

SUPREME COURT OF INDIA

Karya Palak Engineer, C.P.W.D., Bikaner

Vs.

Rajasthan Taxation Board, Ajmer

C.A.Nos.8540-8544 of 2001

(N. Santosh Hegde and S.B.Sinha JJ.)

12.08.2004

JUDGMENT

N.Santosh Hegde, J.

1. These appeals involving similar questions of law are preferred against the judgment of the High Court of Judicature for Rajasthan at Jodhpur made in different Sales Tax, Revision Petitions, Writ Petitions and Review Petitions filed before it challenging the demand of *Sales Tax made under Rajasthan Sales Tax Act, 1994* (the 'local Act').

2. In these petitions certain issues pertaining to interpretation of provision of Article 285 of the Constitution of India, as also the interpretations of the provisions in the local Sales Tax Act are raised. The High Court having rejected the contentions of the appellants in this regard, the appellants are in appeal before us.

3. These matters came to be referred to a larger bench by an order of two Judge Bench on 25-9-2003. Since, according to the said Bench the question involved in the appeals is of an important nature.

4. The constitutional question involved in these petitions pertains to the authority of the State of levy Sales Tax on the Union on its transaction of supply of materials to its contractors. The contentions are based on the exemption granted under Article 285 of the Constitution.

5. The statutory question involved in these appeals pertains to the question whether a supply of materials by the Union of India to its contractors under agreements of works contract would amount to a sale so as to attract the provision of the Sales Tax Act.

6. Since the appeals before us involve similar questions, we will refer to the facts in C.A. Nos 8540-8544 of 2001 for brevity. The Union through its agency Central Public Works Department (CPWD) undertook the work of erection of barbed wire fencing along Indo Pak boarder from 1991 onwards in the State of Rajasthan. In order to get the construction work done the appellant awarded contracts to various contractors and under the terms and

conditions of the said contract it had agreed to supply the contractors materials such as cement, barbed wire, M.S. angles etc. It is pleaded that the appellant purchased the materials from various reputed concerns on payment of consideration and the said transactions were subjected to Sales Tax leviable at that stage. It is further stated that the very same goods were in turn supplied to the contractors and value of the said goods were adjusted in the final bills of the contractors, it is contended that since the appellant issued materials to the contractors at fixed issue rates, the said supply did not amount to "Sale" because the contractor never became owner of such materials but remained only as a "Custodian" of such materials and used them on creation of immovable properties for completing the contracted job. In such circumstances, it is contended that there is no element of sale, therefore, the appellant Union can not be treated as a 'dealer' under the Act nor it can be subjected to the levy of Sale Tax. The next contention in this regard is assuming for argument sake there would be some sort of a sale, the property so transferred being the property of the Union of India, under Article 285 of the Constitution of India the State has no authority to impose a tax on the property of the Union.

7. By the impugned judgment and orders the High Court of Rajasthan has rejected both the contentions advanced on behalf of the appellants and has held that the transfer in question amounted to sale as defined under the Act and the State tax being not a direct tax on the property of the Union as contemplated under Article 285 of the Constitution the same is liable for levy of Sales Tax.

8. In these appeals number of Advocates appearing for the appellants have commonly contended that in view of the exemption provided in Article 285 of the Constitution, it is not open to the State to tax the property of the Union, therefore, the transferred material being the property of the Union of India, the same is not exigible to any State taxation.

9. The argument that supply of materials to the contractors does not amount a sale is based on the language of clause 10 of the agreement which the appellant contends clearly indicates that these transactions do not amount to sale even under the provisions of the local Act. Hence no Sales Tax can be levied on these transactions.

10. In support of their contentions, the learned counsel for the appellants relied on various judgments of this Court both pertaining to the bar of tax on Union property under Article 285 of the Constitution of India as also in regard to the nature of the transaction between the appellants and the contractors concerned.

11. Shri T.S. Doabia, learned senior Advocate appearing for the Union of India in C.A. Nos. 8540-8544 of 2001 strongly relied on the judgment of this Court in the case of New Delhi Municipal Council vs. State of Punjab & Ors., Shri Nikhil Nayar, learned counsel appearing for the appellant in C.A. Nos. 5270-5271 of 2003 relied on the judgment of this Court in Hindustan Aeronautics Ltd. vs. State of Orissa to contend that the transfer in question did not amount to sale attracting the levy of Sales Tax under the local statute. He also contended in the alternative that assuming the transactions are sales even then under the local Act, the levy being single point tax and appellant having suffered the levy when it purchased the same

there could not have been a second demand on a transfer made by it to its contractor, the same being a second sale. Shri Krishnamani, learned senior counsel appearing in C.A. Nos. 1996-1997/2003, C.A. Nos. 4634-4640/2004 and C.A.Nos. 4651-4661/2004 contended apart from the fact that the transfer involving a property of the Union of India can not be taxed under Section 285 even under the local Act, the Union of India can not be a dealer under Section 2 (14) of the said Act. The other Advocates appearing in other appeals mostly adopted the arguments of the above referred counsel.

12. Having heard the learned counsel for the parties and having perused the judgment of the High Court and the relevant clause in the agreement between the appellant and their contractors concerned we are satisfied that the question involved in these appeals are no more res-integra. This Court as far back as in the year 1963 in a presidential reference case under Sea Customs Act held;

"The bar of Article 289 of the Constitution of India does not apply to indirect tax like Customs duty, Central Excise duty, Sales Tax etc."

13. In the said case it was held that exemption of property from tax contemplated in Article 289 was confined to direct tax on property and not to the levy of indirect taxes. The ratio of the said judgment though delivered in context of Article 289, applied to the exemption in favour of the Union of India under Article 285 in all force.

14. Judgment in Sea Customs Case (supra) was followed by this Court in the case of New Delhi Municipal Council vs. State of Punjab & Ors., wherein this Court by majority judgment at para 148 held:-

"It would be appropriate at this stage to notice the ratio of two judgments of this Court dealing with Article 289. In Sea Customs Act, Re, a Special Bench of nine learned Judges, by a majority, laid down the following propositions: (a) clause (1) of Article 289 provides for exemption of property and income of the States only from taxes imposed directly upon them; it has no application to indirect taxes like duties of excise and customs (b) duties of excise and customs are not taxes on property or income; they are taxes on manufacture/production of goods and on import/export of goods, as the case may be, and hence, outside the purview of clause (1) of Article 289....."

15. In the case of Collector of Customs and Anr. vs. State of West Bengal and Anr. 0 this Court dealt with the contention involving Article 285 directly. The question involved in that case pertained to the levy of Sales Tax on goods sold by the Collector of Customs and a challenge made to the decision of West Bengal Taxation Tribunal holding the appellant (Union of India) therein to be a dealer under the provision of the *West Bengal Finance (Sales Tax) Act, 1941* was negated by this Court holding thus;

"Only one contention is advanced before us by learned counsel on behalf of the

appellants, and it is, that Article 285 of the Constitution debars the imposition of tax upon property belonging to the appellants.

Reliance in this behalf is placed on the judgment of two learned Judges of this Court in *State of Punjab vs. Union of India*. The Punjab High Court in that matter had answered the two questions before it in favour of the Union of India. The second question was whether no sales tax could be levied in view of the provisions of Article 285 of the Constitution on goods purchased by the Railways and sold by the Railways in their Catering Department. This Court said that at the time of their sale, the goods belonged to the Railways. The tax had been imposed on such sale. In view of the provisions of Article 285, such sale was immune from taxation under the State law.

It would appear that no real arguments were advanced before this Court by the appellant-State and the judgment of this Court in *Sea Customs Act (1878), S. 20(2)*, was not pointed out. In the *Sea Customs Act* case a nine-Judge Bench of this Court opined by a majority, that Article 285 envisaged immunity from direct taxes and not from indirect taxes such as sales tax. With specific reference to sales tax, this Court said:-

"We may in this connection contrast sales tax which is also imposed with reference to goods sold, where the taxable event is the act of sale. Therefore, though both excise duty and sales tax are levied with reference to goods, the two are very different imposts; in one case the imposition is on the act of manufacture or production while in the other it is on the act of sale. In neither case therefore can it be said that the excise duty or sales tax is a tax directly on the goods for in that event they will really become the same tax."

The decision in the *Sea Customs Act* case was considered by another nine-Judge Bench in the case of *New Delhi Municipal Council vs. State of Punjab* and was affirmed." *

16. From the above judgment of this Court, it is clear that Union is not exempted from the levy of indirect tax under Article 285 of the Constitution. The above discussion also shows reliance placed on the judgment of this Court in the case of *New Delhi Municipal Council* (supra) by one of the learned counsel for the appellants is wholly misconceived and is opposed to his contention with reference to Article 285 of the Constitution.

17. The next contention urged on behalf of the appellant in the alternative is that on the facts of the cases in hand, there is no transaction of sale involved. For this strong reliance was placed on the relevant clauses of the agreement between the parties. In the case of appellants in *C.A. Nos. 8540-8544/2001* the same is found in clause 10 of the agreement. According to the learned counsel for the appellants, as per the terms in the above said clause the materials supplied to the contractors remained to be the absolute property of the Union and the same could not be removed on any account from the site of the work and was at all times open to inspection by the concerned authorities, it is also submitted that any materials supplied, remaining unused in the works contract, were to be returned to the authority concerned and

the contractors at all given point of time was only a 'custodian' of the material so supplied to him. On the basis of the above, it was contended that the title in the property supplied to the contractor never ever got transferred nor any specific consideration has passed for the supply of the goods.

18. This Court had an occasion to deal with a similar clause where the Union of India entered into an agreement for the construction of certain works, wherein it agreed to supply materials such as Cement, Steel etc. (as is the case in hand) in the said case of M/s N.M. Goel & Co. vs. Sales Tax Officer, Rajnandgaon and Anr. this Court held:-

"In order to be sale taxable to duty, there should be an independent contract - separate and distinct - apart from passing of the property, where a party purchases or procures goods from the Government. Mere passing of property would not suffice. There must be sale of goods. The primary object of the bargain judged in its entirety must be viewed. In the instant, case, Clause 10 is significant. Though in a transaction of this type there is no inherent sale but a sale inheres from the transaction. Clause 10 read in the proper light indicates that position. 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 of the contract."

19. In the case of Rashtriya Ispat Nigam Ltd. vs. State of A.P. 1 this Court relying on the said judgment of M/s. N.M. Goel & Co. (supra) held:-

"For the purpose of performance, the contractor was bound to procure materials. But in order to ensure that quality materials are procured, the PWD undertook to supply such materials and stores as from time to time required by the contractor to be used for the purpose of performing the contract only. The value of such quantity of materials and stores so supplied was specified at a rate and got set off or deducted from any sum due or to become due thereafter to the contractor....."

20. An attempt to distinguish the judgment in 'Goyal's case on facts came to be rejected by this Court in the above case of Rashtriya Ispat Nigam Ltd.

21. In the instant case also by the use or consumption of material supplied in the work of construction, there was passing of property and by virtue of receipt of value of such transferred property by way of adjustment in bills the consideration has also passed which in our opinion satisfies the definition of 'sale' in the local Sales Tax Act.

22. In Cooch Behar Contractors Association vs. State of West Bengal and Ors. this Court followed the decision in M/s. N.M. Goel & Co. (supra) and considering a similar clause as is found in the appeal before us this Court held that the goods supplied to the contractor by the contractee and price recovered from the contractor by way of adjustment of value of such goods was held to be a contractual transferred price which is liable to levy of Salex Tax.

Therefore, we do not find any merit in the argument that even on facts that there was no sale in the transfer of materials supplied made by the appellant to its contractors.

23. Consequently, even the argument that in terms of the language of the definition of the dealer under Section 2 (14) of the Rajasthan Act appellants can not be a dealer will also have to be rejected.

24. In view of the reliance placed by us on the judgments referred to hereinabove; it is unnecessary for us to refer to the other judgments relied upon by the learned counsel for the parties.

25. This leaves us to consider the argument advanced by Shri Nikhil Nayyar, learned counsel on behalf of one of the appellants in C.A. Nos. 5270-5271 of 2003 wherein the learned counsel contended that the levy under the local Act being a single point tax and the appellant having suffered the same when it purchased the material in question and same material cannot be subjected to another levy on its transfer to the contractor. This argument requires consideration of factual matrix of the case concerned, whether the levy in question is a single point tax and material purchased by the appellants had suffered the levy at the point of purchase by appellants or not are matters to be decided by the authorities concerned and if the same is not already decided and has not become final, it will be open to the appellants to urge this question before the appropriate authorities.

26. For the reasons stated above these appeals fail and are dismissed.

¹*AIR 1963 SC 1760*