(2015) 02 RAJ CK 0029

In the Rajasthan High Court

Case No : Civil Special Appeal (Writ) No. 175/2002 in Civil Writ Petition No. 2453/2000, Civil Special Appeal (Writ) No. 117/2002 in . Review Petition No. 10/2000 in . Sales Tax Revision No. 905/2000, Civil Special Appeal No. 118/2002 in . R

Indian Hume Pipe Co. Ltd. and Others — APPELLANT

Vs

State of Rajasthan and Others — RESPONDENT

Date of Decision : 13-02-2015

Acts Referred:

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

Citation : (2015) 02 RAJ CK 0029

Hon'ble Judges : Sunil Ambwani, Acting C.J.;Veerender Singh Siradhana, J.

Bench : Division Bench

Advocate : Sudhir Gupta, Senior Counsel assisted by Vivek Singhal, Ashok Gaur, Senior Counsel assisted by Sachin Mehta, for the Appellant; R.B. Mathur, Nikhil Simlote and Tanvi Sahai, Advocates for the Respondent

Judgement

Sunil Ambwani, Actg. C.J.—D.B. Civil Writ Petition No. 4513/2004, relating to the proceedings of Assessment Years 1989 to 1994, arises out of the order passed by learned Single Judge, dated 24.04.2002, by which directions were issued to list the writ petition along with Special Appeals, arising out of the judgment dated 25.02.2002, passed in S.B. Civil Writ Petition No. 724/2002 and six other connected writ petitions, as the issues raised in the writ petition were decided by judgment dated 25.02.2002, are common with the issues raised in said Special Appeals. The matter was earlier pending before the Rajasthan Taxation Tribunal, and after its abolition, was transferred to this Court. D.B. Civil Special Appeal(W) Nos. 177/2002, 179/2002, 174/2002, 175/2002, 176/2002, 178/2002 and 173/2002, arises out of the proceedings of Assessment Years 1990-91, 1994-95, 1995-96, 1996-97, 1997-98, 1998-99 and 1999-2000, and are directed against the order dated 25.02.2002, passed in S.B. Civil Writ Petition No. 724/2002 and six other connected writ petitions. D.B. Civil Special Appeal Nos. 117/2002, 120/2002 and 118/2002, arising out of the proceedings of Assessment Years

1989-90, 1990-91 and 1991-92, against the order dated 24.02.2002, passed in S.B. Review Petition Nos. 14/2000, 10/2000 and 16/2000. D.B. Civil Special Appeal Nos. 6/2012 and 5/2012, arise out of the proceedings of Assessment Years 1992-93 and 1993-94, challengin the order dated 01.03.2012, in S.B. Civil Review Petition Nos. 12/2000 and 13/2000, passed in the light of the order dated 24.02.2002 by a coordinate Bench of this Court in S.B. Review Petition Nos. 14/2000, 10/2000 and 16/2000.

2. M/s. Indian Hume Pipe Co. Ltd. with its registered office at Construction House, Walchand and Hirachand Marg, Mumbai, is engaged in manufacturing and laying of pipelines for water supply schemes of various State Governments including the State of Rajasthan. It had also entered into contracts for execution of civil construction works including laying of pipelines for water supply.

3. The Public Health and Engineering Department (for short, ''the PHED''), Government of Rajasthan, invited tenders for providing and laying of pipes complete with suitable jointing material specials, valves and construction of valve chamber, anchor blocks table crossing including testing and commissioning of pipelines. The petitioner-Company had, under the contracts, agreed to provide PSC pipes manufactured by it and had entered into the contracts with the PHED, Government of Rajasthan for providing and laying of pipelines.

4. In D.B. Civil Writ Petition No. 4513/2004, the petitioner Company has challenged the order dated 24.05.1997, passed by the Deputy Commissioner(Appeals), Commercial Taxes, Ajmer, dismissing all the six appeals for the Assessment Years 1989-90, 1990-91, 1991-92, 1992-93 and 1993-94, upholding the orders passed by the Tax Assessing Authority, on the findings that the contract work executed by the appellant-Company, is a contract, which is divisible under work orders, annexed as Annexures A-2 and A-3, and on which imposition of tax and penalties was made under Section 7AA of the Rajasthan Sales Tax Act, 1954 (for short, ''the Act of 1954''), is in accordance with law. The Appellate Authority held that so far as the application for exemption by the assessee under Rule 10A is concerned, the Tax Assessing Authority had, by its order dated 26.09.1994, rejected the application in accordance with the provisions of the law, on the ground that the contract is a divisible contract, in which two types of work orders have been issued by the PHED. According to the Schedule Annexure A-1, the work of supply of pipes, and in Annexure A-2, the works for contract of civil work, are different contracts, in which the first part is concerned with the sale of pipes, on which tax has been imposed in accordance with the rates applicable to the pipes, and for which exemption certificate cannot be issued, as supply in such cases falls within the definition of ''sale''. The work performed by the appellant-Company was not an undivided work contract.

5. The petitioner-Company had prayed for grant of exemption certificate in respect of work orders dated 23.08.1988 and 10.08.1992, as per the application submitted by it, and for a direction to treat the contracts dated 23.08.1988 and 10.08.1992, as indivisible and composite works contract, which do not constitute

sale of goods.

6. A preliminary objection has been raised by learned counsel appearing for the Revenue, that the order passed by the Deputy Commissioner(Appeals), Commercial Taxes, Ajmer, dated 24.05.1997 under Section 84 of the Rajasthan Sales Tax Act, 1994 (for short, ''the Act of 1994''), is subjected to further appeal before the Rajasthan Tax Board, both, on merits and for rejection of the application for grant of exemption under Rule 10A and 10B of the Rules, made under the Act.

7. It is submitted by learned counsel appearing for the petitioner-Company that the subject contracts are composite/indivisible work contracts. The terms and conditions of the work orders and the agreements as also the nature of work undertaken, clearly establishes that the contract is not a divisible contract. The primary and dominant object of the contract awarded to the petitioner is, laying, jointing etc. of pipes and commissioning of pipelines etc. The work of manufacture and supply of pipes is merely incidental or ancillary thereto. The contract for commissioning of pipelines though involving manufacturing and supplying of pipes, can be completed only by carrying out extensive civil works such as laying, jointing, testing etc. involving substantial amount. The work basically involves laying of pipelines and after designing, excavation etc., the pipelines can be commissioned except for completing the work, as aforesaid. Under the agreement, a contract can be said to be fully executed only after maintaining the pipelines for a period of one year. The payment made by the PHED, is for the entire work contract and no price is paid for the pipes as such.

8. It is submitted that the petitioner-Company is engaged in similar business in the States of Orrisa, Uttar Pradesh and Maharashtra, in which the Tax Authorities have held interpreting the same contracts, to be indivisible. Reliance has been placed on the judgment given by the Orrisa High Court in the case of petitioner-Company.

9. Learned counsel appearing for the Revenue has relied upon the terms and conditions of the agreement, in which substantial part of the value of the contract pertains to the cost of PSC pipes, jointing material specials, valves etc., which were manufactured by the applicant-Company in their factory at Kekri and were supplied to the PHED. After 46 Constitution Amendment Act, 1982, whereby clause 29A was added to Article 366 of the Constitution of India, in the definition of sale, as given in Section 2(o) of the Act of 1954, which later became Section 2(38) of the Act of 1994, was amended and in sub-clause(2), a transfer of property in goods involved in the execution of a works contract, was included. Prior to the amendment, there was certain amount of uncertainty, which was set at rest following the Constitution Amendment Act of 1982. The tax on sale or purchase of goods now includes a tax on transfer of property in goods (whether as goods or in some other form), involved in the execution of a works contract. The Department has relied upon the judgments of the Hon''ble Supreme Court in Builders Association of India and Others Vs. Union of India (UOI) and

Others, , and Gannon Dunkerley and Co. and Others Vs. State of Rajasthan and Others, .

10. The Deputy Commissioner(Appeals), vide his order dated 24.05.1997, had affirmed the assessment orders with respect to the Assessment Years 1989-90, 1990-91, 1991-92, 1992-93 and 1993-94, and had also affirmed the finding in the Assessment Orders that the applicant was not entitled to grant of exemption certificate, and the finding that the contract was a divisible contract; one for supply of pipes etc. amounting to sale, and other for laying of pipes.

11. In Larsen and Toubro Limited and Another Vs. State of Karnataka and Another, , a three Judge Bench of the Hon?ble Supreme Court has held that the term ''works contract'' in Article 366(29A)(b) of the Constitution of India, is amply wide and cannot be confined to a particular understanding of term, or to a particular form. Once characteristics or elements of works contract are satisfied in a contract, then irrespective of additional obligations, such contract would be covered by term ''works contract''. The term ''works contract'' in Article 366(29A)(b), takes within its fold, all genre of works contract and is not restricted to one specie of contract to provide for labour and services. For sustaining levy of tax on goods, deemed to have been sold in execution of a works contract, three conditions must be fulfilled; (i) there must be a works contract, (ii) goods should have been involved in execution of a works contract, and (iii) property in those goods must be transferred to a third party, either as goods or in some other form. The building contracts are species of works contract. A contract may involve both, a contract of work and labour, and a contract for sale. A transfer of property in goods under clause 29A (b) of Article 366, is deemed to be a sale of goods involved in execution of a works contract by person making transfer and purchase of those goods to a person, to whom such transfer is made. A single and indivisible contract, now, by Forty-Sixth Amendment, has been brought on par with a contract containing two separate agreements and the States have now power to levy sales tax on value of material in execution of works contract. The transfer of movable property in a works contract is deemed to be sale, even though it may not be sale within the meaning of Sale of Goods Act. Taxing the element of sale of goods in a works contract under Article 366(29A)(b), read with Entry 54 List II, is permissible even after incorporation of goods, provided tax is directed to the value of goods and does not purport to tax transfer of immovable property. The value of goods which can constitute measure for levy of tax, has to be value of goods at the time of incorporation of goods in works even though property passes as between developer and flat purchaser after incorporation of goods. Distinguishing the opinion expressed in K. Raheja Development Corporation Vs. State of Karnataka, , it was observed that in that case the definition of ''works contract'' in Karnataka Sales Tax Act, was under consideration, which was inclusive and refers to building contracts and diverse construction activities for monetary consideration i.e. for cash, deferred payment or other valuable consideration as works contract. The activity of construction undertaken by developer would be works contract only from the stage the

developer enters into a contract with flat purchaser. The value addition made to goods transferred after agreement is entered into with flat purchaser can only be made chargeable to tax by the State Government. In May, 2005, almost all the States had modified their laws in line with Raheja Development and there is no justification for change in position settled after decision of the Supreme Court in Raheja Development. If at the time of construction and until construction was completed, there was no contract for construction of building with flat purchaser, goods used in construction could not be deemed to have been sold by builder since at that time there was no purchaser and that building was intended for sale ultimately after construction does not make any difference. Raheja Development''s case was held to lay down a correct legal position.

12. The Supreme Court further held in Larsen and Toubro Limited and Anr. (supra), that the value of the goods which can constitute the measure of the levy of the tax, has to be the value of the goods at the time of incorporation of goods in the works even though property in goods passes later. Taxing the sale of goods element in a works contract is permissible even after incorporation of goods, provided tax is directed to the value of goods at the time of incorporation and does not purport to tax the transfer of immovable property, (para 124).

13. The Supreme Court, referring to the circulars and the notifications issued by the Maharashtra Government, held that the circular is a trade circular, which is clarificatory in nature only. The notifications enabled the registered dealer to opt for a composition scheme. (para 125)

14. On the aforesaid declaration of law of the Hon''ble Supreme Court, and considering the reference made in Raheja Development''s case(supra), no interference is required to be made with the order of the Appellate Authority, dated 24.05.1997 under Section 84 of the Act of 1994. The Appellate Authority has, considering the entire case law on the subject, upheld the order passed by the Assessing Authority, that the works contract executed by the appellant-Company is a divisible contract, which is established by the work orders i.e. Annexures A-2 and A-3. The Assessing Authority had examined the work orders in holding that the works contract was divisible and had also rejected the application for exemption on the ground that the sale of prestressed cement concrete pipes falls within the definition of sale of goods under the Act.

15. The arguments raised by learned counsel appearing for the petitioner that this Court may interfere in this writ petition on a question of law, despite availability of alternative remedy of approaching the Rajasthan Tax Board, is not acceptable.

16. In view of the alternative remedy available to the petitioner-Company, we are not inclined to reconsider and review the findings, based upon the terms of the agreement read along with the work orders.

17. The Writ Petition No. 4513/2014 is thus dismissed on the ground of alternative remedy.

18. An interim order was passed by the Tribunal on 01.09.1998, restraining the respondents to initiate the proceedings for recovery, in pursuance to the impugned order dated 24.05.1997. The interim order was extended from time to time. On 24.04.2002, learned Single Judge was of the view that this matter was wrongly treated as revision petition. It was first pending before the Rajasthan Taxation Tribunal since 1997, having jurisdiction to entertain the petition directly in the nature of petition under Article 226 and 227 of the Constitution of India, and was then transferred to this Court on abolition of the Tribunal, and thus the question involved in this petition was pending in the Special Appeal, filed by the present petitioner for different contracts against the judgment dated 25.02.2002, passed in S.B. Civil Writ Petition No. 724/2002, and six other connected writ petitions. Learned Single Judge was not inclined to non-suit the petitioner to avail the alternative remedy against the order passed by the Deputy Commissioner(Appeals), Commercial Taxes Department, and therefore, the preliminary objection was not held sustainable. He further observed that the only question which remains to be considered, was whether the petitioner is entitled to exemption, which in fact is a scheme of composition of tax payable in respect of sale of goods, the property in which passes as a result of execution of work contract at the fixed rate, notified by the State Government in that regard under Rule 10-B of the Rules.

19. The issue, according to the petitioner, was decided against it by learned Single Judge of this Court in S.B. Civil Writ Petition No. 724/2002, and six other connected matters on 25.02.2002, in which it was held that the petitioner is not entitled to any exemption on the principle of strict construction of exemption. It was urged that the judgment dated 25.02.2002, does not decide the question of interpretation of exemption Notification, and the grant of exemption to the petitioner under Rule 10-B of the Rules.

20. Learned Single Judge ordered that the matter may be heard together with Special Appeals arising out of the judgment dated 25.02.2002, passed in S.B. Civil Writ Petition No. 724/2002, and six other connected writ petitions, and that this matter was wrongly treated as revision petition, and will be registered as a writ petition.

21. In all the connected matters, arising out of the assessment of tax liability without filing an appeal, the appellants/petitioners have challenged the orders on the ground that the works contract under the agreements dated 11.01.1989 and 23.07.1989, is an indivisible contract for the supply of pipes and for the supply of labour and services, and that the applicant-Company is not liable to pay tax at the rate of 12%, as charged on the cost of the pipes. It was only liable to pay tax @ 2% on the turn over of the works contract, which has already been deducted at source by the PHED.

22. Learned Single Judge held that while deciding issuing No. 1, the Tribunal had held the works contract in question to be divisible one, and thus, supply of pipes was nothing but the sale of pipes involved in the execution of works contract and

therefore, it was exigible to sales tax. There was no grievance raised by the appellant against this finding. Learned Single Judge observed that:- "The petitioner is having no grievance regarding this finding. However, while deciding Issue No. 2, the Tribunal has held that the assessee is liable to pay the tax at the rate of 12% and his liability is not confined to 2% of the turn over deducted at source. Against this finding also, the assessee is not aggrieved. However the contention of the learned counsel for the assessee is that tax liability in respect of transfer of property involved in the works contract is to be worked out in accordance with the provisions of S.2[38] read with r.25 of the Rules and, therefore, the impugned order dated 27.08.1998 passed by the Tribunal is required to be reviewed. However, before reviewing the aforesaid order, the Tribunal itself has been abolished and these review petitions stood transferred to this Court "

23. Learned Single Judge thereafter held that the impugned order passed by the Tribunal does not make any reference of the fact whether this question was raised before it or not. Learned counsel for the respondents brought to the notice of the Court that in computing the turn over, deduction has been allowed at the rate of 4% and not at the rate of 12% and, therefore, on the merits on the case, the said contention does not survive, and in that view of the matter, he was of the view that the impugned order does not require to be reviewed by the Court. The review petitions were consequently dismissed.

24. It is pertinent to notice that the Rajasthan Taxation Tribunal, constituted under the Rajasthan Taxation Tribunal Act, 1995, was constituted exercising powers under Article 226 and 227 of the Constitution of India. The Act was found to be constitutionally invalid, and was thus repealed by the State of Rajasthan by the Rajasthan Taxation Tribunal(Repeal) Act, 1999 (Act No. 5 of 1999), which came into force on 30.04.1999. Section 5 of the Repealed Act, provides that all matters and proceedings pending before the Tribunal on the date of commencement of this Act shall stand transferred to the High Court for disposal. The review petitions pending in the Tribunal were thus transferred to the High Court, and were decided and dismissed by order dated 24.04.2002.

25. In these appeals, namely D.B. Civil Special Appeal Nos. 117/2002, 120/2002 and 118/2002, arising out of the judgment on review petitions, passed by learned Single Judge, we do not find any good ground to interfere, as learned counsel for the appellant had admitted that he had no grievance against the finding that supply of pipes was nothing but the sale of pipes, involved in the execution of works contract and, therefore, it was exigible to sales tax.

26. D.B. Civil Special Appeal Nos. 117/2002, 120/2002 and 118/2002, arising out of the judgment of learned Single Judge, dated 24.04.2002, dismissing the review petitions, are thus dismissed.

27. D.B. Civil Special Appeal(Writ) No. 177/2002, 179/2002, 174/2002, 175/2002, 176/2002, 178/2002 and 173/2002, for Assessment Years 1990-91,

1994-95, 1995-96, 1996-97, 1997-98, 1998-99 and 1999-2000 respectively, arise out of the common judgment of learned Single Judge dated 25.02.2002, by which he has dismissed the writ petitions, arising out of the assessment orders and demand notices, on the ground that works contract which was the subject matter of the writ petitions, was divisible one consisting of two parts, namely one for the supply of material, and the other for the supply of labour and services. The first part of the works contract would be treated as a contract for sale. The assessment orders and demand notices were issued in accordance with law and the petitioner-Company is liable to pay sales tax on the price of the pipes supplied by it to the PHED in the course of execution of the works contract. It was further held that the Notification dated 29.03.2001, cannot be applied retrospectively and no relief can be granted to the petitioner on the basis of the said Notification in the matters.

28. Learned Single Judge had relied upon the Notification dated 29.03.2001, issued by the State of Rajasthan, whereby laying of pipeline with material was specifically and categorically categorised/terms as works contract, issued under Section 15 of the Act of 1994. It was clarificatory in nature and had retrospective effect. The petitioner-Company had filed an application under Section 40 of the Act of 1994 for grant of exemption in terms of the Notification in respect of the contract for laying of pipelines awarded to the petitioner by the PHED, Ajmer, vide work order dated 18.04.2001. The Additional Commissioner (Anti Evasion), Commercial Taxes Department, Jaipur, granted exemption to the petitioner, vide its order dated 19.07.2001, in terms of the Notification dated 29.03.2001. The Assessing Authority and the Appellate Authority, by their orders for the respective assessment years, treated the supply of pipes by the petitioner to the PHED, to be sale within the meaning of Section 2(o) of the Act of 1994.

29. Learned Single Judge held that substantial part i.e. 75% of the material supplied by the petitioner, constituted a sale within the meaning of Section 2(o) of the Act, on which the petitioner was liable to pay sales tax. If the petitioner had paid any works contract sales tax to the PHED, if and when any certificate from the Department is produced before the Sales Tax Department, the Assessing Authority was required to adjust that amount against the total amount of sales tax. The Assessing Authority as well as the Appellate Authority had applied their mind to the contents of the Notification dated 28.04.1993, and Rule 10(B) of the Sales Tax Rules and had rightly held that manufacturing and supply of PSC pipes, jointing material specials, valves anchor blocks etc., do not fall within the scope of buildings, bridges, dams, roads and canals. The agreement was clearly in two parts, namely sale and supply of PSC pipes, jointing material specials, valves anchor blocks etc., and the remaining part being supply of labour and services. The petitioner was thus under statutory obligation to pay sales tax on the materials sold to the Department. He had sold the items manufactured by him to the PHED and, therefore, he was required to pay the sales tax.

30. Learned Single Judge had noticed the legal effect of the 46th Constitution

Amendment Act, 1982, and the amended Section 2(38) of the Act of 1994, as a consequence of addition of clause 29A to Article 366 of the Constitution of India, by which a transfer of property in goods involved in the execution of a works contract, was included as sub-clause (2), in the definition of sale.

31. Learned Single Judge, thereafter, held that the exemption Notification having been issued on 29.03.2001, will apply only prospectively from the year 2001-2002 onwards. The petitioner had challenged the assessment for the year 1999-2000, and therefore, the Notification was not applicable to the dispute involved in the matter. The petitioner had not submitted counter part of the Form ST-18A, inviting penalty under Section 58 of the Act of 1994.

32. The petitioner is a registered dealer, and is required to pay sales tax, not exceeding 3% of the total value of the contract under Section 25(4) of the Act of 1994 and Rule 43(2) of the Rules, and further that deposit of tax or deduction of amount is provisional, subject to adjustment against the tax liability, determined in the assessment year under Section 29. The petitioner had set up a factory at Kekri and got itself registered as a dealer under the Central Sales Tax Act as well as the Rajasthan Sales Tax Act. It being a registered dealer, was entitled to purchase the goods/raw material for the purpose of production of the pipes in the factory and for the works contract, as per Section 10 of the Rajasthan Sales Tax Act, by availing the benefit of concessional rate of tax.

33. On the aforesaid findings, and after considering the judgment of Hon?ble Supreme Court in Builders Association of India and others v. Union of India and others(supra) and Gannon Dunkerley and Co. v. State of Rajasthan(supra), it was held that the exemption Notification dated 29.03.2001, cannot be given retrospective effect and will only apply prospectively with effect from the year 2001-02 onwards.

34. The legal proposition with regard to definition of ''works contract'' in Article 366(29A)(b) of the Constitution of India, has been explained in the recent judgment in Larsen and Toubro Limited and Anr. v. State of Karnataka and Anr. (supra), decided on 26.09.2013. For sustaining levy of tax on goods, deemed to have been sold in execution of a works contract, three conditions namely (i) there must be a works contract; (ii) goods should have been involved in execution of a works contract; and (iii) property in those goods must be transferred to a third party, either as goods or in some other form, have been amply clarified. A contract may involve both, a contract of work and labour, and a contract for sale. A transfer of property in goods under clause 29A (b) of Article 366, is deemed to be sale of goods involved in execution of a works contract by a person making transfer and purchase of those goods to a person, to whim such transfer is made. A single and indivisible contract has been brought on par with a contract containing two separate agreements, empowering the State to levy sales tax on value of material in execution of works contract.

35. In view of the clarification of law with regard to imposition of tax on the sale

of goods in the works contract, in the judgment of Larsen and Toubro Limited and Anr. v. State of Karnataka and Anr. (supra), the question of law, does not require any further discussion for its determination. The findings with regard to sale of pipes involved in the works contract, are findings of fact, which do not required any interference by us in these matters.

36. So far as the exemption is concerned, we do not find any error in the finding recorded by learned Single Judge, that the exemption Notification having been issued on 29.03.2001, will only apply prospectively from the year 2001-2002, and that the benefit of exemption can be availed by a firm only after issuance of the Notification dated 29.03.2001. The petitioner has challenged the Assessment Year 1999-2000, and therefore, the Notification was not applicable to the dispute involved in the matter.

37. The matters relating to the assessment on the quantum, are left open, to be considered in the appeal or revision, provided under the Act.

38. We do not find any error of law in the judgment of learned Single Judge, dated 25.02.2002, dismissing all the writ petitions filed by the petitioner.

39. All the appeals and the writ petition are, consequently, dismissed.

40. A copy of the judgment be placed in all the connected files.