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(2002) 02 RAJ CK 0085

In the Rajasthan High Court

Case No : Civil Writ Petition No. 724 of 2002

Indian Hume Pipes Ltd. — APPELLANT

Vs

State of Rajasthan and Others — RESPONDENT

Date of Decision : 25-02-2002

Acts Referred:
Rajasthan Sales Tax Act, 1994 — Section 15, 2, 40, 58
Rajasthan Sales Tax Rules, 1955 — Rule 10(B), 43(2)

Citation : (2002) 2 RLW 1264 : (2002) 2 WLC 618 : (2003) 2 WLN 527

Hon'ble Judges : Shiv Kumar Sharma, J

Bench : Single Bench

Advocate : Sudhir Gupta and Anil Sharma, for the Appellant; M. Rafiq, A.A.G., for the Respondent

Final Decision : Dismissed

Judgement

Sharma, J.—Since the questions of law and fact involve in all these matters are common 1 propose to decide them by a common order.

2. Common prayer of the petitioner company in all these matters is as under-

(i) Impugned assessment orders and demand notices be quashed.

(ii) It be held and declared that the petitioner is riot liable to pay any tax under the Rajasthan Sales Tax Act and Rules in respect of the contract undertaken by it under the various works orders.

(iii) It be declared that the petitioner is entitled for grant of exemption . certificate in respect of the said words orders.

(iv) It be held and declared that the contracts undertaken by the petitioner are indivisible composite work contracts and do not constitute sale.

3. For the sake of convenience the facts of writ petition No. 724/2002 are taken into consideration. The petitioner company is a contractor engaged in the execution of civil construction work relating to Dams, canals etc. involving laying

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and commissioning of pipe lines for water supply schemes of various Government Departments throughout the country. Pursuant to Notice Inviting Tenders issued by the Public Health Engineering Department (PHED), Government of Rajasthan from to time, the petitioner was awarded works orders Nos. 16700-715 dated November 30, 1996 and SPA/365 dated July 30, 1998. The works orders consisted of providing and laying of PSG pipes complete with suitable jointing material specials, valves and construction of valve chambers, anchor blocks, suitable crossing including testing and commissioning of pipe lines etc. on turn-key basis under various water supply schemes of the State Government, in accordance with the terms an conditions mentioned in the tender documents and according to the plans annexed thereto. The works order dated November 30, 1996 comprised of works contract relating to supply of water from Rana Pratap Sagar Dam Kota whereas works order dated July 30, 1998 comprised of work contracts relating to commissioning etc. of pipe lines at Karamsary Package. Contention of the petitioner is that the contract was indivisible one. There was no sale of pipes and since it was an indivisible contract, no sales tax could be levied on the total amount of works contract. This view was taken by the Orissa High Court as also by the Apex Court in similar matters. The petitioner has filed instant seven writ petitions assailing various assessment orders and demand notices as also seeking declaration as indicated above.

4. Elaborate submissions of the learned counsel for the petitioner in support of the instant matters may be summarised thus :

(i) From a perusal of the terms and conditions of the aforequoted work orders and the nature of the work, it is clear that the PHED had entrusted works contract to the petitioner. The very fact that he PHED had called for a tender for providing and laying of pipes complete with suitable jointing material, valves etc. including testing and commissioning of pipe lines shows that the PHED was never interested in purchase of pipes and accordingly had not invited tender for purchase/supply of pipes but the primary and dominant object of the contract was execution of complete job of laying, jointing, testing and commissioning of pipe lines complete with material, pipes valves etc. The contract was one right from the stage of designing upto the stage of commissioning and could be said to be divisible one for supply of pipes and other for laying etc. of pipes. The contract thus was indivisible works contract of supply, work and labour.

(ii) While making payments of running bills, tax at source at the rate as applicable from lime to time on the total value of turn over of the works contract completed till then was deducted by PHED which was the rate of tax in respect of works contract relating to any kind of construction payable by a contractor on his turn over of the works contract, as per the Notification issued from time to time by the Sales Tax Department.

(iii) Since the work assigned to the petitioner was a works contract relating to civil works and the dams, the petitioner was clearly entitled to exemption as provided in Rule 10(6) of the Rajasthan Sales Tax Rules 1955 (in short 1955

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Rules) and the Notification dated April 28, 1993.

(iv) As the petitioner has used declaration forms to purchase goods used in the execution of works contract, he is prepared to comply with the condition No.5 of the Notification dated April 28, 1993 i.e. to pay tax on the said purchase of the rate notified u/s 15 of the Rajasthan Sales Tax Act, 1994 (in short 1994 Act) or for a set off as provided.

(v) While the contract of laying of the pipe line awarded to the petitioner under the works order is a work contract, the act of the assessing authority in treating the same to be a sale is absolutely wrong and erroneous.

(vi) A Notification dated March-29, 2001 was issued by the State of Rajasthan whereby the laying of pipe line with material has been specifically and categorically categorised/termed as works contract. The said Notification has been issued in exercise of the powers conferred by Section 15 of the 1994 Act. The Notification is clarificatory in nature and has retrospective effect. On an application filed by the petitioner u/s 40 of the 1994 Act for grant of exemption in terms of the said Notification in respect of the contract for laying of pipe lines awarded to the petitioner by the PHED Ajmer vide its work order dated April 18, 2001, the Additional Commissioner (Anti Evasion) Commercial Taxes Department Jaipur vide its order dated July 19,2001 has granted exemption to the petitioner in terms of the said Notification dated March 29, 2001. It has been categorically Anti Evasion that the works granted to the petitioner by the PHED is exempted under the description of works contract. The work awarded to the petitioner under the aforequoted work order dated April 18, 2001 is identical to the contract awarded to the petitioner under the earlier work orders which form subject matter of the instant writ petitions.

(vii) Imposition of penalty of Rs. 500/- u/s 58 of the 1984 Act on the allegation that the petitioner had not submitted the counter part of Form ST 18 A is wholly incorrect as the counter part of form was duly submitted before the assessing authority.

(viii) The orders of the assessing authority and the appellate authority treating the supply of pipes by the petitioner to the PHED to be sale within the meaning of Section 2(o) of the 1994 Act is illegal.

5, In the reply submitted in writ petition No. 724/2002 on February 11, 2002, following points have been mentioned:

(i) The petitioner apart from laying pipeline for water supply is also a manufacturer of the pipes used in such work of water supply.

(ii) The petitioner was awarded work for supply and laying of PSC pipes and also for jointing material specials, valves and construction of valve chambers, anchor blocks and for testing and commissioning of pipe lines etc. under Bisalpur Water Supply scheme. Out of which 75% of the amount of total contract was towards sales of PSC pipes together with jointing material specials etc. For manufacturing

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all these items the petitioner applied and was granted RST/CST No. 0103/07884 in the year 1988. The petitioner set up an industry at Kekri near the site of work.

(iii) The substantial part i.e. 75% of the above material supplied by the petitioner constituled a sale in meaning of Section 2 (o) of the 1954 Act. The petitioner was liable to pay sales tax on the value of the said pipes and other material manufactured and supplied by him.

(iv) If the petitioner has paid any works contract sales tax to the PHED, if and when any certificate from that department is produced before the Sales Tax Department, the assessing authority will give adjustment of that amount against the total amount of sales tax assessed by it.

(v) The assessing authority as well as the appellate authority have fully applied their mind to the contents of the Notification dated 28.4.1993 and Rule 10(B) of the Sales Tax Rules and they have 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.

(vi) The agreement clearly covered two parts, substantial part being sale and supply of PSC pipes, jointing material specials, valves anchor blocks etc. and the remaining part being supply of labour and service. The petitioner was under a statutory obligation to pay sales tax on the aforesaid materials sold to the department. The petitioner sold the items manufactured by him to the PHED department and therefore he has to pay the sales tax like any other manufacturer of these items.

(vii) The argument raised by the petitioner that the contract was indivisible contract of supply, work and labour is totally unfounded and has no legal force after 46th Constitution Amendment Act of 1982. After amendment in the Constitution whereby Clause 29 A was added to Article 366 the definition of sale as given in Section 2(o) of the 1954 Act which later became Section 2(38) of 1994 Act was amended to also include in Sub-clause (2) a transfer of property in goods involved in the execution of a works contract. The gist of the case of Builders Association of India and others v. Union of India (1), was also incorporated in the reply. In view of the legal position the argument raised by the petitioner that he contract was indivisible and composite one has lost all its legal force.

(viii) The exemption Notification having been issued only on 29.3.2001 will apply only prospectively from the year 2001-2002 onwards. The petitioner has challenged the assessment for the year 1999-2000 and therefore the Notification is not applicable to the dispute involved in the present matter. The petitioner has not submitted counter part of the Form ST-18 A and had the counter part of form ST 18 A was submitted there was no question that penalty of Rs. 500 was imposed upon the petitioner u/s 58 of 1994 Act.

(ix) The petitioner is a registered dealer u/s 2(14) of 1994 Act and therefore he

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is liable to pay sales tax. According to Section 25(4) of the 1994 Act and Rule 43(2) of the Rules the petitioner is required to pay tax not exceeding three per cent of the total value of the contract. According to Sub-section (5) Section 25 of the 1994 Act and Rule 43(4) of the Rules every deposit of tax or deduction of amount in lieu of tax made under this section shall be deemed to be provisional subject to adjustment against the tax liability determined in the assessment year for any year made u/s 29.

(x) The assessing authority taking into consideration (he works orders, the terms of the agreement, quantum of the work involved, the value of the goods supplied in execution of the contract and other allied documents has rightly allowed 25% towards labour and service charges.

(xi) The petitioner has set up a factory at Kekri and has got himself registered as a dealer under the Central Sales Tax as well as Rajasthan Sales Tax. He being a registered dealer is 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 Act by availing the benefit of concessional rate of tax.

(xii) The judgment of Orissa High Court does not help the petitioner in any way. The judgment of Orissa High Court emerged out of a contract executed prior to 46th Constitution Amendment, thus it is not helpful to the petitioner.

(xiii) The writ petition is not maintainable as the petitioner has efficacious alternative remedy by way of appeals and revision under the 1994 Act.

6. I have pondered over the rival submissions and closely scrutinised the record and the case law placed for my perusal.

7. The question that requires my consideration is whether the works contract arising from the agreements is an indivisible contract or a divisible one consisting of two parts-one for the supply of pipes and the other for the supply of labour and services.

8. In Cannon Dunkerly and Company (Madras) Limited v. State of Madras (2), the High Court of Madras took the view that the expression "sale of goods" in entry 48 of List II of the Government of India Act, 1935, and entry 54 in List II of the Constitution had the same meaning as it had in the Sale of Goods Act 1930, and the construction works contracts were not contracts for sale of the material used therein and that the contract, being entire and indivisible could not be broken into a contract for sale of material and a contract from payment for works done. On that view it was held that no tax could be charged on the value of the works contracts. A contrary view was taken by the Kerala High Court in Cannon Dunkerly and Company v. Sales Tax Officer (3), The view taken by the Madras High Court was upheld by me Apex Court in State of Madras v. Cannon Dunkerly and Company (Madras) Limited (4). The position was that if the works contract was indivisible it was not eligible to tax. Until the amendment Act came on the

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seen the position all along was that no sates tax could be charged on a works contract unless it was shown that it consisted of two parts-one for the sale of material and the other for the supply of labour and services. If it was shown that it consisted of two parts then the first part of the contract with regard to the sate or supply of material used for the execution of works contract was exigible to tax. The Amendment Act brought this branch of law concerning works contract out of the state of uncertainty and put it onto the uplands of clarity in that it provided in Clause (29A) of Article 366 for the levy of the tax on the sale on purchase of goods in Clause (b) thus:

(b) a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of works contract.

This amendment made it clear that the State Legislatures were free to make law authorising the levy of tax on the transfer of properly in goods (whether as goods or in some other form) involved in the execution of a works contract. In other words the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract was considered to be a sale or deemed sale. It was immaterial whether the contract was divisible into two parts or an indivisible one. An indivisible contract converted into a contract which consisted of two parts one for the transfer of the properly in goods (whether as goods or in some other form) and the other for supply of labour and services. This legal position was introduced by the Amendment Act in the Constitution itself. The validity of this Amendment Act was under challenge in Builders Association of India and Others Vs. Union of India (UOI) and Others, wherein their Lordships of the Supreme Court upheld the validity while construing the provisions of Sub-clause (b) of Clause (29A) of Article 366, the Apex Court observed thus :

"Sub-clause (b) of Clause (29A) states that tax on the sale or purchase of goods includes among other things a tax on the transfer of property in the goods (whether as goods or in some other form) involved in the execution of works contract. It does not say that lax on the sale or purchase of goods included a tax on the amount paid for the execution of a works contract. It refers to 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. The emphasis is on the transfer of property in goods (whether as goods or in some other form). The latter part of Clause (29A-) of Article 366 of the Constitution makes the position very clear. While referring to the transfer, delivery or supply of any goods that takes place as per Sub-clause (a) to (f) of Clause (29A), the latter part of Clause (29A) says that 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 to whom such transfer, delivery or supply is made. Hence, a transfer of property in goods under Sub-clause (b) of Clause (29A) is deemed to be a sale of the goods involved in the execution of works contract by the person making the transfer and a purchase of those goods by the person to

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whom such transfer is made. The object of the new definition introduced in Clause (29-A) of Article 366 of the Constitution is, therefore, to enlarge the scope of ''tax on sale or purchase of goods'' wherever it occurs in the Constitution so that it may include within its scope the transfer, delivery or supply of goods that may take place under any of the transactions referred to in Sub-clauses (a) to (f) thereof wherever such transfer, delivery or supply becomes subject to levy of sales tax. So construed the expression ''tax on the sale on purchase of goods'' in entry 54 of the State List, therefore includes a tax on the transfer of properly in goods (whether as goods or in some other form) involved in the execution of a works contract also. The tax leviable by virtue of Sub-clause (b) of Clause (29A) of Article 366 of the Constitution thus becomes subject to the same discipline to which any levy under entry 54 of the State List is made subject to under the Constitution.

9. The Hon''ble Apex Court in the above case dealing with the effect of Amendment Act on the powers of the State Legislature to levy sales lax held thus :

"Even after the decision of this Court in State of Madras v. Cannon Dunkerly & Co. (Madras) Ltd. (supra), it was quite possible that where a contract entered into in connection with the construction of a building consisted of two parts, namely, one part relating to the sale of material used in the construction of the building by the contractor to the person who had assigned the contract to the person who had assigned the contract and another part dealing with the supply of labour and services, sales tax was leviable on the goods which were agreed to be sold under the first part. But sales tax could not be levied when the contract in question was a single and indivisible works contract. After the 46th Amendment the works contract which was an indivisible one is by a legal fiction allered 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 Stales to levy sales lax 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 separalc 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

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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."

10. The decision in Buildings Association case (supra) was reiterated in Cannon Dunkerly & Co. case reported in (1993) 88 STC 204.

11. During the course of arguments I was pursuaded to interpret the Notification on the basis of dictionary meaning of various terms Act I have to construe the Notification strictly and not on the basis of dictionary meaning. Their Lordships of the Supreme Court in Union of India and Ors. v. Wood Papers Ltd. and Anr. (5). indicated that exemption Notification be construed strictly. Dictionary meaning cannot be applied. Words have got different shades and have to take colour from context in which they are used. If any doubt or ambiguity, benefit of the same has to go to the revenue.

12. The exemption Notification having been issued on March 29, 2001 cannot be given retrospective effect and it will apply only prospectively with effect from the year 2001-2002 onwards. In the instant matters the assessment for the earlier year has been assailed by the petitioner, therefore the Notification is not applicable, to the disputes involved in the present matters.

13. It appears from the material on record that the petitioner apart from laying pipe line for water supply is also manufacturer of the pipes used in such work of water supply and has also applied for CST and RST numbers. It also appears that the petitioner has been using declaration form and purchasing raw material on concessional rate of sales tax, therefore the petitioner cannot take advantage at both ends particularly when exemption Notification itself provides that a contractor entitled to exemption certificate would not be free to use declaration form for purchasing raw material etc. on concessional rate of tax.

14. It is not necessary for me to discuss each and every judicial precedent on which reliance was placed by both the parties, however deducible principles need to be noticed which are as under-

(i) If law creates a legal fiction such fiction should be carried to its logical end. There should be no hesitation in giving full effect to it.

(ii) A transfer of properly in goods under Sub-clause (b) of Clause (29-A) is deemed to be a sale of the goods involved in the execution of a works contract by the person making the transfer and a purchase of those goods by the person to whom such transfer is made.

(iii) The restrictions mentioned in Clause (2) of Article 286 of the Constitution which says that Parliament may by law formulate principles for determining when a sale or purchase of goods takes place in any of the ways mentioned in Clause (I) of Article 286 would also be attracted to a transfer of goods contemplated under Article 366(29-A)(b). Clause (3) of Article 286 is also applicable to a tax on a transfer of property referred to in Sub- clause (b) of Clause (29-A) of Article 366.

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(iv) All transfers, deliveries and supplies of goods referred lo in Clause (a) to (f) of Clause (29-A) of Article 366 of the Constitution are subject to the restrictions and conditions mentioned in Clause (1), Clause (2) and Sub-clause (a) of Clause (3) of Article 286 of the Constitution and the transfers and deliveries that take place under Sub-clauses (b), (c) and (d) of Clause (29-A) of Article 366 of the Constitution are subject to an additional restriction mentioned in Sub-clause (b) of Article 286(3) of the Constitution.

(v) As a result of the Forty Sixth Amendment, the contract which was single and indivisible has been altered by a legal fiction into a contract which is divisible into one for sale of goods and other for supply of labour and services and as a result such a contract which was single and indivisible has been brought on a par with a contract containing two separate agreements.

(vi) The legal fiction introduced by Article 366(29-A)(b) is carried to its logical end it follows that even in a single and indivisible works contract there is a deemed sale of the goods which are involved in the execution of a works contract. Such a deemed sale has all the incidents of a sale of goods involved in the execution of a works contract where the contract is divisible into one for sale of goods and the other for supply of labour and services.

(vii) Whether a sale is an outside sale or a sale inside the State or whether it is a sale in the course of import or export will have to be determined in accordance with the principles contained in Sections 4 and 5 of the Central Sales Tax Act and the Stale Legislature while enacting the sales lax legislation for the Stale cannot make a departure from those principles.

(viii) Forty sixth Amendment of the Constitution inserting Article 366 (29A) was made precisely with a view to empower the State to bifurcate the contract and to levy sales tax on the value of the material involved in the execution of the works contract, notwithstanding that the value may represent a small percentage of the amount paid for the execution of the works contract. Even if the dominant intention of the contract is the rendering of a service, which will amount to a works contract, after the Forty Sixth Amendment the State would now be empowered to levy sales tax on the material used in such contract.

(ix) Exemption Notification has to be interpreted strictly and to be read in its entirety and not in parts. The person claiming the benefit of exemption must establish that his claim is covered by the exemption notification.

(x) A person invoking an exception or an exemption provision to relieve him of the tax liability must establish clearly that he is covered by the said provision. In case of doubt of ambiguity, benefits of it must go to the Slate. ,

(xi) Dictionary meaning should be understood in the context of the words appearing in the statute.

15. For the reasons aforementioned, I have no option but to hold that the works contract which is the subject matter of the instant writ petitions, is divisible one

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consisting of two parts 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 are just and proper arid the petitioner company is liable to pay sales tax on the price of the pipes supplied by it to PHED in the course of execution of the said works contract. The Notification dated March 29, 2001 cannot be applied retrospectively and no relief can be granted to the petitioner on the basis of said Notification in the instant matters.

16. Consequently all the seven writ petitions shall stand dismissed without any order as to costs.

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