

(1968) 01 BOM CK 0002

In the Bombay High Court

Case No : Sales Tax Reference No. 10 of 1964 with Sales Tax References No"s. 11, 12, 13, 14 and 15 of 1964

K.S. Films

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 17-01-1968

Acts Referred:

Bombay Sales Tax Act, 1959 — Section 13, 2(11), 52

Citation : (1969) 23 STC 121

Hon'ble Judges : Vimadalal, J;N.L. Abhyankar, J

Bench : Division Bench

Judgement

Abhyankar, J.—This order will dispose of all these references. The Sales Tax Tribunal has referred to the High Court the following question for determination :-

"Whether in the facts and circumstances of the case the applicant is a dealer within the meaning of section 2(11) of the Bombay Sales Tax Act, 1959 ?"

The applicants in these cases are motion picture producers. Applications were made on behalf of these motion picture producers separately u/s 52 of the Bombay Sales Tax Act, 1959, asking for the determination of the question as to whether they were dealers under the said Act and whether they were liable for registration under that Act.

2. According to the statement of the case, the applicants as motion picture producers do not sell cinematograph pictures which they produce, but they give away the pictures under certain financial arrangements, and a specimen agreement in respect of such arrangements has been placed on record. The ownership in the motion picture, or the film as it is called, is retained by the applicants themselves, including the copyright. The applicants buy raw films in the required quantities for the purpose of producing motion pictures and make purchases as and when required for that purpose. It is not disputed that motion pictures are produced by the applicants with the ultimate object of making profit

by exhibition of the pictures produced by them. It seems to have also been admitted that the turnover of the purchases made by the applicants exceeds that the turnover Rs. 30,000 a year.

3. The Deputy Commissioner who dealt with the application in the first instance found, in view of the nature of the business done by the applicants, that it was not possible to hold that there is any sale of the film by the applicants and that, if there is no sale, there is no business of sale. The next question that was addressed was whether the applicants, in their capacity as film producers, could be said to be carrying on the business of buying goods. The purchase of raw film was not of a casual character. Raw films were purchased regularly so that they could be used in the production of films. On the view that the word "business" bears a liberal connotation as interpreted in judicial decisions and it has been admitted that the applicants carry on the business of producing films, the Deputy Commissioner came to the conclusion that the purchases made by the applicants, i.e., the purchases of raw films, should be held to be purchases made in the course of business.

4. Against that order, the applicants preferred appeals which were heard by the Sales Tax Tribunal. Before the Tribunal, among other decisions, the learned counsel for the applicants relied on a decision of the Andhra Pradesh High Court in *H. Abdul Bakshi G Brothers, Hyderabad v. The State of Andhra Pradesh* [1960] 11 S.T.C. 526. At that stage, the decision of the Andhra Pradesh High Court had not reached the Supreme Court where the decision has (1) [1960] 11 S.T.C. 526. been ultimately reversed. Therefore, reliance was placed with equal emphasis on both sides on that decision.

5. The Sales Tax Tribunal agreed with the finding of the Deputy Commissioner on the question of the applicants carrying on the business of selling goods. In fact, that finding was not challenged on behalf of the department before the Sales Tax Tribunal. It is also mentioned by the Tribunal in its appellate order that actually the appellants do not sell cinematograph films which they produce. It seems to have been contended before the Tribunal also that the applicants, as producers of motion pictures, do not carry on any business which can attract liability under the Sales Tax Act, because they do not sell anything. The Tribunal has observed that this argument assumed that unless the purchase activity ends in sale, there is no business carried on, and, further, that unless they deal in the goods, i.e., they sell the goods which they buy, there is also no business of buying goods. The Tribunal did not accept this contention, observing that the definition of the word "dealer" does not contemplate that, in order that a person should be a dealer, he should carry on the business of buying and selling goods. The Tribunal was careful to observe that, in deciding the appeals before them, they were not deciding as to which are the commodities purchased by the appellants in which they were dealers, or in which they carry on the business. The point which they were deciding was whether, in the course of their activity of producing motion pictures, the appellants carry on the business of buying raw films on which the

appellants work by engaging artistes for producing the stories which they have in view and ultimately getting them printed ready for being distributed and exhibited. The Tribunal also rejected the contention of the appellants that what was produced by the him producers and their activity of producing films was not a business activity, as the term is popularly understood in the commercial sense, but that what was produced by them was a work of art. It seems to have been argued before the Tribunal that the profession of him producers could not be characterised as a business and was, therefore, not liable to taxation. We may point out that this line of argument as to the nature of the activity carried on by the film producers not being a business is not relied upon before us in support of the contention of the applicants, though it is urged that what the applicants are producing are not goods or a commodity but a work of art, or something in which they have copyrights within the meaning of the Copyright Act. Ultimately, the Tribunal came to the conclusion that, in so far as purchases of raw films are concerned, since the film producer distributes the films, when ready, with a view to earn profit, it was clear that the applicants were making purchases of raw films to carry on their business, and incidentally, the purchases of raw films being with the ultimate object of distributing those films for profit, when ready, the profit motive was also present in regard to that commodity, and, therefore, making purchases of raw films in the course of this activity as film producers was tantamount to carrying on the business of buying that commodity as a dealer.

6. In this Court, it is urged on behalf of the applicants that the applicants do not carry on the business of buying films, nor are they manufacturers or producers of goods, because the films which are produced by him producers like the applicants are not goods. Reference was also made to section 13 of the Bombay Sales Tax Act, 1959, which creates a liability to pay a purchase tax by a dealer who has purchased goods from an unregistered dealer. The contention based on the provisions of section 13 of the Bombay Sales Tax Act, 1959, had reference to the substituted section 13, which substitution was made in 1965 by Maharashtra Act No. 29 of 1965. However, the proper section to be considered in the light of the arguments addressed before us is section 15 of the Bombay Sales Tax Act as it originally stood, and not the substituted section 13. The initial application u/s 52 came to be made in 1960 and was decided by the several authorities, including the Sales Tax Tribunal by its appellate order, long before section 13 was substituted by Maharashtra Act No. 29 of 1965 as it now stands. We are, therefore, answering this reference on the basis of the state of law and the provisions of the Sales Tax Act as they stood on the date the reference was made. We are not considering the impact of the substituted section 13 in the decision of this reference.

7. It is urged on behalf of the applicants that the activity carried on by a film producer in producing motion pictures or films cannot be properly described as a business activity or as a business. In this connection, our attention was invited to a decision of this Court in *The State of Bombay v. The Ahmedabad Education Society* [1956] 7 S.T.C. 497 of the report the learned Chief Justice pointed out

that it was clear from the definition of a dealer under the Sales Tax Act of 1946 that it is not merely the act of selling as defined in the Act which constitutes a person a dealer. It must be mentioned that, in the Act of 1946, the definition of "dealer" meant a person who carried on the business of selling or supplying goods in the State. There was no reference to buying of goods in the definition of "dealer" then. It was further observed that the activity which the person must indulge in is not merely the activity of selling in the sense of transferring property in goods, but it must be the activity of carrying on the business of selling or supplying goods, and that what the Legislature has emphasised is not the act or activity of selling but the act or activity of carrying on the business. At page 500 of the report, the learned Chief Justice observed that the expression "carrying on business" must be given a restricted meaning. It was also pointed out by the Court that although the activity may be continuous, unless it assumes the characteristics of a business, it is not an activity which can come within the ambit of the definition of "dealer" u/s 2 (c) of that Act.

8. The next decision referred to is the decision of the Nagpur Bench of this Court in *Girdharilal Jiwanlal v. The Assistant Commissioner of Sales Tax (Appeals), Nagpur, and Another* [1957] 8 S.T.C. 732. In that case, a big agriculturist who sold agricultural produce from his own cultivation to a very large extent, and at the same time carried on the business of selling cotton, grains etc., as a registered dealer, was held not liable to payment of sales tax in respect of the sale of agricultural produce from his lands. Referring to the definition of "dealer" in the C.P. and Berar Sales Tax Act which is more or less analogous to the definition in the Bombay Sales Tax Act, the Division Bench observed that, bearing in mind the definition of "dealer" set out in the Act, what has to be established is not merely that a person sells or supplies any goods, but that he engages himself in the business of selling and supplying the particular goods. Thus, even though the assessee in that case did the business of purchasing and selling agricultural goods, he was held not to be a dealer with respect to the goods produced from his own farms so as to attract the liability under the Sales Tax Act. The learned counsel for the applicants relied on this principle, viz., that unless there was an intention to carry on business in the particular goods, a person would not be held liable.

9. The argument is that the activities of the applicants are directed towards the production of cinematograph films. Though they are required to use celluloid in the form of raw him, the producers bring it out in another form. On that celluloid, pictures are taken, stories are told and directions are given by the producers. Skilful selection of scenes and their artistic presentation go in the production of a film. Therefore, what is ultimately produced is not a celluloid or raw him in another form, but an entirely different thing, viz., a work of art. In other words, what is contended is that what a producer, like the applicants, produces is a work of art, and he does not manufacture goods or a commodity.

10. Support is sought for this contention on the basis of certain recent decisions

of the Supreme Court as well. Our attention was invited to the case of *The State of Gujarat v. Vivekanand Mills* [1967] 19 S.T.C. 103. In that case, the respondents were carrying on the business of manufacturing cotton fabrics. They were required to purchase certain imported cotton for which they had obtained a licence. As the imports did not arrive in time, they purchased similar cotton from other parties, and when the imported cotton arrived they sold the cotton imported by them. The question was whether the sale of this cotton by the mills would attract the liability for payment of sales tax. At page 107, their Lordships observed as to what is the consensus of opinion regarding what constitutes business. They stated that the word "business" had to be construed in a commercial sense, that the initial intention or object with which the goods in question were purchased is a relevant factor in deciding whether the sale thereof was a part of the business or a business activity of the assessee, and that if the initial intention in purchasing the goods in question was to use the goods in the business of the assessee, such as manufacturing goods or articles, then, unless that factor was offset by circumstances showing that the assessee intended to indulge in a business activity by entering into transactions of sale, the mere fact that the assessee sold the goods so purchased would not render him a dealer in that article. This view taken by the Gujarat High Court from which an appeal was taken to the Supreme Court at the instance of the department seems to be approved, in view of the observations at page 112 of the judgment of the Supreme Court that, evidently, at the time when the bales of cotton were ordered and when the bales were purchased, there was no intention on the part of the respondents to carry on business in cotton.

11. Thus the principle on which the learned counsel for the applicants wants to rely is that if the original intention while purchasing goods was not for producing any goods for sale, then that activity cannot be said to be an activity of doing the business of purchasing goods.

12. The definition of "dealer", on which reliance is placed on behalf of the department in section 2(11) of the Bombay Sales Tax Act, which is relevant and material for the purpose of this reference, is as follows :

"(11) "dealer" means any person who whether for commission, remuneration or otherwise carries on the business of buying or selling goods in the State"

There is no doubt that the connotation of the word "business" necessarily implies a continuous course of activities carried on for commercial purposes, generally with the intention of earning profit. If the films are produced ultimately with a view to their being distributed and exhibited under various agreements, the object certainly is to earn profit, and we do not think that a person engaged in the activity of producing films cannot be said to be engaged in business. Whether such a person is a dealer is another matter, but the fact that the applicants are engaged in business, or an activity which can properly be called business activity, can hardly be disputed.

13. The arena of dispute that has arisen between the parties, as far as we can see, is on account of the fact that the raw films which are used for the production of cinematograph films are certainly not themselves the articles which are resold, nor are they resold in an altered form. The use to which raw films are put in producing a cinematograph film is comparatively small, in the sense that their value in money bears no proportion to the value or price of the ultimate product which is produced. It is, however, equally true that, without raw films, no cinematograph film can be produced. Can it, therefore, be said that the applicants are purchasing goods for doing their business, and that these goods and the purchase of these goods are intimately connected with and as an aid to the production of something else, which it is their business to produce ? This fact also cannot be disputed that the applicants have necessarily to engage themselves in purchasing raw films on a commercial scale in order that they may be used for producing cinematograph films. It is at this stage that the parties join the issue. According to the applicants, the bare fact that raw films are required to be purchased by them in order that they may produce cinematograph films, does not mean that they are engaged in the business of purchasing raw films, because they are not putting raw films to use in the production of a commercial product or commodity. They are undoubtedly using raw films as a base, as it were, but they are used in producing an article which is a work of art. It has been vehemently argued by the applicants that cinematograph films produced by them are not sold, and what they do with the cinematograph films produced by them is merely to enter into agreements with exhibitors and distributors, so that their work of art may be exhibited, though undoubtedly for a profit, by the exhibitors and distributors according to the terms of agreement entered into between the applicants on the one hand and the exhibitors and distributors on the other. If, according to the applicants, at no stage a sale takes place of the cinematograph films produced by them, it cannot be said that they can be properly called dealers within the meaning of the Bombay Sales Tax Act, 1959, even though they may be purchasing raw films, and, therefore, they cannot be said to be doing any business in the purchase of raw films.

14. In support of this contention, our attention was drawn to a recent decision of the Supreme Court in *The State of Andhra Pradesh v. R. Abdul Bakshi and Bros.* [1964] 15 S.T.C. 644. Before we consider the argument based on that decision, it will be material to make a reference to the decision of the Andhra Pradesh High Court in *H. Abdul Bakshi & Bros., Hyderabad v. The State of Andhra Pradesh* [1960] 11 S.T.C. 526 from which decision an appeal was filed in the Supreme Court whose decision is reported in *State of Andhra Pradesh Vs. Abdul Bakshi and Bros.*, . The petitioners Abdul Bakshi and Brothers were a firm of tanners carrying on business in skins and hides. They were registered dealers as such. For the purpose of this business, they purchased tanning bark of substantial value for use in the process of tanning raw hides and skins. Under rule 5(2) of the Rules framed under the Hyderabad Sales Tax Act, the value of certain goods enumerated in that rule was required to be added to the turnover of a dealer, if

those were the goods which were bought by the dealer. The Andhra Pradesh High Court took the view that rule 5(2) was restricted to those goods in respect of which the assessee was a dealer, and would not permit inclusion of the value of other goods used in the process of making the goods in which the assessee dealt. This view of the Andhra Pradesh High Court was not accepted by the Supreme Court, and it is worthwhile to reproduce the whole passage giving the reasons for its decision in the case. The passage reads as follows :

"We are unable to agree with this view of the High Court. A person to be a dealer must be engaged in the business of buying or selling or supplying goods. The expression "business" though extensively used is a word of indefinite import. In taxing statutes it is used in the sense of an occupation, or profession which occupies the time, attention and labour of a person, normally with the object of making profit. To regard an activity as business there must be a course of dealings, either actually continued or contemplated to be continued with a profit motive, and not for sport or pleasure. But to be a dealer a person need not follow the activity of buying, selling and supplying the same commodity. Mere buying for personal consumption, i.e., without a profit motive, will not make a person dealer within the meaning of the Act, but a person who consumes a commodity bought by him in the course of his trade, or use in manufacturing another commodity for sale, would be regarded as a dealer. The Legislature has not made sale of the very article bought by a person a condition for treating him as a dealer the definition merely requires that the buying of the commodity mentioned in rule 5(2) must be in the course of business, i.e., must be for sale or use with a view to make profit out of the integrated activity of buying and disposal. The commodity may itself be converted into another saleable commodity, or it may be used as an ingredient or in aid of a manufacturing process leading to the production of such saleable commodity."

In the penultimate paragraph, the Supreme Court also approved of the decision of the Madras High Court on a similar provision in the Rules in the case in *L. M. S. Sadak Thamby and Co. v. The State of Madras* [1963] 14 S.T.C. 753.

15. As we have already mentioned, both sides relied heavily on that decision in support of their respective contentions. On behalf of the applicants, it is argued that the activity of buying a material such as raw films in this case, must be a part of the integrated activity of buying and disposal in the sense of buying and selling this material, either in the original form or in some form of goods in which that material has been used.

16. According to the applicants, they do not sell the films they produce. Under the terms of the agreement, they give distribution or exhibition rights, and the property in the goods, i.e., films and their ownership, is retained with them. It is, therefore, argued that, on a proper interpretation of the decision of the Supreme Court in *Abdul Bakshi's case* [1964] 15 S.T.C. 644. purchases of raw films in the instant case cannot be said to be a part of any integrated activity of buying and disposal because, according to the applicants, they do not sell their products or

films.

17. On the other hand, it is contended on behalf of the revenue that the correct ratio of the decision of the Supreme Court in this case is that any activity of buying goods in the business of a dealer will qualify for his being considered a dealer within the meaning of the Sales Tax Act, provided the article bought by the person is consumed by him in the course of trade, or the commodity itself is converted into another saleable commodity or is used as an aid to or ingredient in the manufacturing process for producing any commodity which is saleable. In other words, what is contended is that it is not essential in order that a buying activity in the course of business should attract charge under the Sales Tax Act, that the article which is used or consumed in producing some other article is necessarily sold in the market. Whether the ultimate article is sold or not sold is not decisive of the question whether the raw material used in the production of such an article should be considered as goods bought in the course of business so as to attract a charge to sales tax or purchase tax leviable.

18. In our opinion, the ratio of the decision of the Supreme Court contended for by the department ought to be accepted. In this context, a reference to the provisions of section 13 of the Bombay Sales Tax Act, 1959, as it originally stood before that section was substituted in 1965, will be of some relevance.

19. And it is with reference to this section that we are called upon to answer the reference. It will be seen that under this section, which is a charging section for the purpose of levying of a purchase tax, a dealer becomes liable to a tax in respect of purchase of goods specified in the appropriate Schedule, if such goods are purchased from an unregistered dealer and are not resold by the dealer within a period of three months or such other extended period as may be prescribed by the Government. Thus, the underlying idea is to correlate the purchase of the goods with the sale of the goods, either in their original form or in an altered form. Thus, if the goods are of such a character as are capable of being used in the manufacture of some other type of goods, then the goods in this altered form, in the making or manufacture of which the goods originally purchased are used, must be such as are capable of being sold. In other words, the goods manufactured or altered must be a marketable commodity. In our opinion, the observations in the judgment of the Supreme Court that the goods may be used as an ingredient or in aid of manufacturing process leading to the production of a saleable commodity mean that the commodity which is produced, of which the goods purchased may be an ingredient or in the making of which the goods purchased may have figured as an aid in the process of manufacture, must have saleability. It is not necessary, as far as we can see, that the goods must necessarily be sold, because that depends on the volition of the manufacturer. It is difficult to hold that the taxability would depend on the volition of the manufacturer of goods, as for instance whether he proposes to sell the goods or he puts them to some other use.

20. At the same time, we are not inclined to accept the extreme contention

urged on behalf of the revenue that the moment it is shown that the goods are purchased by a person in the course of business, whatever be the nature of business, the mere act of purchase of the goods in the course of business attracts the liability for payment of the tax, and that it is not necessary that the goods must be used as a part of an integrated activity of production and disposal. Though we are unable to accept the contention of the learned counsel for the applicants that the disposal must necessarily be in one manner, viz., by sale and not otherwise, it is still the requirement of the law that the goods produced must be capable of being disposed of by sale, whether they are, in fact, so disposed of or not.

21. On behalf of the revenue, our attention was invited to a decision of the Madras High Court in *Fiaz Ahmed & Co. v. The State of Madras* [1964] 15 S.T.C. 201. We are making a reference to this decision because this decision purports to explain the ratio of the decision of the Madras High Court in *L. M. S. Sadak Thamby and Co. v. The State of Madras* [1963] 14 S.T.C. 753. This decision of the Madras High Court in *L. M. S. Sadak Thamby and Co. v. The State of Madras* [1963] 14 S.T.C. 753 has received the approval of the Supreme Court in *Abdul Bakshi's* cases. On account of this fact, it was contended that the decision in *Sadak Thamby and Co.'s* case [1963] 14 S.T.C. 753 by the Madras High Court, as understood in that Court in the subsequent decision in *Fiaz Ahmed & Co. v. The State of Madras* [1964] 15 S.T.C. 201 is deemed to have been approved by the Supreme Court. It may be mentioned that the decision of the Supreme Court in *Abdul Bakshi's* case [1964] 15 S.T.C. 644 was pronounced on the 8th of April, 1964, while the decision in *Fiaz Ahmed & Co. case* [1964] 15 S.T.C. 201 was given on the 7th of November, 1963, but there is no reference to this later case of the Madras High Court in the Supreme Court judgment. In *Fiaz Ahmed & Co.'s* case [1964] 15 S.T.C. 201, the Division Bench has interpreted the decision of the Madras High Court in *L. M. S. Sadak Thamby and Co. v. State of Madras* [1963] 14 S.T.C. 753 as tantamount to laying down the principle that a buying activity, even though without a counterpart of a selling activity, in the course of a business, whether it be as a dealer in hides or carrying on of the tannery with a profit motive, would be adequate to bring the turnover of purchase price of tanning materials to tax under the Act. In *Fiaz Ahmed & Co.'s* case [1963] 14 S.T.C. 753, the person required to pay the tax was engaged in the business of tanning hides and skins for certain specified charges. They did not buy hides or skins or sell them after tanning. For the purpose of tanning, however, they necessarily purchased tanning materials, and the question was whether the purchase price of such materials was liable to be included in the turnover under rule 5(2). The decision was given in favour of the revenue, purporting to follow the ratio in *Sadak Thamby and Co.'s* case [1964] 15 S.T.C. 201. In our opinion, it is not possible to sustain the contention urged on behalf of the revenue that purchases of any material by a person, whatever be the nature of his business and whatever be the use to which the material so purchased is put, attract the charge of purchase tax, irrespective of whether the material or goods so

purchased form or do not form any integrated activity connected with the purchase of the goods, such as either transformation of the goods produced or production of some other goods which are marketable. The liability having been created under the Sales Tax Act, in our opinion, it is incumbent that, even if the liability for payment of purchase tax is created under the Act in respect of any goods purchased, such goods must be a part of the activity of the business, namely, the business of purchase and sale or supply of goods. If the purchase of goods is for an altogether (1) different purpose unconnected with the production of any goods, or if it is not for the purpose of making other goods which are capable of being sold, we do not think the mere purchase of goods will attract a charge u/s 13. In this context, the illustration given on behalf of the applicants will make the point clear. The Associated Cement Company, manufacturers of cement, were required to purchase stationery of considerable value, consisting of paper and other articles, but it could hardly be said that the purchase of stationery for running their administration would qualify for payment of purchase tax on those goods, because the company produces cement. As observed by the Supreme Court, the goods purchased must be either consumed or used in the manufacture of another commodity for sale; or, to put it differently, the business for which the goods are purchased must form part of the integrated activity of buying and disposal. Thus, a nexus must be established between the article purchased and the article produced, for the production of which the article purchased is used, and the article so produced must be saleable, i.e., capable of being sold. We are, therefore, capable to follow the decision of the Madras High Court in the case of Fiaz Ahmed & Co. v. The State of Madras [1964] 15 S.T.C. 201. It is true that the Deputy Commissioner as well as the Tribunal have held in this case that the applicants do not sell the films produced by them, but it is also contended on behalf of the applicants that not only films produced by them are not sold, but they are not saleable. In other words, what is urged is that cinematograph films produced by persons like the applicants are not a saleable commodity. Whether this is so or not has not been decided by the authorities below because such a contention does not seem to have been raised before them. If it is found that the cinematograph films produced by the applicants are not a saleable commodity, then, on the view we have taken of the provisions of the Act, they cannot be considered to be dealers. If, on the other hand, it is found that the cinematograph films produced by them are a saleable or marketable commodity, then, in view of the answer we propose to give, they will have to be held to be dealers under the Act. Inasmuch as the question whether the films produced by the applicants are or are not a saleable commodity has not been decided, that question will have to be decided by the authorities on the material placed before them, before it is finally decided whether the applicants are or are not dealers under the provisions of the Sales Tax Act.

22. In view of what we have stated above the answer to the question referred to us is that the applicants will be considered to be dealers within the meaning of section 2(11) of the Bombay Sales Tax Act, 1959, if the cinematograph films

produced by them are found to be a saleable commodity.

23. No order as to costs. The fee of Rs. 100 shall stand forfeited to the Government.

24. Reference answered accordingly.