

(2016) 04 SC CK 0038

In the Supreme Court Of India

Case No : Civil Appeal Nos. 2989-3008 of 2016 (Arising out of S.L.P.(C) Nos. 30045-30064 of 2013)

Commissioner, Delhi Value Added Tax

APPELLANT

Vs

M/s. ABB Ltd.

RESPONDENT

Date of Decision : 05-04-2016

Acts Referred:

Central Sales Tax Act, 1956 — Section 3(9), 5(2)
Delhi Value Added Tax Act, 2004 — Section 7(A), 7(c)

Citation : (2016) AIR(SCW) 1901 : (2016) AIRSC 1901 : (2016) 4 JT 274 : (2016) 3 RecentApexJudgments(RAJ) 224 : (2016) 3 Scale 702 : (2016) 6 SCC 791 : (2016) 93 UPTC 201

Hon'ble Judges : Dipak Misra; Shiva Kirti Singh, JJ.

Bench : Division Bench

Advocate : S. Ganesh, Sr. Adv, R. Jawaharlal, Sidharth Bawa, Shyamal Anand, Ashwani Kumar, Advocates, for the Respondent

Final Decision : Dismissed

Judgement

Shiva Kirti Singh, J. - Instant appeals have been preferred by Commissioner, Delhi Value Added Tax to assail the judgment and order of the High Court of Delhi dated 28.09.2012 in S.T.A. Nos. 51-70 of 2012. The High Court reversed the order of the VAT Tribunal and of other lower authorities on the basis of its conclusion that the inter-State movement of goods was in pursuance of and incidental to the contract for the supply of goods used in the execution of the works contract between the respondent-assessee and the Delhi Metro Railway Corporation Ltd. (hereinafter referred to as 'DMRC'). The High Court further came to hold that claimed sales should be deemed to have taken place in course of imports of the goods or inter-state trade and that such import/movement of goods was integrally connected with the contract for their supply to DMRC. On the basis of such twin findings the High Court has held that the transactions constituting inter-State trade and those constituting sale or purchase in the course of import were covered by Section 3(a) and Section 5(2) respectively of

the Central Sales Tax Act, 1956 (hereinafter referred to as `CST Act") and, therefore, exempt from taxation under the Delhi Value Added Tax Act, 2004 (hereinafter referred to as `DVAT Act").

2. According to appellant the impugned judgment and order of the High Court is based upon erroneous interpretation of judgments of this Court particularly that of the Constitution Bench in the case of M/s. K.G. Khosla and Co. v. Deputy Commissioner of Commercial Taxes, Madras, (1966) 3 SCR 352 : AIR 1966 SC 1216. The appellant has placed strong reliance upon a subsequent Constitution Bench judgment in the case of M/s. Binani Bros. (P) Ltd. v. Union of India and Ors., (1974) 1 SCC 459. On the other hand, respondent has fully supported the view adopted by the High Court. Its contention is that ratio in the case of K.G. Khosla, (1966) 3 SCR 352 : AIR 1966 SC 1216 has not been doubted in the later judgment in the case of Binani Bros. and the conclusions drawn by the High Court on the basis of admitted facts are supported by the principle of law settled in the case of K.G. Khosla which has not been doubted in any other case. According to respondent the claim of sale in course of imports occasioned by the contract was negatived in the case of Binani Bros. on peculiar facts of that case which were quite different from the facts of the instant case, as correctly noticed by the High Court.

3. Before advertng to the main issue as to whether the High Court judgment is correct in law as well as in facts or not, it would be appropriate to notice some of the relevant facts. The respondent is a Public Limited Company engaged, inter alia, in manufacture and sale of engineering goods including power distribution system and SCADA system. It appears to be a market leader in power and automation technologies. It is a subsidiary of ABB Ltd., Zurich Switzerland which has operational presence in over 100 countries and employs around 1,30,000 personnel. On 15.05.2003 DMRC invited tenders for supply, installation, testing and commissioning of traction electrification, power supply, power distribution and SCADA system for Line 3 Barakhamba Road-Connaught Place-Dwarka Section of the DMRC. Respondent responded.

4. DMRC short listed the respondent and then executed the contract under which the respondent had to provide transformers, switch-gears, High Voltage Cables, SCADA system and also complete electrical solution, including control room for operation of metro trains on the concerned Section. The Bid Document contained detailed Bill of Goods, quantities and specifications for the goods, sources (i.e, name of the manufacturer/brand), detailed terms and conditions requiring approval of sub-contractors/suppliers and testing. The goods as also the components of works required certification as well as acceptance. The NIT required both, Technical Bid and Financial Bid. Besides the quotation of lumpsum price for the entire scope of work the Bid Document required individual breakup of price of goods and other details. Bid submitted by the respondent finally culminated into a contract on 04.08.2004. The contract document comprised of Special Conditions of Contract, General Conditions of Contract etc.

5. In the year 2005-06 the respondent was called upon to pay DVAT on the deemed sales made by it to DMRC. It denied its liability and claimed exemption under Section 7(a) and (c) of DVAT Act on the ground that it was exempted from payment of VAT in respect of sale effected in the course of import and also in respect of inter-state sale of goods, on account of provisions in Section 3(a) and 5(2) of the CST Act. The Assessing Officer vide order dated 25.11.2005 rejected the claim of the respondent and confirmed the demand of RS. 47,62,366/- towards VAT, RS. 3,32,258/- towards interest and also imposed a penalty of RS. 1,20,56,196/-. The objections of the respondent under Section 74 of Delhi VAT Act were also rejected and hence the respondent preferred an appeal which was rejected by the Additional Commissioner on 11.03.2008. Further appeals before the VAT Tribunal, 40 in total in respect of different assessment periods were also disallowed by the VAT Tribunal by the common judgment dated 07.06.2012. On the issue of penalty there arose a difference between the two Members of the Tribunal and hence that was referred to third Member and is supposed to be pending. The respondent challenged the common judgment and order of the Tribunal vide STA Nos. 51-70 of 2012 and those appeals have been allowed by the order under appeal dated 28.09.2012.

6. The Assessing Officer as well as the Appellate Authority returned a finding that there was no link between the contractee, DMRC and the supplier of goods that were imported by the respondent and hence on account of lack of any privity of contract the requirements of Section 3(a) of the CST Act were not satisfied in respect of movement of goods from outside Delhi to the required site of DMRC in Delhi. Similar finding was returned in respect of movement of the goods under import, i.e., it can not be held to have been occasioned by the contract between DMRC and the respondent.

7. The High Court heard the matter in detail and considered all the relevant facts particularly terms, conditions and stipulations in the contract in the context of contention on behalf of respondent that the revenue authorities and tribunal had failed to consider relevant clauses and conditions of the contract which demonstrate and clarify that the importation of equipment was strictly as per requirement and specification set-out by DMRC in the contract and only to meet such requirement of supply the specified goods were imported and hence the event of import and supply was clearly occasioned by the contract awarded to the respondent by the DMRC. There was a similar contention in respect of procurement of goods within the country and their movement from one state to another. After carefully considering the relevant provisions of the contract, specifications of goods, requirement of inspection of goods at more than one occasion and right of rejecting the goods even on testing after supply, prompted the High Court to accept the contentions advanced on behalf of respondent that the transactions leading to import of goods as well as movement of goods from one state to another were occasioned by the contract awarded by the DMRC to the respondent and hence the transactions were not covered by the Delhi VAT Act but the CST Act.

8. Some of the material terms governing the contract between the respondent and DMRC which were highlighted before the Tribunal and have been noticed by the High Court are as follows:

"The Letter of Acceptance issue by DMRC, in terms of the Contract reads as:

"Your proposal to execute OHE works by M/s Best and Crompton Engg. Ltd. the sub-contractor and control and monitoring (SCADA, AMS, BMS) yourself is accepted. Other sub-contractor (s)/vendor approval (s) shall be as per relevant tender conditions."

The contract specifically required approval of DMRC for sub-contractors/vendors as evident from the following provisions of the SCC to the Contract:

"1.1.2.6 "Sub-Contractor" means any person named in the Contract as a sub-contractor, manufacturer or supplier for a part of the works or any person to whom a part of the Works has been subcontracted with the approval of the Employer and the legal successors in title to such person, but not any assignee of such person." (excerpts from GCC).

Clauses 4 and 4.5 read as follows:

"4. Sub-Contractors

For major sub-contracts (each costing over RS. Four hundred thousand) it will be obligatory on the part of the Contractor to obtain approval of the Employer to the identity of the sub-contractor. The Employer will give his approval after assessing and satisfying himself of the capability, experience and equipment resources of the sub-contractor. In case the Employer intends to withhold his approval, he shall inform the contractor in time to enable him to make alternative arrangements.

4.5 The Contractor shall not sub-contract the whole of the Works unless otherwise stated in the Special Condition of Contract:

(a) the Contractor shall not be required to obtain approval for purchases of Materials which are in accordance with the standards specified in the Contract or provisions of labour or for the sub-contracts for which the Sub-contractor is named in the Contract.

(b) The prior approval of the Engineer shall be obtained for other proposed Sub-contractors;

(c) Not less than 28 days before the intended date of each Sub-contractor commencing work, the Contractor shall notify the Engineer of such intention; and

(d) The contractor shall give fair and reasonable opportunity for contractors in India to be appointed as Sub-contractors.

The Contractor shall be responsible for observance by all Sub-contractors of all the provisions of the contract. The Contractor shall be responsible for the acts or

defaults of any Sub-contractor, his representatives or employees, as fully as if they were the acts or defaults of the Contractor, his representatives or employees and nothing contained in sub-clause 4.5 (a) shall constitute a waiver of the Contractor's obligations under this Contract."

38 (c) Approved Sub-contractors:

Approved Sub-contractors shall be appointed in accordance with the procedure described as hereunder. If the Engineer/Employer instructs, the letting of a sub-contract for an item of Provisional Sums will be subject to pre-qualification of tenderers. In such a case, the Contractor shall prepare documents required for the pre-qualification, (including where appropriate bills of quantities, quantified schedules of prices or rates, specifications, drawings and other like documents) for the work, Plant, Materials or services included in each such Provisional Sum."

Some of the other terms contained in the contract documents are as follows:

"13. Sub-clause 5.1

Construction and Manufacture Documents

No examination by the Engineer of the drawings or documents submitted by the Contractor, nor any approval by the Engineer in relation to the same, with or without amendment, shall absolve the Contractor from any of his obligations under the Contract or any liability for or arising from such drawings or documents.

Should it be found at any time after notification of approval that the relevant drawings or documents do not comply with the Contract or do not agree with the drawings or documents in relation to which the Engineer has previously notified his approval, the Contractor shall, at his own expense, make such alterations or additions as, in the opinion of the Engineer, are necessary to remedy such non-compliance or non-agreement and shall submit all such varied or amended drawings or documents for the approval of the Engineer.

Workmanship, materials and plant

Inspection:

7.3 The employer and the engineer shall be entitled during manufacture, fabrication and preparation at any places where work is being carried out, to inspect, examine and test the materials and workmanship, and to check the progress of manufacture, of all Plant and Materials to be supplied under the Contract. The contractor shall give them full opportunity to inspect, examine, measure and test any work on Site or wherever carried out.

The Contractor shall give due notice to the Engineer whenever such work is ready, before packaging, covering up or putting out of view. The Engineer shall then carry out the inspection, examination, measurement or testing without unreasonable delay. If the Contractor fails to give such notice, he shall, when

required by the Engineer, uncover such work and thereafter reinstate and make good at his own cost." The DMRC issued a letter listing out the approved or authorized list of suppliers which reads as:

"TO WHOMSOEVER IT MAY CONCERN

This is to certify that following is a list of the approved vendors for 3E21 contract entered into between the DMRC Ltd. and ABB Ltd. On 4th August 2004.

1

40 MVA Traction Transformer

M/s. ABB Limited, Vadodara

2

15 MVA Power Transformer

M/s. Crompton Greaves Ltd., Bhopal

3

66 KV/25 KV Circuit Breakers

M/s. ABB Limited, Vadodara

4

66 KV Capacity Voltage Transformer

M/s. ABB Limited, Vadodara

5

66 KV Current Transformer

M/s. ABB Limited, Italy

6

66 KV/25 KV Isolators

M/s. Switchgear and Structural Limited, Hyderabad

7

60 KV/42KV lighting arresters

M/s. Elpro International Ltd., Pune

8

Control and Relay panels

M/s. ABB Limited, Bangalore

9

SCADA Systems

M/s. ABB Limited, Bangalore

10

MV Switchgear

M/s. ABB Limited, Nashik

11

Battery Bank

M/s. AMCO Power Systems, Bangalore

12

LT Switchgear/ ACDB/DCDB

M/s. HEI Engineering (P) Ltd., Gurgaon

13

3000/2500/1000/500/200 KVA Dry Type Auxiliary Transformer

M/s. Electromecannica Colombia, Italy

14

66 KV/33 KV/25 KV HT Cable

M/s. ILJIN, Korea

15

LV Cables (power and control)

M/s. KEI Industries, Bhiwadi

16

66/33/25 KV Cable Terminations and joints

M/s. Tyco, Germany

17

Ms. Round

M/s IISCO, Kolkata

18

Cable Trays/Earthing materials/Electrodes.

M/s. Techno Engg. Co, Chandigarh

9. So far as the issue in respect of sale in the course of inter-state trade is

concerned, the Tribunal rejected the claim on the ground that there was no specific order for supply of such goods issued by DMRC nor there was specific instruction for inter-state movement of goods. The High Court found that in fact the terms of the contract envisaged inter-state movement of goods. Such movement of goods was within the knowledge of DMRC because there was total ban on setting up/ working of heavy industries in Delhi and the DMRC had approved 18 places within the country from where the equipments and goods had to be supplied. These included the premises and factories of the respondent also. On facts, therefore, it was rightly held by the High Court that the inter-state movement of goods was within the contemplation of the parties and it can be reasonably presumed that such movement was to fulfill the terms of the contract and therefore the transaction was covered by Section 3(a) of the CST Act. The law on this issue was also considered by the High Court in correct perspective after noticing the case of *Tata Iron and Steel Co. Ltd. v. S.R. Sarkar*, (1960) 11 STC 655 : AIR 1961 SC 65 that where the goods moved from one state to another as a result of a covenant in the contract of sale it would be clearly a sale in the course of inter-state trade. The conclusion of the High on this issue also finds ample support from the following case laws which were noticed by the High Court (1) *Oil India Ltd. v. The Superintendent of Taxes*, (1975) 35 STC 445 (SC) : (1975) 1 SCC 733 (2) *English Electric Company of India Ltd. v. The Deputy Commercial Tax Officer*, (1976) 38 STC 475 (SC) : (1976) 4 SCC 460 (3) *South India Viscose Ltd. v. State of Tamil Nadu*, (1981) 48 STC 232 (SC) : (1981) 3 SCC 457.

In *Oil India Ltd.* this Court held that the inter-state movement must be the result of a covenant, express or implied in the contract of sale or an incident of the contract. In other words, the covenant regarding inter-state movement need not be specified in the contract, It would be enough if the movement was in pursuance of or incidental to the contract of sale. In *English Electric Co. of India Ltd.* the law was clarified thus: "if there is a conceivable link between the movement of the goods and the buyer's contract, and if in the course of inter-State movement the goods move only to reach the buyer in satisfaction of his contract of purchase and such a nexus is otherwise inexplicable, then the sale or purchase of the specific/ascertained goods ought to be deemed to have taken place in the course of inter-State trade or commerce.....". In *South India Viscose Ltd.* it was held that if there is a "conceivable link" between contract of sale and the movement of goods from one state to another to meet the obligation under a contract of sale it would amount to an inter-state sale and such character will not be changed on account of interposition of an agent of the seller who may temporarily intercept the movement.

10. On the issue of sale in the course of import it is relevant to extract Section 3 and 5 of the CST Act, 1956 enacted by the Parliament in exercise of powers under Article 286(2) of the Constitution of India:

"3. When is a sale or purchase of goods said to take place in the course of inter-

State trade or commerce.- A sale or purchase of goods shall be deemed to take place in the course of inter-State trade or commerce if the sale or purchase -

- (a) occasions the movement of goods from one State to another; or
- (b) is effected by a transfer of documents of title to the goods during their movement from one State to another.

Explanation1- Where goods are delivered to a carrier or other bailee for transmission, the movement of the goods shall, for the purposes of clause (b), be deemed to commence at the time of such delivery and terminate at the time when delivery is taken from such carrier or bailee.

Explanation 2 - Where the movement of goods commences and terminates in the same State it shall not be deemed to be a movement of goods from one State to another by reason merely of the fact that in the course of such movement the goods pass through the territory of any other State.

5. When is a sale or purchase of goods said to take place in the course of import or export.

(1) A sale or purchase of goods shall be deemed to take place in the course of the export of the goods out of the territory of India only if the sale or purchase either occasions such export or is effected by a transfer of documents of title to the goods after the goods have crossed the customs frontiers of India.

(2) A sale or purchase of goods shall be deemed to take place in the course of the import of the goods into the territory of India only if the sale or purchase either occasions such import or is effected by a transfer of documents of title to the goods before the goods have crossed the customs frontiers of India.

(3) Notwithstanding anything contained in sub-section (1), the last sale or purchase of any goods preceding the sale or purchase occasioning the export of those goods out of the territory of India shall also be deemed to be in the course of such export, if such last sale or purchase took place after, and was for the purpose of complying with, the agreement or order for or in relation to such export."

11. A Constitution Bench of this Court had the occasion to consider in the case of M/s. K.G. Khosla and Co. (supra) whether sales in that case were in the course of imports. The assessee in that case had a contract with the Director General of Supplies, New Delhi for supply of axle bodies manufactured by its principals in Belgium. Although goods were inspected in Belgium also but under the contract they could be rejected on further inspection in India. After supplying the goods the assessee claimed the sales to be in course of import. After losing up to High Court, the assessee succeeded before the Supreme Court. The Constitution Bench held that Section 5(2) of the CST Act does not prescribe any condition that before the sale could be said to have occasioned import, it is necessary that the sale should precede the import. The sale is only required to be incidental to the

contract. In other words the movement of goods from another country to India should be in pursuance of the conditions of the contract. The incident was held to be import of goods within Section 5(2) on the reasoning that the entire transaction was an integrated one by which a foreign seller through its Indian agent namely the assessee sold the goods to Indian purchaser namely the Director General of Civil Supplies. It will be useful to reproduce the passage from that judgment which is as follows:

"appellant K.G. Khosla and Co., hereinafter referred to as "the assessee" entered into a contract with the Director-General of Supplies and Disposal, New Delhi, for the supply of axle-box bodies. According to the contract the goods were to be manufactured in Belgium, and the D.G.I.S.D., London, or his representative, was to inspect the goods at the works of the manufacturers. He was to issue an inspection certificate. Another Inspection by the Deputy Director of Inspections, Ministry of W.H. and S., Madras, was provided for in the contract. It was his duty to issue inspection notes on Form No. WSB.65 on receipt of a copy of the Inspection Certificate from the D.G.I.S.D. London and after verification and visual inspection. The goods were to be manufactured according to specifications by M/s La Brugeoies. ET. Nivelles, Belgium.

x x x

10. The next question that arises is whether the movement of axle-box bodies from Belgium into Madras was the result of a covenant in the contract of sale or an incident of such contract. It seems to us that it is quite clear from the contract that it was incidental to the contract that the axle-box bodies would be manufactured in Belgium, inspected there and imported into India for the consignee. Movement of goods from Belgium to India was in pursuance of the conditions of the contract between the assessee and the Director-General of Supplies. There was no possibility of these goods being diverted by the assessee for any other purpose. Consequently we hold that the sales took place in the course of import of goods within Section 5(2) of the Act, and are, therefore, exempt from taxation."

12. For analysing the main contention advanced on behalf of the appellant that the present case is identical to that of the assessee in the case of Binani Bros. (supra), we have examined the facts of Binani Bros. (supra) with meticulous care. In para 13 of that judgment the most peculiar and conspicuous aspect of K.G. Khosla case (supra) was noticed and highlighted that "under the contract of sale the goods were liable to be rejected after a further inspection by the buyer in India." In the same paragraph it was further highlighted with the help of a quotation from K.G. Khosla case (supra) that movement of goods imported to India was in pursuance of the conditions of the contract between the assessee and the Director General of Supplies. There was no possibility of such goods being used by the assessee for any other purpose. In the next paragraph of the Report the peculiar facts of Binani Bros. (supra) were highlighted in the following words, "..... the sale by the petitioner to the DGSandD did not occasion the

import. It was purchase made by the petitioner from the foreign sellers which occasioned the import of the goods". In paragraph 16 it was further pointed out that there was no obligation on the DGSandD to procure import licences for the petitioner.

13. There is no difficulty in holding that Binani Bros. (supra) did not differ with the earlier judgment of a Constitution Bench in the case of K.G. Khosla (supra). A careful analysis of the facts in Binani Bros. (supra) leads to a conclusion that the case of West Bengal Sales Tax authorities in that matter that there were two sales involved in the transactions in question, one by the foreign seller to the assessee and the second by the assessee to the DGSandD, because there was no privity of contract between the DGSandD and the foreign sellers, was accepted mainly because the assessee was found entitled to supply the goods to any person, even other than DGSandD because there was no specification of the goods in such a way as to render it useable only by the DGSandD. This was coupled with the fact that the latter had imposed no obligation on the assessee to supply the goods only to itself. Further, there were no obligations of testing and approving the goods during the course of manufacture or for that matter, even at a later stage with a right of rejection. Such a right of rejecting the specific goods in the present case is identical to the similar right in respect of goods in K.G. Khosla case (supra). Hence we are unable to accept the main contention of the appellant that this case is similar to that of Binani Bros (supra). To the contrary, we agree with the reasonings of the High Court for coming to the view that the present case is fit to be governed by the ratio laid down in K.G. Khosla's case (supra).

14. The legal principles enunciated in K.G. Khosla (supra) have been reiterated in State of Maharashtra v. Embee Corporation, Bombay, 1997 (7) SCC 190 and stand supported by the judgment in the case of Deputy Commissioner of Agricultural Income Tax and Sales Tax, Ernakulam v. Indian Explosives Ltd., 1985 (4) SCC 119, as well as in Indure Ltd. and Anr. v. CTO and Ors., 2010 (9) SCC 461. In these cases, sale in course of imports was accepted without requiring privity of contract between the foreign supplier and the ultimate consumer in India.

15. The aforesaid conclusion leading to our concurrence with the views of the High Court is also based upon the salient facts, particularly the various conditions in the contract and other related covenants between DMRC and the respondent which have been spelt out in paragraph 31 of the High Court judgment, enumerated and described as follows :

- "(1) Specifications were spelt out by DMRC;
- (2) Suppliers of the goods were approved by the DMRC;
- (3) Pre-inspection of goods was mandated;
- (4) The goods were custom made, for use by DMRC in its project;

(5) Excise duty and Customs duty exemptions were given, specifically to the goods, because of a perceived public interest, and its need by DMRC;

(6) The Project Authority Certificate issued by DMRC the name of the subcontractors as well as the equipment/goods to be supplied by them were expressly stipulated;

(7) DMRC issued a Certificate certifying its approval of foreign suppliers located in Italy, Germany, Korea etc. from whom the goods were to be procured.

(8) Packed goods were especially marked as meant for DMRC's use in its project."

16. Before us there was no attempt to assail the aforesaid features and to even remotely suggest any factual error on the part of the High Court in noting those features.

17. The salient features flowing out as conditions in the contract and the entire conspectus of law on the issues as notice earlier, leave us with no option but to hold that the movement of goods by way of imports or by way of inter-state trade in this case was in pursuance of the conditions and/or as an incident of the contract between the assessee and DMRC. The goods were of specific quality and description for being used in the works contract awarded on turn key basis to the assessee and there was no possibility of such goods being diverted by the assessee for any other purpose. Hence the law laid down in K.G. Khosla's (supra) case has rightly been applied to this case by the High Court. We find no reasons to take a different view.

18. In the result the appeals are found without any merit and dismissed as such. The parties are, however, left to bear their own costs.