
(1994) 03 BOM CK 0067

In the Bombay High Court

Case No : Sales Tax Reference No. 11 of 1988

Sarvodaya Printing Press

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 04-03-1994

Acts Referred:

Bombay Sales Tax Act, 1959 — Section 52(1), 61(1)

Citation : (1994) 03 BOM CK 0067

Hon'ble Judges : V.A. Mohta, J;S.M. Jhunjhunwala, J;I.G. Shah, J

Bench : Full Bench

Advocate : G.S. Jetley, in structed by M/s. Malvi Ranchoddas and Co, for the Appellant; Miss P.D. Anklesaria, for the Respondent

Judgement

V.A. Mohta, J.—We are called upon to determine the following question in a reference u/s 61(1) of the Bombay Sales Tax Act, 1959 (the Act) at the instance of the applicant/dealer.

"Whether, on the facts and circumstances of the case, the Tribunal was justified in law in holding that the supply of printed material of Madhya Pradesh Electricity Board by the applicant was a sale and not a works contract ?"

Printed material in question are the multi-colored delegates triplicate receipt books specially designed, printed and prepared for and as per specifications of the Madhya Pradesh Electricity Board (the MPEB) - a statutory corporation. Then entire page from top to bottom is covered in the background by printing the letters "Madhya Pradesh Electricity Bard" in various faint colours. On that background is printed in black dark colour name of the MPEB, detailed beads of charges of electricity such as energy bills, surcharge, etc.

2. M/s. Sarvodaya Printing Press, Nagpur - the applicant, filed an application u/s 52(1)(c) of the Act before the Commissioner of Sales Tax for advance determination of the question as to whether the sales tax was payable in respect of the transaction of supply of such specially tailored receipt books which were of

no use to anyone else. The Deputy Commissioner of Sales Tax, Nagpur Division, passed an order holding that the transaction was a works contract and, therefore, not liable to sales tax. The Commissioner of Sales Tax struck a different note and held that the supply amounted to a sale of goods. The Tribunal upheld that view of the Commissioner, and at the instance of the applicant made a reference to the High Court u/s 61(1) which was heard by the Division Bench at Nagpur. By an order dated July 27, 1990, the Division Bench referred the question to a larger Bench.

3. Following are the uncontroverted salient features pertaining to the transaction : (1) The applicant runs a printing press where only job-work is done. (2) The applicant does not keep ready stock of any material such as paper, ink or standard money receipt books for general use. (3) The MPEB also does not deal in any goods. (4) Charges for supply are one composite amount for the entire job. (5) The applicant could not sell the receipt books to anyone else and was obliged to destroy the excess left over. (6) The receipt books were of no commercial use to anyone else and hence had no marketable value.

4. Having regard to the special type of job work done and other basic circumstances noticed above, it seems to us that the supply does not represent a transaction of sale but represents a works contract which is not subject to sales tax. The intention of parties is most material and it is obvious. The principal object of the MPEB was to get the material printed and not to purchase the printed material. Charges were composite. The books were specially designed for MPEB as per its specifications as to size, type, colour, format, background, etc. No space was left blank obviously because the books were valuable and upon misuse could cause terrible loss to the MPEB. Under the contract the applicant could not retain or use the printed books and the excess, if any, had to be destroyed. Paper and ink used were no doubt property of the applicant before printing, but thereafter they become the property of the MPEB by theory of accretion. No doubt property in the goods used passed to the MPEB but it was by the very nature of things only incidental or ancillary to the contract of printing. No transfer of chattel qua chattel was involved. The work done was composite or indivisible with separate charges for the material. The applicant was prohibited from selling the books to anyone else or to use them for any purpose. It was the duty of the applicant to see that they are safeguarded and they do not fall in the hands of third parties. Element of heavy responsibility was also involved. In any case they were not standard goods and were not capable of any use to anyone else and thus had no commercial value. Material could not be used even as a scrap if rejected and had to be destroyed.

5. Both parties have referred to several decisions dealing with the difference between a sale and a works contract in the context of sales tax laws. They are too numerable to be noticed. The last word on the subject has been uttered in the authoritative pronouncement of the Supreme Court in the case of State of Tamil Nadu v. Anandam Viswanathan [1989] 73 STC 1. It was a case of printing

and supply of question papers of the University. The Supreme Court held that though sale of paper and ink was involved, it was merely incidental. It was not a case of sale but of a works contract having regard to the nature of the job to be done and the confidence reposed for the work to be done for remuneration. Following observations are apposite :

"The primary difference between a contract for work or service and a contract for sale is that in the former there is in the person performing or rendering service no property in the thing produced as a whole, notwithstanding that a part or even the whole of the material used by him may have been his property. Where the finished product supplied to a particular customer is not a commercial commodity in the sense that it cannot be sold in the market to any other person, the transaction is only a works contract. See the observations in *Court Press Job Branch, Salem v. State of Tamil Nadu* [1983] 54 STC 382 and *Commissioner of Sales Tax v. Ratna Fine Arts Printing Press* [1984] 56 STC 77.

In our opinion, in each case the nature of the contract and the transaction must be found out. And this is possible only when the intention of the parties is found out. The fact that in the execution of a contract for work some materials are used and the property in the goods so used, passes to the other party, the contractor undertaking to do the work will not necessarily be deemed, on that account, to sell the materials. Whether or not and which part of the job-work relates to that depends, as mentioned hereinbefore, on the nature of the transaction. A contract for work in the execution of which goods are used may take any one of the three forms as mentioned by this Court in *Government of Andhra Pradesh v. Guntur Tobaccos* [1965] 16 STC 240.

In our opinion, the contract in this case is one, having regard to the nature of the job to be done and the confidence reposed, for work to be done for remuneration and supply of paper was just incidental."

6. We may mention that the decisions of the Madras and Madhya Pradesh High Courts referred to above, relate to turnover mainly representing supply of question papers, judgments, bills, ledgers specially meant for particular customers and which had no general commercial value. It was held that the turnover could not be taxed under the sale tax laws.

7. The first decisions on the subject is of the Supreme Court in the case of *State of Madras v. Gannon Dunkerkey & Co. (Madras) Ltd.* [1958] 9 STC 353 wherein question arose whether sales tax could be imposed under the Madras General Sales Tax Act on supply of material used in building contracts. Question was answered in the negative with the following observations :

"To sum up, the expression "sale of goods" in entry 48 is a nomen juris, its essential ingredients being an agreement to sell movables for a price and property passing therein pursuant to that agreement. In a building contract which is, as in the present case, one, entire and indivisible - and that is its norm, there is no sale of goods, and it is not within the competence of the Provincial

Legislature under entry 48 to impose a tax on the supply of the materials used in such a contract treating it as a sale."

8. In the case of *The Assistant Sales Tax Officer and Others Vs. B.C. Came, Proprietor Came Photo Studio*, , question arose in the context of photographic work which was held to be a works contract though supply of material was involved. It was observed :

"The question as to whether a contract is a contract of work and labour or a contract for sale is not one free from difficulty. The reason for that is that in border line cases the distinction between the two types of contract is very fine. This is particularly so when the contract is a composite one involving both a contract of work and labour and a contract of sale. Nevertheless, the distinction between the two rests on a clear principle. A contract of sale is one whose main object is the transfer of property in, and the delivery of the position of, a chattel as a chattel to the buyer. Where the principal object of work undertaken by the payee of the price is not the transfer of a chattel qua chattel, the contract is one of work and labour. The test is 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, 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."

9. In the case of *Hindustan Aeronautics Ltd. Vs. State of Karnataka*, which related to the question of taxing the turnover of spare parts and materials supplied in execution of job-work of servicing, assembling, repairing and overhauling Air Force planes, it was laid down that the difference between contract of service and contract for sale of goods is that in the former, there is in the person performing work or rendering service no property in the things produced as a whole notwithstanding that a part or even the whole of materials used by him had been his property and in the latter, the thing produced as a whole has individual existence as the sole property of the party who produced it sometime before delivery and the property therein passed only under the contract relating thereto to the other party for price. The court noted with approval the following principles enunciated in Benjamin's *Treatise on the Law of Sale of Personal Property* with reference to the French Code and Civil Law, Eighth Edition (1950) at pages 167-168 :

"1. A contract whereby a chattel is to be made and affixed by the workman to land or to another chattel before the property therein is to pass, is not a contract of sale, but a contract of work, labour and materials, for the contract does not contemplate the delivery of a chattel as such.

2. When a chattel is to be made and ultimately delivered by a workman to his employer, the question whether the contract is one of sale or of a bailment for

work to be done depends upon whether previously to the completion of the chattel the property in its materials was vested in the workman or in his employer. If the intention and result of the contract is to transfer for a price property in which the transferee had no previous property then the contract is a contract of sale.

Where, however, the passing of property is merely ancillary to the contract for the performance of work such a contract does not thereby become a contract of sale."

10. In *Corpus Juris Secundum*, Volume 77 under the heading "Sales" at pages 585 there is a following relevant passage :

"Whether a contract is one for the sale of goods, or for work and labour to be rendered may depend on whether the primary intent is merely to provide for the delivery of goods, or whether the essential consideration is work and labour to be performed at the employer's instance and for his use rather than for the producer's benefit. The distinction has been made that, if the property is not such as the seller usually has on hand for sale and in existence at the time of the sale, but is made specially for the buyer and on his special order, the contract is one for work and labour, and not of sale; but that if the property ordered is exactly such as the seller makes and keeps on hand for sale to anyone, and no change or modification of it is made at the buyer's request, it is a contract of sale, even though it may be entirely made after, and in consequence of, the buyer's order for it. It has also been held that if the property is in existence at the time of the contract for its transfer it is a sale although the seller is to do work thereon to adapt it to a particular use for the buyer; and the fact that work and labour are to be done on, or in connection with, material sold as an incident to, or in connection with, the transfer of title does not rob the transaction of its essential characteristics of a sale if the whole or any measurable part of the consideration for the performance of the contract is compensation for the material."

11. Bombay High Court had occasion to deal with the subject in the context of preparation and supply of designs as required by the customer in the case of *Commissioner of Sales Tax v. Studio Ratan Batra Private Ltd.* [1975] 35 STC 522. It was held therein that the test to determine whether a particular transaction is a contract of work and labour or of skill and labour or a contract of sale is one of intention of the parties which is to be gathered from the terms of the contract and surrounding circumstances. If the parties intend to contract for a chattel, then it is a contract of sale even though work or skill and labour may have to be bestowed in bringing into being the chattel. If the parties contract for the rendering of work and labour or skill and labour, it is not a sale, though in the execution of the contract the passing of materials may incidentally be involved.

12. Our special attention was invited by learned counsel for the department to a Division Bench decision of this Court in the case of *Saraswati Printing Press v.*

Commissioner of Sales Tax [1959] 10 STC 286 wherein the turnover of the printing press was charged to sales tax on the ground that the supply of printed articles was a sale and not a works contract. Undisputed position in that case was that the essential character of the work done by the petitioner-press was the supply of stationery and concession was given on behalf of the dealer that when the printed material is sold by the press to its customer, there is a sale of finished goods to the customer. The said judgment was delivered in the dissimilar factual background and that too, must prior to Supreme Court decision in Kame [1977] 39 STC 237, Hindustan Aeronautics [1984] 55 STC 314 and Anandam Viswanathan [1989] 73 STC 1. The question of general marketability of the goods produced, the intention of parties, the special nature of the work done were obviously not presented before the court and hence not considered. Whether a particular supply amounts to sale or works contract, is essentially a mixed question of law and fact in which area there can be no absolutes.

13. It is submitted on behalf of the department that the case of State of Tamil Nadu Vs. Anandam Viswanathan, has been decided only on the question of confidentiality of the printed material and, therefore, the ratio of that decision will have no application to receipt books. It is not possible to accept this contention. We have already reproduced the relevant passage, from which it is clear that, that was only one of the facets, nature of the job being the principal factor. It is worthwhile noticing that the Supreme Court has made similar observations even about printing of judgments in which quite obviously an element of confidentiality is not involved.

14. Our attention was also invited to the fact that the MPEB had invited tenders for the supply. We fail to see how that feature can have impact on the question. Because tenders were invited, it does not mean the job was not specialised or no responsibility was involved.

15. Thus, having regard to the totality of the background, we hold that the supply in question was not a sale and was a works contract and, therefore, the question is answered in the negative and in favour of the applicant.

16. No order as to costs.

Reference answered in the negative.