

(1975) 01 BOM CK 0032

In the Bombay High Court

Case No : Sales Tax Reference No. 10 of 1972

Commissioner of Sales Tax

APPELLANT

Vs

Studio Ratan Batra Private Ltd.

RESPONDENT

Date of Decision : 13-01-1975

Acts Referred:

Bombay Sales Tax Act, 1953 — Section 2, 2(13), 34(1)

Citation : (1975) 35 STC 522

Hon'ble Judges : M.H. Kania, J; D.P. Madon, J

Bench : Division Bench

Advocate : K.S. Cooper and R.A. Dada, for the Appellant; V.H. Patil and I.M. Munim, for the Respondent

Judgement

Madon, J.—The respondents to this reference made at the instance of the Commissioner of Sales Tax u/s 34(1) of the Bombay Sales Tax Act, 1953, are a private limited company. The respondents prepare designs required by their customers for boosting up the sales of their customers products and wares, and supply these designs to their customers. They also prepare blocks from these designs and sell these blocks to their customers.

2. A question arose in the assessment of the respondents for the period 1st April, 1954, to 31st August, 1955, whether the preparation and supply of designs by the respondents to their customers constituted a contract of work and labour or a sale. The Sales Tax Officer came to the conclusion that the transactions in question were sales. On appeal, the Assistant Commissioner of Sales Tax also took the same view and this was confirmed in revision by the Deputy Commissioner of Sales Tax. In further revision to the Sales Tax Tribunal, the Tribunal, however, reversed the orders of the lower authorities and held that the preparation and supply of designs by the respondents to their customers were not sales within the meaning of clause (13) of section 2 of the Bombay Sales Tax Act, 1953.

3. Arising out of the order of the Tribunal, at the instance of the Commissioner of

Sales Tax, a case has been stated and the following question referred to us for our determination :

"Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that the impugned transactions in respect of preparation and supply of designs by the respondent to its customers were not sales within the meaning of section 2(13) of the Bombay Sales Tax Act, 1953 ?"

4. Mr. Cooper, the learned counsel for the applicant, canvassed two points before us : namely, (1) that the transactions in respect of preparation and supply of designs by the respondents to their customers were sales, and (2) that, in any event, since the designs were prepared by artists employed by the respondents, who are a private limited company, the transactions, assuming they were contracts of art and skill had they been entered into with the artists themselves, could not be said to be contracts of art and skill or of work and labour but were sales as the respondents, being a private limited company, did not themselves draw their designs but got them drawn by artists employed by them.

5. The distinction between a contract of work and labour or of skill and labour and a contract of sale is by now well-settled and the only difficulty which at times arises is in the application of the test laid down for determining in which category a particular transaction falls. The test is one of the intention of the parties which is to be gathered from the terms of the contract and the surrounding circumstances. If the parties intend to contract for a chattel, then it is a contract of sale even though work or skill and labour may have to be bestowed in bringing into being the chattel. If the parties contract for the rendering of work and labour or skill and labour, it is not a sale, though in the execution of the contract the passing of materials may incidentally be involved. In support of his submission that the transactions in question were sales, Mr. Cooper relied upon *Lee v. Griffin* ([1861] 30 L.J.Q.B. (N.S.) 252).

6. In that case, there was a contract to make and supply a set of artificial teeth to fit the mouth of the person who ordered out the set. The person ordering out the said set died before the set could be fitted to her mouth. Thereupon the dentist filed a suit against the executor of the deceased to recover the price thereof. A defence which was taken up was that this was a contract for the sale of a chattel and as it was not in writing u/s 17 of the Statute of Frauds (29 Car. 2c. 3), no action could lie in respect thereof. The court came to the conclusion that this was a contract for the sale of a chattel and non-suited the plaintiff. Crompton, J., observed :

"I do not agree with the proposition, that whenever skill is to be exercised in carrying out the contract, that fact makes it a contract for work and labour, and not for the sale of a chattel; it may be the cause of action is for work and labour, when the materials supplied are merely ancillary, as in the case put of an attorney or printer. But in the present case the goods to be furnished, viz., the teeth, are the principal subject-matter; and the case is nearer that of a tailor,

who measures for a garment and afterwards supplies the article fitted."

7. Hill, J., observed that when the substance of the contract was goods to be sold and delivered, a count for work and labour cannot be sustained. In the same case, Blackburn, J., however, observed :

"I do not think that the relative value of the labour and of the materials on which it is bestowed can in any case be the test of what is the cause of action; and that if Benvenuto Cellini had contracted to execute a work of art for another, much as the value of the skill might exceed that of the materials, the contract would have been the less for the sale of a chattel."

8. Relying upon this authority, it was urged by Mr. Cooper on behalf of the applicant that the real test is whether or not the work and labour bestowed end in anything that can properly become the subject of sale and that neither the ownership of the materials nor the value of the skill and labour as compared with the value of the materials is conclusive, although such matters may be taken into consideration in determining, in the circumstances of a particular case, whether the contract is in substance one for work and labour or one for the sale of a chattel. Mr. Cooper submitted that applying this test the transactions in question were sales. We are unable to accept this submission.

9. In *Robinson v. Graves* [1935] All E.R. 935, the defendant commissioned an artist to paint a three-quarter length portrait of a lady for the sum of 250 guineas and the artist accepted the commission. The defendant repudiated the contract and, on the artist suing him for its breach, pleaded section 4 of the Sale of Goods Act, 1893, which, like the earlier Statute of Frauds, required that the memorandum of a contract should be in writing in order to sustain an action. Action, J., in the trial court decided in favour of the defendant and non suited the plaintiff. In appeal it was held that the plaintiff was entitled to succeed because, as the contract in substance was for the exercise of skill and as materials would have passed from the plaintiff to the defendant only as incidental to that skill, the contract was not a contract for the sale of goods but one for work and labour and materials supplied and, therefore, section 4 of the Sale of Goods Act did not apply. In the Court of Appeal, after referring to the passage of Blackburn, J., in *Lee v. Griffin* [1861] 30 L.J.Q.B. (N.S.) 252, quoted above, Slessor, L.J., observed that looking at the authorities as a whole and considering the matter as a matter of principle, if Blackburn, J., meant to state by his observations quoted above that whenever there was an agreement whereby a chattel would ultimately have to be delivered, that was of necessity a contract for the sale of goods, so wide a proposition cannot be supported.

10. We will now turn to an authority of our own High Court, namely, *Camera House, Bombay v. State of Maharashtra* [1970] 25 S.T.C. 354. In that case one of the questions which the court had to decide was whether a contract for the taking of a photograph as well as the developing the negative thereof was a contract of skill and labour or a contract of sale. This High Court took the view

that it was a contract of work, skill and labour. The court observed (at pages 367-368) :

"It is impossible to say that the first part of the transaction, viz., the taking of a photograph, is, even as a matter of plain language, a contract for sale. It is clearly a contract for the use of the artistic skill and labour of the photographer who takes the photograph. There can be no doubt that considerable technical skill is required in taking a goods photograph, and I have no hesitation in rejecting the contention of Mr. Khambatta that, with modern technique, the taking of photographs is almost mechanical. A person who wants to have his photograph taken does not walk into any shop but discriminates between a good photographer and a bad photographer, and also takes into account the charges for the same which vary considerably according to the skill and reputation of each individual photographer."

11. In principle we see no distinction between the case of a painter commissioned to paint a portrait and supply it or a photographer commissioned to take a portrait photograph and supply the negative thereof or a commercial artist commissioned to draw a design and supply it. In the case before us what the parties were contracting for was not the delivery of a chattel but for the skill and ability of the artist who would draw the design which would boost up the sales of the particular wares which were the subject-matter of the advertisement. We are fortified in this view by a decision of the Madras High Court in *T.V.S. Sarma Studio v. State of Madras* [1963] 14 S.T.C. 784. In that case too, a question arose whether the assessee, who owned a studio and described himself as a commercial artist and who received orders from film producers and distributors for preparing designs for advertisement purposes, was selling designs or whether the contracts entered into with him were contracts of skill, work and labour. The Madras High Court referred to two earlier decisions of the same High Court, namely, *D. P. Roy Chowdhury v. State of Madras* [1962] 13 S.T.C. 866, in which it was held that a sculptor commissioned to make bronze casts was not a dealer and that the contracts by which he was so commissioned were contracts of work and labour and not contracts of sale, and *V. K. Baraskar v. State of Madras* [1983] 14 S.T.C. 615, in which it was held that an artist who drew pictures for remuneration did not sell or supply pictures but was merely executing works involving art and skill.

12. What we have to look at is the substance of the contract between the respondents and their customers. The substance of the contract is for the preparation and supply of a design. The materials involved in it, namely, the piece of paper upon which the design is drawn, and the ink or paint with which it is drawn, are merely incidental. The real essence of the contract is the skill of the artist who draws the designs for the customers. The proposition that a design, because it is drawn on a paper, becomes a chattel because paper, either blank or with print or paint on it, is a salable commodity cannot be accepted. What the customer had contracted for was not paper with ink or paint on it but a design

which is a work of art and skill.

13. To us these authorities seem to be conclusive of the matter.

14. Turning now to the second point urged by Mr. Cooper, the learned counsel for the applicant, Mr. Cooper's submission was that as the designs were prepared not by the respondents themselves, who are merely a juristic person being a limited company, but an artist employed by them, the transactions were sales. In our opinion, this fact makes no difference. When a contract of work and labour or skill and labour is entered into, the person with whom it is entered into may either execute it himself wholly or may employ others to execute it. He may execute it in part and get the remaining part executed by his employees. It may be that the work is of such a nature that it is not possible for one man to execute every single part of it himself. Even great artists have employed pupils ,apprentices and others to execute some parts of their paintings and murals, which are today world famous.

15. In the result, we answer the question put to us in the affirmative. The applicant will pay to the respondents the costs of this reference.

16. Reference answered in the affirmative.