

V.K. Baraskar Vs. State of Madras

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Court : Chennai

Decided On : Nov-26-1962

Reported in : [1963]14STC615(Mad)

Judge : Jagadisan and ;Srinivasan, JJ.

Appeal No. : Tax Case No. 147 of 1961

Appellant : V.K. Baraskar

Respondent : State of Madras

Advocate for Def. : G. Ramanujam, Adv. for ;Additional Government Pleader

Advocate for Pet/Ap. : R. Gangadharan, Adv.

Disposition : Appeal allowed

Judgement :

Jagadisan, J.

1. The vocation of the appellant is to draw pictures for remuneration and hand them over to business firms or printers who have them printed in hundreds and thousands of copies for sale or presentation. The appellant incurs the cost of paper and colours for the drawings. In the financial year 1956-57. he received Rs. 14,916-12 for the drawings. The materials used for the drawings cost him only Rs.

253-43. All the materials were not, however, used up in the drawings for the year and a large surplus was left with him at the end of the year. The Deputy Commercial Tax Officer assessed him to sales tax on a turnover of Rs. 14,916-12. On appeal to the Appellate Assistant Commissioner the assessment was set aside. He held that the appellant was not 'a dealer' and that his transactions were not sales within the meaning of the Madras General Sales Tax Act, 1939. The Board of Revenue, acting in exercise of its revisional power, set aside the order of the Appellate Assistant Commissioner after due notice to the appellant. The Board restored the assessment of the Deputy Commercial Tax Officer. In the view of the Board the appellant sold the pictures for a price and the Act was therefore applicable. It is not clear whether the Board treated the appellant as a 'dealer' but that is implicit in the order as otherwise the Act would not be applicable. This appeal is by the assessee from the said order of the Board.

2. Is the appellant a dealer and was he selling the pictures drawn by him are the two questions which arise for decision. The questions are clearly interdependent. If it is found that the appellant was selling or supplying pictures in the course of business, necessarily he falls within the ambit of the definition of a 'dealer' under the Act. What is important is that there must be a course of business and that the transactions indulged in by him should be 'sales, supply or distribution'. A mere course of business not involving the activities of sale, supply or distribution or a mere sale, supply or distribution without a range of activities constituting a system or course would not each, taken separately, be sufficient to attract the definition of 'dealer'. Only a systematic course of conduct on the part of any person evidencing sales, supply or distribution undertaken in a commercial spirit can lead to the conclusion that the person is a dealer. It is plain that the Madras General Sales Tax Act cannot be invoked against a person who is not a dealer or in the absence of the taxable event, which is a 'sale or purchase' as defined under the Act. In the present case, it has not been established, and indeed it is not the case of the department, that the appellant is a dealer apart from, what may be called, the picture transactions. The primary question, therefore, in this case would be whether these transactions constitute sales within the meaning of the Act. If they are not sales the turnover of these transactions cannot be taxed. If they are sales the appellant must be held to be a dealer, as he, indisputably, carried on such

transactions in the course of his occupation or career.

3. We shall therefore proceed to consider the real nature of the activities of the appellant with reference to the pictures drawn by him.

4. 'Sale' is defined under the Act as follows :

Sale with all its grammatical variations and cognate expressions means every transfer of the property in goods by one person to another in the course of trade or business for cash or for deferred payment or other valuable consideration and includes also....

5. Are the ingredients of this Section fulfilled in the present case is the vital question for consideration.

6. An artist who creates a work of art for reward or remuneration has no resemblance to a dealer in works of art. His activities taken as a whole do not constitute a sale. We can test the true nature of the transaction by an illustration. A picture is drawn by the artist for the use and benefit of another. The artist received charges for the work done. There is no sale of the picture, as there is no transfer of property from the artist to the other person. It can truly be said that the picture comes into existence as the property of the other contracting party. Assuming that there is transfer of property in the picture from the artist to his employer the transaction in its sum total is not a sale, The real question that has to be posed is what is the essence or the pith and substance of the transaction. Is it a sale or is it a contract of work and labour This is the test, which is simple in its enunciation but difficult in its application.

7. We shall now refer to the principles of distinction between a sale and a contract for work and labour as laid down in judicial decisions and in authoritative texts. In Halsbury's Laws of England, Vol. 34, 3rd Edn., page 6, para 3, it is stated as follows :

Contract of sale distinguished from contract for work and labour:-

A contract of sale of goods must be distinguished from a contract for work and labour. The distinction is often a fine one. A contract of sale is a contract whose main object is the transfer of the property in, and the delivery of the possession of, a chattel as a chattel to the buyer. Where the main object of work undertaken by the payee of the price is not the transfer of a chattel qua chattel, the contract is one for work and labour.

8. In *Clay v. Yates* 25 L.J. Ex. 237, the contract was that the plaintiff, a printer, should print for the defendant a second edition of his book, the plaintiff to find the materials including the paper. It was held that this was not a contract for the sale of a thing to be delivered at a future time nor a contract for making a thing to be sold when completed but a contract to do work and labour, furnishing the materials. Pollock, C.B., in the course of the judgment observed thus:

But it seems to me the true rule is this : Whether the work and labour is of the essence of the contract, or whether it is the materials that are found. My impression is, that in the case of a work of art, whether it be silver or gold, or marble, or common plaster, that is a case of the application of labour of the highest description, and the material is of no sort of importance as compared with the labour, and therefore, that all this would be recoverable as work and labour and materials found.

9. The distinction has been very concisely and intelligibly pointed out in an article in *Law Quarterly Review* by Stephen, J., and Sir Frederick Pollock. The learned authors state :-

A contract by which one person promises to make something which when made will not be his absolute property and by which the other person promises to pay for the work done is a contract for work, although the payment may be called a price for the thing and although the materials of which a thing is made may be supplied by the maker.

10. The case of *Robinson v. Graves* [1935] A.E.R. 935 is in point. In that case the defendant commissioned an artist to paint a three fourth length portrait of a lady for the sum of 250 guineas and the artist accepted the commission. The defendant

repudiated the contract and on the artist suing him for its breach pleaded Section 4 of the Sale of Goods Act, 1893. It was held that the plaintiff was entitled to succeed because as the contract in substance was for the exercise of skill, and as materials would have passed from the plaintiff to the defendant only as incidental to that skill the contract was not a contract for the sale of goods but one for work and labour and materials supplied, and therefore Section 4 did not apply. The basis of the decision is to be found in the following words of Greer, L.J., at page 939 :

If you find, as the Court did in *Lee v. Griffin* 1 B. and S. 278, that the substance of the contract was a contract to produce something to be sold by the dentist to the dentist's customer, then that is a sale of goods. But if, on the other hand, the substance of the contract is that skill and labour have to be exercised for the production of the article, and that it is only as ancillary to that 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 article, that does not affect the conclusion that the contract is one for work and labour and materials, because the substance of the contract is for the skill and experience of the artist in producing the article.

11. It would be a misuse of language to describe an artist's work, be it for remuneration, as a sale of the produce of his art for a price. There is no warrant for it either under the Sale of Goods Act or under the Madras General Sales Tax Act. Common sense repels it. The correct approach is to view the transaction as a whole and not to dissect it and catch hold of a limb of it and say that there is an element of sale in the composition. A part cannot determine the nature of the whole and every part cannot have any individuality of its own, as it is merged in the whole: 'A contract of sale is not constituted merely by reason that the property in materials is to be transferred to the employer. If they are simply accessory to work and labour, the contract is for work, labour and materials. Such is the case of medicine supplied by a medical man to a patient, or by a farrier to horse, or plans made by an architect, or drafts by a Solicitor. (Benjamin on Sale, 8th Edn., page 166).' Judged by the principles set forth above, we have no doubt that in the present case, the transactions of the appellant were not, even in any remote sense, sales under the Act.

12. In a similar case reported in D. P. Roy Chowdhury v. State of Madras [1962] 13 S.T.C. 866, Veeraswami, J., held that the person concerned was not a dealer under the Act. The petitioner in that case was a sculptor and artist, who supplied two bronze casts to two State Governments at a cost of Rs. 60,000 and Rs. 41,000 respectively. The learned Judge held that the casts were made not for purposes of sale in open market but to please and satisfy his admirers. It was clear in that case that the assessee was not a sculptor by profession. That decision turned upon the question whether the assessee was a dealer or not. There was no necessity for the learned Judge to consider the question whether there was in fact a sale or a taxable event under the Act. In the view taken by us that the appellant did not sell or supply pictures, but only drew pictures for remuneration, the Board's order cannot be sustained.

13. The appeal succeeds. The order of the Board of Revenue is set aside. The appellant will have his costs from the Department. Counsel's fee Rs. 100.

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