M/S. Rainbow Colour Lab & Anr vs The State Of Madhya Pradesh & Ors on 2 February, 2000

Equivalent citations: AIR 2000 SUPREME COURT 808, 2000 (2) SCC 385, 2000 AIR SCW 359, (2000) 1 JT 498 (SC), 2006 (1) COM LJ 302 SC, 2000 (1) JT 498, 2000 (1) LRI 1037, 2000 (1) SCALE 381, 2000 (3) SRJ 63, (2000) 91 ECR 771, (2000) 118 STC 9, (2001) 1 KANTLJ(TRIB) 189, (2000) 1 SUPREME 346, (2000) 1 SCALE 381, (2000) 2 BLJ 552, (2000) 159 CURTAXREP 37

Bench: S.P.Bharucha, N.S.Hegde

PETITIONER:
M/S. RAINBOW COLOUR LAB & ANR.

Vs.

RESPONDENT:
THE STATE OF MADHYA PRADESH & ORS.

DATE OF JUDGMENT: 02/02/2000

BENCH:
S.P.Bharucha, N.S.Hegde

JUDGMENT:

SANTOSH HEGDE, J.

Common questions involved in these appeals are whether the job rendered by a photographer in taking photographs, developing and printing films would amount to a works contract as contemplated under Article 366(2A)(b) of the Constitution read with Section 2(n) of the M.P.General Sales Tax for the purpose of levy of sales tax on business turnover of the photographers.

Prior to the 46th Constitutional Amendment, this question was settled in favour of the assessees by the judgment of this Court in the case of Assistant Sales Tax Officer & Ors. vs. B.C. Kame (1977 (39) STC 237). Taking advantage of the 46th Amendment of the Constitution and the consequent amendment to the definition of sale in Section 2(n) of the local Sales Tax Act, the Commissioner of Sales Tax, M.P. issued Circular dated 25.1.1992 opining that the job done by the photographers amounted to works contract and turnover from such work would be exigible to the levy of sales-tax. This Circular prompted the concerned Assessing Officers to re-assess the turnover of the assessees and to issue them demand notices. Aggrieved assessees filed writ petition before the M.P.High Court

primarily contending that the work done by them is only a service contract, out of their skill and labour and there was no element of sale involved in their work, hence their turnover was outside the levy of sales-tax. The High Court, however, relying on the judgment of this Court in Builders Association of India & Ors. vs. Union of India & Ors. (1989 (73) STC 370) held that, to the extent of the photo paper used in the printing of positive prints by the appellants in their work, there is a transfer of property in goods. Therefore, to this extent, the job done by the appellants becomes a works contract as contemplated under Article 366(2A)(b) of the Constitution and as incorporated in Section 2(n) of the State Act. This declaration of law is challenged before us in these appeals. On facts, there is no dispute before us in regard to the actual nature of work done by the appellants i.e. in the course of their business. The appellants take photographs of the objects desired by their customers, develop the negatives and supply the prints. They also develop the films brought by the customers, make positive prints thereof and supply the positive prints and return the negative films back to the customers. In some of the cases, it is possible that the appellants may undertake the work of enlarging the photo prints also. It is also of common knowledge that the photo prints supplied by them to their customers are not marketable commodities and as goods they have no value. In this background, we will now examine the question arising in these appeals. This Court in Kames case (supra) while considering the facts of a similar case held: 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. x x x x x We, therefore, find no cogent ground to disagree with the High Court in so far as it has decided against the revenue and has held the contract to be one for work and labour. Since this was a judgment rendered prior to the coming into force of the 46th Constitutional Amendment, we will have to consider whether the said Amendment has brought about any change so as to doubt the legal position enunciated in the above case. It is true that by the 46th Constitutional Amendment by incorporating Clause 29-A(b) in Article 366, the definition of the words sale and works contract have been enlarged. The State of Madhya Pradesh has also brought about a consequent change in the definition of the word sale in Section 2(n) of its Sales Tax Act but it is to be noticed that in the said State Act the expression works contract has not been specifically defined. Prior to the Amendment of Article 366, in view of the judgment of this Court in State of Madras vs. Gannon Dunkerley & Co. (1958 (9) STC

353), 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 (supra) 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 and 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 incident of contract of service. The Amendment, referred to above, has not empowered the State to indulge in 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. State is not 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. vs. State of Karnataka (1984 (55) STC 314 at 322) 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 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..

The Judgment in the above case was quoted with approval by this Court in the case of Everest Copiers vs. State of Tamil Nadu (1996 (103) STC 360) (to which judgment one of us - Hon. Bharucha, J. - was a party) wherein it was stated: 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 payer 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.

In Bavens v. Union of India & Ors. (1995 (97) STC

161), 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 involved in this category of a photographers 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 photographic paper, it is only incidental to the service contract. No portion of the turnover 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. The reliance placed by the High Court in Builders case (supra) is misplaced. Though 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 making 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 : 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 does 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 of goods under clause (29- A) of article 366 is to be found only in entry 54 and not outside it. We may recapitulate here the observations of the Constitution Bench in the case of Bengal Immunity Co. Ltd. (1955) 6 STC 446; (1955) 2 SCR 603 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 another and each one of them has to be obeyed while any sale or purchase is taxed under entry 54 of the State List. Thus, it is clear that unless there is sale and purchase of goods, either in fact or deemed, and which 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 State Act. On facts as we have noticed that the work done by the photographer which as held by this Court in Kames case (supra), is only in the nature of a service contract not involving any sale of goods, we are of the opinion that the stand taken by the respondent-State cannot be sustained.

For the reasons stated above, we are of the opinion that the view taken by the Division Bench of the Madhya Pradesh High Court in the impugned judgment cannot be sustained. Hence, we allow these appeals, setting aside the judgment under appeal and grant the prayer of the appellants by quashing the assessment orders and the demand notices impugned in the writ petitions before the High Court. No costs. SLP © Nos.18089-90/97 :

> Leave granted.
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> Following the judgment of this Court in CA Nos.5350-51/97 etc. these appeals are also allowed. No costs.