

(1964) 11 GUJ CK 0013
In the Gujarat High Court
Case No : Sales Tax Reference No. 47 of 1963

Chelaram Hasomal

APPELLANT

Vs

The State of Gujarat

RESPONDENT

Date of Decision : 20-11-1964

Acts Referred:

Bombay Sales Tax Act, 1959 — Section 2, 2(11), 2(22), 52
Copyright Act, 1957 — Section 17

Citation : (1965) 16 STC 1021

Hon'ble Judges : J.M. Shelat, C.J.; P.N. Bhagwati, J

Bench : Division Bench

Advocate : S.L. Mody, for the Appellant; J.M. Thakore, Advocate-General and M.G. Doshit, Additional Government Pleader, for the Respondent

Judgement

Shelat, C.J.—The question that has been referred to this Court is :-

"Whether on the facts and in the circumstances of the case the work of preparing and supplying a personal technicolour enamelled photograph of an individual to the goldsmith from whom an order with specifications is received for its preparation, amounts to a contract of sale and whether such sale is liable to tax under the Bombay Sales Tax Act, 1959 ?"

2. The applicants prepare coloured photographs of Goods, saints and public men on miniature enamelled copper plates with a view to sell them to the public. Such photographs they describe as religious photographs. They also receive orders for preparing such photographs of individuals on enamelled copper plates. Such photographs are described by them as individual photographs. These plates have sometimes loops with which they are attached to ornaments, such as necklaces, and in such cases, the copper plates so arranged can be used as lockets.

3. On 6th August, 1961, the applicants sold one such locket bearing a personal photograph and several other lockets bearing photographs of religious men under a bill bearing No. 977. They also sold other lockets bearing photographs of

religious men by another bill bearing No. 978. The applicants submitted these two bills and requested the Deputy Commissioner of Sales Tax u/s 52 of the Act to determine whether these sales were taxable. The contention of the applicants before the Deputy Commissioner was that the preparation of these copper plates with photographs inscribed thereon involved considerable degree of skill, that these plates were specialised artistic pieces of work, that the value of raw materials used in the preparation of these plates was negligible compared to the value of the finished products and that the entire transaction was in the nature of a contract for rendering services and not one of sale of goods. With regard to copper plates on which they inscribed photographs of individuals, their further contention was that the ownership in the photographs always remained with the customer under the provisions of the Copyright Act of 1957 and further that there was no evidence of any transfer of title in the finished goods to the customer which he did not already possess. On both these contentions, the applicants submitted that they were not liable to be taxed under the Sales Tax Act. Before the Deputy Commissioner, they produced a writing in which they described the processes which they had to carry out before the finished product could be made by them. According to that writing, the applicants first received a photograph from a customer from which they make negative and positive films of the required size by means of a camera. Thereafter, chromate solution is applied on a small piece of glass for preparing a chromate plate. The chromate plate then is placed with a positive plate bearing a photograph of the customer in sunshine with a view to expose the figure on the chromate plate from the positive plate. As a result of this process, the figure is exposed on the chromate plate. Thereafter, ceramic enamel powder is applied on the chromate plate for developing the figure on the plate. Collodion solution is then applied on the plate and the plate is heated. The plate is then placed in a small water-tub and a small chromate film would be formed which is separated from the glass piece and would be floating in water in the water-tub. The floating chromate film then is taken out from the water-tub and is fixed on an enamel copper plate. After affixing the chromate film on a copper plate, the plate then is placed in a small furnace to give sufficient heat. As a consequence of this process of heating, the chromate film figure becomes permanent on the copper enamel plate in sepia colour. The sepia colour photo plate is then painted with different enamel colours and the plate is then again heated to make the coloured photograph permanent on the plate and to bring glaze on the plate. Relying upon this process, the applicants contended before the Deputy Commissioner that the resultant product was a highly specialized artistic piece of work and that when the applicants prepare such copper plates for a customer, the transaction would not be one of sale of goods but one of work and labour. The Deputy Commissioner rejected this contention and held that the copper plates with colour photographs thereon were covered by Entry 22 of Schedule E to the Act. Aggrieved by this decision, the applicants carried the matter before the Sales Tax Tribunal, but the Tribunal upheld the view of the Deputy Commissioner, observing that the business of the applicants was to produce finished lockets for sale and to sell them to anyone

who wished to buy them. The Tribunal also held that the sale of a locket with the photograph of religious persons was purely a commercial transaction. That fact indeed was conceded by the applicants before the Tribunal and, therefore, the only contention that remained before the Tribunal was with regard to the copper plates prepared by the applicants with photographs of individual customers. The Tribunal was of the view that the transactions in such copper plates also amounted to sales of goods and therefore attracted the provisions of the Sales Tax Act. It is this decision of the Tribunal which is challenged in this reference.

4. The real question that arises in this reference is whether the transaction in question amounts to a sale of goods within the meaning of the Bombay Sales Tax Act, 1959. Section 2(11) inter alia defines a "dealer" as meaning any person who whether for commission, remuneration or otherwise carries on the business of buying or selling goods in the State. Section 2(22) provides that a "sale" means a sale of goods made within the State, for cash or deferred payment or other valuable consideration, and includes any supply by a society or club or an association to its members on payment of a price or of fees or subscription, but does not include a mortgage, hypothecation, charge or pledge; and the words "sell", "buy" and "purchase", with all their grammatical variations and cognate expressions, shall be construed accordingly. Therefore, in order that the transaction in question becomes chargeable under the Act, it must amount to a sale by the applicants as a dealer, i.e., in the course of their business of selling goods.

5. The contention on behalf of the applicants before us was that when a customer placed an order to have an enamelled photograph imprinted on a locket, i.e., on a copper plate, the contract was not one of sale of the copper plate with the technicolour photograph thereupon or the locket, but it was one of work and skill and to create an object of art. The predominant element in the transaction was not to sell the locket but to have the photograph of the customer on the locket. Therefore, the essence or the predominant element of the contract is not to transfer property in the locket but, by the use of technical skill, to have the customer's photograph transferred on to a copper plate which, by its having a loop at one end, can be used as a locket or any other piece of ornament. To make such an enamelled photograph, it was argued, requires considerable technical skill and certain amount of aesthetic value and that it is a more advanced stage of art than mere photography and, therefore, the essence of the contract is to render skilled service. Such a transaction, therefore, does not involve sale of a chattel as a chattel.

6. In support of this contention, Mr. Mody relied upon two decisions, one in *D. P. Roy Chowdhury v. The State of Madras* ([1962] 13 S.T.C. 866(Mad)) and *V. K. Baraskar v. State of Madras* ([1963] 14 S.T.C. 615(Mad)), where it was held that the transactions in question did not amount to sales of goods and were therefore not amenable to the provisions of the Madras General Sales Tax Act, 1939. In *V.K. Baraskar Vs. State of Madras*, however, the petitioner was admittedly a

well-known sculptor, artist and painter and was sought to be taxed under the aforesaid Act in respect of sales by him of two works of sculpture, one a bronze cast called "Triumph of Labour" and the other a bronze statue of Mahatma Gandhi, to the Governments of Madras and West Bengal. The learned Judge who decided the petition held that the petitioner could in no sense be described as a dealer nor could the two creations in question be described as articles of commerce or trade produced for finding a market therefor, and consequently, the requirement of the definition of a "dealer" in the Act, namely, that the sale must be in the course of business or trade, was obviously not satisfied by the two transactions. The learned Judge observed that it was not any and every person who sold or bought would become a dealer as defined in section 2(b) of the said Act. It was only when a person entered into transactions of sale, in a commercial sense, as in trade or business that he could properly be described as a dealer under the definition. The transaction should essentially be commercial as suggested by the words "business of buying, selling, supplying or distributing goods". This requisite of commercial sense of the dealings had been carried also into the concept of sale as defined in section 2(b) of the Act, which made it even clearer than the definition of a "dealer", and that it was only when sales or purchases were effected by one in the course of trade or business that they became sales chargeable to sales tax. In the case of V. K. Baraskar ([1963] 14 S.T.C. 615(Mad)), the vocation of the appellant was to draw pictures for remuneration and to hand them over to business firms or printers who had them printed in considerable number of copies for sale or presentation. In the financial year 1956-57, he received Rs. 14,916-12-0 for the drawings. The taxing authorities held that as the appellant sold pictures for a price, the Act applied. The question before the High Court was whether the appellant was a dealer and whether he was selling the pictures drawn by him. The High Court observed that a mere course of business not involving the activities of sale, supply or distribution or a mere sale, supply or distribution without a range of activities constituting a system or course would not each, taken separately, be sufficient to attract the definition of a "dealer" and that the Act could not be invoked against a person who was not a dealer or in the absence of the taxable event, namely sale or purchase as defined under the Act. The High Court held that in that case it had not been established, and in fact it was not the case of the Department, that the appellant was a dealer, apart from the picture transactions, and therefore the question was whether these transactions constituted sales within the meaning of the Act. After citing the definition of the expression "sale" in that Act, the learned Judges observed that an artist who created a work of art for reward or remuneration had no resemblance to a dealer in works of art and that his activities taken as a whole did not constitute a sale. Illustrating this proposition for the purpose of deciding the true nature of the transaction, they said that when a picture was drawn by an artist for the use and benefit of another, even though the artist received charges for the work done by him, there would be no sale of the picture as there was no transfer of property from the artist to the other person. But assuming that there was transfer of property in the picture

from the artist to the customer, the transaction in its sum total would not be a sale. In every case, therefore, the question that the court must ask itself would be, what is the essence or the pith and substance of the transaction ? Is it a sale or is it a contract for work and labour ? Replying to the question posed by them, the learned Judges, in the context of the facts and circumstances before them, stated that it would be a misuse of language to describe an artist's work, be it for remuneration, as a sale of the produce of his art for a price. There would be no warrant for it either under the Sale of Goods Act or under the Madras General Sales Tax Act. The correct approach, they said, would be to view the transaction as a whole and not to dissect it or to catch hold of a limb of it and say that there was an element of sale in the transaction. A contract of sale would not be constituted merely by reason that the property in the materials would be transferred to the customer. If such materials are merely accessories to work and labour, the contract would be for work and labour and materials. On this principle, they held that the transactions of the appellant were not, even in any remote sense, sales under the Act. This decision was followed by the High Court in *V.K. Baraskar Vs. State of Madras*, where the assessee owned a studio and described himself as a commercial artist. He received orders from film producers and distributors and prepared designs for advertisement purposes. Using his skill and energy, the assessee produced sketches according to the directions given to him by his customers. After finishing the work, he handed over the papers on which the designs were drawn to his customers. These customers in their turn got them printed and used them as cinema posters for their business. The assessee, however, had nothing to do with the preparation of blocks from and out of the designs prepared by him or the printing of the designs. He also painted photographs with suitable colours and gave colour touches to the slides given to him by his customers. It was held that the assessee was only an artist and was not a dealer carrying on business of selling goods and was therefore not liable to sales tax under the Madras General Sales Tax Act, 1959. Following the observations made by Blackburn, J., in *Lee v. Griffin* ((1861) 30 L.J.Q.B. 252), they held that the assessee before them merely gave his personal services in the production of a work of art and that what was given to his customer was the resultant effect of the use of his skill, energy and labour in producing the finished product in accordance with the requirements of his customers. These three decisions, it is clear, turn on the footing that the transaction in question did not constitute a sale of goods but that the substance of the transaction was that the payee had to exercise his skill and labour for the production of the article and that it was only ancillary to that that some materials in addition to the skill and labour involved would pass to the buyer, but in substance, the payment was made not for the sale of goods but for the skill and experience of the payee.

7. The question then is, is the instant case one where the applicants are paid for their skill and experience and not for the sale of an article they produce ? In other words, as stated by the High Court of Australia in *The Federal*

Commissioner of Taxation v. Riley ([1953] 53 C.L.R. 69), is this a case of artistic service of a personal character or of a sale of a finished product ? In order to decide this question, let us first see as to what the applicants did when they received an order from a customer. According to the writing submitted by them to the Deputy Commissioner, the applicants would first receive a photograph from the customer and the customer would then ask them to reproduce that photograph on a copper plate of a required size. They would first prepare negative and positive films out of that photograph with the aid of a miniature camera and then, with the assistance of certain chemical process, reproduce that photograph on a copper plate which, when finished, could be used as a locket or any other ornament. It is, no doubt, true that the resultant article would require some photographic skill and technical knowledge. But that would be necessary in the production of a number of other commercial and mercantile articles. Mere requirement of such technical knowledge and skill, therefore, cannot by itself take away the transaction from the category of sale of goods. It would seem that essentially this work is not any the different from photography except that in addition to the making of a small size photograph, the applicants have to go through additional processes in order that such a photograph is reproduced on a copper plate and the photograph so reproduced then is coloured. Even then, the case is totally different from that of an artist who accepts commission to draw a painting and in which the artist is paid remuneration for his artistic skill and labour and for the creation of a piece of art. The value of such a creation lies in the art of it and not as a mere chattel. On the other hand, when a photographer takes a photograph of his customer and agrees to supply copies as the customer desires, the transaction is one of production of copies intended for sale. As stated earlier, some technical and even artistic skill may be brought into play even in photography and the photograph taken of one individual has no value to another individual. But that again would not take away the transaction from being a sale of goods. Visiting cards, greeting cards, pieces of pottery with the name of the buyer inscribed on them are instances which immediately occur to one's mind as examples where they would be of no value to others. But it is impossible to say that they are not goods for sale. There can, therefore, be no doubt that the production of enamelled colour photographs of individual customers on copper plates is the production of goods for sale. As we have said, the applicants have been producing such copper plates with photographs both of individuals and of eminent men and saints. Both are produced for sale. It was in fact conceded by them before the Tribunal that the latter class of copper plates were goods to which the Act would apply. But a distinction was sought to be drawn by Mr. Mody between the two on the ground that whereas in the former case the plates would be produced on orders from customers, in the latter case no such orders would be placed or required. We, however, fail to see any difference between the two classes of plates in principle, for in both the cases, the resultant copies are finished goods for sale and made in the course of the applicants' trade or business.

8. In this view, we are supported by the decision of the High Court of Madhya Pradesh in *D. Masanda and Co. v. Commissioner of Sales Tax* ([1957] 8 S.T.C. 370(MP)), where the question was whether a photographer could be called a dealer and was liable to sales tax in the matter of sales by him of photographs under the provisions of the Madhya Bharat Sales Tax Act, 1950. The High Court there held that when a customer came to a photographer for being photographed and for copies of photographs on payment, the substance of the contract between him and the photographer was not the performance of skilled service but the supply of finished goods. In such a contract the bringing into existence of physical things, namely, photographs, was the substance and the materials and chemicals of which photographs were the resultant effect were not merely ancillary to the contract. The High Court rejected the contention urged on behalf of the assessee that a contract for the sale of photographs was a contract for work and labour done, and observed that though a photograph was made or produced for a particular individual and had value for that particular person alone, the essential feature of the assessee's business as a photographer was the production of copies for sale wherein he did not, like a portrait painter, give his personal services to the production of a work of art. When a customer came to a photographer for being photographed and for copies of the photograph, the substance of the contract was not the performance of skilled services but the supply of finished goods. A similar view has also been taken by the Patna High Court in *M. Ghosh Vs. The State of Bihar*, , which also was a case of a photographer and where the High Court held that a professional photographer who took photographs of customers and sold printed copies of the photographs to them would be liable to pay sales tax under the Bihar Sales Tax Act, 1947. The learned Judges there held, rejecting the assessee's contention, that the contract was one for work and labour in which skill and artistry were involved, that it was manifest that the assessee was not engaged merely on an aesthetic or artistic occupation and that the gist of the matter was that the assessee was practising photographic process commercially in order to produce an article which would be bought and which would produce commercial profit. The High Court accepted the principle that what one has to look at in such cases is the substance of the contract and ascertain therefrom if the contract was for the supply of finished goods or whether it was an agreement for the exercise of skill and labour for the production of a particular article. Applying that test to the facts of the case, they held that the essence of the contract between the petitioner and the customers was to supply finished goods and the transaction was not a mere agreement for the exercise of skill and labour for the production of the photographs. As already stated, it is difficult to find any significant difference between the case of a photographer and the case of the present applicants, who besides taking photographs, resort to other additional chemical process in order to have that photograph transcribed on a copper plate. The reasoning applied in this case would equally apply to the present case and therefore the view taken by the Deputy Commissioner and the Tribunal has to be upheld.

9. Mr. Mody then contended that u/s 17 of the Copyright Act, the copyright in the photographs would vest in the customer and even where the customer places an order for such a photograph to be transcribed on a copper plate, the applicants can prepare such copper plate for the customer only and cannot sell such copper plates to any one other than the customer. The contention was that as a result of the provisions of the Copyright Act, the applicants would not be in a position to place such copper plates in the market as goods for sale, restricted as they would be to sell such copper plates only to the customer concerned, and therefore such sales cannot be said to be sales of goods within the meaning of the definition of "sale" in the Act. It is not doubt true that there would be a restriction upon the applicants against selling such copper plates to persons other than the customer concerned. But it is difficult to comprehend how such a restriction can possibly have any bearing on the question, namely, whether the sale in question to a customer recorded in the bill submitted to the Deputy Commissioner for his determination was a taxable sale or not. Any restriction upon the applicants, in view of the provisions of the Copyright Act, has really no connection with the question whether the applicants are dealers and are carrying on the business of producing enamelled photographs on copper plates. There is no dispute in the present case that the applicants are in fact carrying on the business of producing enamelled photographs on copper plates and are selling the same. If by reason of the Copyright Act any restriction results against selling such copper plates with the individual photographs of customers to persons other than the customers, it would not mean that such a sale cannot be said to be made in the course of their aforesaid business and that such a sale does not attract the provisions of the Sales Tax Act. A photographer also carrying on the business as such photographer would suffer from the same restriction in the sense that when he takes a photograph of a customer, he would not be entitled to sell copies of such photographs to persons other than the customer without his consent. A photographer carrying on his business of producing photographs and selling them to customers does not for that reasons cease to be a dealer within the meaning of the Act and the transactions entered into by him with his customers do not for that reason cease to be sales amenable to the provisions of the Sales Tax Act. As pointed out earlier, such transactions have in fact been held, both by the High Court of Madhya Pradesh and the High Court of Patna, to be sale falling within the respective Sales Tax Acts applicable in the aforesaid States.

10. For the reasons aforesaid, it is not possible for us to accept the contentions urged by Mr. Mody, on behalf of the applicants. Our answer to the question referred to us, therefore, will be in the affirmative. The applicants will pay to the respondent the cost of this reference.

11. Reference answered in the affirmative.