Camera House, Bombay vs The State Of Maharashtra on 6 May, 1968

JUDGMENT

Vimadalal, J.

1. These are three references under section 61 of the Bombay Sales Tax Act, 1959, by the applicants who are a sole proprietary concern carrying on business as photographers and photographic dealers in Bombay, which were heard together, and may conveniently be disposed of by a common judgment. These references arise on three specimen bills which are typical of three types of transactions entered into by the applicants with their customers in the course of their business. The transaction which is the subject-matter of the first bill No. 60293 dated 9th August, 1960, is one to prepare enlargements of a certain size from negatives given by the customer. The second type of transaction which is to be found in specimen bill No. 95198 dated 18th August, 1960, relates to developing the customer's film roll and taking out prints from the same. The third type of transaction which is to be found in specimen bill No. 16531 dated 23rd August, 1960, relates to the taking of a photograph, and supplying the negative thereof with three prints of a certain size to the customer. On an application under section 52 of the Bombay Sales Tax Act, 1959, by the applicants, for the determination of the question as to whether any tax was attracted on the transactions which were the subject-matter of the said three bills, and, if so, at what rate, the Commissioner of Sales Tax in his order dated 17th August, 1961, took the view that the transactions embodied in all the said bills amount to sales, except that part of the transaction which is the subject-matter of bill No. 95198 which related to the developing of the customer's film roll, which he held would not amount to a sale. The applicants appealed from the decision of the Commissioner of Sales Tax to the Sales Tax Tribunal at Bombay in respect of each of the three specimen bills. The Tribunal by its order dated 28th June, 1963, confirmed the decision of the Commissioner of Sales Tax on all points, and dismissed those appeals on the ground that the gist of the business of a photographer is to practise the photographic process commercially in order to produce an article which would be bought and would yield profit, and that the essence of the contract, therefore, was not work and labour but was sale of goods. The applicants then applied to the Sales Tax Tribunal for a reference under section 61 of the Bombay Sales Tax Act, 1959, and the Tribunal by its order dated 15th January, 1964, referred the following question for the determination of this court which is identical in each of the three references in respect of the three specimen bills referred to above :-

> "Whether having regard to the facts and circumstances of the case, the transactions which were the subject-matter of determination by the Commissioner amount to sales ?"

2. These references were heard together by us, and were argued with characteristic thoroughness by

the learned counsel on either side.

3. In Benjamin on Sales (8th Edition), the observations of Martin B., in the English case of Clay v. Yates ((1856) 156 E.R. 1123 at p. 1125; 108 R.R. 461 at p. 464) have been quoted at (page 160) in which contracts have been divided into three broad classes : (1) contracts for labour simply; (2) contracts for work and materials; and (3) contracts for goods sold and delivered. In another passage in the same book (at page 168), it has been stated that where the passing of property is merely ancillary to the contract for the performance of work, such a contract does not thereby become a contract of sale. In a classic passage in Halsbury's Laws of England (3rd Edition), Volume 34, pages 6-7, paragraph 3, which has been quoted in most of the leading decisions on the subject, it has been laid down as follows :

> "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. 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 the 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."

4. The leading case on the subject of contracts which involve both the transfer of property in some material, as well as the performance of work and labour, is the case of the State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd. ([1958] 9 S.T.C. 353). The respondents in that case were doing the business of construction of buildings, roads and other works, and one of the items to which the reference in the said case related was the value of the material used by the respondents in the execution of their contracts. The Madras General Sales Tax Act, 1939, contained certain provisions, whereby tax was imposed on the supply of materials in the execution of works contracts. The sole question which arose before the Supreme Court in that case was whether there was a transaction of sale in respect of those goods, and the power of the Madras Legislature to impose a tax on sales under entry 48 in List II of Schedule VII of the Government of India Act, 1935, extended to imposing a tax on the value of the materials used in works. After an exhaustive review of the relevant case law, the Supreme Court held (at pages 377-78) :

> "It has been already stated that, both under the common law and the statute law relating to the sale of goods in England and in India, to constitute a transaction of sale there should be an agreement, express or implied, relating to goods to be completed by passing of title in those goods. It is of the essence of this concept that both the agreement and the sale should relate to the same subject-matter. Where the goods delivered under the contract are not the goods contracted for, the purchaser has got a right the reject them, or to accept them and claim damages for breach of

> warranty. Under the law, therefore, there cannot be an agreement relating to one kind of property and a sale as regards another. We are accordingly of opinion that on the true interpretation of the expression 'sale of goods' there must be an agreement between the parties for the sale of the very goods in which eventually property passes. In a building contract, the agreement between the parties is that the contractor should construct a building according to the specifications contained in the agreement, and in consideration therefor receive payment as provided therein, and as will presently be shown there is in such an agreement neither a contract to sell the materials used in the construction, nor does property pass therein as movables. It is therefore impossible to maintain that there is implicit in a building contract a sale of materials as understood in law."

5. The Supreme Court held that the expression "sale of goods" in entry 48 is a nomen juris, its essential ingredients being an agreement to sell movables for a price, and property passing therein pursuant to that agreement. The Supreme Court further held that, in a building contact which was, as in that case, one, entire and indivisible - and that was its norm -, there was no sale of goods, and it was not within the competence of the Provincial Legislature under entry 48 to impose a tax on the supply of the materials used in such a contract, treating it as a sale. The Supreme Court, therefore, came to the conclusion that there was no sale, as such, of materials used in a building contact, and that the Provincial Legislature had not competence to impose a tax thereon under entry 48. In arriving at that conclusion, the Supreme Court rested its decision also on the principle of accretion (at pages 385-86) holding that the property in the materials used in a building contract does not pass to the other party to the contract as movable property, but the construction embedded on the land becomes an accretion to it, and it vests in the other party, not as a result of the contract, but as the owner of the land. The Supreme Court observed (at page 386) that the theory that a building contract can be broken up into its component parts, and as regards one of them it can be said that there was a sale, must fail on the grounds that there was no agreement to sell materials as such, and that property in them did not pass as movables. In order to avoid misconception, the Supreme Court has made it clear (at pages 387-88) that their conclusion in the said case had reference to works contracts which were "entire and indivisible" as in the case before them. The Supreme Court then proceeded to observe that contract could, however, take several forms, and further stated (at pages 387-388) as follows :

> "It is possible that the parties might enter into distinct and separate contracts, one for the transfer of materials for money consideration, and the other for payment of remuneration for services and for work done. In such a case, there are really two agreements, though there is a single instrument embodying them, and the power of the State to separate the agreement to sell from the agreement to do work and render service and to impose a tax thereon cannot be questioned, and will stand untouched by the present judgment."

6. In the case of a transaction for work and labour done, and material furnished, the first question that has, therefore, to be considered is - is the contract in question "entire and indivisible", or does the transaction embody two distinct and separate contracts, one for the sale of goods as such and the

other for work and labour. That is precisely what has not been considered at all in the cases reported in D. Masanda and Co. v. Commissioner of Sales Tax ([1957] 8 S.T.C. 370 at p. 375), M. Ghosh v. The State of Bihar ([1961] 12 S.T.C. 154 at p. 156), B. V. Bhatta v. The State of Madras ([1965] 16 S.T.C. 441 at p. 445) and Chelaram Hasomal v. The State of Gujarat ([1965] 16 S.T.C. 1021 at pp. 1028-1030), or in the Australian case reported in Federal Commissioner of Taxation v. Riley (53 Com. L.R. 69), which have been strongly relied upon by the taxing authorities in the present case, which I will presently discuss. In the first of these case, severability was assumed whilst the learned Judges who decided each of the remaining cases appear to have assumed that the transactions which they were considering were entire and indivisible, which is the primary question that must be decided in all such cases. I am, therefore, unable to follow the decisions in those cases. It is only in the case of contracts that are "entire and indivisible" that the tests laid down in the passage from Halsbury quoted above and by the Supreme court in Gannon Dunkerley & Co. (Madras) Ltd.'s case ([1958] 9 S.T.C. 353), have to be applied for the purpose of determining the real nature of the transaction. In the case of transactions that are distinct and severable, on the other hand as the Supreme Court itself has indicated at the end of its judgment (at page 388) in Gannon Dunkerley's case ([1958] 9 S.T.C. 353) it is only the activity which results in a sale that can be taxed to sales tax.

7. It is the contention of Mr. Mehta on behalf of the applicants that, in the case of the transactions embodied in all the three specimen bills in the present case, the intention of the parties is not to effect a sale of goods, but to enter into a bargain for rendering service which involves the exercise of the artistic skill of the photographer concerned. In support of his contention that the assessee's work involves skill and labour, he has relied upon certain photographic publications which show the highly technical nature of the operations of a photographer in the matter of taking a photograph, developing the film and preparing the prints and/or enlargements. It is, on the other hand, contended by Mr. Khambatta on behalf of the department that the essential feature of the business of a photographer is the production of goods for sale, and that, with the advance that has been made in the manufacture of cameras, and even in the matter of the subsequent process of developing, printing and enlarging in the studio, there is very little scope for the exercise by the photographer of skill of any nature, everything being regulated by mechanical gadgets in the camera itself, or by other scientific precision processes. In support of that contention, Mr. Khambatta has relied strongly on four reported decisions of various High Courts in the country, and also on a reported decision of the High Court of Australia, which, he has contended, are directly in point. I must, therefore, proceed to deal with each of those decisions.

8. The first is a decision of the Madhya Pradesh High Court in the case of D. Masanda & Co. v. Commissioner of Sales Tax ([1957] 8 S.T.C. 370). The facts of that case were that, during the year 1952-53, the assessee imported photographic materials of the value of Rs. 37,559 of which materials of the value of Rs. 11,900 were utilised by him in taking photographs and supplying copies thereof to the order of his customers on payment. Before the taxing authority, the assessee contended that he could not be assessed to sales tax on the value of the materials used by him in taking photographs, as there was no sale of those materials when, with the aid of those materials, he took photographs for his customers and supplied to them copies of the photographs on payment. That contention was rejected by the taxing authority, and the petitioner was assessed to sales tax on the value of the photographic materials imported by him and utilised by him in his business as a photographer. The

assessment made by the Sales Tax Officer was upheld in revision by the Commissioner of Sales Tax, and on a reference to the High Court of Madhya Pradesh, that decision was confirmed. The question referred to the Madhya Pradesh High Court in that case actually was whether the photographic material consumed in photographic work could be treated as a sale, and the assessee could be said to be a dealer vis-a-vis such material. The High Court answered both parts of the question in the affirmative, and there could really be no quarrel with that decision. No question arose in Masanda's case ([1957] 8 S.T.C. 370) of levying sales tax on the photographer's charges for taking the photographs, or on the charges for developing or for preparing the prints or enlargements of the photograph for his customers. Those are the questions that arise in the present case, and the decision in Masanda's case ([1957] 8 S.T.C. 370) cannot, therefore, be considered to be an authority in regard to the same. There are, no doubt, observations contained in the judgment in the said case (at page 375) to the effect that the essential feature of the applicant's business as a photographer was the production of goods for sale, but those observations go further than was necessary for the purpose of answering the question that was referred to the Madhya Pradesh High Court. Moreover, though the earlier decision of the same High Court in the case reported in Babulal v. D. P. Dube and Others ([1955] 6 S.T.C. 255), which was followed in Masanda's case ([1957] 8 S.T.C. 370), had proceeded specifically on severability, and only the sale part of the transaction had been held liable to tax in that case, severability was assumed and the question of severability was not considered at all in Masanda's case ([1957] 8 S.T.C. 370).

9. The next in point of time its the decision of the Patna High Court in the case of M. Ghosh v. State of Bihar ([1961] 12 S.T.C. 154 at p. 156). The facts of that case were that the petitioner carried on the business of a professional photographer, and was the proprietor of a shop and a photographic studio in Patna, and he was assessed to sales tax for the period from 1st January, 1952, to 31st March, 1955. The contention of the petitioner before the sales tax authority was that sales tax could not be lawfully levied on finished articles like photographs, as the action of the petitioner in taking photographs of customers and developing and printing negatives was not tantamount to sale of goods within the meaning of the Bihar Sales Tax Act. Having failed at all stages of the proceedings before the revenue authorities, the question as to whether, in the circumstances of the case, the petitioner was liable to pay sales tax with regard to the sale of photographs of customers takes by him for the purpose of supplying printed copies of photographs to them on payment was referred to the Patna High Court. The reference was answered by the High Court against the assessee, and he was held liable to pay sales tax on the same. As was done in Masanda's case ([1957] 8 S.T.C. 370), a professional photographer was distinguished from a portrait painter in Ghosh's case ([1961] 12 S.T.C. 154), and the distinction sought to be drawn in the latter case was that the petitioner was practicing a photographic process commercially in order to produce an article which would be bought and produce a commercial profit (at page 155). I fail to see how that observation would be inapplicable to a commercial artist who paints the portraits of any customer who chooses to walk into his studio and delivers it to the customer for a certain amount. The Patna High court took the view that the essence of the contract between the petitioner and the customer was the supply of finished goods, and there was not a mere agreement for the exercise of skill and labour for the production of the photographs, but, with respect to the Patna High Court, the question as to whether the transaction which a photographer enters into with a customer is severable or not has not even been touched in the judgment in the said case.

10. The third decision in chronological order which was relied upon by Mr. Khambatta was the decision of the Madras High Court in case of B. V. Bhatta v. State of Madras ([1965] 16 S.T.C. 441) (at page 445). The said case related to two distinct types of transactions, the first relating to sales of radios, and the second relating to, what has been called in the said case, "Photo House Studio receipts" amounting to Rs. 2,023.30 for the assessment year 1959-60. We are concerned in the present case only with the second type of transaction. As in the present case, it was contended on behalf of the assessee in Bhatta's case ([1965] 16 S.T.C. 441), that the supply of photos and photo-copies by a professional photographer to his customers is really the execution of a work of art, and that the bargain by the photographer with his customers is really a bargain for work and labour, and not for the sale of specific goods or chattels. In rejecting that argument, it was observed in the judgment of the Madras High Court in Bhatta's case ([1965] 16 S.T.C. 441) (at pages 447-48), that when a customer goes into a photographer's studio and engages his services to take a picture, he is bargaining not merely for the special skill which the photographer has to produce a negative, but also to supply from that negative as many copies of the finished positive as the customer may require. In that connection, the Madras High Court relied (at page 449) on the fact that a professional commercial photographer does not surrender his negative, as showing that the bargain was for the supply of copies therefrom as finished goods, and was, therefore, not a contract of labour. I fail to see how the fact as to whether a photographer surrenders the negative or retains it could make any difference in deciding upon the real nature of the transaction. Though the Madras High Court has in Bhatta's case ([1965] 16 S.T.C. 441) discussed several authorities on the point, I do not find anything in the judgment of the Madras High Court in that case by way of reasoning to command itself to me. Moreover, in the judgment in that case also, the question as to whether the transaction was severable or not seems to have completely escaped the attention of the Madras High Court.

11. The next case to which I must refer is the decision of the Gujarat High Court in the case of Chelaram Hasomal v. State of Gujarat ([1965] 16 S.T.C. 1021 at pp. 1026-1030), which, in my opinion, is clearly distinguishable on facts. The assessee in that case prepared photographers of Gods, saints, public men, and even private individuals, and transferred them by a certain process on enamelled copper plates. The question referred to the High Court, however, related only to enamelled photographs of individuals. In holding that that amounted to a contract of sale, the court no doubt, proceeded on the analogy of a photograph, but, in my opinion, the real nature of the transaction in question in that case was clearly distinguishable from the normal transaction of a photographer. Moreover, in Chelaram's case also ([1965] 16 S.T.C. 1021 at pp. 1026-1030), the question of severability was not considered at all in the judgment of the Gujarat High Court.

12. I must now proceed to consider the decision of the High Court of Australia in the case of Federal Commissioner of Taxation v. Riley. (53 Com. L.R. 69). The assessee in that case had refused to pay sales tax in respect of photographs, tinted or untainted, taken of, and supplied to, clients for reward in the course of his business as a photographer. Though certain general observations were made in regard to the nature of the business of a portrait photographer which have been relied on in the four cases of our High Courts which have been discussed above, the questions which were "reserved for the opinion of the court" in that Australian case were, however, quite different. As stated in the majority judgment of the court in the Australian case, "that the transaction is a sale is not, and

doubtless could not be disputed. What is in question is whether photographs are goods manufactured in Australia" within the terms of the Sales Tax Assessment Act (No. 1) 1930-1935. In holding that photographs are goods manufactured in Australia within the meaning of the sales tax enactment, it was observed as follows in the judgment of three of the four Judges who constituted the majority :-

> "In the present case, it is the element of 'manufacture' or 'production' which the taxpayer says is not present. The argument in support of his contention is, in effect, that the photographer is employed to exercise his art to obtain a portrait possessing the qualities that are demanded by the taste it is his purpose to consult, and that the end of his labours in not the production of so many material objects regarded as vendible articles. The contention is open to the observation that it does not strictly adhere to the question in the special case, which assumes the sale of the photographs as goods, and inquires, are they produced or manufactured ? ..... In any case, we think the contention cannot prevail. The end of the organised business of a portrait photographer is to produce as many copies of a picture as his customer will buy, and to sell them to him with a view to profit. It differs from many other productive arts in the fact that its products must be designed in each case for one individual, and in its attempt to secure some aesthetic value. But it is a process practised commercially to produce an article which will be bought. A tailor must attempt to fit his individual customer and the manufacturer of ornaments might claim that his designs had an aesthetic purpose."

13. Starke, J., who was the fourth Judge constituting the majority, however, confined his judgment strictly to the question as to whether photographs taken by a photographer and supplied to clients are goods manufactured in Australia, and based his decision only on the comprehensive terms of the Act in question. The fifth Judge Evatt, J., in his dissenting judgment, took the view that the service which the photographer performs for his clients is finally embodied in the photograph, and payment has to be made "for the actual chattel delivered as well as for the service rendered", that what the photographer did was "in the nature of an artistic service of a personal character", that the service was so confidential that, without the client's consent, the law prevents the further reproduction of the photograph, and that "the application of the words 'goods manufactured' to cases like the present is unreal, and almost whimsical."

14. Neither the question of severability of the transactions into which a photographer enters, nor the question as to whether, if a transaction be held to be indivisible, it is in essence a "sale", arose for decision, or could be said to have been decided in that case. All that could be said is that certain general observations were made in regard to the nature of the business of a photographer. As far as those observations are concerned, in my opinion, it is Evatt, J., who has taken a correct view of the same. I, however, do not think the said Australian case can be regarded as an authority in regard to either of the two points mentioned above which arise for decision in the present case, or can even be regarded as being of any assistance in deciding the same.

15. In my opinion, as already stated above, the primary question that arises for consideration in the case of a transaction which is neither a pure contract of sale nor a pure works contract, but which is of a mixed nature, is whether the transaction is entire and indivisible, or whether it is severable into more than one distinct contract. As pointed out by me above, that question has not been considered at all in any of the four decisions of our High Courts discussed by me above, or in the Australian case cited therein. Under the circumstances, I am of opinion that, with respect to the learned Judges who decided those cases, the same do not afford any assistance in deciding the present case, and I am unable to accept the view expressed therein.

16. I must, therefore, proceed to discuss the principles that should be applied for the purpose of deciding the question of severablity. In the case of Sundaram Motors (Private) Ltd. v. The State of Madras ([1958] 9 S.T.C. 687), the facts were that the assessee-company which carried on business in selling and distributing motor vehicles also dealt in motor parts and accessories, and maintained a workshop where reconditioning or repairs of motor vehicles were undertaken. The court was, however, concerned in the said case mainly with transactions in the workshop department of the company in which the turnover would represent not only the labour charges as such, but the cost of spare parts or materials supplied or used in effecting the repairs. The Madras High Court, in deciding that case, held that there was no evidence of any anterior agreement between the parties in regard to the transaction, and the only evidence available consisted of the account books of the assessee-company, as well as the bills issued by it to the customers. It was pointed out in the judgment in the said case that, in the accounts, the assessee had made a distinction between a cases of sales as such and cases of charges for labour and work, but the entries in the books and the bills issued showed that there was no agreement or intention to sell movables, namely, king pin bushes, as such, whilst charging for the repairs of the car. It was, therefore, held that the charges for the fabricated material should be treated as charges in respect of the works contract, and not independent sales of those materials, and that, subject to the liability of the petitioner in regard to parts supplied and in respect of which tax was levied on the customers, and the tax on such taxes collected, there was no other liability on the part of the assessee in regard to the workshop transactions. After referring to the decision of the Supreme Court In Gannon Dunkerley's case ([1958] 9 S.T.C. 353), which had been given only a few months earlier, the Madras High Court observed (at page 695) that a mere passing of the property in the particular chattel was not decisive of the question whether the component parts of that chattel were sold or not. It further observed that if a particular motor part, for example, king pin bushes, is put in the car while reconditioning and repairing it, it is undoubted that title to that motor accessory passed when the repairers delivered the car to its owners. It was, however, also observed that to constitute sale of that part, it is necessary that there should have been an agreement between the parties for the sale of that accessory. The Madras High Court then formulated the test to be applied in such cases as follows :

> "There is no doubt that the property in those materials would eventually pass to the customer, but the question would be whether the agreement between the parties was that such parts should be treated as sold separatim or were they merely supplied in the course of carrying out a works contract of repair and charged as such.

> Therefore whether in a particular case there is a contract of sale of materials as distinct from a pure works contract would depend upon the agreement between the parties and on proof of an intention to sell the materials as such."

17. With regard to the question of severability, reference may also be made to the decision of the Gujarat High Court in the case of A. A. Jariwala and Brothers v. State of Gujarat ([1965] 16 S.T.C. 942 at p. 953) in which the assessees used to get sari pieces from their customers for getting embroidery work done on them according to the specific instructions of the customers. The assessees, in their turn, delivered the sari pieces to embroidery workers, who were to be paid piece-rates according to the work done by them, the jari material being supplied by the assessees to these workers, and after the embroidery work was completed, the saris were returned to the customers. The cost of the jari materials used in the embroidery work come to about 30 per cent. of the total charges charges by the assessees to their customers, for which one consolidated bill was sent by the assessees, which also showed the rates per sari. On an application by the assessees under section 27 of the Bombay Sales Tax Act, 1953, the revenue authorities held that the contract in question was, firstly, a contract for the supply of materials for a price, and, secondly, to get embroidery work done by workmen, and that the property in the materials passed to the customer before the materials were affixed to the saris. At the instance of the assessees, the following question was then referred to the Gujarat High Court :

> "Whether on the facts and in the circumstances of the case, the agreement with Messrs Pacific Traders (the customers of the assessees) was works contract, or was a composite agreement, one for the sale of jari materials and another for doing work ?"

18. The Gujarat High Court answered that question in favour of the assessees holding that the agreement was a contract of work, and not a composite one which included a sale of jari materials. After an exhaustive review of the authorities on the subject, including Sundaram Motors' case ([1958] 9 S.T.C. 687) which I have discussed above (at pages 950-51), Shelat, C.J., (as he then was) summed up the legal position in the following terms :

> "Thus, the principles that emerge form these decisions are : (1) that the question whether a contract in question is for work and labour or is a composite one, depends upon the intention of the parties and whether there is an agreement, express or implied, of sale of materials used in producing the article in question, and (2) that mere passing of property in the materials used is not enough unless the passing of such property takes place as a result of an agreement for sale." (page 953).

19. It was observed (at page 956) that the burden of proving that it was a composite contract was upon the revenue, and that the contact in the said case was one and indivisible, and was not severable into two contracts, one for service and the other for sale of jari materials. The learned Chief Justice came to that conclusion on a consideration of the modus operandi followed between the assessees and their customers, and the intention of the parties in regard to the question of severablity or otherwise as appearing therefrom. It was held in that case (at page 957) that, taken as a whole, the contract in question was essentially one for work and labour and the supply of jari

materials in the execution of the embroidery work was merely ancillary. I respectfully agree with the principles enunciated by the learned Chief Justice in regard to the same. On the facts of that case, there can be no quarrel with the conclusion arrived at by the Gujarat High Court that the contract in question in that case was one and indivisible, and was essentially one of service and work.

20. The tests laid down by the Madras High Court in the Sundaram Motors' case ([1958] 9 S.T.C. 687) and by the Gujarat High Court in Jariwala's case ([1965] 16 S.T.C. 942) for the purpose of determining the severability or otherwise of a transaction which involves work and labour as well as the supply of materials, therefore, are : whether there was an agreement, express or implied, between the parties that the materials should be treated as sold separatim, and whether the intention to sell the materials, as such, has been proved.

21. Applying these tests to the transactions which are the subject-matter of each of the specimen bills in the present case in respect of the transaction embodied therein, in my opinion, the parties intended to enter into more then one contract, viz., for the sale of materials as well as for work and labour to be done, and those contracts are distinct and easily serverable though they form part of one transaction under each of the said three bills. It is not possible to say that any of those transactions embodies a pure contract for the sale of goods, or a pure contract for work and labour to be done. Each of these three transactions is in the nature of a transaction relating to work and materials, such as would fall within the second of the three broad categories into which they have been classified in the passage from the English case of Clay v. Yates ((1856) 156 E.R. 1123) quoted in Benjamin on Sale at page 160, to which I have referred earlier in this judgment.

22. It would be convenient at this stage to consider separately each of the three types of transactions which fall for consideration in the present case. Turning to the first type of transaction, which is for the preparation of enlargement from an already developed negative given by a customer, and which is to be found in bill No. 60293 in the present case, there is not doubt whatsoever that what the customer, as well as the photographer, bargain for, is for two separate contracts : (1) for work on the part of the photographer in subjecting the negative supplied by the customer proper processes requiring considerable technical skill so that the enlargement is not disproportionate or distorted or inartistic in any manner; and (2) for sale of the enlarged photograph as reproduced on paper of a particular quality and size. In such a transaction, there is an implied agreement between the parties that the enlarged photograph, as reproduced on paper of that quality and size, should be sold separatim and a clear intention to sell it as such. The fact that these two activities are distinct and severable is apparent, not only from the nature of the transaction, but also from the fact that the payment in respect of each of these activities is clearly ascertainable. Each photographer has his own rates for the reproduction of a photograph of a particular size, whether it be an enlargement or a mere print on paper of a particular quality, and there would, therefore, be no difficulty in separating the two contracts, though they form part of one transaction, as embodied in the said bill No. 60293.

23. Turning to the second type of transition which is to be found in bill No. 95198, and which involves developing the customer's film roll and taking out prints from it, for the same reasons as in the case of the first type of transaction, this is also a transaction in which two separate contracts are implied, one for developing the film roll furnished by the customer, which the Commissioner of

Sales Tax as well as the Sales Tax Tribunal have held to be not in the nature of a sale of goods but in the nature of a contract for work and labour, and the other for taking out prints therefrom on paper of a particular quality and size. What is called the "negative" is nothing but the film roll supplied by the customer himself after it has been subjected to certain technical processes which are known as "developing" processes. The first part of the transaction has, therefore, rightly been held by the Commissioner as well as the Tribunal not to be a contract of sale. There is, however, a clear intention to sell the prints as such, or as many copies of the prints as the customer may require, and an implied agreement that they should be sold separatim. These two contracts are distinct and severable parts of the transactions embodied in bill No. 95198, and the charges thereof are also clearly ascertainable, and are actually stated separately in the bill in question.

24. Turning to the third type of transaction which is the subject-matter of bill No. 16531 and is of the most comprehensive nature, involving as it does the taking of the photograph in the studio, the developing of the film, and the furnishing of three prints thereof, there can be no doubt that the intention of the parties in respect of this transaction also was to enter into three distinct contracts. It is impossible to say that the first part of the transaction, viz., the taking of a photograph, is, even as a matter of plain language, a contract for sale. It is clearly a contract for the use of the artistic skill and labour of the photographer who takes the photograph. There can be no doubt that considerable technical skill is required in taking a good photograph, and I have no hesitation in rejecting the contention of Mr. Khambatta that, with modern technique, the taking of photographs is almost mechanical. A person who wants to have his photograph taken does not walk into any shop, but discriminates between a good photographer and a bad photographer, and also takes into account the charges for the same which vary considerably according to the skill and reputation of each individual photographer. The second part of this transaction is the developing of the film into a negative which has been held by the Commissioner of Sales Tax and by the Sales Tax Tribunal not to amount to a sale in regard to the transaction embodied in bill No. 95198. The Commissioner of Sales Tax as well as the Sales Tax Tribunal have, however, apparently come to the conclusion that the transaction comprised in bill No. 16531 is not severable, and have held the whole transaction embodied in the said bill No. 16531 to be a contract for sale of the photographs to the customer. I fail to see why the lower authorities have taken that view, in view of the fact that, not only are the three activities involved in the transaction which is the subject-matter of the said bill No. 16531 distinct and severable form their very nature, but the charges in respect of the same are clearly ascertainable. Every photographer has his own charges for subjecting films, whether taken by the himself or supplied by the customer, to the process of developing into, what is called a negative, as well as for making out prints on paper of a particular quality and size. In this connection, reference may be made to bill No. 95198 in the present case itself, in which the charges for developing and printing are stated separately. If the developing and printing charges are deducted from the amount mentioned in bill No. 16531 what is left will be the charges of the photographer for the skill and labour of taking the photograph in question. Though, as stated in the passage from Halsbury quoted by me above, the value of the skill and labour as compared with the value of the material is not conclusive, the same can be taken into consideration. A reference to bill No. 95198 would show that developing and printing charges would be a negligible part of the amount of Rs. 4 which has been charged in bill No. 16531. By far the major part of it, therefore, relates to the photographer's skill and labour, and had I come to the conclusion that the transaction comprised in bill No. 16531 was

"entire and indivisible", I would have held it to be, in essence, a works contract, and not a contract of sale. In my opinion, the dominant intention of the parties in regard to this type of transaction is not to buy or sell the negatives, or the prints. That is apparent from the fact that, even as a matter of plain language, no person who walks into a photographic studio to have a photograph taken of himself says, "I am going to buy my photograph." What the parties really intend to do would be correctly expressed by the customer's saying to the photographer, "I want to have a photograph taken, and to buy 3 prints of it which you must give me along with the negative." In such a case, what the parties, therefore, intend to do is to enter into three separate contracts which are distinct and severable, though they form pat of one transaction. The first is a contract for the use of the labor and the artistic skill of the photographer in taking a good photograph in the appropriate pose; the second is a contract to use the work and labour of the photographer in developing the same into a negative; and the third is a contract to sell the prints thereof as taken out on paper of a particular quality and size. There is, in my opinion, an implied agreement between the parties in such a case that the prints should be sold separatim and a clear intention to sell the prints as such, or as many copies of the prints as the customer may require. The State would, therefore, be entitled to levy sales tax only on the last of the three severable contracts embodied in bill No. 16531.

25. On behalf of the assessees, reliance was also placed on the provisions of the Indian Copyright Act, 1957, for the purpose of showing that it is impossible in law that there could be any sale of a customer's photograph, either to the customer himself or to anybody else. It is contended that, in view of the fact that, under section 17 of the Copyright Act, the copyright in a photograph vests in the customer whose photograph it is, there can be no sale of the photograph to the customer who is already the owner of that photograph under the relevant provisions of the Copyright Act. It is further contended that there could be no sale of the photograph of the customer to anybody else, in view of the fact that the customer, whose photograph it is, is the sole owner of the copyright therein. In view of the conclusion at which I have arrived on the question of severability, it is not necessary for me to consider the argument advanced on behalf of the assessees in the present case based on the provisions of the Copyright Act. Suffice it to say that I agree with the view taken by Shelat, C.J. (as he then was) in Chelaram's case ([1965] 16 S.T.C. 1021) cited above, in which that very contention was rejected by the learned Chief Justice (at page 1030) on the ground that the restrictions contained in the Copyright Act had no bearing on the question as to whether a particular transaction was taxable to sales tax as a sale of goods.

26. In the result, I have come to the conclusion that the parties to the transactions which are the subject-matter of the said bills Nos. 60293, 95198 and 16531 intended to enter into, and have, in fact, entered into, distinct and separate contracts as stated above, though the same form part of the single transaction that is embodied in each of the said three bills. In the case of each of the said three bills, therefore, as the Supreme Court has observed in Gannon Dunkerley and Co. (Madras) Ltd.'s case ([1958] 9 S.T.C. 353), though there is a single instrument there is more than one agreement embodied therein which can be, and should be, separated, and only such part of each of the said transactions as amounts to a sale of goods is liable to sales tax under the Act.

27. I, therefore, answer the question that has been referred to this court in each of the three references as follows :-

Each of the transactions which is the subject-matter of determination by the Commissioner of Sales Tax embodies more than one contract, and only the following are liable to sales tax :

(1) In the case of the transaction embodied in bill No. 60293, only the contract for the supply of the enlarged photographs as reproduced on paper of the particular size mentioned therein, excluding the work of preparing the enlargements which is a contract for skill and labour, amounts to a sale.

(2) In the case of the transaction embodied in bill No. 95198, only the contract for the supply of prints on paper of the particular size mentioned therein, excluding the work of developing the negative form the film roll of the customer which is a contract for skill and labour, amounts to a sale.

(3) In the case of the transaction embodied in Bill No. 16531, only the contract for the supply of prints of the particular size mentioned therein, excluding the contract for the taking of the photograph as well as the contract for the developing for the negative, which are contracts for skill and labour, amounts to a sale.

28. As, in the view which I have taken above, the applicants have substantially succeeded in these references, I would order that the department must pay the applicants' costs of the references fixed at Rs. 250 in one set for all the three references, since they were heard together.

29. References answered accordingly.