

(1999) 09 KAR CK 0014

In the Karnataka High Court

Case No : Writ Appeal No's. 852, 964, 965, 966, 998, 999, 1000, 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1008, 1009, 1384 and 1385 of 1998

Keshoram Surindranath Photo-Mag (P.) Ltd. and Others

APPELLANT

Vs

Assistant Commissioner of Commercial Taxes (LR), City
Division and Others

RESPONDENT

Date of Decision : 06-09-1999

Acts Referred:

Karnataka Sales Tax Act, 1957 — Section 5 A, 5 B, 6 B

Citation : (2001) 121 STC 175

Hon'ble Judges : V.K. Singhal, J; T.N. Vallinayagam, J

Bench : Division Bench

Advocate : R.V. Prasad and S. Narayan, for the Appellant; K.M.S. Swaamy, High Court Govt. Pleader, for the Respondent

Final Decision : Allowed

Judgement

V.K. SINGHAL, J.—All these appeals are disposed of by this common judgment since the controversy is common.

2. The facts of Keshoram Surindranath Photo-Mag (P) Ltd., are taken into consideration. The appellant carries on the business of taking photographs and supplying prints thereof, making enlargements from negatives given by the customers and preparing positive prints from the negatives brought by the customers. A consolidated amount is charged depending upon the work involved and the size and number of prints required. It is contended that the photographs of one person cannot be sold to another as it is a non-marketable commodity and the contract is one of pure skill and labour from which the desired results are obtained. After the photograph is taken or film is "received developing and processing of the film is done under controlled temperature, chemical involvement and time-limit. The quality of print is the result of technical knowledge and expertise. After the film is exposed it passes through four chemical stages, (a) Developer, where the latest image or immersion is

developed ; (b) Bleach, where the film is colour dried ; (c) Fixture, where colour dried film is permanently fixed with the colour ; and (d) Stabiliser, where the image is permanently imposed in a particular position.

3. The film is washed, dried and the chemicals used are diffused with emulsion creating light and shade on the negative of the film. The dried negative is taken from the printer processing machine for printing and at that point the colour and density of the negative is examined. The prints are placed before the paper processor undergo further two stages requiring precise timing and accurate temperature. Here, the chemicals used in the course of processing gets diffused on deep emulsion for obtaining the best finish and obtaining the colours on the print which is later washed and dried and subsequently cut into proper sizes. It is submitted that it is expertise/expert knowledge with which the customer is concerned and not with the paper or the chemicals used therein. The return in form 4 for assessment year 1992-93 is filed claiming the exemption from payment of tax on the supply of photographs, photo prints and photo negatives. Proposition notice in form 31-A was issued on February 22, 1994 proposing to levy tax on the activity of processing and supplying of photographs, photo prints and photo negatives at the rate of 5 per cent under entry 25 of the Sixth Schedule. Turnover tax at 1.25 per cent was also proposed u/s 6-B. Entry 25 of the Sixth Schedule provides processing and supplying of photographs, photo prints and photo negatives.

4. It is pointed out that a circular dated October 24, 1989 was issued by the Commissioner of Commercial Taxes that form 37 cannot be issued for purchase of raw material to be used by the dealer in the activity of developing the photographs. The act of developing the photograph was considered to be his work of skill and art. The benefit u/s 5-A could not be claimed as no component part or raw material or any other goods are used in the manufacture, inside the State for sale. Section 5-B provides for levy of tax on transfer of property in goods, whether as goods are in some other form involved in the execution of works contract and it reads as under :

5-B. Levy of tax on transfer of property in goods (whether as goods or in some other form) involved in the execution of works contracts.--Notwithstanding anything contained in Sub-section (1) or Sub-section (3) or Sub-section (3C) of Section 5, but subject to Sub-section (4), (5) or (6) of the said section, every dealer shall pay for each year, a tax under this Act on his taxable turnover of transfer of property in goods (whether as goods or in some other form) involved in the execution of works contract mentioned in column (2) of the Sixth Schedule at the rates specified in the corresponding entries in column (3) of the said Schedule."

5. Reliance is placed on the judgment given in the case of The Assistant Sales Tax Officer and Others Vs. B.C. Came, Proprietor Came Photo Studio, where it is observed :

"When a photographer like the respondent undertakes to take 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, in our opinion, is essentially one of skill and labour. A good photograph reveals not only the aesthetic sense and artistic faculty of the photographer, but it also reflects his skill and labour. A good photograph in most cases is indeed a thing of beauty. It not only seeks to mirror and portray a scene from actual life, but it also catches and preserves for the future what belongs to and is a part of the fleeting moment. The ravage brought about by the passage of time, the decay and the ageing process which inevitably set in as the years roll by leave what is preserved in the photograph unaffected. It is no wonder that an old photograph revives nostalgic memories of days no more, but to which we look back through the mist of time with fondness even though such fondness has a tinge of sadness.

We, therefore, find no cogent ground to disagree with the High Court in so far as it has decided against the revenue and has held the contract to be one for work and labour."

Works contract has been defined as under :

"2(1)(v-i) "Works contract" includes any agreement for carrying out for cash, deferred payment or other valuable consideration, the building, construction, manufacture, processing, fabrication, erection, installation, fitting out, improvement, modification, repair or commissioning of any movable or immovable property."

6. On the basis of this judgment it is submitted that processing and supplying of photographs, photo prints and photo negatives is only a condition of service and these items cannot be considered to be goods.

7. Reliance is placed on the judgment given by the West Bengal Taxation Tribunal in the case of Studio Kamalalaya v. Commercial Tax Officer [1993] 89 STC 307 SC where it was observed as under :

"In the case of a negative film supplied by a 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, ornamentation, etc., to the negative film, which is returned intact to the customer. An impression is taken from the negative film and a photograph is produced from the impression keeping the negative intact. The words "processing, treating or adapting" in Section 2(b)(iv) imply that whatever is done should be done to the goods, namely, the negative supplied by the customer, in order to bring the activity within the ambit of works contracts. Processes of photography start from a negative film, but nothing is

done to the negative itself so that it can be said that the negative has been altered or ornamented or finished or furnished or improved or some similar processing, treating or adapting has been employed to the negative by the photographer. Processing or treating of the negative or the purpose of taking an impression does not affect or change the negative. It is returned to the customer, although the final photograph could not be produced without it. The processing, treating or adapting, as contemplated in Section 2(b)(iv), is not any and every processing, treating or adapting. If we keep the concept of works contract in view, it will be clear that processing, treating or adapting should be of such a nature that it improves or enhances the value, utility or beauty of the original goods. The negative film, being the original goods, no improvement or enhancement in its value, utility or beauty is effected by the process or treatment employed thereto by a photographer. The negative remains as before. Therefore, the activity of a photographer does not constitute a works contract within the meaning of Section 2(b)(iv), where the photographer produces a final photograph or enlargement out of a negative supplied by the customer. Since the negative remained intact at the end of the entire transaction and nothing was added or employed to it to increase its value, utility or beauty, there could be no works contract."

8. It is submitted that the 46th Constitutional Amendment would be applicable if the transaction is of sale of goods or the goods are involved in the execution of works contract and there must be passing of the property during the execution of contract. In the case of work of an artist it is only the quality of imagination and taste. The film roll belongs to the customer and is taken back and after developing the film roll it continues to be film roll without there being any addition, accretion or accession.

9. Validity of entry 25 of the Sixth Schedule has been challenged and it is found that it is beyond the competence of the State Legislature as there is no transfer of property in goods involved in the execution of the works contract in respect of processing and supplying of photographs, photo prints and photo negatives. Photograph of a person cannot be considered to be a commercial commodity and there is no transfer of property.

10. We have considered over the matter.

11. So far as the question of any sale is concerned, it may be observed that the judgment in *The Assistant Sales Tax Officer and Others Vs. B.C. Came, Proprietor Came Photo Studio*, has clearly laid down that there is no contract for sale of goods. The only point therefore remains to be examined is as to whether it is a works contract in which there is any transfer of property as contemplated by Sub-clause (b) of Clause (29A) of Article 466 of the Constitution of India read with Section 6-B of the Karnataka Sales Tax Act, 1957. In the case of *M/s. Everest Copiers through R.A. Partner, etc. Vs. State of Tamil Nadu*, it was observed by the apex Court as under :

"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 a photocopier or xerox machine is not the transfer of the paper upon which the copy is produced ; it is to duplicate or make a xerox 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. What is involved is not a sale but a contract of work or labour."

12. The decision given in the case of State of Tamil Nadu Vs. Anandam Viswanathan, was also observed wherein it was observed :

"The High Court relied on the decision of the Allahabad High Court reiterating the principle that it is necessary to determine the substance of the contract, and as the substance of the contract is that skill and labour that had been exercised for the production of the article and sale of material is only ancillary to that. In our opinion, the principle upon which the High Court relied, is not applicable in case of transactions of printing of question papers. Question papers as such, after being printed are neither available commercially nor available to any community--commercial or otherwise, save under specific circumstances for the candidates appearing at a particular time in an examination. Mr. Mohan also drew our attention to the decision of the Andhra Pradesh High Court in The State of Andhra Pradesh Vs. Sri Krishna Power Press, . There, the court reiterated that a transaction which results in the transfer of property in finished goods to another person cannot be described as a works contract. It was further held that where the assessee press itself purchased stationery and did printing work upon it according to the orders of individual customers and supplied the printed stationery to the customers at an agreed price the transaction was sales liable to sales tax and not works contract. The fact that the goods prepared by the assessee could not be exhibited for sale to the general public is not decisive of the issue."

13. After taking into consideration the rival contentions and the decision of the Kerala High Court in Baven's case [1995] 97 STC 161 KER it was observed that after the 46th Constitutional Amendment legal fiction is created by which the individual contract can be divided into contract for sale of goods and contract for supply of labour on the value of goods involved. It was observed that it is not possible to generally lay down that in all cases of processing and supplying of photographs, photo prints and photo negatives, there is no element of works contract involved and there is no transfer of property in goods. The validity of entry 25 was upheld.

14. While interpreting the Central Excises and Salt Act, in the case of Collector of Central Excise, Baroda v. Ambalal Sarabhai Enterprises (P.) Ltd. [1990] 77 STC 190 (SC) it was observed in order to determine whether a particular article is "goods" or not, for the purpose of levy of excise duty, it is necessary to determine whether there was any application of any process to the raw materials as a result of which there emerged a new and different article having a distinctive name, character or use. It is true that goods with unstable character can be theoretically marketable if there is a market for such transient type of articles. But in determining whether such goods are marketable, one has to take a practical approach.

15. In the case of A.P. State Electricity Board Vs. Collector of Central Excise, Hyderabad, it was observed :

".....marketability is an essential ingredient in order to be dutiable under the Schedule to the Act.....The "marketability" is thus essentially a question of fact to be decided in the facts of each case. There can be no generalisation. The fact that the goods are not in fact marketed is of no relevance. So long as the goods are marketable, they are goods for the purposes of Section 3. It is not also necessary that the goods in question should be generally available in the market. Even if the goods are available " from only one source or from a specified market, it makes no difference so long as they are available for purchasers..... The marketability of articles does not depend upon the number of purchasers nor is the market confined to the territorial limits of this country."

16. In M/s. Indian Cable Company Ltd., Calcutta Vs. Collector of Central Excise, Calcutta and others, it was observed that "marketability" is a decisive test for dutiability. It only means "saleable" or "suitable for sale". It need not be in fact, "marketed". The article should be, capable of being sold or being sold to consumers in the market, as it is, without anything more.

17. In Bavens v. Union of India [1995] 97 STC 161 KER Kerala High Court has taken the view that taking the photograph of the customer, developing and supplying the print to them involves skill and talent and the photographs have no marketable value. It is not a works contract. Developing exposed films to customers and supplying the prints or taking prints from customer's negatives involves processing. The element of skill is not important and it amounts to works contract.

18. In Deputy Commissioner of Sales Tax (Revenue) Vs. Sreeni Printers, it was found that for making photo block, the block-maker has first to take a photograph, develop and enlarge it to the desired size and thereafter it has to be engraved on to a zinc plate with the aid of some processing chemicals. The skill and labour involved in making the block was considered more than what is required by a photographer to take a photograph. Compared to the degree of labour and skill involved, the value of the materials was found negligible and the nature of the contract was considered to be a works contract.

19. In Union of India (UOI) Vs. Delhi Cloth and General Mills, it was observed that excise duty is on the manufacture of goods and not on the sale. The fact therefore, that the substance produced by the manufacturer at an intermediate stage is not put in the market would not make any difference to the chargeability of the substance to excise duty if it is covered by an item in Schedule I of the Act.

20. In South Bihar Sugar Mills Ltd., etc. Vs. Union of India (UOI) and Others, it was observed that as the Act does not define goods, the Legislature must be taken to have used that word in its ordinary, dictionary meaning. The dictionary meaning is that to become goods it must be something which can ordinarily come to the market to be bought and sold and is known to the market.

21. In the case of Bhor Industries Ltd., Bombay Vs. Collector of Central Excise, Bombay, it was observed in order to be goods as specified in the Schedule, the first condition was that they must come into existence as a result of manufacture. For articles to be goods, they must be known in the market as such or must be capable of being bought and sold in the market as goods.

22. In Union of India and others Vs. Indian Aluminium Co. Ltd. and another, it was observed that the article should be capable for being sold to the consumer as it is without any change.

23. In State of Maharashtra Vs. Sarvodya Printing Press Fine Art Printer, relying on the decision given in the case of State of Tamil Nadu Vs. Anandam Viswanathan, which was a matter pertaining to printing and supplying of question papers to the University it was held that it was not a sale but a works contract and on that basis, the High Court's decision was upheld.

24. The learned High Court Government Pleader has relied the decision given in the case of Modi Xerox Ltd. v. State of Karnataka S.T.R.P. No. 31 of 1996 decided on February 18, 1999, Reported in [1999] 114 STC 424 (Kar). , wherein this Court considered the provisions of the Sales Tax Act with reference to the 46th Constitutional Amendment particularly the provisions of works contract, "sale" and "goods". The spare parts supplied resulting in printing of the copies taken from the machine were considered to be sale whereas the supply of fuse oil is concerned it was held not amounting to sale. This judgment is with regard to photocopiers and it does not require much of the skill. This judgment has no application because the activity was considered to be a sale.

25. The Full Bench of the Punjab and Haryana High Court in Thomson Press (India) Ltd. v. State of Haryana [1996] 100 STC 417 P&Hit was held that printing of lottery tickets which involve not only expertise but also confidentiality, does not amount to sale and use of paper and ink is only incidental and tickets cannot be sold to any person in the market.

26. In M/s. Everest Copiers through R.A. Partner, etc. Vs. State of Tamil Nadu, the decision given in the case of B. Giriya and Another Vs. State of Karnataka, was upheld where it was observed that :

"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 a photocopier or xerox machine is not the transfer of the paper upon which the copy is produced ; it is to duplicate or make a xerox 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."

27. The Bombay High Court in the case of Commissioner of Sales Tax, Maharashtra State, Bombay v. Radio Advertising Services [1997] 106 STC 50 Bom, it was observed that the assessee supplied additional prints of the advertising films to the customers. The prints supplied were not prints which could be sold in the market, nor there was any utility of the same to anyone other than the customer. Admittedly, the prints supplied by the assessee is not a commercial commodity in the sense that it cannot be sold in the market to any other person. The fact that in the preparation of the prints, a mechanical process was used or that the additional prints were to be used by the customers for advertising their products, in our opinion, is not relevant in determining the nature of the transaction which, in the instant case, is obviously works contract.

28. In Sarvodaya Printing Press v. State of Maharashtra [1994] 93 STC 387 Bom, Full Bench of the Bombay High Court held that the supply of printed triplicate receipt books to specifications to State Electricity Board is not a sale and goods have not commercial value for persons other than the Electricity Board. The transfer of property in paper and ink was considered incidental to contract.

29. The Rajasthan Taxation Tribunal has also considered the subject-matter in Spectrum Foto Color Labs Pvt. Ltd. v. Commercial Taxes Officer, Anti-Evasion, Jodhpur [1998] 110 STC 145 Raj. It was observed as under :

"8. Admittedly, the petitioner developed exposed films and obtained negatives therefrom and also prepared positive prints from the negatives, both brought by the customers. For these jobs, consolidated amounts had been charged depending upon the work involved and size and number of prints required. The exposed films are developed in a dark room with the help of a mixture of certain chemicals in defined proportion and negatives are obtained therefrom. This work can only be done by a person who has acquired experience and specialised knowledge in this respect. If exposed film is not properly developed, the negative obtained therefrom would not give proper and positive prints. In order to get good positive prints, retouching of the negatives is done. This again can be done by an expert of this line. It cannot be done by any or every person. It involves its own technique. Obtaining positive prints from the negatives involves specialised technique. Proper intensity of light and duration of the exposure of the negative film is required to obtain a good positive print.

9. A customer going to a photographer for getting his exposed film developed does not ask to purchase the negative but asks to develop exposed film and to give him the negative obtained therefrom. Similarly, a customer approaching a photographer with his negative for obtaining positive prints does not ask for purchase of positive prints but requests for giving him positive prints from his negative. Both of them, i.e., exposed film and negative are not marketable commodities. They have no market value for other persons. While taking out positive prints from the negative with the help of photo papers and chemicals, there is no accretion on the basic material, i.e., negative.

10. The main object of the work undertaken by the petitioner was not to transfer the photo papers upon which the positive prints were taken. The transfer of paper was simply incidental to the said transaction. Payment was made to get the positive prints and not to get the photo papers. Customers had interest in the positive prints and not in the photo papers. The contracts in-between the petitioner and its customers were neither the contracts of sale nor the direct or indirect works contract involving supply of photo papers. No sale of photo papers was involved which could be taxed under the Act."

30. In words and phrases the word "photography" is denned as under :

"Photography" is the science which relates to action of light on sensitive bodies in production of pictures, fixation of images and the like.

31. Photography is a process of an art of producing visible images on sensitive bodies by action of light or other form of radiant energy. Duration of action of light and also use of the chemical is highly a technical expertise therefore taking into consideration the various decisions referred to above it could be considered that it is a works contract where property which is transferred in paper is only incidental to such contract. In strict sense, it is a service where the main object is not transfer of property in goods. The good photograph as observed by the apex Court is a thing of beauty and revives nostalgic memories. It is a work of art. In *The Assistant Sales Tax Officer and Others Vs. B.C. Came, Proprietor Came Photo Studio*, it has already been held that there is no sale involved and in spite of the fact that it is a works contract it could not be subjected to tax because the intention of the parties is not to transfer the goods in the execution of said works contract. It is only ancillary and incidental to service contract. The photographs are not marketable or saleable commodity and as such no tax can be levied. Entry 25 of the Sixth Schedule to the Karnataka Sales Tax Act, 1957, therefore is beyond the scope of Article 466 of the Constitution of India.

Writ appeals are accordingly allowed.