
(2016) 12 KL CK 0074
In the High Court Of Kerala
Case No : ST. Rev. No. 224 of 2008

State of Kerala

APPELLANT

Vs

Malayala Manorama Company Limited, Kottayam

RESPONDENT

Date of Decision : 21-12-2016

Acts Referred:

Copyright Act, 1957 — Section 17(b)
Kerala General Sales Tax Act, 1963 — Section 5

Citation : (2017) 1 KerLJ 514 : (2017) 2 KLT 36

Hon'ble Judges : Mr. P.N. Ravindran and Mr. A. Muhamed Mustaque, JJ.

Bench : Division Bench

Advocate : C.K. Govindan, Senior Government Pleader, for the Petitioner;
Kuryan Thomas, Anil D. Nair, P. Benny Thomas, K. John Mathai and E.K.
Nandakumar, Advocates, for the Respondent No. 1

Final Decision : Disposed Off

Judgement

A. Muhamed Mustaque, J.—The State in this revision questions the order of the Kerala Sales Tax Appellate Tribunal wherein it was found that the transaction between the assessee and Doordarshan in respect of 13 episodes of television serial entitled "Mohapashikal" was not a sale and it was only a contract for work.

2. The turnover of the assessee, Malayala Manorama Co. Ltd., for the assessment year 1993-94, included a receipt of Rs.13,00,000/- as sale consideration for sale of Manorama Vision Software to Doordarshan. However, the assessee raised a question that the receipts for sale of software to Doordarshan is not assessable as sale, as the consideration received was for the works contract undertaken by them. The assessing authority overruled the objection and assessed the above receipt as sale consideration in the assessment order dated 24.11.1997. The Deputy Commissioner also affirmed the order of the assessing authority in its appellate order dated 5.12.1998. The assessee then filed a further appeal before the Sales Tax Appellate Tribunal contending that the assessee was only offering

its service to produce a 13 episode serial and therefore, there was no sale by the assessee. The tribunal after evaluating the nature of the transaction, took the view that the assessee had only offered its service to produce the serial and the assessee had no right over the film or any part thereof by virtue of the agreement to attract transfer of property. Thus, the appeal filed by the assessee was allowed by the tribunal.

3. The question is whether the transaction referred in the contract to make a serial and transferring the right over the serial would attract the definition of the term "goods" occurring in the Kerala General Sales Tax Act, 1963 (hereinafter referred to as the "KGST Act").

4. The issue involved in this case is an appreciation of the terms of a contract for the purpose of ascertaining whether it constitutes a contract of sale or contract of work in the light of the definition of "goods" under the KGST Act. The question whether making a serial for valid consideration amounts to sale of goods or not, is more or less settled by a large number of decisions of the Apex Court and of this court. It is settled now that "goods" would include all kinds of movable and immovable property whether it be tangible or intangible. The Hon"ble Supreme Court in *Tata Consultancy Services v. State of A.P.* [(2005) 1 SCC 308] has held as follows:

"...Thus a transaction/sale of computer software is clearly a sale of "goods" within the meaning of the term as defined in the said Act. The term "all materials, articles and commodities" includes both tangible and intangible/incorporeal property which is capable of abstraction, consumption and use and which can be transmitted, transferred, delivered, stored, possessed, etc. The software programs have all these attributes."

The answer to the question involved in this case would depend upon answering the point whether the agreement is a mere contract for work and labour or contract for sale of goods.

5. The agreement was entered on 4.3.1994 between the assessee and Doordarshan. By the said agreement, the assessee was directed to produce a 13 episode serial entitled "Mohapashikal". The assessee had to carryout the entire production work. It was agreed that the assessee will have to write the script, shoot, direct, produce, edit and complete the serial in all respects. Thus, the entire creation of the work was rested on the assessee. It was reserved in the agreement that the approving authority (Doordarshan) will have full authority and liberty to reject any or all of the materials or workmanship. It was also agreed that the Government will not be liable to pay any amount to the assessee towards expenses incurred or service rendered in the event the approving authority is dissatisfied with the making of the serial. It is further agreed that upon delivery of the serial and materials to the Government, the same will become the absolute property of the Government and it will have all the perpetual copy rights, distribution rights etc.

6. On a perusal of the agreement, it can be seen that dominant intention of the parties was to make a "television serial" which can be classified as a "cinemautograph film" as defined under the Copyright Act, 1957.

7. The serial in all forms will have to be completed by the assessee (producer). The labour and skill deployed by the assessee therefore, will have to be transcended into a material form to produce the film satisfying the description of "cinemautograph film" as per the terms and conditions in the contract. While dissecting a contract, the court has to examine the dominant intention of the parties to find whether the contract was for production of articles or was only for providing labour and skill. The Hon''ble Supreme Court has in *Hindustan Shipyard Ltd. v. State of A.P.* [(2000) 6 SCC 579] held that there is no straitjacket formula to determine sale or works contract and the intention of the parties has to be culled out on an overall reading of the several terms and conditions of the contract. In *State of A.P. v. M/s.Kone Elevators (India) Ltd.* [(2005) 3 SCC 389], it was held as follows:

"... In a "contract of sale", the main object is the transfer of property and delivery of possession of the property, whereas the main object in a "contract for work" is not the transfer of the property but it is one for work and labour. Another test often to be applied to is : when and how the property of the dealer in such a transaction passes to the customer: is it by transfer at the time of delivery of the finished article as a chattel or by accession during the procession of work on fusion to the movable property of the customer? If it is the former, it is a "sale" if it is the latter, it is a "workscontract". Therefore, in judging whether the contract is for a "sale" or for "work and labour", the essence of the contract or the reality of the transaction as a whole has to be taken into consideration. The pre-dominant object of the contract, the circumstances of the case and the custom of the trade provides a guide in deciding whether transaction is a "sale" or a "works-contract". Essentially, the question is of interpretation of the "contract". It is settled law that the substance and not the form of the contract is material in determining the nature of transaction..."

In *Bharat Sanchar Nigam Ltd. and another v. Union of India and others* [(2006) 3 SCC 1], it was held by the Hon''ble Supreme Court, in a case where a transaction for providing telecom service was involved, that a telephone service is nothing but a service and a transaction involving telephone service as well as providing an apparatus may involve a composite contract of service and sale.

8. In the case in hand, the assessee had to write the script, shoot and produce the serial which means the production of serial itself was to be done by the assessee. Undoubtedly the principal object of the work undertaken by the assessee is the production of a "cinemautograph film" in a material form. If the skill and labour in making the film cannot be separated from the material object in which it exists the contract will have to be construed as a contract for sale and not as a contract of work and labour. In *Assistant Sales Tax Officers and others v. B.C.Kame* the Hon''ble Supreme Court held that

"...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..."

It is to be noted that the production of a film on its completion attains marketable value having the characteristics of a chattel and therefore the contract in question cannot be treated as a mere contract of service.

9. The learned counsel for the assessee then argued that the contract refers that the "cinemautograph film" to be made by the assessee is at the instance of the Doordarshan and the first owner of the copyright therein as per the contract is the Government. It is therefore argued that the ownership of material article thus produced is vested with the Government. It is further argued that such being the intention of the parties, the assessee will have no right over the "cinemautograph film" produced and their obligation as per the contract can be termed only as a duty to provide labour and skill. It is also argued that since ownership of material object produced being vested with the Government as a result of their labour and skill, the contract can only be construed as one providing for contract of service. This argument of the learned counsel apparently is premised on Section 17(b) of the Copy Right Act, 1957.

10. Section 17(b) of the Copy Right Act, 1957 stipulates that a "cinemautograph film" made for consideration at the instance of any person, such person shall, in the absence of any contract to the contrary, be the first owner of the copyright therein. The object of Section 17 in general is to protect the economic interest of the person at whose instance the subject of the copyright is produced. This provision therefore, cannot defeat the copyright of the producer of "cinemautograph film", unless any agreement is made to the contrary. We must view this issue as simply as to draw a finer distinction between the "ownership of a property" and "intellectual property" involving copyright in the particular facts and circumstances of this case. It seems the concept of ownership and intellectual property rights are often conflated and blurred, the boundary distinguishing it is not free from doubt. The ownership is traditionally understood as a legal relationship between a person and a thing over tangible and corporeal property. Blackstone describes it as a "sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in this universe" (see Commentaries on the laws of England of Sir William Blackstone Vol II of the Rights of things). Due to rapid growth of trade and industry, the original definition of ownership has undergone various changes. It is now rather understood as a bundle of rights and each of such rights can be separated from other rights. It is possible for an

owner to retain some ownership associated with the property and transfer other rights. Intellectual property rights on the other hand represent monopoly of intellectual creation of the owner of such rights. It is more understood as conceptional rights on intangible and incorporeal properties. Ownership rights cannot be synonymously understood as intellectual property rights though such rights may overlap other rights in certain circumstances. The distinction however narrow or thin as the case may be, the legal distinction is copious and lucid. Consider, "A" goes to buy the DVD of a cinema or a book over which "B" has the copyright; the owner of the DVD or the book will be "A" and all the right to use the DVD or book would be governed by the copyright owned by "B". thus it is possible one may be the owner of a material article and other may be the owner of a copy right. This distinction as such therefore has to be drawn in the light of the arguments raised based on Section 17(b) of the Copyright Act, 1957.

11. The arguments raised by the learned counsel for the assessee must be repelled for more than one reason. Section 17 provides safeguards to protect the economic interest of a person in the place of the author of the work. Copyright is an exclusive right given to the author or creator of the original work in relation to literary or dramatic works or similar works as referred in the Copyright Act. The author of the work is the person who makes or produces such work. However, in order to protect the economic interest of the person who caused production of the work, the legislature thought it fit to divest copyright and invest such right with the person who caused the work to be created. Thus, Section 17 of Chapter IV of the Copyright Act, 1957 provides that the first owner of the copyright would be the person at whose instance such work is made. We are of the view that vesting of copyright under Section 17 with a person may not have any impact in relation to transfer of material (Cinematograph film). The transfer of materials has to be understood with reference to wellknown norms of "sale" under Sale of Goods Act, 1930. There are two elements for such transaction which are sale and delivery of goods. The vesting of copyright is different from divesting the ownership right in the property in which copyright subsists. The divesting of the ownership right essentially depends upon the nature of contract in relation to the transaction. The deemed transfer of copyright as contemplated in law itself will not result in transfer of ownership of the property. To understand transfer of ownership in a particular transaction for the purpose of sale, the court has to differentiate the terms and conditions of the contract. In this case as seen from the contract (clause 11), it was agreed that TV films and materials will become the absolute property of the Government with perpetual copyrights, distribution rights etc., only upon delivery of the film. If that be so, the contract can be easily comprehended as having the characteristics of a sale as contemplated under the Sale of Goods Act, 1930.

12. Thus we are of the considered view that the tribunal erred in construing the contract as a contract of service. Therefore, we set aside the order of tribunal and restore the order of the assessing authority. No costs.