

(1975) 08 GUJ CK 0007

In the Gujarat High Court

Case No : Sales Tax Reference No. 22 of 1974

M/S. TASVEER KENDRA, CHAUTA BRIDGE, SURAT.

APPELLANT

Vs

THE STATE OF GUJARAT

RESPONDENT

Date of Decision : 04-08-1975

Acts Referred:

Citation : (1976) 5 CTR 52B

Hon'ble Judges : J. B. Mehta, J

Bench : Division Bench

Judgement

J. B. Mehta, J. - The Tribunal has posed the following three questions in this

(1) Whether having regard to the facts and circumstances of the case Tribunal was right in holding that the transactions which were subject matters for determination in Second Appeal No. 25 of 1972 amounted to Sales liable to tax ?

(2) Whether having regard to the facts and circumstances of the case, the transactions which were subject matters for consideration in Second Appeal No. 25 of 1972 amount to works contract not liable to tax at all ?

(3) In the alternative whether the transactions which were subject matters for consideration in Second Appeal No. 25 of 1972 were divisible partly amounting to sales liable to tax in so far as the value of photographic materials used in preparing photo prints and developing negatives is concerned and partly amounting to works contract in so far as art and labour in taking photo-print and developing its negative are concerned ?

2. The assessee dealer was running a studio known as TASVEER KENDRA during the relevant assessment period and his business was to take photos of the customers and so supply prints thereof. He dealt in photographic materials besides taking photo and supplied photo prints to the customers. Before the decision of this Court in Chelaram Hasomal v. The State of Gujarat 16 S.T.C. 1021, there is no dispute that the department was till March 31, 1966, severing

the contract so far as of 60 : 40. But after the aforesaid decision of this Court it has now been held that the entire work of producing these photo copies being by way of commercial practice of photography by supplying as many copies as the customers needed with a view to make profit, the transaction was clearly one of indivisible sale of the photographic materials, as a whole and the assessee having been taxed as such, he has sought the present reference, especially, as the Tribunal did not even follow the course adopted by the Maharashtra High Court in *Camera House, Bombay v. The State of Maharashtra* 25 S.T.C. 354, where the two contracts had been severed, and one of photographic services viz. of taking photo, and developing the negative for taking out the first finished copy had been held to be a contract of services, while only further bargain was held to be a commercial bargain of the sale of the other copies.

3. In the context of sales tax legislations after the decision of *The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd.*, it is now well settled law that the words "sale of goods" in Entry 48 have to be construed not in the popular sense but in their technical sense and have to be given the same meaning which they carry in the Sale of Goods Act, 1930. The expression "sale of goods" is a nomen juris, its essential ingredients being an agreement to sell moveables for a price and property passing therein pursuant to that agreement. Their Lordships in terms pointed out the underlying principle of law that there could not be agreement relating to one property and sale as regards another for the "sale of goods", because there must be an agreement between the parties for the sale of the very goods in which the property eventually passes. In that case, a building contract, which was found to be one and indivisible, was in terms held to be a works contract, because property in the material did not pass to the other party as moveable property under the contract but only on the principle of accretion. The other contention was also repelled for holding such a building contract as having all elements of a sale of materials by making a reference to the form of action when the claim is in quantum meruit on the simple ground that such claim was one for damages or breach of contract where the value of the materials was a factor relevant only a furnished a basis for assessing the amount of compensation. Therefore, the case was held to be of a works contract and not of sale of the building materials in which property passed of a works contract and not of sale of the building materials in which property passed of course, under the theory of accretion and not under the agreement. At page 578, their Lordships however, pointed out that it was possible that the parties might enter into distinct and separate contracts, one for transfer of material for money consideration and the other for payment of remuneration for services and for work done. In such cases there were really two agreements, though there was single instrument embodying them, and in such cases their Lordships held that the power of the State to separate agreement to sell materials, from the agreement to do work and to render service, and to impose a tax thereon could not be questioned, and that aspect remained untouched by that judgment. In *T.V. Sundram Iyengar and Sons Vs. The State of Madras*, a distinction between

a contract of sale and a contract for work and labour was laid down in the following words from Halsburys Laws of England, Vol. 34, page 6. Third edition :-

"The distinction between the two contracts is often a fine one. A contract of sale is a contract whose main object transfer of property in, and the delivery of the possession of, a chattel as a chattel to the buyer. Where the main object of work undertaken by the payee of the price is not the transfer of a chattel qua chattel, the contract is one for work and labour. The rest is whether or not the work and labour bestowed end in anything that can properly become the subject of sale; 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",

These principles have been applied by their Lordships in a number of decisions. In *State of Rajasthan Vs. Man Industrial Corporation Ltd.*, , at page 1248, the ratio in the earlier decision in *Government of Andhra Pradesh Vs. Guntur Tobaccos Ltd.*, , was called out as under :-

A contract for work in the execution of which goods are used may take one of three forms. The contract may be for work to be done for remuneration and for supply of materials used in the execution of the works for a price; it may be a contract for work in which the use of materials is accessory or incidental to the execution of the work, or it may be a contract for work and use or supply of materials though not accessory to the execution of the contract is voluntary passes it does not pass for a price. Whether a contract is of the first or second class must depend upon the circumstances, if it is of the first, it is composite contract for work and sale of goods; where it is of the second category, it is a contract for execution of work not involving sale of goods."

Applying these principles in that case to a contract to fix windows as stipulated, which required special technical skill, their Lordships held that the primary undertaking of the dealer was not merely to supply the windows but to fix windows. This service was not rendered under a separate contract nor was it shown to be rendered customarily or normally as incidental to the sale by the person who supplied windows. In such work which required such technical skill if the windows were not properly fixed the contract would not be completed. The dealer could not claim the amount agreed to be paid. Therefore, it was held to be the works contract and not a sale, by applying the relevant test in such cases as to whether the object of the party sought to be taxed was that the chattel passes to the other party and the services rendered in connection with installation were under a separate contract or were incidental to the execution of the contract of sale. We will also consider at this stage the decision the *State of Himachal Pradesh v. Associated Hotels of India Ltd.* 29 S.T.C. 474, where at page 483, the transaction between a hotelier and its resident visitor was held to be one of essential service in the performance of which and as part of which by way of only

the amenities incidental service, the hotelier served meals at stated hours. The revenue was, therefore, not entitled to split up the transaction into two parts, one of service and the other of sale of food-stuffs and to split up also the bills charged by the hotelier as consisting of charges for lodging and charges for food stuffs served to him with a view to bring the latter under the Act. It may be noted that their Lordships at page 477 had an occasion to consider one of the earliest decision in *D. Masanda & Co. v. Commissioner of Sales Tax* 8 S.T.C. 370, of the Madhya Pradesh High Court, where the question was whether supply of photographic materials imported and used in the process of manufacturing photographic work, copies of which were supplied by the assessee to a customer, was a transaction involving sale of those materials. The Madhya Pradesh High Court held that such a transaction did not cease to be a sale merely because the materials were not sold in their original form but in another form, forming the components of the finished product, namely the copies of the photograph, and that the transaction was not merely the performance of skilled services but the supply of finished goods. Their Lordships in terms held that that was, however, a border line case and the transaction might well be considered as one of service, during the performance of which a transfer of certain materials in respect of which there was no contract for sale, either express or implied, might be said to have taken place. Their Lordships in that context considered the illustration furnished by the case of *United Bleachers Ltd. vs. Madras State* 11 STC 278 and the decision in *Krishna & Co. Ltd vs. Andhra Pradesh State* 7 STC 26 and pointed out that in all such cases where there would be possible sale of printing and packing materials quite apart from the contract of service, the question would be one of evidence whether there was such a contract besides the one of service. Where however, there were no such distinct contracts and the contract was one and indivisible, the essential part of which was own of service, unless an intention to charge for the materials used in the packing could be spelt out, the revenue would not be entitled to split up the contract, estimate approximately the charges for such materials and treat them as chargeable on the mere ground that the transaction involved transfer of packing materials, whose value must have been taken into consideration while fixing charges for the service. Even when the contract was implied or inferred in such a contract for the service. Even when the contract was implied or inferred in such a contract of service for a supply of packing material, the decision could not be rested on there being transfer of the materials to the customers but on the evidence that such a transfer was for consideration, inasmuch as the amount charged as remuneration for service also contained charges for such materials, though such charges were not separately shown in the accounts of the assessee. Their Lordships pointed out that in such a state of evidence, it would be possible for the Court to infer separate implied contract of sale of materials and not as part of service. That is why their Lordships pointed out categorically that in spite of difficulties in the construction of such contract of work and labour on the one hand and contracts for sale, their fine distinction must be recognised. That was particularly so when the contract was composite one involving both the contract of labour and

contract or sale, and that distinction rested on a clear principle. The contract of sale was one whose main object was transfer of property in, and the delivery of possession of, a chattel as a chattel, to the buyer. Where the principal object of work undertaken by the payee of the price was not the transfer of a chattel qua chattel, the contract was one of work and labour. Their Lordships pointed out that the test was whether or not the work and labour bestowed end in anything that can properly become the subject of sale; neither the ownership of materials, nor the value of the skill and labour as compared with the value of the materials, was conclusive, although such matters might be taken into consideration in determining, in the circumstances of a particular case, whether the contract was in substance one for work and labour or one for the sale of a chattel. These principles have been succinctly summarised by this Court by the learned Brothers in their decision in *Variety Body Builders v. Commissioner of Sales Tax, Gujarat* (28 S.T.C. 339.)

4. On the aforesaid settled principles, it is a simple question in context of such photographers' services which were inherently individual services of value to an individual and rendered by an individual professional man, as the whole service was a highly subjective type that there would be no element of sale so far as these professional photographic services are concerned. Indisputably, a prominent part was played in such a contract of services of a photographer by individual subjective considerations in treatment of the client, arranging pose, setting, light and operation of the studio and even at the stage of developing and retouching the photograph. The business element or the business side aspect would begin only after the first finished positive print was properly made out as per the customer's true likeness; and when further copies were to be mechanically or commercially prepared in such a number as the customer wanted and where the charges of other copies would depend essentially on the cost of the photographic materials. Therefore, such individual service by individual to an individual of taking an individual photograph, for producing a true *Tasveer*, would be clearly a contract of work as per its primary object or on the test of true essence or substance of the contract. The photographic skill was of the paramount importance in entering into this contract and the materials were hardly of importance as compared to the skill and labour of the photographer, that is to say, in such cases work and labour were essence of the contract and the property in the materials passed in the incidental or ancillary manner to the contract. If the underlying principle is appreciated that the agreement of sale and the sale must be of the very goods, it is obvious that the contract of photographers' services could not be held to be a sale of the photographic prints. As in *M. I. Corporation's* case where the fixing of windows required special technical skill, merely fixing up of the windows did not complete the contract in such works contract but only fixation as per the specification of the customer's order would complete the contract. On a parity of reasoning, mere supply of photographic prints, however blurred or defective and not bringing

out true Tasveer of the client concerned amount to completion of the contract or delivery of the very goods which the customer bargained for. Therefore, the property in the materials of the first print passed only incidentally or as ancillary to the main bargain for photographic services of taking a true photograph of the individual customer. No doubt, at the stage of further copies, where the primary object of the bargain is of commercial sale of the further prints, there may be a different consideration permitting severance of the two separate, distinct contracts. But so far as the photographic services are concerned, which are really in their essence professional services by an individual to an individual, their contract is of a highly subjective type, which could never by any stretch of imagination be treated as a contract of sale or materials and not of the essential professional services of the photographer. Such a contract of individual photographers skill so as to bring out the true Tasveer of the customer could never be compared with other contracts for production of vendible articles of commercial products, as it did not make the customer as selective, as when he wanted his true representation or Tasveer to be taken out. Therefore, in such cases, the contract could never be a contract of furnishing any copies or prints which are not the true likeness or the Tasveer of the person concerned and, therefore, on the aforesaid settled principles such, contract was one for professional services of a photographer so far as such supply of first prints is concerned, although at the later stage of the multiplication of copies by mechanical process the professional bargain may have the character of a commercial bargain, with a view to make profit by taking out as many copies the customer requires.

5. A host of authorities has been referred to before us and these decisions have been influenced by two foreign cases which dealt with such cases of portrait painting or portrait photographs. In *Robinson vs. Greaves* AIR 1935 953, the Court of Appeal held the contract of an artist to paint the portrait of a lady as the contract of work and labour and materials supplied but not as a contract for the sale of goods. The reasoning was that even in common parlance one would be annoyed if such bargain of painting a portrait by an artist was treated as a bargain of sale of goods. The application of skill and labour was of the highest description and the material in such cases was of no importance for production of the article and it was only as ancillary from that, that the materials involved in the production in addition to skill would pass to the customer or the client. But that would not change the essence of the contract which was one for work and labour and material, as the substance of the contract was skill and experience of the artist in producing the articles and materials passed only incidentally. Slesser I. J. at page 941 had also taken the same view. He had, however, confined in himself only to the decision on the peculiar facts because there might be cases where portraits were ordered in circumstances which would constitute the contract one for the sale of a picture as a chattel. On the reasoning in *Robinsons* case we have clearly pointed out that there can be no doubt as to the contract being one in its essence or with the primary object of getting photographic

services, and it is only incidental that the materials passed so far as the first copy was concerned. Any aspect of sale could arise only at a later stage when further copies were multiplied. In the *Federal Commissioner of Taxation vs. Riley* 1935 53 C.L.R. 69, a Bench of five Judges had under the Australian Sales Tax Assessment Act held that photographs, whether tinted or untinted, taken of, and supplied to, clients for reward in the course of photographers business carried on within the Commonwealth are "goods manufactured in Australia" within the meaning of the Sales Tax Assessment Act, and accordingly are liable to tax. The relevant statutory definition attracted sales tax levy on the sale value of goods manufactured by a tax payer in Australia and sold by him. The statutory definition of manufacture included production in the widest manner by covering all operations conducted for the purpose of bringing tangible things into existence for sale. It was first pointed out at page 79 that the language of the relevant section 17 would not apply to many productions and pursuits in the exercise of which physical things incidentally came into existence and became property of the client or customer, although the essential character of the work, performance of skilled services and not the supply of things, as for example, a conveyancer who made a will and handed it over to the testator, a writer who composed an article for a journal and sent in the typescript, a shorthand writer who transcribed his notes and supplied a transcript, because one or the other elements was lacking that were required to satisfy the description "sale value of goods manufactured, or produced and sold by the taxpayer, or treated as stock for sale by retail or applied to his own use. However, in the case of such a photographer it was held by three Judges as under :-

"The end of the organised business of a portrait photographer is to produce as many copies of a picture or his customer will buy, and to sell them to him with a view to profit. It differs from many other productive arts in the fact that its products must be designed in each case for one individual, and in its attempt to secure some aesthetic value. But it is a process practised commercially to produce an article which will be brought. A tailor must attempt to fit his individual customer and the manufacturer of ornaments might claim that his designs had an aesthetic purpose".

The fourth Judge Starke J. however relied only on the statutory definition, and having regard to the provisions of the Act, the production of photographs and supplying them to clients for a price in the ordinary course of the taxpayers business was held to constitute a "manufacture" of goods within the meaning of the relevant Sales Tax legislation because the term "manufacture" was of the widest amplitude to include a printer, publisher, lithographer or engraver, who may do no more than change the condition of an article already manufactured. The dissenting view of the fifth Judge, Evatt J. was categorical at page 81 that application of the words "goods manufactured" to cases like this was unreal and almost whimsical, because such a photographer rendered artistic services of personal character and the service was so confidential that without the clients consent, the law prevented further reproduction of the photograph, and

therefore, he refused to resolve the doubt in favour of the revenue. The decision is on the special statutory language of the Australian statute by application of the end product test. Even though the learned Judges took the view that a photographers services differed so essentially from other productive arts in the fact that its products must be designed in each case for one individual and in its attempt to secure some aesthetic value, the decision had been rested solely on the fact that it was sufficient for that definition to be attracted that photographers process was practised commercially to produce article which was clearly "manufactured" within the statutory definition. The dissenting view of Evatt J. boldly sets out the professional nature of the artistic services of personal character of such a photographer which could never be treated as commercial services in any sense of the term, unless the professional man commercialise at a later stage by multiplying copies with a view to make profits. It is Evatt J.s reasoning which has appealed to our Supreme Court as pointed out in the aforesaid decision in *Associated Hotels* where their Lordships characterised D. Masandas decision as a border-line case, as it was also possible to hold such photographers contract as a works contract where the sale of material was only incidental. In *Dr. Devendra M. Surti Vs. The State of Gujarat*, , even in the context of an industrial legislation where the question had arisen whether a doctors activity was professional or commercial activity so as to make his establishment a commercial establishment where the statutory definition was wide enough to take in a profession, their Lordships pointed out that the profession, involved the idea of an occupation requiring either purely intellectual skill, or a manual skill controlled, as in painting and sculpture or surgery, by the intellectual skill of the operator as distinguished from an occupation which is substantially the production or sale or arrangements for the production or sale of commodities. It was of the essence of a profession that profits should be dependent mainly upon the personal qualifications of the person by whom it is carried on and that can only be an individual. It was, therefore, held that professional activity must be an activity carried on by an individual by his personal skill and intelligence. There was a fundamental distinction between a professional activity and an activity of a commercial character and unless the profession carried on in a particular case also partook of the character of a commercial nature, the professional activity would not become a commercial activity.

4th August 1975.

6. In *The Management of Safdarjung Hospital, New Delhi Vs. Kuldip Singh Sethi*, , even in the industrial context it was held by the Bench of Five Judges that material services were not services which depended wholly or largely upon the contribution of professional knowledge, skill or dexterity for the production of a result, and, therefore, such services which are given individually and by individuals were services no doubt but not material services. Therefore, services of a professional man involving benefit to individuals according to their needs, such as doctors, teachers, lawyers, solicitors etc. could not be treated as

commercial services in which something was brought into existence quite apart from the benefit to particular individuals. Therefore, it is obvious that the Riley ratio in so far as the majority took the view that such individuals services of a photographer which had individual aesthetic value would also amount to "manufacture" is not the law of this land, and it is Evatt J. s dissenting view which finds favour with our Supreme Court even in the industrial context. Besides, the end product test which was treated as determinative in context of the Australian statute could never be pressed in aid in the context of our sales tax law, where the material test is whether the agreement was one for service or one for sale of materials. As pointed out by their Lordships, while treating the border line case of *D. Masanda vs. Commissioner of Sales Tax*, even in photographic services the other view was possible to hold it as a contract, contract of service, or at the most to serve the two contracts, when there were two separate bargains for services and for the sale of materials. Therefore, as per the aforesaid settled legal position Riley ratio could never help the field so far as the sales tax legislation in our country is concerned.

7. Even apart from the first principles which are so well settled as pointed out by us, even the host of authorities which have been relied upon before us can be easily reconciled on the aforesaid settled legal position. The first decision of our own High Court in *Chelaram Hasomal vs. State of Gujarat* 16 S.T.C. 1021 would be in-consistent with the aforesaid settled principles unless it is confined to its own set of facts. The Riley ratio was pressed in aid in that decision, alongwith that border line *D. Masandas* case, because the business of that dealer in that case was to produce enamelled photographs of saints, religious leaders, and goods on copper plates and to sell the same. That is why in those peculiar facts the contract was interpreted as one essentially, of a bargain for those lockets containing those photographs, especially as the individual element of services by an individual to an individual, which was the essence of a professional service, was wholly absent and the goods had become vendible articles in the market. That ratio is, therefore, to be confined only to those special facts where the photographic dealer carries on this business of sale of photographic prints of religious leaders, saints, Gods, sportsmen, film stars or other public leaders where the aspect of rendering individual, service by an individual to an individual is only incidental. Therefore, the Tribunal was wholly in error in invoking this decision on the facts of the present case where the professional service of the photographer is of the essence of the contract as it is involving individual service of a highly subjective character. Accordingly, the entire line of decisions, resting on this Riley ratio of the Patna High Court in *P. Ghosh vs. State of Bihar* 12 S.T.C. 154 and of the Madras High Court in *B. V. Bhatta vs. State of Madras* 16 S.T.C. 441, again of the Madras High Court in *Eastern Photo Studio* case 25 S.T.C. 376 and of the Orissa High Court in *Oriental Photo Art Studio* case 35 S.T.C. 129 could never be pressed into service for the proposition that even where the contract of photographic service is one of essentially professional service by an individual, to an individual so far as the making out of the first print is concerned

and where there is no sale involved of the further prints, the contract is not one of services but of sale of prints. In such cases, the other contract of multiplication of the prints only can be rightly held as a sales bargain where the property in those very goods passed only under a separate agreement which is clearly of a commercial character, and that distinction has been ignored in this line of decision.

8. On the other hand, the decision of a sculptor 13 S.T.C. 366 and V. K. Baraskar vs. State of Madras 14 S.T.C. 615 (619) and of T.V.S. Sarma Studio vs. The State of Madras 14 S.T.C. 784 by the Madras High Court rightly preferred Robinsons ratio in the context of such photographic services which are professional services by an individual to an individual and, therefore, the contract was held to be essentially a works contract, as the passing of materials was only incidental. The question of severability had not arisen in those cases, and that question has been specifically considered by the Maharashtra High Court in Camera House case 25 S.T.C. 354, This ratio is applied by the Maharashtra High Court later on in Durga Khote Patel Productions 34 S.T.C. 77 and 83, even in the context of cinematographic films production by treating them as works of art and the contract in question as contract of services, as the commercial bargain would only have to be severed at the stage of further prints by way of commercial exploitation. We completely agree with the Camera House decision by the Maharashtra High Court in so far as those Judges have rightly severed the two contracts by treating the contract of taking a photo, of developing, and retouching till the stage of the first print as the contract of service where no sale of materials was involved except incidentally or in ancillary way, and treated as separate contract the commercial bargain by way of sale of further prints for the specific consideration agreed upon with the customers.

9. Mr. Nanavati, however, sought to make a distinction on the ground that this was a partnership concern and, therefore, the contract was not for personal services, and, therefore, Riley ratio should be invoked in such cases. There is no substance in this contention for the simple reason that if the end-product test is not the correct test to be applied, and the correct test under our sales tax legislation is whether the agreement and the sale are of the very same goods and, therefore, the two contracts of services and sales of materials, if there are two separate contracts, should be severed by the revenue. Therefore, even though the partnership concern may be rendering such services, the services still remain professional services of an individual by an individual, so far as the stage of delivery of the first print is concerned, and the bargain assumes commercial character when further copies are to be multiplied and sold for profit. Similarly, the notification of exemption in Item 50 in the exemption notification of August 10, 1966, could hardly be pressed in service by Mr. Nanavati for the simple reason that this exemption notification has been issued by the State Government on a complete misconception of the true ratio in Chalamrams case which, as earlier pointed out by us, in the light of the settled legal position must be confined to its special facts where there is clearly a sale of photographs of religious leaders,

saints and gods, and which ratio could not be invoked to such cases of professional photographers rendering individual services with such highly subjective individual element involved, where in the first stage of the contract of service, there would be no element of sale whatsoever. Similarly, a distinction which was sought to be made by Mr. Nanavati as regards the social and marriage functions photographs could hardly be stressed, because there also it is only at the stage of multiplication of copies that commercial character predominates and, therefore, there is no different test involved. Therefore, no ground whatever was been made out by Mr. Nanavati which would justify invocation of Chelarams ratio to the facts of the present case.

10. In the result, we must answer the Reference by holding that the Tribunal was not right in holding the transactions in question as sales and as not amounting to works contracts; but the Tribunal should have allowed the alternative contention and proceeded on the footing that the transactions were divisible consisting of two separate contracts of photographic services in taking a photograph, developing the negatives and retouching the negatives and in preparing the first print, and it is only the second bargain which should have been held to be a sale of photographic prints which attracted sales tax levy. In other words, the two contracts should have been severed as laid down in Camera House decision in 25 S.T.C. 354. The Reference is accordingly disposed of with no order as to costs in the circumstances of the case.