
(2003) 03 RAJ CK 0014

In the Rajasthan High Court

Case No : Civil Writ Petition No. 828 of 2002

Garrison Engineer (Project-I) and Another

APPELLANT

Vs

State and Others

RESPONDENT

Date of Decision : 24-03-2003

Acts Referred:

Constitution of India, 1950 — Article 285

Rajasthan Sales Tax Act, 1994 — Section 2(14), 2(38)

Citation : (2003) 4 RLW 2310 : (2004) 135 STC 511 : (2003) 3 WLC 23

Hon'ble Judges : N.N. Mathur, J;H.R. Panwar, J

Bench : Division Bench

Advocate : J.P. Joshi, J.L. Purohit, R.K. Purohit, S.P. Vyas and Vineet Kr. Mathur, for the Appellant; Sagar Mal Mehta, General, assisted by Sangeet Lodha, Sanjeev Johari and Sundeeep Bhandawat, for the Respondent

Final Decision : Dismissed

Judgement

Mathur, J.—In this group of writ petitions under Article 226 of the Constitution of India, the Union of India through its two different departments viz; Military Engineering Services and Tele Communications Department, has challenged the constitutional validity of Explanation-II added to Section 2 (14) and Section 2(38) (ii) of the Rajasthan Sales Tax Act, 1994, hereinafter referred to as "the Act", being hit by Article 285 of the Constitution of India. The petitioners have also challenged the order of assessment as well as the appellate order passed by the authorities under the Act.

2. The first set of group of petitions are filed in the name of Garrison Engineers. It is averred that the Military Engineering Services is the department, which is owned and controlled by the Ministry of Defence, Government of India. One of its department is Garrison Engineers. The said department is responsible for the construction and maintenance of building and services in the Defence Areas. In order to maintain the quality in the construction work, the material required in construction of the execution work of Defence Areas is normally purchased and

supplied by the department to the Contractor. Thus, as per the terms and conditions of the contract, cement and steel for the purpose of construction of building and its maintenance are supplied by the department for carrying out the construction and that for the said purpose and the value of material so supplied, is set off or deducted from the final bill. After completion of the work, the contractor is required to return un-used material.

3. The second set of group of petitions has been filed in the name of Bharat Sanchar Nigam Limited, which is a Government of India Enterprise, controlled by the Ministry of Tele Communications, Government of India. It provides tele communication facilities to the public at large as statutory obligation provided under the Indian Telegraph Act, 1885. The department is also responsible for maintaining the communication system by providing telephone connections and other modes of communication to its subscribers. It is averred that for the purpose of providing tele communication system and telephone connections, petitioner is required to set up infrastructure such as telephone building, telephone exchanges etc. at different places in various districts. In order to maintain the quality in the construction work, the material required in execution of the construction work for Tele Communication purpose, is normally purchased and supplied by the department to the contractors. As per the terms and conditions of the contract, the cement and steel for the purpose of construction of telephone exchanges and its maintenance are supplied by the petitioners. As per the terms and conditions of the Notice Inviting Tender, the cement/steel remains in the custody of Junior Engineer/Site Incharge of the petitioner, who gives the same to the contractor for the purposes of using it and further for the said purpose, a register is maintained at the site and in the said register, the representative of the contractor shows the receipt and issue of the cement/steel as and when the same is delivered and used by him after every transaction. Thus, according to the petitioners, the material supplied to the contractor is a property belonging to the Union of India and it is immune from levy of tax at the hands of the State. Government in view of Article 285 of the Constitution of India.

4. The State Government has sought to explain the definition of "dealer" u/s 2(14) of the Act by adding the Explanation which provides inclusion of the Central Government. Thus, by adding the Explanation-II by a legal fiction, the Central Government and its departments have been treated as a "dealer" for the purpose of the Act. Similarly, the expanded meaning of "sale" u/s 2(38) (ii) has been given to include the transfer of property in goods involved in execution of the work contract.

5. We have heard Mr. J.P. Joshi, Mr. J.L. Purohit and Mr. Vineet Mathur Additional Central Government Standing counsel appearing for the petitioners and M. Sagar Mal Mehta, learned Advocate General assisted by Mr. Sanjeev Johari.

6. It is submitted that the ownership of the goods supplied by the petitioner departments of the Central Government for execution of its own work, is not transferred to the contractors. Thus, the incidence of "sale" never takes place

and the property remains the property of the Union. Article 285 of the Constitution of India completely prohibits the levy of a tax by the State on the property of the Union. Thus, the State legislature is not competent to enact provision in violation of the provisions of Article 285.

7. On the other hand, it is submitted by the learned Advocate General that the State legislature has levied tax on transaction of "sale" and not on the property of Union of India, as such, Article 285 is not attracted. Elaborating the contention, it is submitted that the activities and functioning of the petitioner departments in supplying the goods on price consideration so as to make it deductible ultimately from the final bills, amounts to sale transactions and, therefore, the department falls within the definition of "dealer". It is also submitted that what is exempted under Article 285 of the Constitution of India is the direct tax on the property of the Union of India and not an indirect tax. The learned Advocate General has heavily placed reliance on a decision of the Apex Court in *In re Sea Customs Case* reported in AIR 1963 SC 1760 advice tendered by nine Hon'ble Judges on a reference made under Article 143 of the Constitution of India, wherein it is held that indirect tax is not barred by Article 285 of the Constitution of India. The said view has been followed by a nine judges bench of the Hon'ble Supreme Court in *New Delhi Municipal Council v. State of Punjab* (2). The learned Advocate General has also invited our attention to a decision of the learned Single Judge of this Court in *Karyapalak Engineers v. Rajasthan Tax Board* (3), wherein same controversy on same facts has been decided against the Union of India. It is held therein that in a case of rate contract including the cost of material where material supplied by the contractor the cost of material is adjusted in the final bill against the amount payable to the contractor, the transaction constitutes "sale" and is chargeable under the Rajasthan Sales Tax Act. It is not hit by Article 285 as the Immunity of the Union of India from State tax does not extend to impost of indirect tax like sales tax. It is further held therein that the immunity is restricted to tax imposed on the property directly. In rejoinder, it is submitted by Mr. J.P. Joshi that the decision of the Hon'ble Supreme Court in *Re Sea Customs Case* has been rendered in the context of Article 289 and not 285 of the Constitution of India and, as such, the said decision does not provide clue to controversy pertaining to Article 285. It is further submitted that the decision of the Apex Court in the subsequent case i.e. *In the case of Delhi Municipal Council* has clearly held that Article 289 does not grant an absolute immunity like the one envisaged in Article 285 of the Constitution. He has submitted that as per the terms of the contract, even on passing on the material to the Contractor, the ownership remains with the Government, as such, there is no sale. Learned counsel has heavily placed reliance on a decision in *State of Punjab v. Union of India* (4).

8. Thus, the crucial question which arises for consideration is as to whether the Union of India can be subjected to sales tax under the Act of 1994. It appears that with a view to treat the Government of India as a "dealer", the meaning of the word "person" in Section 2(14) of the Act of 1994 has been explained by

adding Explanation-II which reads as follows :

"2. Definitions.- In this Act, unless the subject or context otherwise requires, -

(14) "dealer" means any person, who carries on business in any capacity, of buying, selling, supplying or distributing goods directly or otherwise, or making purchases or sales as defined in Clause (38) of himself or others, whether for cash or deferred payment, or for commission, remuneration or other valuable consideration;

Explanation I.-Every person who conducts any business activity of buying, selling, supplying or distributing goods, as an agent of a non-resident dealer shall be deemed to be dealer for the purpose of this Act;

Explanation II.-The Central or any State Government or any of their departments or offices which, whether or not in the course of business, buy, sell, supply or distribute goods directly or otherwise, whether for cash or deferred payment, or for commission, remuneration or other valuable consideration shall be deemed to be a dealer for the purpose of this Act;

Explanation III.-A person, who sells agricultural or horticultural produce, grown by himself or grown on any land in which he has an interest as owner or tenant as defined in the Rajasthan Tenancy Act, 1955 (State Act 3 of 1955) shall not be deemed to be a dealer within the meaning of this clause."

9. The Explanation-II creates a legal fiction and enlarges the concept of dealer as defined in main Clause (14) of Section 2. On a plain reading of Explanation-II added to Section 2(14), it emerges that every sale or purchase of goods as defined in the Act by a department of the Government whether in the cause of business or not, shall attract a tax under the Act.

10. Similarly, the definition of "sale" u/s 2(38)(ii) of the Act of 1994 has been expanded to mean and include the transfer of property in goods (whether as goods or some other form) involved in execution of the work contracts, which reads as follows:

"2 (38)(ii) a transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract.

11. Thus, the inclusion of words "transfer of property in goods involved in the execution of the works contract" has expanded the definition of "sale". In other words, the State legislature by legal fiction has included the property used in the works contract within the definition of "sale", irrespective of the fact that whether the transfer of property in goods by one person to another takes place.

12. The challenge to the Explanation-II added to Section 2 (14) and the definition of "sale" "under Section 2(38) of the Act of 1994 is mainly on the ground that the Government of India is immune from levy of tax in view of Article 285 of the Constitution of India. As far as the Constitution of India is concerned, the difference between when the Government of India can tax and to

what extent, the State Government may tax, has been clearly provided in Article 285 of the Constitution of India, which is extracted as follows :

"285. (1) The property of the Union shall, save in so far as Parliament may by law otherwise provide, be exempt from all taxes imposed by a State or by any authority within a State.

(2) Nothing in Clause (1) shall, until Parliament by law otherwise provides, prevent any authority within a State from levying any tax on any property of the Union to which such property was immediately before the commencement of this Constitution liable or treated as liable, so long as that tax continues to be levied in that State."

13. Thus, the Article 285 of the Constitution sets out that the property of the Union is immune from taxation. The Government of India enjoys immunity from taxation. The use of the word "property" is significant, as it provides clue as to whether it also includes levy of indirect tax.

14. In so far as the States within the Union are concerned i.e. the State Governments, the liability to tax the property of the State by the Union is referred to in Article 289 of the Constitution, which runs as under :

"289 (1) The property and income of a State shall be exempt from Union taxation.

(2) Nothing in Clause (1) shall prevent the Union from imposing, or authorising the imposition of, any tax to such extent, if any, as Parliament may by law provide in respect of a trade or business of any kind carried on by, or on behalf of, the Government of a State, or any operations connected therewith, or any property used or occupied for the purposes of such trade or business, or any income accruing or arising in connection therewith.

(3) Nothing in Clause (2) shall apply to any trade or business, or to any class of trade or business, which Parliament may by law declare to be incidental to the ordinary functions of Government."

15. It is evident that Articles 285 and 289 provide for the immunity of the property of the Union and the State from mutual taxation. While Article 285 provides that property of the Union shall be exempted from the State or local taxation, Article 289 declares that the property and income of a State, shall be immune from Union taxation, excepting commercial undertakings carried on by the State, unless such undertakings are declared by Parliament to be incidental to the ordinary functions of Government. The scope and extent of immunity of the States from tax by the Union and Union from tax by the States has been the subject matter of interpretation by the Hon"ble Supreme Court in number of decisions. The first in the line is In Re Sea Customs Case (supra), which was an advice tendered by the Bench of nine Hon"ble Judges on a reference under Article 143 of the Constitution of India to the Supreme Court by His Excellency the President of India seeking advice on the authority of the Parliament in

amending Section 20 of the Sea Customs Act, 1878. This related to imposition of tax on activity of import and export outside India, which was an indirect tax imposed by the Union of India and related to trading activity of import-export business primarily and selling confiscated goods by the States, was merely incidental to the main nature of levy. The Apex Court on construction of the provisions of Articles 285 and 289 of the Constitution, opined as under:

"We are therefore of opinion reading Article 289 and its complementary Article 285 together that the intention of the Constitution makers was that Article 285 would exempt all property of the Union from all taxes on property levied by a State or by any authority within the State while Act 289 contemplates that all property of the States would be exempt from all taxes on property which may be leviable by the Union. Both the Articles in our opinion are concerned with taxes directly either on income or on property and not with taxes which may indirectly affect income or property. The contention therefore on behalf of the Union that these two Articles should be read in the restricted sense of exempting the property or income of a State in one case and the property of the Union in the other from taxes directly either on property or on income as the case may be, is correct."

16. Thus, the Supreme Court has clearly laid down that the immunity under Article 285 of the Constitution is in regard to direct tax on property held by the Union of India. It does not impose any bar on State legislature from levying a tax on the transactions or the activities relating to the property of the goods i.e. on movement of the goods or the transaction. However, it is submitted by Mr. J.P. Joshi, learned counsel for the petitioners that in Sea Customs Case, the Apex Court only rendered opinion under Article 143 and it can not be considered as law declared by the Supreme Court. In this context, we may simply refer to another decision of the Apex Court rendered by a Bench of nine Hon'ble Judges in New Delhi Municipal Council v. State of Punjab (supra). In para 153, the Court found the decision in Sea Customs Case as a binding decision as follows :

"The decision in Sea Customs Act, Re has been rendered by a Bench of nine learned Judges. The decision of the majority is binding upon us and we see no reason to take a different view."

17. In Delhi Municipal Council's case, the Apex Court has analyzed the expression "property" used in different senses in Articles 285 and 289 of the Constitution of India. Article 285 exempts the property of the Union from all taxes imposed by the State, which are directly imposed on the property and not otherwise and likewise, the property as well as the income of the State is exempt from incidence of imposition of all taxes, which is on the property or the income levied by the Union.

18. Mr. Sagar Mal Mehta, learned Advocate General, has also placed reliance on another decision of the Apex Court in N.M. Goel & Co. v. Sales Tax Officer (5). In the said case, the appellant before the Supreme Court, a building contractor,

agreed to construct foodgrain godown and ancillary buildings for the Central Public Works Department. The contract was an item rate tender. The prices of the material to be used for construction included the cost of iron, steel and cement. The C.P.W.D. agreed to supply from its stores the iron, steel and cement for construction work and to deduct the price of material so supplied and consumed in construction from the final bill of the appellant. A plea was raised to the effect that there being no transfer of property in the goods, which can be supplied by the department to be used in execution of work and all materials so supplied were to remain absolute property of the Government and, therefore, the supply of the goods did not amount to sale within the meaning of M.P. General Sales Tax Act. The Court rejected the plea and held that though in transaction of this type, there is no inherent sale, a sale inheres from the transaction. The court concluded as follows :

"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 PWD. 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."

19. A similar view has been taken by the Apex Court in *Cooch Behar Contractors' Association v. State of Bengal* (6). In the said case, the appellant before the Supreme Court, the contractors Association raised the contention that value of the stores and the material supplied by the contractee to the contractor for the specific purpose of use in execution of works contract, should not be included in the "contractual transfer price." According to the learned counsel, in such a case, there was no transfer of property in the goods inasmuch as the property remained with the contractee. The Apex Court relying on its earlier decision in *N.M. Goel & Co.'s case* (supra) held that such supplies fell within the definition of "sale".

20. Recently, the Supreme Court has taken the same view in *R.I. Nigam v. State of Andhra Pradesh* (7). In that case, R.I. Nigam, a Govt. Undertaking was entrusted the work relating to the construction of its administrative building and erection plan. One of the conditions of the contract with the contractor was that the appellant Company would supply cement, steel and A.C. sheets from its stores and deduct the price thereof from the bills of the contract on actual cost basis. The Apex Court found the case squarely covered by its earlier decision in *N.M. Goel's case* (supra).

21. In *Collector of Customs v. State of West Bengal* (8), the Apex Court held that the Collector of Customs is a "dealer" within the meaning of the definition of that word in the Bengal Finance (Sales Tax) Act, 1941. The Court held that Article 285 of the Constitution envisages immunity of property of the Union of India from direct taxes levied by the States and not from indirect taxes such as sales tax. The decision of the Apex Court in *Collector of Customs case* (supra) is though short one but it is significant as it expands the status of all its earlier cases. It is

considered appropriate to read para Nos. 2 to 5 of the judgment as follows :

"2. 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.

3. Reliance in this behalf is placed on the judgment of two learned judges of this court in *State of Punjab v. Union of India* 1990 (79) STC 437. 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.

4. It would appear that no real arguments were advanced before this Court by the appellant-State and the judgment of this Court in *re Sea Customs Act, 1878 In Re: The Bill To Amend S. 20 of The Sea Customs Act, 1878 and S. 3 of The Central Excises and Salt Act, 1944*, was not pointed out. In *Sea Customs Act* case a 9 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 sale tax is a tax directly on the goods for in that event they will really become the same tax."

5. The decision in the *Sea Customs Act* case *In Re: The Bill To Amend S. 20 of The Sea Customs Act, 1878 and S. 3 of The Central Excises and Salt Act, 1944*, was considered by another 90 Judge Bench in the case of *New Delhi Municipal Committee Vs. State of Punjab, etc. etc.*, and was affirmed."

22. From a reading of the judgments, it emerges that-

(i) In *Sea Customs Case*, 9-Judge Bench has opined that Article 285 envisages immunity from direct tax and not from indirect tax such as sales tax;

The decision in the *Sea Customs Case* was considered by another 9-Judge Bench in the case of *New Delhi Municipal Committee v. State of Punjab (supra)*, and was affirmed. The Court did not approve the judgment of the two learned Judges in *State of Punjab v. Union of India (supra)*, as the decision of the *Sea Customs Case* was not pointed out.

23. Learned counsel has further placed reliance on a decision of the Apex Court

in Union of India v. Purna Municipal Council (8). The said case was decided in the light of the special provisions made u/s 35 of the Indian Railways Act providing for the contingency under which Railways shall be subjected to local tax imposed by the local authorities. The Railways act itself was not the law made by the State for imposition of local taxes but was a Central Act and only envisaged levy of local taxes as may be so notified. This, this case has no application to the facts of the instant case.

24. Thus, it is seen that what is exempt u/s 285(1) is the property of the Union from imposition of tax. The expression "property" has been used perfectly in the general sense and would include land, building, chattels, shares, debts etc. The provision is concerned with the tax either on income or property but not the tax which may indirectly affect income or property, thus, in our opinion, the Explanation-II added to definition of "dealer" u/s 2(14) is not hit by Article 285 of the Constitution. Accordingly, we upheld the constitutional validity of Explanation-II added to Section 2(14) of the Act of 1994.

25. The petitioner has also challenged the expansion of definition of "sale" by including the words "transfer of property in goods involved in works contract" as given u/s 2 (38) (ii) of the Act of 1994 on the ground that it is beyond the legislative competence of the State Government. It is submitted that the State legislature by legal fiction can not change artificially the definition of "sale" as given in Sub-section (38) of Section (2) by further including such transfers i.e. property in goods involved in execution of the works contract. The contention deserves to be rejected by just reference to amendment of Article 366 of the Constitution of India inserting Sub-article 29-A which reads as follows :

"(29-A) "tax on the sale or purchase of goods" includes-

- (a) a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;
- (b) a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;
- (c) a tax on the delivery of goods on hire-purchase or any system of payment of instalments;
- (d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;
- (e) a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;
- (f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or

service, is for cash, deferred payment or other valuable consideration, and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made."

26. Thus, it is clear that the tax can be levied on transfer of goods involved in the works contract.

27. The controversy involved in the instant case pertains to imposition of tax on the transaction by passing on goods from the petitioner, may it be the Military Engineering Services or the Bharat Sanchar Nigam to the contractors on the value consideration deducted ultimately from the final bills, which amounts to "sale" within the meaning of R.S.T. Act, 1994; Undisputedly, the goods are supplied by the department and the price is deducted later on from the final bills. The same amounts to "sale" attracting imposition of sales tax. The transaction between the department and the contractor is a sale and hence eligible to sales tax within the provisions of law prevailing in Rajasthan i.e. RST Act, 1994. The transaction reveals that ownership passes-on to the contractor and that is the reason that the prices are deducted from their final bills. It may also be noticed that the goods are supplied to the contractor on price consideration. In view of this, the ownership of the same does not remain with the departments any more.

28. Consequently, we find no merit in all these petitions and the same are dismissed. The interim order granted, is vacated.