(1991) 11 MAD CK 0050

In the Madras High Court

Case No : T.C. No. 1416 of 1982

State of Tamil Nadu — APPELLANT

Vs

Everest Copiers — RESPONDENT

Date of Decision : 12-11-1991

Acts Referred:

Citation : (1991) 11 MAD CK 0050

Hon'ble Judges : A.S. Anand, C.J;Raju, J

Bench : Division Bench

Advocate : T. Pramod Kumar, for AGP Taxes, for the Appellant; C. Natarajan, for the Respondent

Judgement

Dr. A.S. Anand, C.J.—The substantial question of law involved for determination in this case is as to whether the taking of photostat copies with the use of xerox machine and delivering the copies so taken to the customers on receipt of certain charges will amount to sale of goods exigible to tax under the Tamil Nadu General Sales Tax Act, 1959.

2. The Revenue has filed the above revision against the order of the Sales Tax Appellate Tribunal (Additional Bench), Coimbatore, dated July 20, 1982, made in C.T.A. No. 714 of 1981 whereunder the Tribunal held that there is no element of sale involved in the transaction and that the charges received by the assessee for taking and supplying xerox copies of the document would amount to cost of labour and skill, without which the xerox machine cannot work perfectly and smoothly. The respondent-assessee reported a total turnover of Rs. 77,659 for the assessment year 1979-80 and claimed exemption from tax on the entire turnover thereby reporting the taxable turnover to be "nil" in the form A1 return filed by them. Before the assessing authority, the assessee claimed deduction of the entire turnover as labour charges received. On the other hand, the assessing authority was of the view that the assessee sold copies of documents taken in "xerox" photostat copies and consequently, the transaction should be considered to be sale of copies of the documents produced by them and subject to tax at 4

per cent.

3. Aggrieved against the same, an appeal was filed before the first appellate authority which confirmed the view of the assessing officer. The first appellate authority was of the view that there is material distinction between taking photographs and xerox copies and unlike photography which involves works of skill and labour, the production of copies by utilising the xerox copying machine does not involve any peculiar work of skill and labour and consequently, the turnover was rightly subjected to tax. On further appeal before the Tribunal, the claim of the assessee was sustained holding that taking of copies with the help of xerox machine involves a process almost similar to photography, that it requires trained personnel to handle the machine and requires skill and intelligence for operating the machine and, therefore, the charges received by the assessee for the same would amount to cost of labour and skill only. The Tribunal consequently set aside the orders of the authorities belows.

4. The Revenue contends before us that the Tribunal committed an error in holding that there was no element of sale in the transaction and that the charges received ny the assessee from the customer would represent the cost of labour and skill only. According to the Revenue, the Tribunal ought to have held that the transaction involves delivery of copies made by using the xerox machine for valid consideration and that it satisfies the requirement of sale rendering the entire turnover exigible to tax. It is also contended before us that the Tribunal has not properly considered and applied the relevant case law on the subject and the ratio of the decision reported in Assistant Sales Tax Officer v. B. C. Kame [1977] 39 STC 237 of the Apex Court would have no application to the case on hand.

5. On behalf of the assessee, learned counsel appearing, while reiterating the conclusions of the Tribunal relying upon certain decisions to which a reference will be made hereinafter, and particularly relied upon a Division Bench judgment of the Karnataka High Court reported in Girija v. State of Karnataka [1984] 56 STC 297, which also related to the levy of tax under the local sales tax law in respect of an assessee carrying on similar business as the assessee before us. The decision in Court Press Job Branch, Salem v. State of Tamil Nadu [1983] 54 STC 382, was that of a Division Bench of this Court, concerning a printer who himself supplied paper and did printing work thereon charging separately for paper and for printing work and the turnover substantially represented relating to printing of judgments, question papers, weddings cards, letter-heads and bills, ledgers and binding works for certain customers. The Division Bench was of the view that the finished product printed specially for particular person and supplied by the assessee to a particular customer cannot be sold in the market to any other person and it has not must commercial value. The ratio of the decision in Deputy Commissioner (C.T.) v. Karthikeya Press [1982] 51 STC 28 which followed the decision in Sales Tax Officer v. I. V. Somasundaran [1974] 33 STC 68 , was applied to come to the conclusion that transactions of the nature concerned therein can be, if at all, taken as constituting two contracts (a) for the

sale of paper and (b) for the supply of labour and since the sale of paper was second sales in the hands of the assessee it will not be taxable and supply of labour also did not invite levy of sales tax. So far as the turnover relating to printing of question papers for educational institutions is concerned, the ratio of the decision in The State of Tamil Nadu Vs. Anandam Viswanathan, since affirmed by the Supreme Court in State of Tamil Nadu v. Anandam be a contract for sale of a finished product and that in the nature of things, the same can be a contract only for labour.

6. In the decision of the Kerala High Court in I. V. Somasundaran case [1974] 33 STC 68, where the assessee was a printer and supplier of letter heads, invitation cards, wedding invitation, judgments of courts or ration cards, while expressing the view that the different types of turnover must be considered separately to find out the essentiality of the agreement between parties, the court held that the printing of judgments is essentially a contract for work and labour and the printing of ration cards is a contract for material and being essentially in the nature of job-works and, therefore, essentially a contract for the sale of finished articles. The court also held that in every case, there can be an agreement for work and labour or there can be one for sale of goods and that if essentially the agreement is one for work and labour complete exemption from taxation should be allowed and if the same is contract for sale, the whole turnover should be taxed. The other category of contracts for sale and for work and labour was also noticed and it was held that in such cases, the possibility of bifurcating the contract into two on the basis of relevant material was there. The decision in Commissioner of Sales Tax M.P. Vs. Purshottam Premji, , concerned an assessee who was quarrying stones from the quarries of the railways and converting stones into ballast of specified sizes and supply them to the railway for remuneration. The transaction was held not to be a sale but a works contract and the reasoning proceeded on the fact situation that the property in the ballast at all relevant times was with the railways and there was no transfer of property involved to make the transaction one of sale.

7. The decision of the Supreme Court in Hindustan Aeronautics Ltd. v. State of Karnataka [1984] 55 STC 314 concerned a contract for servicing, repairing and overhauling Air Force planes which also provided for necessary supply of the bulk materials required by the Government itself and in case of delay in such supply allowing the assessee to procure and use the material at specified rates. The court held applying the ratio in the earlier judgments of the court relating to body-building cases pertaining to construction of bus body and railway coaches that the passing of property in the material so used was merely ancillary to the contract of work and, therefore, no sale was involved in the same. While dealing with such an issue, the Apex Court held :

"It cannot be said as a general proposition that in every case of works contract, there is necessarily implied the sale of the component parts which go to make up the repair. That question would naturally depend upon the facts and circumstances of each case. Mere passing of property in an article or commodity during the course of performance of the transaction in question does not render the transaction to be transaction of sale. Even in a contract purely of work or service, it is possible that articles may have to be used by the person executing the work, and property in such articles or materials may pass to the other party. That would not necessarily convert the contract into one of sale of those materials. In every case, the court would have to find out what was the primary object of the transaction and the intention of the parties while entering into it. It may in some cases be that even while entering into the contract of work or even service, parties might enter into separate agreements, one of work and service and the other of sale and purchases of materials to be used in the course of executing the work or performing the service. But, then in such cases, the transaction would not be one and indivisible, but would fall into two separate agreements, one of work or service and the other of sale."

In B. Girija and Another Vs. State of Karnataka, the assessee, owner of a xerox machine used her own paper and ink and by the use of the xerox machine turned out copies of the documents brought to her and charged for all the services rendered in addition to the cost of the materials used. The Karnataka High Court held the contract to be essentially one for work and labour or service and not for sale on the view that no person goes to the assessee for buying duplicates of his own documents. The court while placing reliance on Hindustan Aeronautics Ltd. case [1984] 55 STC 314 distinguished the decision of the Andhra Pradesh High Court in S.R.P. Works and Ruby Press v. State of Andhra Pradesh [1972] 30 STC 195 wherein the printing and supply of cinema tickets as per specification of the customer was held to be a contract for sale.

8. In Deputy Commissioner of Sales Tax v. Dr. Paran''s Dental Laboratories [1987] 67 STC 249, a Division Bench of the Kerala High Court expressed the view that the job undertaken by a dentist of setting of teeth for patients or customers was essentially a works contract to do skilled labour and the dentures prepared for a particular customer were not taken delivery of by him, they would be waste and that what was manufactured was not a marketable commodity.

9. The distinction between a contract for sale and contract for work is at times subtle and overlapping and eludes an easy answer. The Apex Court, in some of the decisions had occasion to consider the indicia which distinguished these two and indicated the essential differences and the method of identifying them in a given case. In T. V. Sundram Iyengar & Sons v. State of Madras [1975] 35 STC 24, the Apex Court considered the issue with reference to an assessee who was carrying on the business of construction of bus bodies on chassis provided by customers. The court was of the view that the sum and substance of the contract as a whole has to be considered along with the intention of the parties in entering into such contract. While considering the earlier decisions on the subject it referred to the fact that it made no difference whether an article is a ready-made article or is prepared according to the customers'' specification as also

whether the assessee prepares it separately from the thing and fixes it on or does the preparation and fixation simultaneously in one operation. The use of different nomenclature in describing the assessee and the absence of use of word "sale" in the contract were held not decisive or to affect the basic character of the contract.

10. In Assistant Sales Tax Officer v. B. C. Kame [1977] 39 STC 237 the Apex Court considered the question in the context of a photographer undertaking photograph and supplying positive prints to customers. The Apex Court laid down the following relevant and essential tests in such cases :

"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 possession 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."

After elucidating the principles, the court on the nature of the case considered by them expressed their views as hereunder :

"Keeping the above principles in view, we may now turn to the facts of the present case. When a photographer like the respondent undertakes to take photograph, develop the negative, or do other photographic work and thereafter supply the prints to his client, he cannot be said to enter into a contract for sale of goods. The contract on the contrary is for use of skill and labour by the photographer to bring about a desired result. The occupation of a photographer, except in so far as he sells the goods purchased by him, in our opinion, is essentially one of skill and labour. A good photograph reveals not only the aesthetic sense and artistic faculty of the photographer, but it also reflects his skill and labour. A good photograph in most cases is indeed a thing of beauty. It not only seeks to mirror and portray a scene from actual life, but it also catches and preserves for the future what belongs to and is a part of the fleeting moment. The ravage brought about by the passage of time, the decay and the ageing process which inevitably set in as the years roll by leave what is preserved in the photograph unaffected. It is no wonder that an old photograph revives nostalgic memories of days no more, but to which we look back through the mist of time with fondness even though such fondness has a tinge of sadness."

11. In State of Tamil Nadu v. Anandam Viswanathan [1989] 73 STC 1, the Apex Court was considering the taxability under the local Sales Tax Act of the turnover of an assessee who printed question papers for the respective educational institution by using or supplying incidentally the papers on which the question papers were printed. While referring to and analysing the ratio of its earlier decision in Government of Andhra Pradesh v. Guntur Tobaccos Ltd. [1965] 16 STC 240, the court observed as follows :

"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 or gratuitous. In the last class, there is no sale because though property passed it did not pass for a price. Whether a contract is of the first or the second class must depend upon the circumstances; if it is of the first, it is a 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."

It was further observed by the court in analysing the question of law with reference to the particular nature of the contract in the following terms :

"Normally, it may be that the goods prepared by the assessee which could not be exhibited for sale, would be decisive of the matter and could in certain circumstances be sales liable to sales tax, but in all circumstances it depends upon the nature of the sale and the nature of the transaction involved. Printing of question papers at the behest of a University or educational institutions is rather a delicate and confidential type of work and the price paid for supplying such printed question papers or printed matters entails primarily the confidence, and secondly the skill and to a very small measure the material. If that is the position then, in our opinion, it cannot be categorised as entailing sales of goods but it is rather a contract for works done."

While referring to the decisions reported in [1969] 23 STC 72 (Venkatachalam Pillai v. State of Madras) of this Court, [1971] 27 STC 98 (State of Orissa v. Ramanath Panda) of the Orissa High Court and that of the Andhra Pradesh High Court in [1972] 30 STC 195 (S.R.P. Works and Ruby Press v. State of Andhra Pradesh) and distinguishing them on the nature of the contracts in those cases, the court declared the position that "the transaction under its true perspective must be viewed and the intention of the parties must be found out". The decision of the Kerala High Court in [1974] 33 STC 68 (Sales Tax Officer v. I. V. Somasundaran) and [1976] 37 STC 171 (P. T. Varghese v. State of Kerala) as well as that of this Court in [1983] 54 STC 379 (Hameed Bharath Press v. State of Tamil Nadu) and that of the Allahabad High Court in [1984] 56 STC 300

(Commissioner of Sales Tax v. Uma Art Press) were also referred to without disapproval but at the same time as relatable to the peculiar facts of those cases. Finally, the Court held as follows :

"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 Ltd. [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. Hence, the entire price for the printed question papers would have been entitled to be excluded from the taxable turnover, but since in the instant case the demand notes prepared by the assessee showed the costs of paper separately, it appears that it has treated the supply of paper separately. Except the materials supplied on the basis of such contract, the contract will continue to be a contract for work and labour and no liability to sales tax would arise in respect thereof."

12. After bestowing our thoughtful consideration to the problem before us in the light of the various judicial pronouncements referred to and some of those whose reference has been avoided to avert multiplicity and repetition, the basic test commended as acceptable seems to be as to what essentially is the nature of the contract and an answer to this has to be found by looking into the true perspective and the intention of the parties on an overall consideration of all relevant aspects and not merely on the basis of any particular aspect or feature or the ostensible language used in any one contract. Though in some of the decided cases, depending upon the peculiar facts and circumstances of those cases, special emphasis appears to have been laid upon certain or one or more of the peculiar feature, such emphasised aspects shall not, in our view, be either taken to or meant to be taken as decisive of the problem. Each one of those aspects or features by itself cannot be the sole or singular test either to bring into or take out of the net of taxation, a particular transaction or an item of turnover. That apart, having regard to the modern developments and changed conditions of business activities and the abandoning of the business or commercial element of sale for purposes of taxation in the local sales tax law no rough and ready classification of contracts or universal or invariable standards and norms can be adopted divorced of the intrinsic nature of individual contracts which come up for consideration in a given case.

13. The decision of the Karnataka High Court reported in [1984] 56 STC 297

(Girija v. State of Karnataka) on which heavy reliance was placed for the petitioner is concerned, in our view proceeded upon an erroneous understanding of the nature of the transaction and apparently carried away by the corporeal rights over the contents or subject-matter of the copies with the material turned out, viz., the duplicate copies made. If an author or a publisher of a text orders for the printing and supply of a specified number of copies of the literature concerned, it could not be said that the work merely is a contract for work and labour or service and not a contract for sale. Duplication or making out copies does not get its character altered merely on account of the proprietary ownership of the material which is sought to be duplicated or multiplied. Consequently, we are unable to subscribe ourselves to the view of the Karnataka High Court in the said decision.

14. The Tribunal, in the case on hand, had misconstrued the nature of the contract and misapplied the ratio of the decisions relied upon by it in the order under challenge before us. There can be no comparison of the case of a photographer taking photos and agreeing to supply positive prints with that of a person undertaking duplication work with the assistance or means of a xerox machine. To identify both to be one and the same would be turning one''s blind eye to the special attributes and intricate nature of the work of a photographer highlighted in the decision of the Apex Court, reported in [1977] 39 STC 237 (Assistant Sales Tax Officer v. B. C. Kame) or basic principles underlying the case relating to the printer of question papers of educational institutions or court judgments. After a careful consideration of the various judgments referred to by the Tribunal as well as the peculiar facts and circumstances of the case on hand and the essential nature and vital features of the contract in question, we are of the view that supply of a xerox copy manufactured by the use of xerox machine for a price consists of an indivisible contract of sale and consequently the turnover relating to the same was rightly subjected to tax by the assessing authority. The conclusions and findings of the Tribunal do not lay down the correct position of law and consequently, we set aside the order of the Tribunal and restore that of the other authorities below. In the circumstances of the case, however, we make no order as to costs.

15. Petition allowed.

