The Assistant Sales Tax Officer

Vs

B. C. Kame, Prop., Kame Photo Studio

Civil Appeal No. 138 of 1972

(H.R. Khanna, A.C. Gupta, Jaswant Singh JJ)

14.12.1976

JUDGMENT

KHANNA, J. -

1. Whether sales tax is payable by a photographer under the Madhya Pradesh General Sales Tax Act (Act 2 of 1959) when the photographer takes photographs or does other photographic work and thereafter supplies the photographic prints to his client or customer is the question which arises for determination in this appeal on certificate against the judgment of Madhya Pradesh High Court reported in 28 S.T.C. 1. The High Court answered the question in the negative in favour of the assessee respondent.

2. The respondent is the proprietor of Kame Photo Studio. He has apart from his main shop two branches. He carries on business, inter alia, of buying and selling photographic goods. After buying photographic goods he either sells them to his customers or uses them in three ways - (1) in taking photographs and supplying prints thereof, (2) in making enlargements for the clients who bring their own negatives, and (3) in preparing positive prints of the same size from the negatives brought by the clients. For doing these various types of works the assessee respondent charges consolidated amount depending upon the work involved and the size and number of prints demanded by the client.

3. The sales tax authorities assessed the respondent for different periods from April 1, 1964 to March 31, 1969 to sales tax on his turnover on best judgment basis as he had not kept full and complete accounts. It may be convenient to refer to the figures of assessment for one of the years. For the year 1964-65 the total turnover of the respondent was taken to be Rs. 41,500. Out of this amount a deduction of Rs. 6,500 was allowed as relatable to developing and enlargement which was considered to be not chargeable to tax. The balance of Rs. 35,000 was divided into two parts Rs. 12,000 being treated as relatable to sale of materials as such and the rest, Rs. 23,000, being taken to be the receipts on account of the supply of photoprints to those who got themselves photographed at the studios.

4. The respondent filed writ petition to challenge the levy of sales tax on the last item, namely, the item for the supply of photoprints. The contention of the respondent was that in taking a photograph, preparing its negative and thereafter the final positive print for supplying the same to the clients, the respondent undertakes a contract of work and labour and does not enter into a sale transaction. It was also stated on behalf of the respondent that the prepared positive print was not a marketable commodity and he could not sell the photograph of one person to any other person except with the former's consent. As against that, the case of the appellants was that the respondent

was carrying on a commercial activity in the nature of trade and business and the finished photographs supplied by him to his customer was a commodity and the supply of same attracted the levy of sales tax.

5. The High Court, on consideration of the matter, came to the conclusion that the respondent only undertook the contract of work and labour and did not enter into a sale transaction. The respondent as such was held not liable to pay sales tax in respect of the item to which the writ petition related. The High Court while accepting the writ petition also observed as under :

> "We may lastly make it clear that in this case we are not called upon to go into the question whether the material used in preparing the photograph is sold and is taxable. The petitioner has alleged in the petition that he has paid full tax on the value of such material and the respondents have neither denied the fact nor have claimed tax on such material. We, therefore, express no opinion on that question and need not consider either Masanda's case, (1957) 8 STC 370, where the only question referred to this Court was whether such material alone could be taxed, or the observations of the Bombay High Court in Camera House Case, 1970 25 STC 354, about severability of the contract into one separately for service and supply and material."

6. In appeal before us Mr. Shroff has assailed the judgment of the High Court. As against that, Mr. Gupte on behalf of the respondent has canvassed for the correctness of the view taken by the High Court.

7. 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 principle object of work undertaken by the payee of the price is not the transfer of a chattel qua chattel, the contact 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 (See The State of Himachal Pradesh & Ors. vs. Associated Hotels of India Ltd. The respondent company in that case carried on business as hoteliers. As a part of its business as hoteliers, the company received guests in its several hotels to whom, besides furnishing lodging, it also served several other amenities, such as public and private rooms, bath with hot and cold running water, linen, meals during stated hours. The bill tendered to the guests was all inclusive one, namely, a fixed amount for the stay in the hotel for each day and did not contain different items in respect of each of the amenities. The question which arose for determination was whether the company was liable to pay sales tax under the Punjab General Sales Tax Act, 1948 in respect of meals served in the Hotel to the guests coming there for stay. It was held by the Constitution Bench of this Court that the transaction was essentially one and indivisible, namely, one of receiving a customer in the hotel to stay. It was essentially one of service by the hotelier in the performance of which, and as part of the amenities incidental to the service, the hotelier served meals at stated hours. The revenue, it was held, was not entitled to split up the transaction into two parts, one of service and the other of sale of food-stuffs. This Court accordingly came to the

conclusion that there was no sale of food-stuffs and the respondent company was not liable to pay sales tax in respect of the meals served to the guests in the hotel. In arriving at this conclusion this Court observed as under :

> "Thus, in considering whether a transaction falls within the purview of sales tax, it becomes necessary at the threshold to determine the nature of the contract involved in such a transaction for the purpose of ascertaining whether it constitutes a contract of sale or a contract of work or service. If it is of the latter kind it obviously would not attract the tax. From the decisions earlier cited it clearly emerges that such determination depends in each case upon its facts and circumstances. Mere passing of property in an article or commodity during the course of the performance of the transaction in question does not render it a transaction of sale. For, 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 these 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 a contract or work or even service, parties might enter into separate agreements, one of work and service and the other of sale and purchase 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 invisible, but would fall into two separate agreements, one of work or service and the other of sale."

8. Reliance in the above cited case was placed upon an earlier decision of this Court in the case of State of Madras vs. Gannon Dunkerley & Co. (Madras) Ltd. Wherein the Constitution Bench of this Court held that in a building contract the property in materials used does not pass to the other party to the contract as movable property. It would so pass if that be the agreement between the parties. But if there was no such agreement and the construct a building, then the materials used therein would, in the opinion of the Court, became the property of the other party to the contract only on the theory of accretion.

9. The distinction between a contract of sale and contract for skill and labour has been discussed at page 10 of the 4th Edn. of "Sale of Goods" by P. S. Atiyah. The following passage in that book has a material bearing so far as the present case is concerned :

> "The distinction between contracts of sale and contracts for skill and labour has agitated the courts for many years, and though its importance has been greatly diminished by the repeal of Section 4 of the Act, it still cannot be ignored. It was thought for many years that Lee vs. Griffin (1861), 1 B. as. 272) laid down that, if a contract would result in the transfer of the property in goods from one party to another, then it must be a contract of sale. This review was exploded in Robinson vs. Graves (1935) 1, K.B. 579 where it was held that a contract to paint a portrait was a contract for skill and labour and not a contract for the sale of goods, despite the fact that it was object of the contract to transfer the property in the completed portrait to the defendant. Greer, L.J. stated the law as follows, (1935)1 K.B. at p. 587 :
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> "If the substances of the contract . . . is that skill and labour have to be exercised for the production of the articles . . . it is only ancillary to that 'there will pass from the

> artist to his client or customer some materials in addition to the skill involved in the production of the portrait, that does not make any difference to the result, because the substance of the contract is the skill and experience of the artist in producing the picture'".

10. Keeping the above principle 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 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, it is also reflects his skill and labour. A good photograph in most cases is indeed a thing of a beauty. It not only seeks to mirror and portray a scene from actual life, it also catches and preserves for the future what belongs to and is 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.

We, therefore, find no cogent ground to disagree with the High Court in so for as it has decided against the revenue and has held the contract to be one for work and labour. Our attention has been invited during the course of arguments to some decisions of the High Courts. It is, in our opinion, not necessary to deal with those cases because after giving the matter our consideration we are of the opinion that the view taken by the High Court in the judgment under appeal substantially represents the correct position in law. The appeal consequently fails and is dismissed, but in the circumstances without costs.

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