(2011) 07 GAU CK 0027

In the Gauhati High Court

Case No : Writ Appeal No''s. 82 and 83 of 2006

S.S. Photographic Lab Pvt. Ltd. — APPELLANT

Vs

State of Assam and Others — RESPONDENT

Date of Decision : 27-07-2011

Acts Referred:
Constitution of India, 1950 — Article 366, 366(12), 366(29A)

Citation : (2011) 44 VST 39

Hon'ble Judges : Madan B. Lokur, C.J;A.C. Upadhyay, J

Bench : Division Bench

Advocate : N. Hawelia, for the Appellant; K.N. Choudhury, Additional Advocate-General, for the Respondent

Final Decision : Allowed

Judgement

Madan B. Lokur, C.J.—These appeals are directed against a common judgment and order dated February 1, 2006, passed by a learned single judge in W.P. (C) No. 7812 of 2002, W.P. (C) No. 5369 of 2002 and W.P. (C) No. 7896 of 2002 (S.S. Photographic Lab. Pvt. Ltd. v. State of Assam [2006] 145 STC 156 (Gauhati)). The appellants in two of the appeals are a private limited company which was earlier a partnership concern of Sanat Kumar Dey. The appellant in the third appeal is Sanat Kumar Dey. All the appellants, therefore, are really one and the same.

2. The appellants carry on the business of developing exposed photographic film rolls into negatives and then processing the negatives into positive photographs. They also process negatives received by them from customers into positive photographs. The developing and processing is done on a job-work basis and, according to the appellants, it does not involve any sale of goods or transfer of property in goods. The appellants, it appears, are not in the business of being commissioned to take photographs or processing them.

3. According to the respondents, the appellants'' transactions fall within the

category of "works contract"'' as defined in article 366(29A) of the Constitution of India and the Assam General Sales Tax Act, 1993 (hereinafter referred to as "the Act"). According to the respondents since the various job-works involve a sale of goods (the chemicals used in developing exposed photographic film rolls and processing negatives), the appellants are liable to pay sales tax under the Act to that extent.

4. Show-cause notices for payment of sales tax were issued to the appellants and they denied their liability. However, the respondents did not accept the views expressed by the appellants and they raised demands for different financial years. The appellants preferred appeals before the Deputy Commissioner of Taxes (Appeals) but the appeals were rejected and the assessments confirmed. Under these circumstances the appellants filed writ petitions before this court which came to be dismissed by the learned single judge by the judgment under appeal.

5. The question that we are required to answer is whether the transactions entered into by the appellants are works contracts (that is composite contracts having both a service element and a sale element) with deemed sales or mutant sales of goods for the purposes of liability to sales tax.

6. The concept of works contract was introduced in the Constitution through article 366(29A) by the Forty-sixth Amendment. In terms of article 366(29A), a tax on the sale or purchase of goods includes a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract. Article 366(12) of the Constitution defines "goods" as including all materials, commodities and articles.

7. The Assam General Sales Tax Act, 1993 defines a works contract in section 2(38). We are concerned with clause (iv) thereof. Section 2(38)(iv) of the Act reads as follows:

2. In this Act, unless the context otherwise requires,-- (38) ''works contract'' means and includes any agreement for carrying out--

(i) to (iii) ....

(iv) the fitting out or fabrication, assembling, altering, or reassembling, blending, furnishing, improving, processing or otherwise treating or adapting any goods.

8. "Goods" has been defined in section 2(15) of the Act as follows;

2. In this Act, unless the context otherwise requires,--

(15) ''goods'' means all kinds of movable properties other than newspapers, actionable claims, stocks, shares or securities;

9. The first question that we are required to answer is whether exposed photographic film rolls and negatives are "goods" within the meaning of section 2(15) of the Act. If they are not "goods" then they fall outside the purview of a

works contract which includes any agreement for processing or otherwise treating or adapting any goods.

10. In M/s. Rainbow Colour Lab and Another Vs. The State of Madhya Pradesh and Others [OVERRULED], , the Supreme Court accepted the test of marketability of goods for the purposes of deciding whether a contract is a works contract or not as laid down in Bavens v. Union of India [1995] 97 STC 161 (Ker) . Although M/s. Rainbow Colour Lab and Another Vs. The State of Madhya Pradesh and Others [OVERRULED], was overruled on another issue, the marketability of goods remained intact as a proposition of law.

11. That the test of marketability of goods has not been overruled is clear from Bharat Sanchar Nigam Ltd. and Another Vs. Union of India (UOI) and Others, . In that case, the Supreme Court referred with approval to Tata Consultancy Services Vs. State of Andhra Pradesh, , where it was held that goods may be tangible property or intangible property. Such property would become goods if it has the attributes thereof having regard to-

(a) Its utility,

(b) Its capability of being bought and sold, and

(c) Its capability of being transmitted, transferred, delivered, stored and possessed.

12. There is, therefore, no doubt that to qualify as "goods" an item must have some utility and must be marketable. Applying this test, the Supreme Court held that electromagnetic waves are not "goods". They cannot be delivered or possessed and they are not marketable.

13. The question that now arises is whether exposed photographic film rolls and negatives are goods? The answer must be a firm "no". Exposed photographic film rolls and negatives per se have absolutely no utility for anyone--not even for the owner. Furthermore, no one goes to the market (or anywhere else for that matter) to buy an exposed photographic film roll or negatives. It is only when they are developed or processed, as the case may be, that they have some personal value for the owner of the photographs. Clearly, therefore, if exposed photographic film rolls and negatives are not "goods" they cannot be the subject-matter of a works contract which concerns itself with the processing or otherwise treating or adapting any goods as defined in section 2(38)(iv) of the Act.

14. Alternatively, if the transactions entered into between the appellants and their customers are not works contracts, would the utilization of chemicals in developing exposed photographic film rolls into negatives and then processing the negatives into positive photographs be a "sale" of such chemicals?

15. "Sale" has been defined in section 2(33) of the Act as follows:

2. In this Act, unless the context otherwise requires,-- (33) ''sale'' with all the grammatical variations and cognate expressions means any transfer of property

in goods by any person for cash, deferred payment or other valuable consideration, and includes-

(i)....

(ii) any transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract.

16. Again, there must be a transfer of property in goods involved in the execution of a works contract.

17. Assuming that the chemicals used in developing exposed photographic film rolls into negatives and then processing the negatives into positive photographs are "goods", these chemicals are not used in the execution of a works contract. Therefore, the respondents cannot urge that there is a "sale" of chemicals within the meaning of the Act.

18. Finally, it was sought to be urged on behalf of the respondents that section 8 of the Act provides that the tax leviable u/s 7 thereof shall be charged on the taxable turnover during the relevant year on the transfer of property in goods. Our attention was drawn to clause (e) of section 8(1) of the Act and this reads as follows:

8. (1) The tax leviable u/s 7 for any year shall be charged on the taxable turnover during such year-

(a) to (d) ....

(e) in respect of any transfer of property in goods (whether as goods or in any other form) involved in a works contract of the nature specified in Schedule VI, at the rate or rates specified in that Schedule.

19. Schedule VI to the Act gives the description of the goods and the rate of tax on the taxable turnover. Entry 24 of Schedule VI reads as follows:

24. Processing and supplying of photograph, photoprints, photonegatives including photographing with camera, X-ray and other scanning machines.

20. It is clear from the above that if there is an agreement both for transfer of property in goods and for processing or otherwise treating or adapting any goods, then the agreement is a works contract involving a sale, otherwise not. Therefore, three ingredients are necessary:

(i) The existence of goods,

(ii) The transfer of property in those goods,

(iii) The processing or treating or adapting of those goods.

21. A combined reading of all the provisions suggests that goods for processing must be in existence. As we have already held that exposed photographic him rolls and negatives are not "goods" the provisions of sections 7, 8 and Schedule

VI of the Act do not come into play at all. When a customer goes to the appellants to have his exposed photographic film rolls developed or negatives processed, there may be an agreement for the transfer of property in the chemicals used in the processing or otherwise treating or adapting the exposed photographic film rolls and negatives. But since they are not "goods" within the meaning of the Act, the question of taxing the "sale" of the chemicals does not at all arise.

22. The above discussion undoubtedly leads to only one conclusion which is that the conversion of exposed photographic film rolls into negatives and then into positive photographs or the conversion of negatives into positive photographs is nothing but a rendering of service specific to a customer and is a matter of skill and expertise of the developer--it is not a works contract.

23. The learned counsel for the appellants sought to further buttress her case by relying on Studio Sujata Vs. Commissioner of Sales Tax, . In this case, the question framed for consideration was whether the Sales Tax Tribunal was right in holding that sales tax is leviable on photographs as execution of works contract. The learned judges answered the question in the negative (no pun intended) after referring to The Assistant Sales Tax Officer and Others Vs. B.C. Came, Proprietor Came Photo Studio, , Photo Emporium Vs. Additional District Magistrate and Others, , Bavens v. Union of India [1995] 97 STC 161 (Ker) , Keshoram Surindranath Photo-Mag (P.) Ltd. and Others Vs. Assistant Commissioner of Commercial Taxes (LR), City Division and Others, , M/s. Rainbow Colour Lab and Another Vs. The State of Madhya Pradesh and Others [OVERRULED], and Bharat Sanchar Nigam Ltd. and Another Vs. Union of India (UOI) and Others, . Reference was also made to Imagic Creative Pvt. Ltd. Vs. The Commissioner of Commercial Taxes and Others, , and it was concluded that contracts for taking photographs are only service contracts and it is difficult to hold that sales tax would be leviable on them. There is no dispute about this, but that is not the issue here.

24. The issue in our case is whether the exposed photographic film rolls and negatives are "goods" or not. We have held that they have no utility and are not marketable. As such, they are not "goods". Consequently, a contract for processing exposed photographic film rolls and negatives is not a works contract as defined in section 2(38) of the Act. Reference to Studio Sujata Studio Sujata Vs. Commissioner of Sales Tax, is not at all apposite.

25. The learned counsel for the appellants also relied upon M/s. Rainbow Colour Lab and Another Vs. The State of Madhya Pradesh and Others [OVERRULED], to contend that the dominant intention of the contract is required to be considered as also the marketability of the goods. The learned Additional Advocate-General is partially right in submitting that M/s. Rainbow Colour Lab and Another Vs. The State of Madhya Pradesh and Others [OVERRULED], was overruled in Bharat Sanchar Nigam Ltd. and Another Vs. Union of India (UOI) and Others, . In paragraph 49 of the Report, the Supreme Court held (page 120 in 3 VST):

...After the Forty-sixth Amendment, the sale element of those contracts which are covered by the six sub-clauses of clause (29A) of article 366 are separable and may be subjected to sales tax by the States under entry 54 of List II and there is no question of the dominant nature test applying. Therefore when in 2005 C.K. Jidheesh Vs. Union of India (UOI) and Others, held that the aforesaid observations in M/s. Associated Cement Companies Ltd. Vs. Commissioner of Customs, were merely obiter and that M/s. Rainbow Colour Lab and Another Vs. The State of Madhya Pradesh and Others [OVERRULED], was still good law, it was not correct. It is necessary to note that M/s. Associated Cement Companies Ltd. Vs. Commissioner of Customs, did not say that in all cases of composite transactions the Forty-sixth Amendment would apply.

26. The Supreme Court made it clear that there are two categories of composite contracts, one covered by article 366(29A) of the Constitution-- to which the dominant nature test did not apply. To this extent M/s. Rainbow Colour Lab and Another Vs. The State of Madhya Pradesh and Others [OVERRULED], was overruled. The other category is those not covered by article 366(29A) of the Constitution. The applicability of the dominant nature test to the second category of contracts was not decided. The marketability test (which was accepted in M/s. Rainbow Colour Lab and Another Vs. The State of Madhya Pradesh and Others [OVERRULED], after referring to Bavens [1995] 97 STC 161 (Ker)) was approved in Bharat Sanchar Nigam Ltd. and Another Vs. Union of India (UOI) and Others, after referring to Tata Consultancy Services Vs. State of Andhra Pradesh, . Therefore, to contend that M/s. Rainbow Colour Lab and Another Vs. The State of Madhya Pradesh and Others [OVERRULED], was completely overruled is not correct. We are mentioning this only for the record, although in our opinion this controversy does not arise.

27. The case of the appellants is fully covered in their favour by the law laid down by the Supreme Court in Bharat Sanchar Nigam Ltd. and Another Vs. Union of India (UOI) and Others, . The appeals are allowed and the judgment and order of the learned single judge is set aside. There will be no order as to costs.

