(2014) 04 CAL CK 0032

In the Calcutta High Court

Case No : W.P. No. 19185 (W) of 2013

Joyrath Projects Pvt. Ltd. APPELLANT

Vs

Sales Tax Officer, Alipore Charge RESPONDENT

Date of Decision : 25-04-2014

Acts Referred:

Central Sales Tax Act, 1956 — Section 2(d), 2(g), 2(ja)
Constitution of India, 1950 — Article 248, 286, 366, 366(29-A)
Government of India Act, 1935 — Section 100, 104
West Bengal Value Added Tax Act, 2003 — Section 86

Citation : (2014) 4 CHN 79

Hon'ble Judges : Harish Tandon, J

Bench : Single Bench

Advocate : Kamalendu Ghosh, Sovontonu Bhattacharya and Raja Ghosh, Advocates for the Appellant; Abhratosh Majumdar, Advocates for the Respondent

Judgement

Harish Tandon, J.—The petitioner is a Registered Dealer under the Central Sales Tax as well as under the West Bengal Value Added Tax and possessed the certificate of registration. The petitioner No. 1 is basically engaged in a business as "Works Contract" and claims a concessional rate of tax on purchase and sale of the goods connected with the execution of the said works contract. In course of the aforesaid business, the petitioner purchased ARC Building rectifier from a registered dealer outside the State of West Bengal and applied for issuance of Form "C" to avail the concessional rate of tax under the Central Sales Tax Act, 1956. The Sales Tax Officer rejects the application for issuance of Form "C" on the ground that the goods so purchased does not come within the purview of transfer. The said order of the Sales Tax Officer is assailed before the Revisional Authority who declines to interfere with the order of the Sales Tax Officer as the Items purchased by the petitioner is capital goods and have not actually been sold. The further application for revision before the Commissioner, Commercial Taxes could not yield the fruitful results to the petitioner. Further revisional application under section 86 of the West Bengal Value Added Tax Act, 2003 filed before the Additional Commissioner, Commercial Tax, West Bengal was again rejected for want of statutory power.

2. Although the petitioner assailed the order of revisional authority in this writ petition but at the time of an argument, the respective Councils and both the parties have addressed on the issues relating to rejection of an application for supply of declaration form (Form "C") before this Court.

3. The learned Advocate appearing for the petitioner submits that section 2(ja) of the Central Sales Tax Act, 1956 defines the work contract to mean a contract for carrying out any work which includes apart from other construction, building, manufacturing, processing and fabricating and, therefore, the said machine purchased for the work contract is includable within the aforesaid definition and, thus, the refusal to issue the Form "C" is illegal. According to the petitioner, as per the definition of the goods under section 2(d) of the said Act, all materials, articles and commodities and all other kinds of notable property partakes the character of the goods and is considered to be a sale as defined under section 2(g) of the said Act. By placing reliance upon a judgment of the Kerala High Court in case of Ajantha Colour Lab Vs. Additional Sales Tax Officer-III and Another, , the petitioner submits that the authority cannot refuse to issue Form "C" if the dealer is registered under the Central Sales Tax Act and engaged in "Works Contract". The petitioner further submits that the judgment rendered in case of Ajantha (supra) was accepted and applied in a subsequent unreported judgment rendered by the Kerala High Court in case of DLF Laing O''Rourke (India) Ltd. vs. State of Kerala & Ors. (decided on February 26, 2008) wherein it is held that the person engaged in a "Works Contract" of a building construction is a manufacturer and entitled to a declaration form (Form "C") for effecting inter-State purchaser. The petitioner thus contends that the refusal to issue Form "C" on the plea that such purchases does not amount to a transfer is perverse and contrary to the ratio laid down in the above judgments.

4. The learned Advocate appearing for the respondents refuted the aforesaid contention in submitting that if the goods and/or the materials were not used in the construction of a building and passed on to the person who awarded the "works contract", it did not amount to sale and placed reliance upon a judgment of the Constitutional Bench in case of The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd., . By relying upon a subsequent judgment of the Constitution Bench rendered in case of Builders Association of India and Others Vs. Union of India (UOI) and Others, , the learned Advocate submits that after the 46th amendment made to the Constitution of India, the State can levy the Sales Tax on a value of the goods involved in a "works contract" which are indivisible one, provided the goods of the materials used in the construction of a building passes to the owner of the land on which the building is constructed.

5. The learned Advocate further relied upon a judgment Gannon Dunkerley and Co. and Others Vs. State of Rajasthan and Others, rendered by the Supreme Court to contend that there is no transfer of the goods unless involved in

execution of the "work contract".

6. Having considered the respective submissions, it appears that all the judgment cited by the respondents were delivered on the issue whether the respective States have the competence to impose a tax on the supply of materials in execution of "works contract" treating it as a sale of goods involved in execution of the "works contract" to legislate. In case of Gannon Dunkerley & Co. Ltd. (supra), the Constitutional Bench held that Entry 48 empowers the State to enact laws imposing tax on the supply of the materials in the "works contract" in these words:

"35. This conclusion entails that none of the legislatures constituted under the Government of India Act, 1935 was competent in the exercise of the power conferred by section 100to make laws with respect to the matters enumerated in the lists, to impose a tax on construction contracts and that before such a law could be enacted it would have been necessary to have had recourse to the residual powers of the Governor-General under section 104 of the Act. And it must be conceded that a construction which leads to such a result must, if that is possible, be avoided. Vide Manikkasundara vs. R.S. Nayudu. It is also a fact that acting on the view that Entry 48 authorises it, the States have enacted laws imposing a tax on the supply of materials in works contracts, and have been realising it, and their validity has been affirmed by several High Courts. All these laws were in the statute book when the Constitution came into force, and it is to be regretted that there is nothing in it which offers a solution to the present question. We have, no doubt, Article 248 and Entry 97 in List I conferring residual power of legislation on Parliament, but clearly it could not have been intended that the Centre should have the power to tax with respect to works constructed in the States. In view of the fact that the State Legislatures had given to the expression "sale of goods" in Entry 48 a wider meaning than what it has in the Sale of Goods Act, that States with sovereign powers have in recent times been enacting laws imposing tax on the use of materials in the construction of buildings, and that such a power should more properly be lodged with the States rather than the Centre, the Constitution might have given an inclusive definition of "sale" in Entry 54 so as to cover the extended sense. But our duty is to interpret the law as we find it, and having anxiously considered the question, we are of opinion that there is no sale as such of materials used in a building contract, and that the Provincial Legislatures had no competence to impose a tax thereon under Entry 48."

7. The subsequent Constitutional Bench in case of Builders Association of India (supra), upon considering the introduction of clause (29-A) to Article 366 of the Constitution by the 46th Amendment held:

"41. 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 relate 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(29-A), would equally apply to other species of "works contracts" with the requisite situational modifications.

42. The Constitutional amendment in Article 366(29-A) read with the relevant taxation entries has enabled the State to exert its taxing power in an important area of social and economic life of the community. In exerting this power particularly in relation to transfer of property in goods involved in the execution of "works contracts" in building activity, insofar as it affects the housing projects of the underprivileged and weaker sections of society, the State might perhaps, be pushing its taxation power to the peripheries of the social limits of that power and, perhaps, even of the Constitutional limits of that power in dealing with unequals. In such class of cases "building activity" really relates to a basic subsistential necessity. It would be wise and appropriate for the State to consider whether the requisite and appropriate classifications should not be made of such building activity attendant with such social purposes for appropriate separate treatment. There of course are matters for legislative concern and wisdom."

8. The aforesaid view taken in the above noted decisions is reiterated in a subsequent judgment rendered in case of Gannon Dunkerley and Co. and Others Vs. State of Rajasthan and Others, and M/s. Builder''s Association of India Vs. State of Karnataka and others, and, therefore, this Court does not intend to deal the same separately. The issues involved in the above noted reports have not been questioned and in my view as well, is not germane to the disputes involved in the writ petition. In the present case, the petitioner purchased a machine required for execution of the "works contract" from outside the State. Both the seller and the purchaser are the registered dealer which admits no ambiguity as the departments have not disputed the same. What is intended to be said is that such sale and purchase does not constitute the transfer. In this regard, the reliance can be placed upon a Division Bench judgment rendered by the Kerala High Court in case of Ajantha Colour Lab(supra) where the person engaged in a business of photography, photo processing and purchase sophisticated film processor with its accessories from outside the State, an application for insertion of those items in the registration certificate and simultaneously the issuance of Form "C" was prayed before the authority. On refusal to allow the prayer as made, the writ application was filed which was ultimately dismissed. The Division Bench held that the person executing the "works contract" is a dealer and the transfer of property involved in execution of such "work contract" is a sale within the definition contained in the Act. Ultimately the division bench allowed the appeal by amending the registration certificate and directing the authority to

issue "C" Form. Relying on the judgment of the Division Bench rendered in case of Ajantha Colour Lab (supra), the Single Bench of the Kerala High Court in an unreported judgment delivered in case of Dlf Laing O''Rourke (India) Ltd. (supra) held that a person engaged in a "works contract" of a building construction is a manufacturer and is entitled to be granted registration as a dealer under the CST Act and is further entitled to issuance of "C" Form for effecting the inter-state purchaser. In the said unreported judgment, certain machineries were purchased for execution of the "works contract" from outside the State. The department took the stand that the said person is not a manufacturer and cannot effect purchase against "C" Form. In the above backdrop, it was held:

"5. In sum and substance the contention raised by the respondents is that since the petitioner is not a manufacturer, it cannot effect purchase against C Forms and that the petitioner can only get Form 16 countersigned by the jurisdictional assessing authority. The respondents seem to be relying on the decision in the case of Deputy Commissioner of Sales Tax (Law) vs. N. Kannan Nair in support of this proposition. However, the subsequent decisions of the Supreme Court and this Court shows that the view now taken by the respondents is incorrect. In the case of Assistant Commissioner (Intelligence) vs. Nandanam Construction Co. a Constitution Bench of the Supreme Court while examining this very question in the context of section 6A(ii)(a) of the Andhra Pradesh General Sales Tax Act, 1957, upheld the liability of the contractors to pay purchase tax on goods purchased from persons other than registered dealers and either consumed for the purpose of manufacture of goods for sale or consumed otherwise. The Supreme Court held that the contractors who were engaged in building of flats and houses, for which purpose they bought materials from person other than registered dealers, were liable to purchase tax under the Act since the goods purchased were used in the manufacture of other goods for sale or otherwise. Therefore, this judgment of the Apex Court is an authority for the proposition that the activity of a "works contractor" engaged in building contracts amounts to manufacture. In Ajantha Colour Lab vs. Additional Sales Tax Officer-III, II Circle, Kozhikode a Division Bench of this Court held that a dealer engaged in works contract was entitled to registration under the CST Act. The Division Bench followed the earlier judgments which took the view that a person executing works contract is a dealer and entitled to receive C forms from the prescribed authority. In fact, in the judgment of a learned Singe Judge in Colourgraphs vs. Sales Tax Officer III Circle, Ernakulam it was held that once a dealer is registered under the CST Act, he cannot be denied C Forms.

6. From the judgments referred to above, it is therefore clear that a person 6 engaged in works contract of building construction is a manufacturer and is liable to be granted registration as a dealer under the CST Act and entitled to issue C Forms for effecting inter-State purchases. If that be so, the stand taken by the respondent in their statement justifying the denial of the benefit to the petitioner cannot be upheld."

9. In the present case, the said machineries are purchased for execution of the "works contract" and is an integral part thereof. The certificate of registration issued to the petitioner under the Central Sales Tax (Registration & Turnover) Rules, 1957 depicts the nature of business as "works contract" which was subsequently amended by incorporating certain machines in the year 2002. The petitioner is treated as a dealer of the machine as well by allowing the amendments by incorporating the machines. Those machines are intended to be used for execution of the "works contract" and this Court, therefore, does not intend to take a contrary view as has been taken by a Single Bench of the Kerala High Court in case of Dlf Laing O''Rourke (India) Ltd. (supra).

10. This Court, therefore, does not concur with a view of the department that the sale and purchase of the said machines which are required for execution of the "works contract" and in fact, involved in such work does not amount to transfer.

11. This Court, therefore, set aside the order of the assessing authority and directs the said authority to consider the case afresh in the light of the observations made hereinabove.

12. It is expected the Sale Tax Officer to take at most care to take a decision within four weeks from the date of the communication of this report in accordance with law.

13. With these observations, the writ petition is thus disposed of.

14. However, there shall be no order as to costs. Urgent photostat certified copy of the judgment, if applied for, be given to the parties on priority basis.