(2001) 09 GAU CK 0016

In the Gauhati High Court

Case No : Writ Appeal No. 27 (SH) of 1999

Vishwa Vimohan Jha APPELLANT

Vs

State of Meghalaya and Others RESPONDENT

Date of Decision : 05-09-2001

Acts Referred:

Constitution of India, 1950 — Article 286, 366, 366(29A)
Meghalaya Finance (Sales Tax) Act — Section 2(1B)

Citation : (2002) 1 GLT 276

Hon'ble Judges : R.S. Mongia, C.J;N.S. Singh, J

Bench : Division Bench

Advocate : Saraf and K. Khan, for the Appellant; None, for the Respondent

Final Decision : Allowed

Judgement

1. The core question that arises for consideration in this appeal is to whether the photo paper used in the printing of positive prints by the photographers in their work is a transfer of property in the goods? In other words, when a photographer makes a positive print on 2 photo paper from a negative on the order of customer and hands over that photograph to the customer, any sale of photo paper is involved in the transaction on which sales tax is leviable under the Meghalaya Finance (Sales Tax) Act.

2. The aforesaid question has arisen in the following circumstances.

3. Appellant-writ Petitioner is 2 proprietor of a firm known as M/s Colour Calcutta, Kacheri Road, Shillong. He runs a colour photo lab and undertakes the jot of developing photographs from the negative belonging to the customers. In other words, he is running a photograph) shop. The Appellant had obtained registration under the Central Sales Tax Act for importing material required in the business of photography from outside the State of Meghalaya. The said certificate was issued to the Appellant by the Superintendent of Taxes, Circle-6 or 19.1.95 bearing registration No. KH/CST 7762 dated 27.1.94. The firm of the

Petitioner has been registered as a processing unit-processing of film rolls and making colour prints for customers.

4. The Sales Tax authorities in Meghalaya seized 36 number of rolls of Agfa colour photo paper on 28.11.94 at Byrnihat Check Gate. The said photo printing paper was being carried in a tourist taxi in six cardboard boxes. The said taxi was detained by the Superintendent of Taxes at the aforesaid barrier and the goods were seized. The Superintendent of Taxes at the barrier issued the following endorsement:

The case may be considered provided that the permit of the vehicle along with the licence of the Driver is surrendered at this office as security. The composition money of Rs. 23,930.00 (Rupees twenty three thousand . nine hundred thirty) only should be cleared within 5 (five) days from today, failing which the consignment may be auctioned by this office and the vehicle may be detained at this check gate in the future.

Sd/- Superintendent of Taxes Taxation Checkgate Byrnihat, Meghalaya.

By Anr. letter dated 27.4.95 of the Superintendent of Taxes, Byrnihat, addressed to the Manager, M/s. Meghalaya Road Carrier Private Limited, it was advised not to give delivery or consignment of 5 C/B of photo chemical of M/s. Colour Calcutta, till the following conditions were fulfilled:

1. The photostat copies of the Registration Certificate under (a) The Meghalaya Finance (Sales) Tax Act and (b) the Central Sales Tax Act duly attested by the Superintendent of Taxes/Inspector of Taxes Government of Meghalaya are furnished in this office.

2. The Cosignment Note No. 227 dt. 17.4.95 and the Invoice No. 25-95/96 dt. 17.4.95 detained are released by this office.

3. The delivery permit is to be duly allowed by the Superintendent of Taxes, Shillong Circle-VI.

The aforesaid letters and the action of the Sales Tax authorities was challenged before the learned Single Judge.

5. It was inter alia argued before the learned Sine Judge that the Assam Finance (Sales Tax) Act, 1956, as adopted in Meghalaya as Meghalaya Finance (Sales Tax) Act, was not applicable so far as the business of the writ Petitioner (now Appellant) is concerned. It was the case of the writ Petitioner that he runs a photo colour lab which undertakes the job of developing photographs belonging to customers. The business of the Petitioner does not come within the purview of the Meghalaya Finance (Sales Tax) Act and he is not a dealer under the said Act. On the other hand, the revenue submitted that, in view of the provisions of Section 2(1B) which was introduced by the Meghalaya Sales Tax Amendment Act, 1985, the business of the Petitioner was such as would come within the purview of the Meghalaya Sales Tax Act and subject to sales tax. Section 2(1B) of the

Meghalaya Sales Tax Act reads as under:

...(1B) - "Business" includes:

(i) any trade, commerce or manufacture of execution of works contract or any adventure or concern in the nature of trade, commerce, manufacture, execution or works contract, or adventure or concern is carried on with the motive to make gain or profit and whether or not any gain or profit accrues from such trade, commerce, manufacture, execution of works contract or adventure or concern; and

(ii) any transaction in connection with or incident or ancillary to such trade, commerce, manufacture, execution of works contract, adventure or concern...

The learned Single Judge was of the opinion that, in view of the aforesaid provision, defining business the case of the writ Petitioner was covered against him by the Supreme Court''s judgment in Builders Association of India and Others Vs. Union of India (UOI) and Others,

6. Learned Counsel for the Appellant this appeal submitted, that it is not necessary now to go into any other judgment of the Apex Court inasmuch as, the Apex Court itself in the judgment reported as M/s. Rainbow Colour Lab and Another Vs. The State of Madhya Pradesh and Others [OVERRULED], has held that to the extent the paper is used in printing of positive prints by the photographers in their work, there was no transfer of property in the goods. After the decision of the Apex Court in The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd., 46th amendment of the Constitution was brought about. Clause 29A was added to Article 366 relevant extract of which is as follows:

(29A) ''tax on the sale or purchase of goods'' includes:

(a) a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;

(b) 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).

7. In the Madhya Pradesh Sales Tax Act, Section 2(n) was introduced to include the job done like the photographer to be a works contract. The photographer i.e. Rainbow Colour Lab was subjected to the Sales Tax on the printing paper on which the photographs were developed as according to the Revenue, it amounted to ''works contract''. The Rainbow Colour Lab was doing the job as desired by the customers i.e., develop the negatives and supply the prints. The Apex Court observed as under:

Prior to the amendment of Article 366, in view of the judgment of this Court in State of Madras v. Cannon Dunkerley & Co. (Madras) Ltd. the States could not levy sales tax on sale of goods involved in a works contract because the contract was indivisible. All that has happened in law after the 46th Amendment and the judgment of this Court in Builders'' case is that it is now open to the States to divide the works contract into two separate contracts by a legal fiction: (i) contract for sale of goods involved in the said works contract, and (ii) for supply of labour service. This division of contract under the amended law can be made only if the works contract involved a dominant intention to transfer the property in goods and not in contracts where the transfer in property takes, place as an inciden of contract of service. The amendment, referred to above, has not empowered the State to indulge in a microscopic division of contracts involving the value of materials used incidentally in such contracts. What is pertinent to ascertain in this connection is what was the dominant intention of the contract. Every contract, be it a. service contract or otherwise, may involve the use of some material or the other in execution of the said contract. The State is an empowered by the amended law to impose sales tax on such incidental materials used in such contracts. This is clear from the judgment of this Court in Hindustan Aeronautics Ltd. v. State of Karantaka where it was held thus:

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 works 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 further went to observe as under:

Unless there is sale and purchase of goods, either in fact or deemed, and such'' sale is primarily intended and not incidental to the contract, the State cannot impose sales tax on a works contract simpliciter in the guise of the expanded definition found in Article 366(29-A)(b) read with Section 2(n) of the MP General Sales Tax Act. The work done by the photographer is only in the nature of a service contract not involving any sale of goods, and, therefore, the stand taken by the Respondent State cannot be sustained.

In Everest Copiers v. State of Tamil Nadu, (1996) 5 SCC 390 it was observed as under:

Where the main object of the work undertaken by the person to whom the price is paid is not the transfer of a chattel as a chattel, the contract is one of work and labour.

The main object of the work undertaken by the operator of a photocopier or Xerox machine is not the transfer of the paper upon which the copy is produced'' it is to duplicate or make a xerox copy of the document which the prayer of the price wants duplicated. The paper upon which the duplication takes place is only incidental to this transaction. The object of the payment of the price is to get the document duplicated, not to receive the paper. The payer of the price has no interest in the bare paper upon which his document is duplicated. He is interested in it only if it bears such duplication. What is involved is not a sale but a contract of work or labour.

8. The Apex Court, in the aforesaid judgment of Rainbow Colour Lab approved the view taken by the Kerala High Court in Bavens v. Union of India (1995) 97 STC 161 by observing as under:

In Bavena v. Union of India a Division Bench of the Kerala High Court had taken the view that:

Where a photographer takes a photograph of his customer, develops the negative and supplies positive prints in the desired size to the customer, the photographer uses his own camera and his own film. The negative which is subjected to further processing belongs to the photographer and not to the customer. No basic goods are provided by the customer which are subjected to processing, etc. by the photographer so as to make the contract a works contract. There is no accretion to goods or property or the nucleus of a property which originally belonged to the customer. There is no works contract involves in this category of a photographer''s activity. However modernised the camera be, the skill of the photographer is still important for getting the best results. It cannot also be treated as a sale of the photograph for the reason that it is not the intention of the customer to buy a photograph from the photographer. The photograph has no marketable value. What is expected from the photographer is his service, artistic skill and talent. If any property passes to the customer in the form of philographic paper, it is only incidental to the service contract. No portion of the turn over of a photographer relating to this category of work would be exigible to sales tax.

We are in agreement with the view taken by the Kerala High Court in the above case." So far as the Builders'' case (supra) is concerned, the Apex Court observed as under:

The reliance placed by the High Court on Builders'' case is misplaced. Through this Court in the said case held that by the 46th Amendment to the Constitution, the definition of the expression "tax on the sale or purchase of goods" stood enlarged, it also held that the 46th Amendment does no more than make it possible for the States to levy sales tax on the price of goods and materials used in the "works contract" as if there was a sale of such goods and materials. The Court also observed: (SCC pp. 674-75, para 40).

40. We are surprised at the attitude of the States which have put forward the plea that on the passing of the 46th Amendment the Constitution had conferred on the States a larger freedom than what they had before in regard to their power to levy sales tax under Entry 54 of the State List. The 46th Amendment docs no more than making it possible for the States to levy sales tax on the price of goods and materials used in works contracts as if there was a sale of such goods and materials. We do not accept the argument that Sub-clause (b) of Article 366(29-A) should be read as being equivalent to a separate entry in List II

of the Seventh Schedule to the Constitution enabling the States to levy tax on sales and purchases independent of Entry 54 thereof. As the Constitution exists today the power of the States to levy taxes on sales and purchases of goods including the ''deemed'' sales and purchases under Clause (29-A) of Article to be found only in Entry 54 and not outside it. We may recapitulate here that observations of the Constitution Bench in the case of Bengal Immunity Co. Ltd. in which this Court has held that the operative provisions of the several parts of Article 286 which imposes restrictions on the levy of sales tax by the States are intended to deal with different topics and one could not be projected or read into Anr. and each one of them has to be obeyed while any sale or purchase is taxed under Entry 54 of the State List.

9. On the aforesaid premises, the Apex Court held that the answer to the question posed in the opening paragraph of this judgment was that there was no sale or "deemed'' sale when the paper on which the photograph was developed passed to the customer as selling of that paper are not the dominant purpose in the labour contract. The work done by the photographer is only in the nature of a service contract not involving any sale of goods.

10. So far as the definition of ''business'' in Section 2(1B) of the Meghalaya Sales Tax Act is concerned as has been reproduced above, firstly, we are of the view that this is simply a definition of ''business'' and it does not go further to say that such business, if carried out, would amount to sale. Otherwise, if any other interpretation is to be given, then such a provision will not be permissible under the Constitution even after the 46th Amendment as has been held in the Rainbow''s case (supra).

11. For the foregoing reasons, we allow this appeal, set aside the judgment of the learned Single Judge and hold that the paper on which the photographs are developed or for that matter, any material used in the developing of a photograph cannot be subjected to sales tax under the Local Sales Tax Act and such businessman is not require/I to obtain registration under the Meghalaya Sales Tax Act. Writ appeal would stand allowed in the above terms.

12. However, before parting with this judgment, we may observe that if it is found as a fact that the writ Petitioner-Appellant is selling the printing paper as such (on which developing of the photograph is to be done) or any other material required in the developing of photograph, the authorities under the Sales Tax Act would be at liberty to take action in accordance with law.