

**(1989) 09 PAT CK 0023**  
**In the Patna High Court**  
**Case No : C.W.J.C. No. 726 of 1989 (R)**

Ashok Kumar Ghosh

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

**Date of Decision :** 07-09-1989

**Acts Referred:**

Bihar Finance Act, 1981 — Section 16(8), 2, 21(1), 25(3), 25A  
Bihar Sales Tax Rules, 1983 — Rule 13A  
Constitution of India, 1950 — Article 226, 286, 366

**Citation :** (1989) 37 BLJR 300 : (1990) 76 STC 57

**Hon'ble Judges :** S.B. Sinha, J

**Bench :** Single Bench

**Advocate :** Pawan Kumar and M.S. Mittal, for the Appellant; R.K. Chowdhury, G.P. 1 and A.K. Jha, J.C. to G.P. 1, for the Respondent

**Final Decision :** Partly Allowed

## Judgement

S.B. Sinha, J.—In this writ application the petitioner inter alia has prayed for a declaration that the Constitution (Forty-sixth Amendment) Act as also the provisions of Bihar Finance Act, 1981, in so far as it seeks to impose sales tax on works contract are ultra vires the Constitution of India and further for a declaration that Section 21(1)(a)(i) as inserted by the Bihar Finance Act, 1985, and Rule 13-A of the Bihar Sales Tax Rules, 1983, are also ultra vires, illegal, void ab initio and further for quashing of the orders imposing penalty upon the petitioner for the assessment years 1985-86 and 1987-88 as also the demand notices for the years 1986-87 and 1987-88 and the notices of assessment for the years 1986-87 and 1987-88 as contained in annexure-4 series to the writ application.

2. The facts of the case lie in a very narrow compass.

3. Allegedly the petitioner had entered into various contracts with the respondent No. 5 and pursuant thereto had been carrying on various construction jobs of civil nature. According to the petitioner, the material contents involved in the

works contract is about 25 per cent and 30 per cent of the entire works contract. The petitioner has further asserted that most of the materials specially steel and cement are supplied by the principal either free of cost or on cost recovery basis and the title of the said property at all times remains with the principal and never passes on to the petitioner. It is further alleged that the said contract jobs are performed by the hired labourers. It has further been asserted that sales tax payable by him on the whole contract is 8 per cent plus 1 per cent turnover plus 5 per cent surcharge on sales tax payable which is about 9.5 per cent in terms of the notification issued by the State of Bihar under the Bihar Finance Act, 1981 and rules framed thereunder. The petitioner has further asserted that his principal had been deducting 4 per cent from the amount payable to the petitioner from his running account bills in terms of Section 25A of the Bihar Finance Act.

4. The petitioner was assessed for the year 1985-86 and the total tax was assessed at Rs. 22,157.29 out of which the amount of Rs. 9,189 was deducted at source from the running account bills of the petitioner by respondent No. 5 and deposited in the Government treasury and the balance amount of Rs. 13,038.29 was paid vide challan No. 2 dated 12th August, 1988.

5. According to the petitioner the assessing authority namely respondent No. 4 without taking into consideration the aforementioned facts levied penalty u/s 25(3) at the rate of two and one half per cent per month for the first three months and at the rate of 6 per cent per month for the balance period, aggregating a sum of Rs. 13,848.

The petitioner has further contended that he could not file his return for the first and second quarters of the assessment year 1987-88 within the stipulated period in view of strike resorted to by the labourers wherefor the respondent No. 4 had imposed a penalty of Rs. 3,800 upon him in terms of Section 16(8) of the Bihar Finance Act. The aforementioned orders of penalty are contained in annexure-4 and 4/3 to the writ application.

6. The petitioner has further contended that he has been issued with notices of assessment for the assessment years 1986-87 and 1987-88.

7. Mr. Pawan Kumar the learned counsel appearing on behalf of the petitioner did not press the question of vires of Constitution (Forty-sixth Amendment) Act, in view of the recent Supreme Court decision in Builders Association of India v. Union of India reported in 1989 73 STC 370 : 1989 BLT 151.

8. The learned counsel however, submitted that in the aforementioned decision, the Supreme Court did not go into the question of the vires of the legislation made by the State Legislature which may be capable of being challenged on the grounds other than the question of vires of the said Constitution (Forty-sixth Amendment) Act. The learned Counsel, therefore, submitted that the vires of the provision of Section 21(I)(a)(i) of the Bihar Finance Act as amended with effect from 1985 as also Rule 13-A of the Bihar Sales Tax Rules are open to question in

this writ application.

Mr. Pawan Kumar further submitted that the gross turnover is defined in Section 2(j) of the Bihar Finance Act, 1981, on the basis whereof, sales tax in respect of works contract is to be assessed, cannot be done in the manner as provided for u/s 21(l)(a)(i) of the Bihar Finance Act and Rule 13-A of the Bihar Sales Tax Rules. According to the learned counsel the said provisions are ultra vires the Constitution inasmuch as the amount of the labour charges prescribed by reason of Rule 13-A has also been included for the purpose of calculating taxable turnover. The Supreme Court in the case of Builders Association of India [1989] 73 STC 370 : 1989 BLT 151, has clearly held that only such portion of works contract would come within the purview of Clause (29A) of Article 366 of the Constitution whereby and whereunder actual transfer of goods takes place from the contractor to the principal in execution of the works contract.

9. The learned counsel further submitted that in this view of the matter labour charges involved in execution of works contract cannot be brought within the purview of the aforementioned Act and the Rules framed thereunder.

10. "Gross turnover" has been defined in Section 2(j) of the Bihar Finance Act, 1981, which reads as follows :

"(i) For the purposes of levy of sales tax, in respect of sale of goods, aggregate of sale prices received and receivable by a dealer, including the gross amount received or receivable for execution of works contract or for the transfer of right to use any goods for any purpose (whether or not for a specified period) during any given period (and also including the sale of goods made outside the State and in the course of inter-State trade or commerce or export), but does not include sale prices of goods which have borne the incidence of purchase tax u/s 4.

(ii) For the purposes of bearing in the incidence of purchase tax, aggregate of purchase prices paid or payable by a dealer during any given period in respect of purchase of goods or class or description of goods which have borne the incidence of purchase tax u/s 4.

(iii) For the purposes of Section 3, the aggregate of the amounts under Sub-clauses (i) and (ii)."

11. "Works contract" has been defined in Section 2(w) of the said Act which reads as follows :

" "Works contract" means any agreement for carrying out for cash or deferred payment or other valuable consideration the construction, fitting out, improvement or repair of any building, road, bridge or other immovable or movable property."

12. "Taxable turnover" has been defined u/s 21 of the said Act which reads as follows :

(1) "For the purpose of this part the taxable turnover of a dealer shall be that

part of his gross turnover which remains after deduction therefrom--

(a) (i) in case of works contract the amount of labour charges in the manner or to the extent prescribed ;

(ii) sale price on account of sales exempted u/s 7 ;

(b) amount of sales tax actually collected as such, if any, along with the sale prices received or receivable in respect of sales of goods ;

(c) sale prices on account of sales to a registered dealer other than a dealer liable to pay tax under Sub-section (8) of Section 3, of goods mentioned in Sub-section (4) of Section 11 and specified in his registration certificate as being required for resale by him inside Bihar or in course of inter-State trade or commerce : "

13. Rule 13-A of the Bihar Sales Tax Rules, 1983, which was inserted by Notification bearing No. S.O. 1142 dated 8th October, 1986, which reads as follows :

"13-A. Deduction in case of works contract on account of labour charge.-- Deduction under Sub-clause (i) of Clause (a) of Sub-section (1) of Section 21 on account of labour charges in case of works contract from gross turnover shall be equal to the following percentage in respect of different types of works contract :

PERCENTAGE

Per cent

(1) (a)

Earthwork in all types of soil and in all works on canals, roads, embankments, small dams, etc., by manual labour ; and exclusive labour rate contracts.

100

(b)

Earthwork in all types of soil in all works on canals, roads, embankments, dams, etc., by machines.

20

(c) Construction of earth dams with earth moving machines. 26

(2) (a)

Construction of masonry/concrete dams, barrages, bridges of more than 16 metres length, water towers and P.H.E.D. installations and lift-irrigation installations, etc.

30

(b) Stone masonry in dams and other such works. 35

(3)

Construction of canal structures, bridges up to 16 metres length, all types of building and lining of canals.

30

(4) (a) Construction of pucca roads (excluding earthwork) 16

(b)

Construction of pucca roads (including earthwork in formation of new roads)

26

(5)

River taming and flood protection works involving boulder and brick pitching (excluding earthwork)

40

(6) In the case of electrical contracts 20

(7) In the case of contracts 30

(8) In the case of sanitary contracts 33-1/3

(9) In the case of retreading contracts 50

(10) In the case of textile dyeing and printing works contracts 60

(11) In the case of photography and printing contract 30

(12) In the case of sculptural contract or contracts relating to arts 70

(13)

In the case of refrigeration, air-conditioning or other machinery rolling shutters, cranes, installation contracts

15

(14) In the case of other contracts 30."

14. In Builders Association [1989] 73 STC 370 : 1989 BLT 151, the Supreme Court has inter alia held that the definition of sale as contained in Clause (29A) of Article 366 of the Constitution of India is subject to Article 286 of the Constitution of India. It has further been held that for the purpose of imposing liability of sales tax upon the assessee, no factor other than what has been contemplated under the aforementioned provisions of Clause (29A) of Article 366 of the Constitution can be taken into consideration. In other words an assessee is liable to pay tax only in relation to such transaction which involves sale of goods.

15. It is now well-known that a provision of the law can be read down in order to

uphold its constitutionality is concerned. In this case reference may be made to Kedar Nath Singh Vs. State of Bihar, and in All Saints High School, Hyderabad and Others Vs. Government of Andhra Pradesh and Others, . It is further well-known that a restricted meaning can be given to such a statute.

Reference in this connection may be made in Attorney General v. Prince Ernest Augustus of Hanover reported in [1957] AC 436, wherein the necessity of rule of interpretation of a statute in its proper context has been emphasised in the following terms :

"I wish at the outset to express my dissent from it, if it means that I cannot obtain assistance from the preamble in ascertaining the meaning of the relevant enacting part. For words, and particularly general words, cannot be read in isolation : their colour and content are derived from their context. So it is that I conceive it to be my right and duty to examine every word of a statute in its context, and I use "context" in its widest sense, which I have already indicated as including not only other enacting provisions of the same statute, but its preamble, the existing state of law, other statutes in *pari materia*, and the mischief which I can, by those and other legitimate means, discern the statute was intended to remedy".

However, a legislature cannot be presumed to have intended to violate the provision of the Constitution, but the same does not mean that a statute will be read down, even if it be *ultra vires*.

16. There is no doubt that Section 21(l)(a)(i) of the said Act and Rule 13-A of the Bihar Sales Tax Rules have brought within its purview even the element of labour charges within its sweep and the same must be held to be illegal and unenforceable.

In view of the decision of the Supreme Court in Builders Association [1989] 73 STC 370 : 1989 BLT 151, this aspect of the matter has recently been considered by a Division Bench of this Court in Jamshedpur Contractors' Association v. State of Bihar [1989] 75 STC 132 and other analogous cases being C.W.J.C. No. 1034 of 1984(R) and other analogous cases disposed of on 2nd August [1989] 75 STC 132, wherein it has been held that Rule 13-A is *ultra vires* the Constitution.

In the aforementioned decision the Division Bench further referred to the decision of M/s. N.M. Goel and Co. Vs. Sales Tax Officer, Rajnandgaon and another, and read the same in the light of the decision of the Constitution Bench in the Builders Association of India and Others Vs. Union of India (UOI) and Others, by holding as follows :

"...From the judgment in M/s. N.M. Goel and Co. Vs. Sales Tax Officer, Rajnandgaon and another, , it appears that the company was a building contractor and was registered as dealer under the Madhya Pradesh General Sales Tax Act. The tender of the company for construction of godown and ancillary building was accepted by the Central Public Works Department (C.P.W.D.). In the

tender so submitted by the company, the prices of the materials to be used for construction including cost of iron, steel and cement were included. The C.P.W.D., however had agreed to supply from its stores iron, steel and cement for construction work and to deduct the prices of materials so supplied and consumed in the construction from the final bill of the company. The company was assessed to purchase tax under the Madhya Pradesh General Sales Tax Act and was as such liable for payment of entry tax for iron, steel and cement, the entry for the same having been effected at the instance of the company because it had ultimately used the materials for the construction work. Under the Madhya Pradesh Entry Tax Act, it was assessed also to entry tax. The company challenged the assessment of purchase tax and also assessment of entry tax and the matter came to the Supreme Court.

This case was decided earlier than the Builders Association of India and Others Vs. Union of India (UOI) and Others, . But the same was not brought to the notice of the Bench hearing the Builders Association of India and Others Vs. Union of India (UOI) and Others, . Some observations made in M/s. N.M. Goel and Co. Vs. Sales Tax Officer, Rajnandgaon and another, are no doubt in conflict with the judgment of Builders Association of India and Others Vs. Union of India (UOI) and Others, as in the former the effect of Forty-sixth amendment to the Constitution was not considered, viz., observation made in M/s. N.M. Goel and Co. Vs. Sales Tax Officer, Rajnandgaon and another, that for building materials supplied by the contractor in works contract there is no question of sale or purchase, is directly in conflict with the judgment of the Builders Association of India and Others Vs. Union of India (UOI) and Others, and that no more can be held to be a good law. However, in M/s. N.M. Goel and Co. Vs. Sales Tax Officer, Rajnandgaon and another, , it was held that if there is an agreement between the parties by which the employer undertakes to supply materials which are to be consumed for execution of the works contract and the price of which the contractor is made liable to pay, the contractor shall be deemed to have sold the goods to the employer and the contractor is liable to pay tax under the Sales Tax Act. In view of this legal position, notwithstanding the submission made on behalf of the States in Builders Association of India and Others Vs. Union of India (UOI) and Others, , it must be held that if there is an agreement between the contractor and the employer under which the employer agrees to supply building materials to the contractor to be used in the work, and the contractor is made liable to pay the price of those materials, there is sale of goods by the contractor and he shall be liable to pay tax on such sale. The legal position now is when there is a transfer of property in goods by the contractor in execution of works contract, sales tax law is attracted."

True it is that in the aforementioned decision the provision of Section 21 of the Bihar Finance Act was not taken note but this does not alter the ratio of the decision inasmuch as evidently Rule 13-A was framed in terms of Section 21(1)(a)(i).

It is thus clear that the question of law raised by the petitioner has to be determined by the assessing authority keeping in view the aforementioned decisions of the Supreme Court and this Court.

Needless to add that before the assessing authority, various questions which are peculiar in the facts and circumstances of each case may arise which cannot be conceived of at this stage.

The petitioner has also not annexed the copies of the contract entered into by and between him and the respondent No. 5 and further has not stated the other relevant facts in order to enable this Court to ascertain as to whether and if any to what extent the works contract undertaken by him involves supply of materials so as to bring the same within the purview of "taxable turnover" under the said Act.

17. By an order dated 9th May, 1989, at the time of admission of the writ application the Division Bench of this Court passed the following interim order :

"In the meantime, the respondent may continue with the assessment pursuant to the notice (annexure-4/2), but shall not issue a notice of demand till disposal of the writ application."

18. Counsel appearing on behalf of the parties could not however inform me as to whether the assessment proceedings for the assessment years 1986-87 and 1987-88 have been concluded, pursuant to the aforementioned notices as contained in annexure-4/2 or not.

The assessing authority, therefore, in the event he has not concluded the assessment proceedings, shall while doing so pass orders keeping in view the aforementioned decisions of the Supreme Court in Builders Association [1989] 73 STC 370 : 1989 BLT 151 and M/s. N.M. Goel and Co. Vs. Sales Tax Officer, Rajnandgaon and another, and decision of this Court in Jamshedpur Contractors Association's case [1989] 75 STC 132.

19. So far as the prayer of the petitioner for quashing the order of penalty as contained in annexure-4 is concerned it appears that the respondent No. 4 did not take into consideration the fact that the respondent No. 6 had already deducted 4 per cent of the amount payable to the petitioner by way of running bills in terms of Section 25A of the Bihar Finance Act, 1981, and thus he misdirected himself in law.

In view of the large number of writ petitions pending in this Court as also before the Supreme Court of India the law applicable for imposition of tax in the matter of works contract was uncertain.

20. It is well-known that penalty is not to be imposed only because it is lawful to do so. In Hindustan Steel Ltd. Vs. State of Orissa, it was held as follows :

"An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed

unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute. Those in charge of the affairs of the company in failing to register the company as a dealer acted in the honest and genuine belief that the company was not a dealer. Granting that they erred, no case for imposing penalty was made out."

21. In this view of the matter I am of the opinion that annexure-4 as also the demand notices issued pursuant thereto and as contained in annexure-4/1 cannot be sustained and the respondent No. 4 should re-examine the matter after giving an opportunity of bearing to the petitioner.

22. So far as the imposition of penalty for not filing the returns within the prescribed period is concerned, it appears from the order dated 26th December, 1988, passed by the respondent No. 4 as contained in annexure-4/3 to the writ application, the petitioner was given an opportunity of hearing by the respondent No. 4 before imposing penalty upon him in terms of Section 16(8) of the said Act and as such no illegality has been committed by him in respect of the said order nor do I find any. Before the respondent No. 4, as noticed hereinbefore, the petitioner got an opportunity to explain the reason for non-submission of returns in time, and the respondent No. 4 in his impugned order has assigned cogent reason for not accepting the said explanation and imposing a penalty of Rs. 3,800 upon the petitioner in exercise of his power u/s 16(8) of the said Act. Reference in this connection may be made to Gujarat Travancore Agency, Cochin Vs. Commissioner of Income Tax, Kerala, Ernakulam, .

23. The petitioner has not made out any case whatsoever for interference with the said order by this Court in exercise of its writ jurisdiction.

24. In the result this writ application is allowed to the aforementioned extent and order dated 16th December, 1983, as contained in annexure-4 and the demand notices as contained in annexure-4/1 to the writ application are quashed. In the facts and circumstances of the case there will be no order as to costs.