

Cooch-Bihar Contractors' Association and Others

Vs

State of W.B. and Others

M. Banerjee and Co. and Another

Vs

State of W.B. and Others

Nepal Chandra Banerjee

Vs

State of W.B. and Others

Civil Appeals Nos. 5577-79(NT) of 1993 with Nos. 4606 of 1990

(S. P. Bharucha, K. Venkataswami JJ)

11.09.1996

JUDGMENT

VENKATASWAMI, J. –

1. Common questions of law arise out of a common judgment of the West Bengal Taxation Tribunal dated 26-4-1990 rendered in RN-39(T), RN-31(T), RN-34(T), RN-103(T), RN-367(T), RN-138(T), RN-338 and RN-339 of 1989.
2. The appellants are contractors and they execute civil construction works including construction of roads and bridges under different departments of the Central and State Governments as well as respective Corporations. Such works include excavation of earth, drilling, construction of water channel and river bank protection. Such works of contract were not brought under the net of sales tax till the Bengal Finance (Sales Tax) Act, 1941 (6 of 1941) (hereinafter referred to as "the Act") was amended by the West Bengal Act 4 of 1984 inserting Section 6-D and amending Section 2(c) of the Act. These amendments were pursuant to the 46th Amendment of the Constitution of India in the year 1982 inserting clause 29-A in Article 366.
3. The constitutional validity of the 46th Amendment inserting clause 29-A in Article 366 was challenged and this Court in Builders' Assn. of India v. Union of India [(1989) 2 SCC 645 : 1989 SCC (Tax) 317] upheld the constitutionality of the said amendment.
4. As a result of the insertion of Section 6-D to the Act, all transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract was deemed to be a sale of those goods by the person making the transfer and the purchase of those goods by the person to

whom such transfer was made. The Revenue sought to assess the appellants under Section 6-D of the Act and the appellants aggrieved by such assessments moved the High Court challenging initially the constitutionality of Section 6-D and finally confining their challenge to certain limited aspects which we shall refer to hereinafter. The cases were originally filed in the High Court and subsequently were transferred to the West Bengal Taxation Tribunal (hereinafter referred to as "the Tribunal") and the Tribunal in its detailed judgment repelled every one of the arguments raised on behalf of the appellants and consequently dismissed the cases.

5. Before us Mr Jayant Das, the learned Senior Counsel for the appellants, broadly raised three points while attacking the assessments under Section 6-D of the Act. The first contention raised by the learned counsel was that Section 6-D unjustly discriminates in the matter of grant of declaration forms to the dealers under Section 6-D and thereby denies the advantage gained by other dealers by using declaration forms and thus it is violative of Article 14 of the Constitution of India.

6. The second contention put forward by the learned counsel was that the value of the stores and materials supplied by the contractee to the contractor for the specific purpose of use in the execution of works contract should not be included in the "contractual transfer price" under Section 6-D as according to the learned counsel in such supplies there is no transfer of property and the property always remains with the contractee. The third submission advanced by the learned counsel for the appellants was that the royalty paid by the contractors in the execution of works contract while procuring boulders, earth etc. should not be included in the "contractual transfer price". Another minor point raised by the learned counsel was that the cost of freight and delivery for carrying goods to the works site should not also be included in the "contractual transfer price".

7. Mr B. Sen, learned Senior Counsel in reply submitted that none of the questions raised by the learned counsel for the appellants remain res integra as they are totally covered either by the decision of this Court in Builders' Assn. case [(1989) 2 SCC 645 : 1989 SCC (Tax) 317] or the recent decision of this Court in Gannon Dunkerley and Co. v. State of Rajasthan [(1993) 1 SCC 364]. In addition to that he also invited our attention to a decision of this Court in the case of State of M.P. v. Orient Paper Mills Ltd. [(1977) 2 SCC 77 : 1977 SCC (Tax) 261] wherein this Court has held that 'royalty' is a feudalistic euphemism for price. So far as the cost of freight and delivery for carrying the goods to the works site is concerned, the learned counsel invited our attention to the judgment of the Tribunal wherein the Tribunal has not finally decided the issue, but has left open the same for decision with reference to the facts of each case. In view of this overall submission with which we agree we do not feel it necessary to deal elaborately the contentions raised before us.

8. For appreciation of the rival contentions, it is necessary to set out Sections 2(c) and 6-D of the Act as amended in the year 1984. They read as follows :

"2. (c) 'dealer' means any person who carries on the business of selling goods in West Bengal or of purchasing goods in West Bengal in specified circumstances or any person making a sale under Section 6-D...

6-D. (1) Liability to payment of tax on the transfer of property in goods involved in the execution of works contract and rate thereof. - (1) Notwithstanding anything contained elsewhere in this Act, -

(a) any transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract (hereinafter referred to as contractual

transfer) shall be deemed to be a sale of those goods by the persons making the transfer and the purchase of those goods by the person to whom such transfer is made;

(b)(i) every dealer whose contractual transfer price during the last year ending on or before the 31st day of March, 1984 exceeds rupees two lakhs shall, in addition to the tax payable by him under Section 5 and Section 6-B, if any, be liable to pay from the 1st day of April, 1984 a tax at the rate specified in sub-section (3) of such part of his contractual transfer price as specified in sub-section (2);

(ii) every dealer, other than a dealer referred to in sub-clause (i), whose contractual transfer price during any year ending on or after the 1st day of April, 1984 exceeds rupees two lakhs shall, in addition to the tax payable by him under Section 5 and Section 6-B, if any, be liable to pay from the first day of the year immediately following such year a tax at the rate specified in sub-section (3) of such part of his contractual transfer price as specified in sub-section (2);

(iii) every dealer who has become liable to pay tax under sub-clause (i) or sub-clause (ii) shall continue to be so liable until the expiry of three consecutive years during each of which the contractual transfer price does not exceed rupees two lakhs and on the expiry of such three years his liability to pay such tax shall cease;

(iv) every dealer, whose liability to pay tax has ceased under the provisions of sub-clause (iii), shall, if the contractual transfer price during any year against exceeds rupees two lakhs, be liable to pay from the first day of the year immediately following such year the tax at the rate specified in sub-section (3) of such part of this contractual transfer price as specified in sub-section (2).

(2) The tax payable under sub-section (1) shall be levied on that part of contractual transfer price of a dealer during any period which remains after deducting therefrom his contractual transfer price during the period on -

(a) contractual transfer of goods referred to in Section 14 of the Central Sales Tax Act, 1956 (74 of 1956), on a prior sale whereof in West Bengal due tax under this Act or under the West Bengal Sales Tax Act, 1954, if such goods are notified for taxation under that Act, is shown to the satisfaction of the Commissioner to have been paid;

(b) contractual transfer of goods, sales of which are declared tax-free under Section 6;

(c) contractual transfer of goods, sales of which are generally exempt from tax under sub-clause (vi) of clause (a) of sub-section (2) of Section 5;

(d) contractual transfer of goods, on the purchase of which tax is payable by him under Section 6-C;

(e) such other contractual transfers as may be prescribed.

(3) The tax under this section shall be levied at the rate of four per cent of such part

of the contractual transfer price as specified in sub-section (2).

Explanation 1. - In this section, the expression 'contractual transfer price', used in relation to any period, shall mean the aggregate of the amounts received or receivable by a dealer during such period as valuable consideration for the transfer of property in goods used in execution of a works contract, whether or not the amount receivable as valuable consideration for such transfer is separately shown in the works contract, and shall include the value of such goods purchased, manufactured, processed or procured otherwise by the dealer and the cost of freight or delivery as may be incurred by such dealer for carrying such goods to the place where these are used in execution of such works contract, but shall not include such portion of the aforesaid amounts as may be prescribed.

Explanation 2. - For the purpose of this section, the expression 'goods' shall include commodities specified for taxation under Section 25 of the West Bengal Sales Tax Act, 1954 and, notwithstanding anything contained in this Act or in the West Bengal Sales Tax Act, 1954, tax shall be levied on such commodities under this section."

9. A perusal of Section 6-D clearly indicates that it is a self-contained code so far as dealers in works contract are concerned. Whatever concessions the legislature wanted to extend to such dealer were enumerated in clauses (a) to (e) of sub-section (2) of section 6-D. Apart from that and having regard to the non obstante clause used in section 6-D, it is made clear that no further concession was intended to be extended to the dealers in works contract. As they form a class by themselves, they cannot compare themselves with other dealers coming under Section 4 or 5 and allege discrimination to invoke Article 14 of the Constitution of India. The Tribunal has rightly taken a view by holding

"we are satisfied that the contractors, being dealers under Section 6-D read with Section 2(c), have been appropriately grouped together in one class, distinct and separate from the other classes of dealers. The charge of arbitrariness and unreasonableness must fail. The classification cannot be faulted on account of denial of the facility of use of declaration forms, because this class of dealers has been treated and dealt with on a different footing altogether and they are governed by almost a self-contained code envisaged in Section 6-D."

10. As rightly pointed out by the learned Senior Counsel for the respondents, Mr B. Sen, the recent decision of this Court in *Gannon Dunkerley and Co. v. State of Rajasthan* [(1993) 1 SCC 364] also supports the view taken by the Tribunal. This Court has observed as follows : (SCC pp. 397-98, para 50)

"A question has been raised whether it is permissible for the State Legislature to levy tax on deemed sales falling within the ambit of Article 366(29-A)(b) by prescribing a uniform rate of tax for all goods involved in the execution of a works contract even though different rates of tax are prescribed for sale of such goods. The learned counsel for the contractors have urged that it would not be permissible to impose two different rates of tax in respect of sale of the same article, one rate when the article is sold separately and a different rate when there is deemed sale in connection with the execution of a works contract. On behalf of the State it has been submitted that it is permissible for the State to impose a particular rate of tax on all goods involved in

the execution of a works contract which may be different from the rates of tax applicable to those goods when sold separately. In the field of taxation the decisions of this Court have permitted the legislature to exercise an extremely wide discretion in classifying items for the tax purposes, so long as it refrains from clear and hostile discrimination against particular persons or classes. (See : East India Tobacco Co. v. State of A.P. [(1963) 1 SCR 404 : AIR 1962 SC 1733 : (1962) 13 STC 529], P.M. Ashwathanarayana Setty v. State of Karnataka [1989 Supp (1) SCC 696], Federation of Hotel & Restaurant Assn. of India v. Union of India [(1989) 3 SCC 634] and Kerala Hotel and Restaurant Assn. v. State of Kerala [(1990) 2 SCC 502 : 1990 SCC (Tax) 309].) Imposition of sales Tax at different rates depending on the value of the annual turnover was upheld in S. Kodar v. State of Kerala [(1974) 4 SCC 422 : 1974 SCC (Tax) 272]. Similarly, imposition of purchase tax at different rates for sugar mills and khandsari units was upheld in Ganga Sugar Co. Ltd. v. State of U.P. [(1980) 1 SCC 223 : 1980 SCC (Tax) 90]. In our opinion, therefore, it would be permissible for the State Legislature to tax all the goods involved in the execution of a works contract at a uniform rate which may be different from the rates applicable to individual goods because the goods which are involved in the execution of the works contract when incorporated in the works can be classified into a separate category for the purpose of imposing the tax and a uniform rate may be prescribed for sale of such goods."

11. In view of the above we hold that there is no discrimination violating Article 14 of the Constitution as alleged by the learned counsel for the appellants.

12. So far as the second contention urged on behalf of the learned counsel for the appellant is concerned, the Tribunal on facts has found that the contractor has to pay the price of the goods supplied by the contractee by way of adjustment. This Court in Builders' Assn. case [(1989) 2 SCC 645 : 1989 SCC (Tax) 317] has observed as follows : (SCC p. 673, para 36)

"Ordinarily unless there is a contract to the contrary in the case of a works contract the property in the goods used in the construction of a building passes to the owner of the land on which the building is constructed, when the goods or materials used are incorporated in the building. The contractor becomes liable to pay the sales tax ordinarily when goods or materials are so used in the construction of the building and it is not necessary to wait till the final bill is prepared for the entire work."

13. It is, therefore, clear that goods used in the execution of the works contract stand transferred from the contractor to the contractee at the time the goods are incorporated in the construction. It is also brought to our notice by the learned counsel for the respondents that the principle laid down by this Court in N.M. Goel & Co. v. STO [(1989) 1 SCC 335 : 1989 SCC (Tax) 4 : (1989) 72 STC 368] squarely applies to the second point raised herein. While considering a similar issue, namely, whether there was sale of goods in view of the contract between the parties whereunder the custody and control of the goods remained with the PWD and goods were only used in the construction under the contract, this Court held that : (SCC pp. 344-45, para 12)

"In the instant case, by use or consumption of materials in the work of construction, there was passing of the property in the goods to the assessee from the PWD. By appropriation and by the agreement, there was a sale as envisaged in terms of clause 10 set out hereinbefore. Therefore, in our opinion, there was a sale which was liable

to tax."

Though this case was sought to be distinguished before the Tribunal by contending that that ratio must be treated as one given per incuriam it was rightly rejected by the Tribunal. We are, therefore, in agreement with the conclusion reached by the Tribunal that :

"... having considered all aspects of the matter, we hold that a sale within the meaning of Section 2(g) of the 1941 Act, namely, a transfer of property in goods supplied by the owner/contractee to the contractor for use in the execution of a works contract takes place in the cases under our consideration, when such goods are actually used in the construction work, provided prices of such goods are deducted from or adjusted against bills or dues of the contractor."

14. So far as the third question of payment of royalty is concerned, we did not think there is any substance in that argument. As rightly pointed out by the learned counsel for the respondents that in view of the decision of this Court in Orient Paper Mills [(1977) 2 SCC 77 : 1977 SCC (Tax) 261] the payment of royalty amounts to payment of price for the goods obtained from the government departments and used in the works contract.

15. Regarding the additional minor point, the Tribunal has not finally disposed of the issue and it has left open the issue by observing as follows :

"Learned counsel for the applicants did not submit that such inclusion is in any way bad or unconstitutional. Expenses incurred on account of labour simpliciter surely cannot form a part of the contractual transfer price simply because it is not a value of or valuable consideration for any 'goods' unless such expense amounts to cost of freight or delivery for carrying the goods to the work site. It will depend on the circumstances in which or the purpose for which labour was employed. On this question we hold accordingly. Each case shall have to be judged on its own merits and on its peculiar facts. ... We, therefore, do not at this stage express any opinion one way or the other on those charges and expenses as to whether or not they will form part of the contractual transfer price."

16. In view of the above it is not necessary to go into this issue further.

17. For the foregoing reasons, we do not think there is any case for interference under Article 136 of the Constitution. Accordingly, the appeals are dismissed. No costs.