 1994 is the Appellant. The Appellant is engaged in the business of photo processing laboratory and also in the purchases and sales of photographic materials. It carries on business inter alia of purchase and sales of photographic goods, processing of film from the negatives given by their customers. They also undertake the job of photography. The controversy arose when "works contract" was made deemed sales in pursuance of the 46th Constitutional Amendment to the Kerala General Sales Tax Act (for short "the Act"). According to the Appellant, photography is not a specified activity covered by the 4th Schedule to the Act and the activity of a photographer/the processing unit are three fold: (a) taking photographs of customers with films supplied by the photographer and supplying prints or enlargement after developing the same; (b) developing, printing and if necessary enlarging exposed films supplied

by the customers; and (c) take positive prints from the negatives brought by the customers and supply the prints in desired size to the customer along with their negative. When a photographer undertakes to take photographs, develop negative or do other photographic works and thereafter supply the prints to his clients, he cannot be said to enter into a contract for sale of goods and the contract, on the contrary, is for use of skill and labour by the photographers to bring about a desired result.

3. The assessing authority discarded the case of the Appellant and levied works contract tax in respect of the turnover in the hands of the Appellant. They challenged those assessment orders for the years 1989-90, 1990-91 and 1991-92 by filing the present Original Petition contending that on a proper interpretation of definition clause of "works contract" and also the relevant charging section, the "activity of photography will not come within the ambit thereof. The decision reported in *Jacob Gherian v. Union of India* (1995 (1) KLT 240) was relied on. When the Original Petition came up for hearing, Counsel for the Appellant made a submission, which appears to be without comprehending the subsequent judicial pronouncement on the subject, that the case can be disposed in the light of *Jacob Ckerian's* case (1995 (1) KLT 240) (supra). Accordingly, Shanmugham, J., by judgment dated 23rd November 1998 disposed of the Original Petition. Learned Counsel for the Appellant submitted in this context that in the decision in *Studio Kamalalaya v. Commercial Tax Officer*, the West Bengal Taxation Tribunal took the view that there is no works contract exigible to tax with reference to the activity of photography. It was held that the activity of photography relates to the transaction where the photographer supplies every thing from start to finish, from the photographic films which turns into a negative exposed film upto the production of finished photograph. In such a transaction, no works contract can be conceived by because no goods belong to the customer to which the processes of taking a photograph, developing, printing and if necessary enlarging. Hence Counsel submitted that this cannot be termed as works contract. It was also held in that case that in case of negative films supplied by the customer to a photographer for developing, printing and enlarging, although it is true that the negative belongs to the customer, who is a person other than the works contractor, the works done by the photographer to bring about the finished photographs do not effect any improvement or repair or alteration etc. to the negative films which is returned intact to the customer. The word "processing" in the definition clause imply that whatever is done should be done to the goods, namely, the negative supplied by the customer in order to bring about the activity within the ambit of the works contract. It is submitted that the said decision has been affirmed by the Supreme Court when it dismissed SLP (Civil) No. 4700 of 1993 on 3rd May 1993 against the decision of the West Bengal Taxation Tribunal. This apart, the Supreme Court had also approved this position in the decision reported in *M/s. Everest Copiers through R.A. Partner, etc. Vs. State of Tamil Nadu*, . In view of the above decision, Counsel submitted that the learned Single Judge ought to have allowed the Original Petition in toto

declaring that the Appellant is not liable to pay tax on their turnover relating to the photography as works contract.

4. Since this legal position has not been considered by the learned Judge, the Appellant filed R.P. 1 of 1999 highlighting the aforesaid aspects. The learned Judge dismissed the Review Petition on 12th January 1999. Aggrieved by the judgment of the learned Single Judge, the Petitioner preferred the Writ Appeal. According to the Appellant, in view of the settled legal position, the processing of photographic prints is a skilled labour irrespective of the fact that the materials are supplied by the customer and that the photograph is not a marketable commodity and there can be no transfer of property in goods unless the goods themselves exist. The transaction in question does not involve transfer of any goods within the meaning of Sub-clause (b) of Clause 29(a) of Article 366 of the Constitution and it is a pure service contract. The activity relating to customer's exposed films being developed and processed by the studio for preparation of final prints, there the negative of the customers are not altered or processed within the meaning of the definition clause contained in Section 2(xxix)(a) of the Act. According to the Appellant, their business transaction is in the nature of service contract and no element of sale of goods is involved in it attracting any of the provisions of the Sale of Goods Act. Similarly, "clause (6) of the Table appended to Section 5C of the Act purporting to cover photography as a deemed sale is ultra vires the very charging section. Schedule IV to the Act does not cover or take" in photography as specified item of works contract. The definition clause, particularly the explanation 3(3) of Section 2(xxi) of the Act did not cover nor intends to cover the processing of photo films as works contract and the provision is necessarily to be read down in such a way that the processing of photo films is not a deemed sale-works contract. Therefore, the proposal to levy tax in respect of the turnover relating to the film processing in the hands of a photographer treating the same as deemed sale of works contract is unconstitutional and clearly hit by Article 265 of the Constitution of India.

W.A. No. 800 of 1999:

5. This Writ Appeal is directed against the judgment of G. Sivarajan, J. in O.P. 6964 of 1999, dated 17 th March 1999. The Original Petition was filed to quash Exts.P-1, P-4 and P-5 and also to declare that Clause (6) of the Table appended to Section 5C of the Act to the extent it covers photography as works contract for the purpose of computation of tax is ultra vires and void and also for a further declaration that on a proper interpretation of Explanation 3B to Section 2(xxi) of the Act, it does not cover or intends to cover processing of film by a photographer and it cannot be termed as a deemed sale works contract. Ext. P-1 is the assessment order. Ext. P-4 is the demand notice and Ext. P-5 is the order passed by the Appellate Assistant Commissioner, Thrissur in a stay petition filed by the Appellant wherein the Appellate Assistant Commissioner granted conditional stay directing the Appellant to pay 50 percent of the balance tax and surcharge within 15 days and furnish security for the balance amount. In the

Original Petition, similar and identical contentions and question of law have been raised as in W.A. 776 of 1999. The Original Petition was dismissed by the learned Single Judge by confirming the conditional order of the Appellate Authority.

W.A. No. 820 of 1999:

6. This appeal has been filed against the judgment of Shanmugham, J. in O.P. 7208 of 1994 which was disposed of in terms of Jacob Cherian's case (1995 (1) KLT 240) (supra) The Review Petition filed to review the above judgment was dismissed by Sivarajan, J. on 19th March 1999 in R.P. 7/99. Here again, the very same contentions are raised as in the other two Writ Appeals.

7. Learned Counsel for the Appellants reiterated the contentions raised by the Appellants in the respective appeals and also cited Jacob Cherian's case (1995 (1) KLT 240) (supra) and also the judgment of the Supreme Court in M/s. Everest Copiers through R.A. Partner, etc. Vs. State of Tamil Nadu, We have gone through the relevant provisions of law and also the judgments relied by learned Counsel for the Appellants and also the other decisions which have been referred to in Jacob Cherian's case (1995 (1) KLT 240) (supra) in order to appreciate the rival contentions.

8. The question that arise for consideration is whether, in the activities carried on by the Appellants any works contract, is involved, thus making a portion of their business turnover exigible to sales tax in view of the 46th amendment to the Constitution and the consequential amendments to the Kerala General Sales Tax Act and Rules. According to Mr. Mayankutty Mather, the 46th Constitutional Amendment has not brought about any change in the matter of exigibility to sales tax as far as photographic work is concerned from the position as it obtained at the time of the decision of the "Supreme Court in Asst. Sales Tax Officers and Ors. v. B.C. Kame ((1977) 39 S.T.C. 237).

9. Learned Government Pleader pointed out that the challenge against the Constitutional Amendment is no longer available to the Appellants in view of the decision of the Supreme Court in Builders Association of India and Ors. v. Union of India and Ors. (1989) 73 S.T.C. 370. In this context, we may also usefully notice a series of decisions of the Supreme Court after the 46th Amendment to the Constitution reported in Gannon Dunkerley and Co. and Ors. v. State of Rajasthan and Ors. ((1993) 88 S.T.C. 204) and Builders Association of India v. State of Karnataka and Ors. ((1993) 88 S.T.C. 248). Thus, it is competent to the State Legislature to impose tax on transfer of property in goods involved in the execution of a works contract. Appellants can escape liability only if they are able to establish that the photographic work done by them will not come within the term "works contract".

10. We will now examine the activities carried on by the Appellants in photographic work and whether the said work would come within the works contract. The word "works contract" is defined in the Act as under:

2 (xxix-a) Works contract includes any agreement for carrying out for cash or for deferred payment or other valuable consideration the construction, fitting out, improvement, repair, manufacture, processing, fabrication, erection, installation, modification or commissioning of any movable or immovable property.

Mere execution of a works contract does not by itself attract liability for tax under the Act unless it is accompanied by transfer of property in goods involved in the execution of the contract when goods used in the process of executing a works contract are consumed in the process as in the case of chemicals used by the party or fuel and power, there is no transfer of any goods from the contractor to the awarder of the contract attracting liability to tax. The 46th Amendment to the Constitution has introduced Clause 29A to Article 366 defining "tax on sale or purchase of goods" as inclusive of a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of works contract). The definition of sale in Section 2(xxi) of the Act was thereafter amended with effect from 1st April 1984 inter alia adding explanation (3A) deeming a transfer of property in goods (whether as goods or in some other form) involved in the execution of works contract as a sale. The Supreme Court, as already noticed in paragraphs above, has analysed the reason behind the constitutional amendment in Builders Association of India v. Union of India ((1989) 73 S.T.C. 370) and had laid down that the emphasis is on the transfer of property in goods, without such transfer of property in goods being involved, there could be no levy of sales tax in relation to a works contract. The ratio of the decision applies to Explanation (3A) to Section 2(xxi) of the Act as well.

11. We shall now examine the three categories of activities carried on by the photographers. They are:

- (1) take photograph of customer, develop the negative and supply positive prints in the desired size to the customer;
- (2) develop the exposed film brought by the customer, take positive prints from them and supply negative and the prints in the desired size to the customer;
- (3) take positive prints from the negative brought by the customer and supply the prints in the desired size to the customer along with negative.

Learned Counsel for the Appellants contended that none of the three categories of the photographic work undertaken by them would come within the term "works contract" as defined in the Act as it does not involve construction, fitting out, improvement, repair, manufacture, processing, fabrication, erection, installation, modification or commissioning of any movable or immovable property. According to learned Counsel for the Appellants, the contract between them and the customers is only that of skill and labour in the nature of a service contract and passing of property in the photographic paper while handing over the positive prints is only incidental to the contract of service and that the concept of the deemed sale has no application in the nature of the transaction. Since the works carried on by the Appellants do not come within the definition of

"works contract" under the Act, it cannot be treated as a works contract and, therefore, no portion of their turnover can be made exigible to sales tax.

12. It is the case of the Revenue as put forward by learned Government Pleader that the photographic work undertaken by the Appellant would directly come within the term "works contract" and that a photographer's work is not based exclusively on his artistic skill and even if it is admitted that for taking a good photograph some amount of skill is necessary, it is not so in the case of the further processing or taking positive prints or making additional copies especially due to the availability of sophisticated cameras and other accessories/equipments used by the photographers in their work. Therefore, the Government Pleader submitted that the Appellants are bound to pay tax on the value of the photographic paper which forms part of their turnover.

13. We have already extracted the three categories of activities carried on by the photographers. The first category is where the photographer takes a photograph of the customer, develops the negative, takes positive prints and delivers the prints to the customer. Here, the photographer uses his own camera and his own film. The negative which is subjected to further processing belongs to the photographer and not to the customer. No basic goods is provided by the customer which was subjected to processing etc. by the photographer so as to make the contract one in the nature of works contract. There is no accretion to goods or the property or nucleus of a property which originally belonged to the customer. By applying the above test, it cannot be held that there is any works contract involved in the first category of the Appellant's activity. It cannot also be treated as sale of the photograph for the reason that it is not the intention of the customer to buy a photograph from the photographer which is not a marketable commodity and has no marketable values.

14. The second and third category of work can be considered together. The photographers undertake to develop exposed film handed over by the customer and take positive prints. They also receive processed negative from the customers and take positive prints therefrom. In these two cases, the developed negatives along with the positive prints are delivered to the customers. Sometimes, the work of enlargement is also taken up along with the above work. When such a work is done by the photographer, can it be said that there is no movable property of a person other than photographer with reference to which the work is executed? The property is the exposed film in the second category and the developed negative in the third category which belong to the customer and which is handed over to the photographer to work upon it. Appellants would contend that developing an exposed roll of film and taking positive prints therefrom would not come within any of the activities mentioned in the definition of "works contract".

15. We are not inclined to accept the contention of learned Counsel for the Appellants that the negative film is not undergoing any improvement or enhancement in its value by the process or treatment employed thereto by the

photographer and that the negative remains as before even after the process and treatment and, therefore, there could be no works contract. In our opinion, the second and third categories would come within works contract since the photographer is working upon the exposed film or the negative supplied by the customer and produce the positive prints in the desired size. We are also of the opinion that there is no artistic talent or skill of the Appellants in the activity of processing of an exposed film and taking prints therefrom.

16. The Supreme Court, in *Assistant Sales Tax Officer v. B.C. Kame* ((1977) 39 S.T.C. 237), had occasion to consider the levy of sales tax on the item, namely, the item for the supply of photoprints. The question which arose for determination before the Supreme Court was whether sales tax is payable by a photographer under the Madhya Pradesh General Sales Tax Act when the photographer takes photographs or does other photographic work and thereafter supplies the photographic prints to his customer. The photographer in that case carries on business inter alia of buying and selling photographic goods also. After buying photographic goods, he either sells them to his customers or uses them in three ways: (i) in taking photographs and supplying prints thereof, (ii) in making enlargements for the clients who bring their own negatives, and (iii) in preparing positive prints of the same size from the negatives brought by the customers. The Sales Tax authorities assessed the Assessee to sales tax on his turnover. The Assessee filed a Writ Petition to challenge the levy of sales tax on the last item, i.e., item (in) above, namely, the item for the supply of photoprints. His contention was that in taking a photograph, preparing its negative and thereafter the final positive print for supplying the same to the clients, he undertakes a contract of work and labour and does not enter into a sale transaction. It was also his contention that the prepared positive print was not a marketable commodity and he could not sell the photograph of one person to any other person except with the former's consent. The case of the State was that the Respondent therein was carrying on a commercial activity in the nature of trade and business and the finished photographs supplied to the customer was a commodity and the supply of the same attracted the levy of sales tax. The Madhya Pradesh High Court came to the conclusion that the Assessee only undertook the contract of work and labour and did not enter into a sales transaction and as such held that the Assessee was not liable to pay sales tax in respect of the item to which the Writ Petition related. In appeal, the State has assailed the judgment of the High Court and the Counsel for the Assessee has canvassed for the correctness of the view taken by the High Court. The Supreme Court held thus:

When a photographer undertakes to take a photograph, develop the negative or do other photographic work and thereafter supply the prints to his client, he cannot be said to enter into a contract for sale of goods. The contract on the contrary is for use of skill and labour by the photographer to bring about a desired result. The occupation of a photographer, except in so far as he sells the goods purchased by him, is essentially one of skill and labour. Therefore, sales

tax is not payable by a photographer under the Madhya Pradesh General Sales Tax Act, 1958, when the photographer takes photographs or does other photographic work and thereafter supplies the photographic prints to his client or customer.

The Supreme Court has decided the case against the Revenue and has held the contract to be one for work and labour.

17. Another judgment of a Division Bench of our High Court in Deputy Commissioner of S.T. (Law) v. Vidyarambham Press and Book Depot ((1985) 58 S.T.C. 322) was also cited. In that cases, the Division Bench was considering a case of a printer who supplies letter heads, visiting cards, bill books, account books, balance sheets, ration cards etc. to a customer in pursuance of orders placed by him, is there a sale of finished goods or printed material to him and is their turnover exigible to sales tax. The Tribunal held that most of the transactions were in the nature of works contract and that marginal instances would require closer scrutiny with reference to the facts and circumstances of each transaction and that the test of marketability will be a useful guide in most of the situations. The Division Bench, after referring to Srinivasa Printing Works v. Sales Tax Officer (1966 KLT 1139), Sales Tax Officer v. Somasundaran ((1974) 33 S.T.C. 68), P.T. Varghese v. State ((1976) 37 S.T.C. 171) and various other decisions, held that on the facts and circumstances of the case, no mistake was committed by the Tribunal either in ascertaining the facts or in applying the relevant principles of law and that the transactions regarding supply of letter heads, visiting cards etc. were in the nature of works contract. The Division Bench has also observed that the Tribunal's decision could not be treated as laying down inflexible rules applicable to all transactions of a similar nature where attendant facts might be different. The Bench further held that it is difficult to accept the contention of the Government Pleader that supply of bill books, etc. by a printer should always be regarded as sale on the basis of the authority of P.T. Varghese v. State ((1976) 37 S.T.C. 171) (supra) and that the said decision cannot be construed as laying down any such inflexible rule.

18. Another decision of a Division Bench of this Court reported in Deputy Commissioner of Sales Tax v. Dr. Paranj's Dental Laboratories ((1987) 67 S.T.C. 249) can also be beneficially looked into. The Revenue was the Petitioner in that case and the Respondent was an Assessee under the Kerala General Sales Tax Act. The matter relates to "teeth setting" done by the Dental Laboratories to their patients. The amount received by the Laboratory was brought to tax by the assessing authority and in appeal, the Appellate Assistant Commissioner held that the amount realised towards teeth setting charges is not a transaction of sale of goods and directed exclusion of the same from the taxable turnover. The Revenue took up the matter before the Appellate Tribunal wherein reliance was placed on the judgment reported in John Mathew Bros. v. State of Kerala ((1978) 42 S.T.C. 140). The Tribunal concurred with the decision of the Appellate Assistant Commissioner and held that the amount realised towards teeth setting

charges is not a transaction of sale of goods exigible to sales tax. The Revenue filed the revision before the High Court which was dismissed by the Division Bench holding that interference is called for with the decision of the Tribunal. The Division Bench has observed thus:

We heard Counsel for the Revenue, Mr. Nambiar. It was contended that the final product was transferred on undertaking the job of teeth setting, and it cannot be denied that the said product is a sale of the goods. So, it is exigible to sales tax. We are unable, to agree. The Respondent Assessee was arranging teeth setting to the patients or customers. What they usually do is to take measurements of the gums of the customers and make the teeth setting. The set Manufactured for a particular customer cannot , be used by another. The measurement of the gum of each patient will vary. After noticing the above, facts, the Appellate Tribunal held that the teeth set prepared by a, dentist would be a waste, if the customer, who placed the order, did not turn up. It cannot and could not be sold to another. It not a marketable commodity. In the circumstances, it was stated to be only a contract of work and labour and that there was no sale of goods. We are of the view that on the analogy of a photographer, dealt with in the decision in *The Assistant Sales Tax Officer and Others Vs. B.C. Came, Proprietor Came Photo Studio,]*, this is essentially a contract to do skilled labour. Moreover, if the teeth, prepared by the dentist for a particular customer was not taken delivery of by him, it would be a waste. In other words, what is manufactured is not marketable goods. That is a very vital factor to decide whether there is a sale of goods. In the light of the above and for the reasons contained in paragraph 3 of the order of the Appellate Tribunal, we hold that the Appellate Tribunal was justified in stating that "teeth setting charges" is not a transaction of sale of goods exigible to levy of sales tax under the Act.

19. We shall now advert to the decision cited by learned Counsel for the Appellants in *M/s. Everest Copiers through R.A. Partner, etc. Vs. State of Tamil Nadu, .* In that case, the Appellant runs a photocopying business. Assessment was made on the basis that there was a sale by the Appellant of the photocopied or xeroxed document to the customer. The Supreme Court was concerned with the question as to whether the making of photostat copies with the use of a xerox or other machine and delivering the copies so taken to the customer on receipt of payment amounts to a sale of goods exigible to tax under the Tamil Nadu General Sales Tax Act. The Supreme Court, after referring to *B. Girija v. State of Karnataka ((1984) 56 S.T.C. 297)*, *Hindustan Aeronautics Ltd. v. State of Karnataka ((1984) 55 S.T.C. 314)* and other judgments, came to the following conclusion:

7. As we see it, the view taken by the Karnataka High Court is right and is based upon the decisions of this Court. Where the main object of the work undertaken by the person to whom the price is paid is not the transfer of a chattel as a chattel, the contract is one of work and labour. The main object of the work undertaken by the operator of the photocopier or xerox machine is not the

transfer of the paper upon which the copy is produced; it is to duplicate or make a zerox copy of the document which the payer of the price wants duplicated. The paper upon which the duplication takes place is only incidental to this transaction. The object of the payment of the price is to get the document duplicated, not to receive the paper. The payer of the price has no interest in the bare paper upon which his document is duplicated. He is interested in it only if it bears such duplication.

8. The case is very similar to Kame's case. The tests laid down by this Court as aforesaid are satisfied; the contract between the Appellant and the payer of the price to him is a contract of work or service, not a contract of sale upon which sales tax is exigible.

9. In the result, the appeals are allowed and the judgments and orders under appeal are set aside.

In our opinion, the above case of the Supreme Court has no application in the present case of the Appellants. The Supreme Court, in the above case, has held that the activities of a photocopier or zerox machine supplying duplicate copies of documents to the customer would not come within the definition of works contract. The Supreme Court held that in the photocopy process there is only duplication takes place and the object of the person is to get the document duplicated and there is in fact no processing is involved. In our opinion, the above decision of the Supreme Court has no application to the facts and circumstances of the cases on hand and is distinguishable on facts and on law.

20. We have already considered and categorised the activities of the "photographers into three categories and also considered the various judgments cited by either side. The Division Bench in Jacob Cherian v. Union of India (1995 (1) KLT 240) has held with respect to first category as work not exigible to sales tax finding that the work of the photographer "is of artistic skill and talent. If any property passess to the customer in the form of photographic paper, it is only incidental of service contract. As regards category Nos. 2 and 3, the Division Bench held that the work done by the Assessee in these categories would certainly come within the activity "processing" referred to in the definition of works contract. Taking positive prints out of the developed negatives which is an allied activity to the processing of exposed film would come under the definition of works contract. The photographer is working upon the exposed film or the negatives supplied by the customer and produce the positive prints in the desired sizes. The Division Bench also negatived the contention that while carrying on the above activity of processing an exposed roll of film and taking positive prints therefrom, there is no artistic talent or skill involved. Therefore, the artistic talent or skill which is required to take a photograph is already investigated by someone other than the Assesseees. It cannot be compared to the artistic skill or talent necessary for taking a good photograph or painting a good portrait.

21. In B.C. Kame's case (1977) 39 S.T.C. 237 (supra), the Supreme Court has

considered only the first category of work and second and third categories were not specifically considered. It was also found by Their Lordships that the value of the photographic paper is so minimal comparing to the charges taken by them after processing. Therefore, Their Lordships held that the photographic paper, the property which is transferred to the customer, is exigible to tax. Accepting the above view and the contentions of the Appellants, the learned Single Judges disposed of the Original Petitions finding that the Assesseees are entitled to the benefit of exemption coming under first category. The categories coming under second and third are exigible to tax.

For the foregoing reasons, we are of the opinion that the Writ Appeals are only to be dismissed and accordingly we do so. However, there will be no order as to costs.