

(2012) 11 GAU CK 0024
In the Gauhati High Court
Case No : Writ Petition (C) No. 508 of 2012

Coastal Projects Limited

APPELLANT

Vs

State of Tripura and Others

RESPONDENT

Date of Decision : 19-11-2012

Acts Referred:

Constitution of India, 1950 — Article 226, 300A
Income Tax Act, 1961 — Section 194C(4)
Tripura Value Added Tax Act, 2004 — Section 2(36), 4(3)

Citation : (2013) 3 GLT 176 : (2013) 58 VST 166

Hon'ble Judges : S.C. Das, J;S. Talapatra, J

Bench : Division Bench

Advocate : A.C. Bhowmik, A. Bhowmik, S. Debnath and Ms. S. Chakraborty, for the Appellant; N.C. Pal, Government Advocate, for the Respondent

Final Decision : Dismissed

Judgement

S. Talapatra, J.—Heard Mr. A. Bhowmik, learned counsel appearing for the petitioner, namely, M/s. Coastal Project Ltd. as well as Mr. N.C. Pal, learned Government Advocate appearing for respondent Nos. 1, 2 and 3. By this petition, the petitioner has challenged the vires of rule 7(1) of the Tripura Value Added Tax Rules, 2005 as amended by the Tripura Value Added Tax (First Amendment) Rules, 2011 and prayed for consequential relief of prohibition from giving effect of section 4(3) of the Tripura Value Added Tax Act, 2004 and rules 7(1) of the Tripura Value Added Tax Rules, 2005 as amended by the Tripura Value Added (First Amendment) Rules, 2011 and from deducting the tax at source while making payment of bills to the petitioner and also for direction to refund the tax deducted at source by respondent No. 4 from the RA bills in pursuance to the impugned provision.

2. The brief fact that would be necessary for examining the question that has surfaced at the threshold, whether the petitioner has got any locus standi to file the writ petition, may be noted at the outset.

3. Respondent No. 4, namely, National Projects Construction Corporation Limited, hereinafter referred to as "the contractor" was awarded works contracts for the works, namely, "construction of border fencing along Indo-Bangladesh Border in the State of Tripura" pursuant to the following NITs. The awards as made by the Ministry of Home Affairs, Government of India, against each of the NITs are also shown against the NITs for purpose of record:

4. Thereafter, respondent No. 4 entered into turnkey agreements with the petitioner separately for each of the works as indicated in the table above. It appears that in pursuance to those agreements separate work orders were also issued to the petitioner on October 25, 2011 (as available at annexure P2 series) where the following clause has been made imperative:

(7) The works contract tax/VAT and all other taxes shall be governed as per relevant clause(s) of the NIT/tender document.

5. It is observed that the said agreement as entered into between the petitioner and respondent No. 4 and the work orders dated October 25, 2011 as issued in pursuance thereto are not the works contract within the meaning of section 2(36) for purpose of the works under reference.

6. There is no dispute as to the position that has emerged that in the transaction respondent No. 4 for all purposes is the contractor from whose bills, the contractee, the Union of India in the Ministry of Home affairs has been authorized by the statute to deduct the tax at source for execution of the works contract for the transfer of property in goods involved thereto.

7. The grievance of the petitioner as it surfaced from the writ petition is that respondent No. 4 (not the taxing authority under the Tripura Value Added Tax Act, 2004) has been deducting the tax at source in pursuance of section 4(3) of the Tripura Value Added Tax Act, 2004 read with rule 7(1) of the Tripura Value Added Tax Rules, 2005 as the statute provides that the deduction of tax at the time of payment, every person responsible for paying any sum to any person on account of works contract and right to use any goods for any purpose, shall at the time of credit of such sum to account of the person or at the time of payment thereof in cash or by issue of a cheque or draft or any other mode, deduct such amount towards sales tax (not being more than the total tax payable by the dealer) as may be prescribed. There is no dispute that the petitioner is neither the contractor nor the person to whom the payment would be made by the dealer on account of the works contract. However, the petitioner independently has approached this court to challenge the vires of rule 7(1) of the Tripura Value Added Tax Rules, 2005 on the ground that the said tax as is sought to be deducted having been part of the amount situates outside the purview of entry 54 List II of the Constitution of India and that the said entry is to be exercised subject to the restrictions as provided. An additional ground has been projected that no mechanism has been set up in the relevant statute *pari materia* to section 194C(4) of the income tax Act, 1961 and as such the provision of rule

7(1) of the Tripura Value Added Tax Rules, 2005 as amended is absolutely arbitrary and de hors the constitutional prescriptions inasmuch as it amounts to infringement of article 300A of the Constitution for depriving the petitioner of his property. It has been further stated that uncertain amount cannot be deducted as the tax at the source on condition of return as it has been enunciated by the apex court in Bhawani Cotton Mills Ltd. Vs. State of Punjab and Another, that it is no solace that the money so deducted at source would be returned in future. It is essential to highlight the averment as cited in the writ petition:

That the petitioner states that respondent No. 4 without undertaking any exercise to compute the taxable turnover has deducted the tax at source from the gross amount of the bills of the petitioner and as such unless during the pendency of the rule, this honourable court directs the respondents not to deduct any tax u/s 4(3) of the Act, 2004 and rule 7(1) of the Rules, 2005 as amended by the First Amendment of 2011 at source from the bills of the petitioner, the petitioner shall suffer irreparable loss and injury.

8. The averment as excerpted would show that the dispute is fundamentally confined to performance of the private contract (as distinct from the works contract) as entered into by the petitioner and respondent No. 4. While considering the petition the question of the locus standi of the petitioner has surfaced very strongly so much so that whether without authority from respondent No. 4 the petitioner has got any locus standi as it surfaced again that the petitioner is admittedly not an assessee nor the tax at source is directly deducted by the dealer from the petitioner but by the contractor only by dint of the terms of the turnkey agreements nor that the petitioner by any means comes within the meaning of the dealer or conversely whether any person having been affected by the provisions of the private contract, provisions of which have been agreed to by the petitioner, can approach this court for challenging the constitutionality of the said rule.

9. Mr. A. Bhowmik, learned counsel, quite strenuously argued that since the tax is being deducted from the petitioner in pursuance of the impugned provision, the petitioner is definitely "an aggrieved person". In support of his contention he also relied on the decision of the apex court in M/s. Nathpa Jhakri Jt. Venture Vs. State of Himachal Pradesh and Others, . In that case the appellant had called in question the validity of section 12A of the Himachal Pradesh General Sales Tax Act, 1968 and rule 31A of the Himachal Pradesh General Sales Tax Rules before the High Court of Himachal Pradesh as that provision provided for deduction of an amount from the bills or invoices of the works contractors purporting to be tax payable towards transfer of goods involved in the works contract. The High Court took the view that the relevant amount is the valuable consideration payable for the transfer of property in goods and not the entire value or consideration for the entire works contract and what was directed to be deducted is only an amount not exceeding four per cent as may be prescribed purporting to be a part or full of the tax payable on such sales which would necessarily

mean tax payable under the charging provisions of the Act. In that case the aggrieved contractor approached the High Court and thereafter to the apex court. The apex court on considering the decision in *Steel Authority of India Ltd. Vs. State of Orissa and Others etc. etc.*, held that (pages 309 and 310 in 118 STC):

4. A bare perusal of the two provisions will make it clear that in either provision there is an obligation to deduct from transactions relating to works contract on bills or invoices raised by the works contractor an amount not exceeding four per cent or two per cent, as the case may be. Though the object of the provision is to meet the tax in respect of the transactions on all works contract on the valuable consideration payable for the transfer of property in goods involved in the execution of the works contract, the effect of the provision is that irrespective of whether the sales are inter-State sales or outside sales or export sales which are outside the purview of the State Act and those transactions in respect of which no tax can be levied even in terms of the enactment itself, such deductions have to be made in the bills or invoices of the contractors. To say that if a person is not liable for payment of tax inasmuch as on completion of the assessment refund can be obtained at a later stage is no solace, as noticed in *Bhawani Cotton Mills Ltd. Vs. State of Punjab and Another*, , further, there is no provision for certification of the extent of the deduction that can be made by the authority. Therefore, we must hold that arbitrary and uncanalised powers have been conferred on the concerned person to deduct up to four per cent from the sum payable to the works contractor irrespective whether ultimately the transaction is liable for payment to any sales tax at all In that view of the matter, we have no hesitation in rejecting the contention advanced on behalf of the State.

10. In that case the person who approached the court was the contractor from whom the tax was being deducted by the principal/dealer for execution of the contract. The other decision as relied on by the petitioner in *Rapti Commission Agency Vs. State of U.P. and Others*, where the agent of the principals was subjected to the procedure of assessment and determination of tax even though he had no liabilities to pay the tax. The apex court while dealing with the issue of locus standi held that (page 574 in 147 STC):

Before we part with the case, it would be appropriate to remind the Legislatures of what was stated in *Bhawani Cotton Mills Ltd. Vs. State of Punjab and Another*, that if a person is not liable for payment of tax at all, at any time, the collection of a tax from him, with a possible contingency of refund at a later stage, will not make the original levy valid, because if sales or purchases are exempt from taxation altogether, they can never be taken into account, at any stage, for the purpose of calculating or arriving at the taxable turnover and for levying tax. The view was reiterated in *Steel Authority of India Ltd. Vs. State of Orissa and Others etc. etc.*, and *M/s. Nathpa Jhakri Jt. Venture Vs. State of Himachal Pradesh and Others*, . In the latter case, it was noted, echoing the view in *Bhawani Cotton Mills Ltd. Vs. State of Punjab and Another*, that it is no solace to say that such a

person can get refund after completion of assessment. If the principles indicated in these cases are followed, large number of unnecessary litigations can be avoided.

The appeal is allowed to the aforesaid extent without any order as to costs.

11. To understand that principle, the factual matrix related to that case has to be given the proper emphasis. In *Rapti Commission Agency Vs. State of U.P. and Others*, it has been underlined in no uncertain terms that the appellant being the agent of the principal was not liable to pay tax. It appears from that decision that since the appellant had not deducted that tax from the sellers and deposited the same in terms of section 8E of the U.P. Trade Tax Act, 1948 he was subjected to the procedure of assessment and determination of tax. The apex court held that when the person had no liability to pay the tax he could not be compelled to go through the procedure under the statute for purpose of assessment and determination of the tax. Indisputedly the factual matrix of that case is inhibiting to borrow the said principle for this case. In the present case, the petitioner as such has no statutory liability to pay tax at source or nor can he be assessed in terms of rule 7(8) of the Tripura Value Added Tax Rules, 2005, which provides all such deductions and deposits into the Government Treasury shall be deemed to be provisional payment of tax and shall be adjusted at the time of assessment under sections 29/30/31 of the Act as the case may be, but by virtue of the turnkey agreements as entered into between respondent No. 4 and the petitioner, the petitioner has been required to pay the amount of such tax to respondent No. 4 and this clause has no relation with the taxing authority nor the petitioner has been directed to deposit tax neither were they subjected to the procedure of determination of tax or assessment. Neither the dealer, the Union of India (not made party in the proceeding) nor respondent No. 4 has canvassed any grievance in this regard. Admittedly there is no question of public injury that any member of the public may having interest come forward for a judicial redress of the injury on challenging the constitutional or legal validity of any piece of legislation. Even though Mr. Bhowmik, learned counsel appearing for the petitioner, did not refer to the decision of the apex court in *Steel Authority of India Ltd. Vs. State of Orissa and Others etc. etc.*, which has been discussed both the decisions *supra*, the apex court therein has discussed as obiter the question of locus standi. The core issue in that case can be availed of from the following passage (page 304 in 118 STC):

13. There can be no doubt, upon a plain interpretation of section 13AA, that it is enacted for the purposes of deduction at source of the State sales tax that is payable by a contractor on the value of a works contract. For the purposes of the deduction neither the owner nor the Commissioner who issues to the contractor a certificate u/s 13AA(5) is entitled to take into account the fact that the works contract involves transfer of property in goods consequent upon of an inter-State sale, an outside sale or a sale in the course of import. The owner is required by section 13AA(1) to deposit towards the contractor's liability to State sales tax

four per cent of such amount as he credits or pays to the contractor, regardless of the fact that the value of the works contract includes the value of inter-State sales, outside sales or sales in the course of import. There is, in our view, therefore, no doubt that the provisions of section 13AA are beyond the powers of the State Legislature for the State Legislature may make no law levying sales tax on inter-State sales, outside sales or sales in the course of import.

12. In that case the owner, the Steel Authority of India was required by the provision of section 13AA(1), of the Orissa Sales Tax Act to deduct the tax at source from the bills of the contractor. In view of that, the apex court held that the owner was the aggrieved person in the context of the fact and circumstances as he was affected by the action of the taxing authority directly. The apex court held that (page 305 in 118 STC):

14. It was contended on behalf of the State that the appellant, as owner, had no locus to challenge the validity of section 13AA. It was contended that the moneys that were deducted were moneys that belonged to the contractor and it was only the contractor who could successfully lay such a challenge. The contention ignores the fact that the appellant-owner is aggrieved and damnified by the penalty that has been imposed upon it under sub-section (5) for contravention of sub-section (1) of section 13AA. It has, therefore, the standing to contest the validity of section 13AA.

13. The apex court held that since the appellant was the owner who was aggrieved and damnified by the penalty that had been imposed upon it under sub-section (6) for contravention of sub-section (1) of section 13AA of the Orissa Sales Tax Act it had the legal standing. But in the present case no action of the taxing authority has affected the petitioner nor have they got any relation with the taxing authority by operation of any statutory provision. Apart that they have not been authorized either by the dealer or by the contractor to set in the proceeding. Ultimately, Mr. Bhowmik learned counsel for the petitioner submitted that in similar other matters this court had granted interim order of stay against the recovery subject to examination of the writ petitions on merit and he referred the interim orders passed in W.P. (C) No. 689 of 2012, W.P. (C) No. 690 of 2012, W.P. (C) No. 691 of 2012 and W.P. (C) No. 692 of 2012 at Imphal Bench.

14. Mr. N.C. Pal, learned Government Advocate, stated that even not by any executive fiat the contractor was asked for deduction of tax at source from the petitioner. In view of this, the question of locus standi for issuance of certiorari is of paramount importance. He would further contend that the petitioner lacks locus standi and as such this petition is not maintainable.

15. On considering the challenge of the petitioner, this court is countenance with the irresistible view that the petitioner has got no locus standi to invoke the jurisdiction under article 226 of the Constitution of India for calling the validity of rule 7(1) of the Tripura Value Added Tax Rules, 2005 in question or for praying other consequential reliefs as stated. Moreover, from the work-orders as awarded

by respondent No. 4 it is apparent that the petitioner agreed to pay the category of the tax which includes the works contract tax/VAT. The decision in Haroop v. Bayley as reported in 25 LJ. MC 107 holds that a person who has consented expressly or impliedly to a thing cannot be said to be "aggrieved" by it. The rationale so provided in Haroop as reported in 25 LJ. MC 107 has strongly persuaded us. If the petitioner is aggrieved by any action of respondent No. 4, the remedy is definitely not under article 226 of the Constitution of India inasmuch as there is an arbitration clause in each of the work orders as emanated from the agreements, which is extracted hereunder:

15 Both the parties shall make efforts to settle the disputes or differences amicably. If amicable settlement is not possible, the same shall be referred to the Sole Arbitrator, Chairman and Managing Director of NPCC or the person appointed by CMD, NPCC and the decision of the arbitrator shall be final and binding on both the parties. Arbitrator shall be accorded in Indian Arbitration and Conciliation Act, 1996. The arbitrator will give the speaking award.

The jurisdiction of any dispute legal and otherwise will be within High Court of Guwahati.

16. It has been also found that there is a provision of reimbursement of the tax to the petitioner in the turnkey agreements in the following manner:

(7) The works contract/VAT paid by the agency to the State Government will be reimbursed by NPCC on submission of documentary proof of payment after assessment of each financial year subject to reimbursement of the same from MHA to NPCC.

(Ref. 70064/IBBF/1936 dated November 5, 2007, part of annexure P/2 series)

17. From the reference to the interim orders as passed by this court at Imphal Bench by Mr. Bhowmik, learned counsel for the petitioner, it is apparent that the question of locus standi was not examined or raised at the time of passing the interim orders. Therefore, those orders cannot have any bearing either in law or in propriety in the present context.

18. In view of this, we have no hesitation to hold that the petitioner lacks the locus standi, as the petitioner has got no legal grievance, to set in the writ proceeding and this writ petition does not deserve any further consideration and the same is accordingly dismissed. However, there shall be no order as to costs.