

(1996) 09 SC CK 0170

In the Supreme Court Of India

Case No : Civil Appeal No's. 5577-79 (NT) of 1993, 4606 of 1990 and 571-74 (NT) of 1991

Cooch-Behar Contractors" Association and Others

APPELLANT

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 O

RESPONDENT

Date of Decision : 11-09-1996

Acts Referred:

Bengal Finance (Sales Tax) (Amendment) Act, 1984 — Section 2, 5
Bengal Finance (Sales Tax) Act, 1941 — Section 6D
Constitution of India, 1950 — Article 14, 366(29A)

Citation : (1996) 7 AD 154 : (1997) 1 CALLT 19 : (1996) 8 JT 343 : (1996) 6 SCALE 440 : (1996) 10 SCC 380 : (1996) 6 SCR 57 Supp : (1996) 103 STC 477

Hon'ble Judges : S. P. Bharucha, J;K. Venkataswami, J

Bench : Division Bench

Advocate : Jayant Das, Aruna Banerjee and G.S. Chatterjee, for the Appellant;
B. Sen, T. Ramachandran, Senior Advs., Dilip Sinha, D. Krishnan and J.R. Das, for the Respondent

Final Decision : Allowed

Judgement

K. Venkataswami, J.—Common questions of law arise out of a common judgment of the West Bengal Taxation Tribunal dated 26.4.1990 rendered in RN-30(T), RN-31(T), RN-34(T), RN-103KT), RN-367(T), RN-138(T), RN-338, 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 (hereinafter referred to as "the Act") was amended by the West Bengal Act 4 of 1984 inserting Section 6D 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 29A in Article 366.

3. The constitutional validity of the 46th Amendment inserting Clause 29A in Article 366 was challenged and this Court in Builders Association of India and Others Vs. Union of India (UOI) and Others, upheld the constitutionality of the said amendment.

4. As a result of the insertion of Section 6D 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 u/s 6D of the Act and the appellants aggrieved by such assessments moved the High Court challenging initially the constitutionality of Section 6D 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 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, learned Senior Counsel for the appellants broadly raised three points while attacking the assessments u/s 6D of the Act. The first contention raised by the learned Counsel was that Section 6D unjustly discriminates in the matter of grant of declaration forms to the dealers u/s 6D 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 contract to the contractor for the specific purpose of use in the execution of works contract should not be included in the 'contractual transfer price' u/s 6D as according to the learned Counsel in such supplies there is no transfer of property and the property always remains with the contract. 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' Association case (*supra*) or the recent decision of this Court in Gannon Dunkerley and Co. and Others Vs. State of Rajasthan and Others, . In addition to that he also invited our attention to a decision of this Court in the case of State of

Madhya Pradesh and Others Vs. Orient Paper Mills Ltd., wherein this Court has held that 'royalty' is a feudalistic euphemism for price. So far as the cost of freight and delivery for caning 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 6D 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 u/s 6D....

6D. - 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 these goods by the person 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 of March, 1984 exceeds rupees two lakhs shall, in addition to the tax payable by him u/s 5 and Section 6B, 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 u/s 5 and Section 6B, 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 again 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 (West Bengal Act IV of 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 u/s 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 u/s 6C;

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

(3) The tax under this section shall be levied at the rate of four per centum 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" include commodities specified for taxation u/s 25 of the West Bengal Sales Tax Act, 1954 (West Bengal Act IV of 1954) and, notwithstanding anything contained in this Act or in the West Bengal Act IV of 1954, tax shall be levied on such commodities under this section.

9. A perusal of Section 6D 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 dealers were enumerated in Clauses (a) to (e) of subsection (2) of Section 6D. Apart from that and having regard to the non obstante clause used in Section 6D, it is made clear 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 Sections 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 u/s 6D 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 6D.'

10. As rightly pointed out by learned senior counsel for the respondents Mr. B. Sen, the recent decision of this Court in *Gannon Dunkerley and Co. and Others Vs. State of Rajasthan and Others*, also supports the view taken by the Tribunal. This Court has observed as follows:

A question has been raised whether it is permissible for the State Legislature to levy tax on deemed sale 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 works contract. On behalf of the States 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 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.*, *P.M. Ashwathanarayana Shetty v. State of A.P.*, *P.M. Ashwathanarayana Shetty v. State of Karnataka*, *Federation of Hotel & Restaurant Association of India v. Union of India* and *Kerala Hotel and Restaurant Association v. State of Kerala*.) Imposition of sales tax at different rates depending on the value of the annual turnover was upheld in *S. Kodar v. State of Kerala*. Similarly, imposition of purchase tax at different rates for sugar mills and khandasari units was upheld in *Ganga Sugar Co. v. State of U.P.* 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 the contractor has to pay the price of the goods supplied by the contract by way of adjustment. This

Court in Builders Association of India and Others Vs. Union of India (UOI) and Others, has observed as follows:

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 the 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 contract 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. Sales Tax Officer and Anr.* 72 STC 375 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 P.W.D. and goods were only used in the construction under the contract, this Court held that '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 P.W.D. 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 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/contract 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 do 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 (supra)* 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 worksite. 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.