
(1989) 09 PAT CK 0022

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No's. 862 and 1015 of 1989 (R)

General Electric Technical Service Company and Another

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 27-09-1989

Acts Referred:

Bihar Finance Act, 1981 — Section 14, 21(1)

Bihar Sales Tax Rules, 1983 — Rule 13A

Constitution of India, 1950 — Article 226, 227, 286, 366, 366(29A)

Citation : (1990) 76 STC 134

Hon'ble Judges : S.B. Sinha, J;B.P. Singh, J

Bench : Division Bench

Advocate : Devi Pal, K. Bahadur, D.K. Sarkar and Ajit Kumar Sinha, for the Appellant; Government Pleader (I) and N. Roy, Government Pleader (III), for the Respondent

Final Decision : Allowed

Judgement

B.P. Singh and S.B. Sinha, JJ.—These two writ applications involving common questions of law were, with the consent of the parties, heard together and are being disposed of at this stage. The petitioners in both the writ applications have mainly challenged annexures 1 and 2, both dated 7th March, 1989, whereby the Deputy Commissioner of Commercial Taxes, respondent No. 3 has directed the Damodar Valley Corporation respondent No. 4, to make payment of sales tax at 4 per cent on the entire contract value, since the contract between the petitioner, the General Electric Company and the Damodar Valley Corporation being indivisible contract on turnkey basis, it was not possible to divide it into two, one for material supply and other for contract work. Accordingly, the petitioner in C.W.J.C. No. 862 of 1989(R) has been directed to apply for registration u/s 14 of the Bihar Finance Act, 1981. The petitioner in C.W.J.C. No. 1015 of 1989(R) is further aggrieved by the deduction made from its bills on the above basis, even in respect of goods supplied by the General Electric Company to the Damodar Valley Corporation in the U.S.A. against dollar payment.

2. The facts of these cases lie in a very narrow compass.

3. General Electric Company, the petitioner in C.W.J.C. No. 862 of 1989(R) entered into a contract on 7th April, 1987, with the Damodar Valley Corporation (hereinafter referred to as "the DVC" for short), a Corporation formed and incorporated under the provisions of the Damodar Valley Corporation Act, for supply, erection and commissioning of three gas turbine plants, including design, manufacturing, delivery, civil work, erection, along with all auxiliaries on a complete turnkey basis at its Maithon site.

4. The said agreement is contained in annexure 3 to the writ application. Clause 5 of the said contract deals with the scope of the work, whereas Clause 17 deals with the local portion of the contract work, that is the work which is to be performed in India to be carried out on assignment by the General Electric Technical Service Company (the petitioner in C.W.J.C. No. 1015 of 1989(R) (hereinafter referred to as "the GETSCO").

5. According to the petitioner on 3rd June, 1987, an Import Trade Control Licence was granted by the Government of India in the name of Damodar Valley Corporation as it appears from annexure 7 to the C.W.J.C. No. 862 of 1989(R).

6. On 19th June, 1987, an irrevocable letter of credit was opened by the DVC in favour of the petitioner through the State Bank of India, D.T.S.B. New York, U.S.A., for payment in U.S.A. in dollars for contract price with regard to the price of U.S. equipments and charges for service, etc., procured from U.S.A. This fact appears from annexure 6 to the writ application.

7. On 4th August, 1987, General Electric Company entered into an agreement with the GETSCO whereby it assigned the work to be performed in India to the GETSCO. The said assignment agreement expressly provides that the payments were to be received by the GETSCO directly from the DVC against invoices issued by it.

In the said assignment agreement it was further made clear that the General Electric Company desires to retain only that portion of the contract price pertaining to the supply of equipment f.o.b. port of export U.S.A. and training of the DVC's personnel in U.S.A.

8. According to the petitioners from the aforementioned assignment agreement it would further appear that for selling and/or supplying the plant and machinery, the payments were to be made by the DVC in U.S. dollars in U.S.A. where the property in the goods passed.

9. According to the petitioners in between February and April, 1988, General Electric Company delivered to the DVC all the plants and machinery in U.S.A. on f.o.b. basis appertaining to the aforementioned contract and received payment in U.S. dollars in U.S.A. On 10th May, 1988, however, respondent No. 3 directed the DVC to deduct from the gross amount of the bills paid to the petitioner the tax in terms of Section 25A of the Bihar Finance Act, 1981. By a letter dated 29th June,

1988, General Electric Company informed the respondent No. 3 that in terms of Section 7 of the Bihar Finance Act, 1981 and also in terms of Article 286(1)(b) of the Constitution of India, the provisions of Section 25A of the Bihar Finance Act as amended by the Bihar Finance Act, 1984, will have no application in respect of the value of the goods supplied and sold outside India and/or in the course of import of goods into India. The said letter is contained in annexure 7 to C.W.J.C. No. 1015 of 1989(R).

10. According to the petitioner by a supplemental agreement being amendment No. 2 to the contract agreement dated 7th April, 1987, the DVC agreed to make payment relating to civil work, unloading, storage, erection, testing and commissioning, and supervision of operation and maintenance of the gas turbine plant for 12 months in U.S. dollars to the GETSCO. This letter dated 15th July, 1988, is contained in annexure 5 to both the writ applications.

11. On 19th July, 1988, respondent No. 3 informed the DVC that he forwarded the contract documents to the Commissioner, Commercial Taxes for clarification with a request not to deduct any amount for two months. This letter dated 19th July, 1988, is contained in annexure 12 to C.W.J.C. No. 1015 of 1989(R).

12. By virtue of a letter dated 9th December, 1988, the respondent No. 3 directed General Electric Company to produce the contract deed, invoices, copy of import and export papers.

According to the petitioner, General Electric Company appeared before respondent No. 3 when he partially perused the papers and adjourned the matters to 20th January, 1989. The hearing of the case was again adjourned to 7th February, 1989. On 7th February, 1989, the matter was heard again.

13. On 26th February, 1989, General Electric Company requested respondent No. 3 to cancel and/or withdraw the notice dated 9th December, 1988, which is contained in annexure 12 to C.W.J.C. No. 862 of 1989(R).

14. On 7th March, 1989, respondent No. 3 directed General Electric Company to apply for registration u/s 14 of the Bihar Finance Act, 1981, within thirty days from the date of issue of the said letter, as contained in annexure 2 to both the writ applications.

15. By a letter dated 7th March, 1989, the respondent No. 3 requested the DVC to make payment of sales tax at 4 per cent on the amount paid to General Electric Company by 20th March, 1989. This letter is contained in annexure 1 to the C.W.J.C. No. 1015 of 1989(R).

16. On 3rd April, 1989, General Electric Company received a letter from respondent No. 4 wherefrom it appears that a sum of Rs. 2,14,555 had been deducted from the invoice by way of recovery of Bihar sales tax which was not deducted earlier.

According to the GETSCO on 10th June, 1987, a registration was granted to it

with effect from 11th June, 1987, and as the said invoice was exempted from the levy of Bihar sales tax respondent No. 4 was requested to refund the said amount.

17. It further appears that the GETSCO by a letter dated 6th April, 1989, addressed to the Senior Accounts Officer of the DVC objected to the said illegal action on the part of respondent No. 4. A similar letter was issued by General Electric Company to the DVC on 6th April, 1989.

18. In both these writ applications a counter-affidavit has been filed on behalf of respondent No. 3. According to respondent No. 3 after receiving the objections filed by the petitioner, legal opinion was sought from the department and on the basis of instructions received by respondent No. 3 he sent notice to the petitioner on 9th December, 1988. According to the said respondent both these companies are liable to pay sales tax at the rate of 4 per cent. It has further been asserted that the total estimated cost of the works to be executed was more than Rs. 2,92,00,000. The respondents have further submitted that the transfer of ownership in goods did not pass in favour of the DVC in U.S.A., rather the ownership of the machinery would be transferred at the works site at Maithon in India after it started commercial production.

19. In the counter-affidavit filed on behalf of respondent No. 3 in C.W.J.C. No. 1015 of 1989(R) various clauses of the said contract have also been reiterated.

20. Dr. Debi Pal, the learned counsel appearing on behalf of the petitioners in both these writ applications, submitted that there cannot be any doubt whatsoever that from a perusal of the aforesaid contract dated 7th April, 1987 (annexure 3), the agreement dated 4th August, 1987 (annexure 4), and the supplemental agreement dated 15th July, 1988 (annexure 5) to the writ application, that so far as the plant, machinery and equipment are concerned they were supplied and paid for in U.S.A. and as such the provisions of the Bihar Finance Act are not applicable in the instant case.

21. As noticed hereinbefore, the parties entered into a contract for installation of 3 X 30MW gas turbine plants along with all auxiliaries on a complete turnkey basis at Maithon site in the district of Dhanbad.

22. From the counter-affidavit filed on behalf of the respondent it appears that the case of the respondent is/was that the contract is in two parts, whereas, inter alia, the equipments were to be supplied by General Electric Company, a part of the job, that is the installation thereof, commissioning, etc., was to be done by the GETSCO at Maithon.

23. In terms of Bihar Finance Act, 1981, as amended by the Bihar Finance Act, 1984, there is absolutely no doubt that General Electric Company would be liable to make payment of sales tax on goods supplied, if any, in the execution of the works contract with effect from 1st August, 1984. However, it is also clear that the sales tax payable in respect of the aforesaid contract would be in relation to

only that part of the contract whereby and whereunder goods are supplied to the DVC in any form whatsoever in terms of Clause (29A) of Article 366 of the Constitution of India. Such a sale, it is needless to point out will be subject to Article 286 of the Constitution of India.

24. In law, tax is levied on the supply/transfer of goods and not on the entire value of the project, in view of the definition of the "goods", as contained in Article 366(12) read with Section 2(h) of the Bihar Finance Act, 1981. Thus, the tax on sale of the goods in terms of Clause (29A) of Article 366 of the Constitution read with entry 64 of List II of the Seventh Schedule to the Constitution of India must also be confined only to the goods actually supplied in any form in execution of the works contract, and not in respect of the value of the entire contract.

25. It is also clear that in terms of Clause (29A) of Article 366 of the Constitution of India, supply of such goods in execution of a works contract, which was not treated to be sale is now considered to be "deemed sale" in terms of the said provisions of the Constitution. Such a deeming clause must be given its full play and effect and would be subject to the provisions contained in Article 286 of the Constitution as also other conditions, if any, laid down under the Bihar Finance Act, 1981, as well as the Central Sales Tax Act, 1956.

26. This is evident from the decision of the Supreme Court in Builders Association of India v. Union of India reported in [1989] 73 STC 370 : 1989 BLT 151. In the aforementioned case the Supreme Court has held as follows :

"After the 46th Amendment the works contract which was an indivisible one is by a legal fiction altered into a contract which is divisible into one for sale of goods and the other for supply of labour and services. After the 46th Amendment, it has become possible for the States to levy sales tax on the value of goods involved in a works contract in the same way in which the sales tax was leviable on the price of the goods and materials supplied in a building contract which had been entered into in two distinct and separate parts as stated above. It could not have been the contention of the Revenue prior to the 46th Amendment that when the goods and materials had been supplied under a distinct and separate contract by the contractor for the purpose of construction of a building the assessment of sales tax could be made ignoring the restrictions and conditions incorporated in Article 286 of the Constitution. If that was the position can the States contend after the 46th Amendment under which by a legal fiction the transfer of property in goods involved in a works contract was made liable to payment of sales tax that they are not governed by Article 286 while levying sales tax on sale of goods involved in a works contract ? They cannot do so. When the law creates a legal fiction such fiction should be carried to its logical end. There should not be any hesitation in giving full effect to it. If the power to tax a sale in an ordinary sense is subject to certain conditions and restrictions imposed by the Constitution, the power to tax a transaction which is deemed to be a sale under Article 366(29A) of the Constitution should also be subject to the

same restrictions and conditions."

Proceeding further the Supreme Court observed that after the Constitution (Forty-sixth Amendment) Act, it is not possible to accede to the plea of the State that transfer in works contract is the right in immovable property.

27. The Supreme Court, after taking into consideration the provisions of the Constitution laid down the law in the following terms :

"We are surprised at the attitude of the States which have put forward the plea that, on the passing of the 46th Amendment the Constitution had conferred on the States a larger freedom than what they had before in regard to their power to levy sales tax under entry 54 of the State List. The 46th Amendment does no more than making it possible for the States to levy sales tax on the price of goods and materials used in works contracts as if there was a sale of such goods and materials. We do not accept the argument that Sub-clause (b) of Article 366(29A) should be read as being equivalent to a separate entry in List II of the Seventh Schedule to the Constitution enabling the States to levy tax on sales and purchases independent of entry 54 thereof. As the Constitution exists today the power of the States to levy taxes on sales and purchases of goods including the "deemed" sales and purchases of goods under Clause (29A) of Article 366 is to be found only in entry 64 and not outside it. We may recapitulate here the observations of the Constitution Bench in the case of *The Bengal Immunity Company Limited Vs. The State of Bihar and Others*, in which this Court has held that the operative provisions of the several parts of Article 286 which imposes restrictions on the levy of sales tax by the States are intended to deal with different topics, and one could not be projected or read into another and each one of them has to be obeyed while any sale or purchase is taxed under entry 54 of the State List.

We, therefore, declare that sales tax laws passed by the Legislatures of States levying taxes on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract are subject to the restrictions and conditions mentioned in each clause or sub-clause of Article 286 of the Constitution. We, however, make it clear that the cases argued before and considered by us related to one specie of the generic concept of "works contracts". The case-book is full of the illustrations of the infinite variety of the manifestation of "works contracts". Whatever might be the situational differences of individual cases, the constitutional limitations on the taxing-power of the State as are applicable to "works contracts" represented by "building contracts" in the context of the expanded concept of "tax on the sale or purchase of goods" as constitutionally defined under Article 366(29A), would equally apply to other species of "works contracts" with the requisite situational modifications."

28. In view of the aforementioned authoritative pronouncement of the Supreme Court, there cannot be any doubt that the impugned orders are not in accordance with law.

29. It may further be mentioned that a Division Bench of this Court in *Jamshedpur Contractors' Association v. State of Bihar* being C.W.J.C. No. 1034 of 1988 reported in [1989] 75 STC 132 and another analogous cases held that Rule 13-A of the Bihar Sales Tax Rules is ultra vires the Constitution of India.

A Bench of this Court *Ashok Kumar Ghosh v. Union of India* [page 57 supra] has held that Section 21(1)(a)(i) of the Bihar Finance Act is also ultra vires the Constitution of India. By reason of the aforementioned decisions it has been held that no sales tax is leviable with regard to the element of labour in execution of the works contract.

30. Further from a perusal of the impugned orders it does not appear that respondent No. 3 has assigned sufficient or cogent reasons in support thereof.

31. It is well-known that necessity to assign reasons while passing a quasi-judicial order is an extended limb of the principles of natural justice and the same is required in order to enable the appellate court or this Court in exercise of its jurisdiction under Articles 226 and 227 of the Constitution of India to appreciate the orders impugned before it in their true perspective.

32. It is also well-known that a statutory authority while exercising its statutory power cannot supplement reasons which have not been assigned in the orders, by way of an affidavit.

33. In the result, the impugned orders, as contained in annexures 1 and 2 to the writ applications are hereby set aside and respondent No. 3 is hereby directed to apply its mind again keeping in view the principles of law as enunciated by the Supreme Court in *Builders Association's case* [1989] 73 STC 370 : 1989 BLT 151 and the observations made hereinbefore. However, in the facts and circumstances of the case, there will be no order as to costs.