
(2003) 11 SC CK 0116

In the Supreme Court Of India

Case No : C.W.J.C. 2740 Of 2003 and C.W.J.C. No. 3827 of 2002

Larsen and Toubro Ltd., Mumbai

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 05-11-2003

Acts Referred:

Air (Prevention and Control of Pollution) Act, 1981 — Section 19
Central Sales Tax Act, 1956 — Section 11, 14, 15, 3, 4
Constitution of India, 1950 — Article 366, 368

Citation : (2003) 3 BLJR 2228

Hon'ble Judges : R. S. Garg, J; Nagendra Rai, J

Bench : Division Bench

Advocate : Debi Pal, A. Mazumdar, M.S. Mittal, Tej Bahadur Roy and Raj Kishore Prasad, for the Appellant; R.K. Dutta, SC IV and P. Singh, for the Respondent

Final Decision : Allowed

Judgement

Nagendra Rai and R.S. Garg, JJ.—This order shall finally dispose of CWJC No. 2740 of 2003 Larsen & Toubro Ltd. v. The State of Bihar and Ors., and CWJC No. 3827 of 2002 Larsen & Toubro Ltd. v. The State of Bihar and Ors.

2. The petitioner M/s Larsen & Toubro Ltd. is registered as a dealer in commercial tax at Begusarai Circle as a works contractor. The petitioner secured a turn key contract of divisible nature from M/s Indian Oil Corporation Limited, New Delhi ('IOCL' for short) vide letter of acceptance dated 28-4-2000 followed by detailed contract agreement. The said contract agreement provides a separate schedule for supply of goods with separate consideration for the same as well as another schedule relating to erection./installation including civil portion of work to be executed, as appended to the contract. After securing the contract the petitioners secured an exclusive registration on the file of Dy. Commissioner of Commercial Taxes, Barauni, respondent No. 3. It is submitted by the petitioners that in response to the notice issued by respondent No. 3, they produced their books of accounts and other details to finalise the assessment for the period 1-4-2000 to

31-3-2001 under the Bihar Finance Act and the Central Sales Tax Act. It is also submitted that in compliance to the notice issued by the respondent No. 3 they submitted various details and documents under their registered letter and thereafter, also personally appeared before the said Deputy Commissioner on various dates and produced the required documents, and as alleged by the petitioners, extended full co-operation to finalise the assessment for the period under reference. According to them they were served with a notice of demand dated 28-1-2002 which was received by the petitioners on 31-1-2002. According to the petitioners, huge demands were made which were not only illegal but were contrary to law and were contrary to the judgments of the Supreme Court. It is also submitted by them that demand of additional tax and penalty is not only confiscatory in its nature but is also had because no follow up legislation to Section 21 (1) of the Bihar Finance Act has been enacted nor the Rules to make Section 21 (1) of the Bihar Finance Act workable have been made. According to the petitioners, the amount already paid by them towards the tax was depicting the correct tax amount and the demands made by the Taxing Officer after illegally assessing the petitioner were bad. According to them the respondents acted in a hot haste in issuing the order and did not give proper opportunity of hearing to the petitioners. It is, also submitted by them that the order dated 7-1-2002 under which the petitioners have been assessed is patently illegal and the authority has not taken into consideration the Inter-State sale and has also not given the benefit of the deductibles in a works contract. According to the petitioners, they have secured a turn key contract for a sum of Rs. 435 crores. Out of these Rs. 15,22,50,000/- are towards design & engineering portion of work vide Schedule of SP 1. Vide Schedule contract. A sum of Rs. 148,67,23,000/-, vide Schedule of SP 3 is towards erection and installation, including contract as well as civil portion of work to be executed.

3. According to the petitioners, after entering into the contract they took up the work and thereafter, for the said assessment period submitted their return giving their turnover details, including computation of Gross Turnover (GTO), Taxable Turnover (TTO) and the tax amount as supported by the various entries for the exemption claimed under the specific caption. According to them, they are entitled to deduction under the head of Sales Tax, Inter State Sales Turnover, Tax Paid Works and Labour Charges. According to them the authority did not appreciate the true import of taxable turnover and also issued a notice observing that the petitioners had brought in certain goods, therefore, they were liable to pay the sales tax. They have also submitted that unless the follow up legislation to Section 21 (1) of the Bihar Finance Act is enacted, the said Section 21 (1) of the Act would not become workable and in the matter of works contract, the works contractor cannot be assessed. Number of other pleadings were raised by the petitioners in the Writ Applications, however the argument was confined to the follow up legislation to Section 21 (1)(a) (i) of the Bihar Finance Act, 1981 prescribing the "manner and extent of deduction". The other question raised in the Writ Applications were not pressed into service probably because this Court

could direct that the petitioners may raise all the questions in the duly constituted appeal.

4. The respondents have filed their counter inter alia submitting that the Assessing Officer has assessed the petitioners on best judgment on sound principles of law. The order was passed after affording fullest opportunity to the petitioners, the taxable turnover was determined strictly in accordance with Rule 13A of the Bihar Finance Act, 1981 read with Section 13 of the Bihar Sales Tax Rules, 1983 ('the Rules' for short).

5. It is also submitted in the counter-affidavit that Section 21 (1) (a) (i) of the Act has been properly followed by enacting Rule 13A of the Rules, therefore, there was nothing wrong in assessing the petitioners. They have also submitted that the Supreme Court in the matter of Gannon Dunkerley and Co. and Others Vs. State of Rajasthan and Others, has observed that value of the goods involved in execution of works contract will have to be determined by taking into account the value of the entire works contract and deducting therefrom the charges towards labour and services. They also submitted that original Rule 13-A of the Rules was declared ultra vires by this Court in the case of Jamshedpur Contractors Association v. State of Bihar 1989)75 STC 132. After the Supreme Court observed that if the contractor fails to produce accounts or the accounts produced by the contractor are found to be unreliable it would be permissible to prescribe a formula for determination of labour charges and services for fixing a particular percentage of the value of works contract and allow deductions accordingly. According to them Rule 13A of the Rules was accordingly amended on 1-2-2000. They have also submitted that the petitioners' defences about the applicability of the Central Sales Tax Act is misconceived because in the present matter as a fact it was found that the petitioners were liable to pay the tax under the Bihar Finance Act. It is also submitted by them that the petitioners did not provide the correct details despite various opportunities and as the authorities were left with no other option, they have proceeded on the strength of best judgment assessment. They have submitted that the order passed by the Taxing Authority is absolutely justified and in any case it should have been challenged in a duly constituted appeal.

6. The matter was heard by this Division Bench and was reserved for orders.

7. The petitioners again received a notice from the concerned assessing authority and they have made a submission before the authority that the questions raised by them are pending consideration in CWJC No. 3827 of 2002, therefore, the assessment for the year 2001-2002 be deferred and the judgment in CWJC No. 3827 of 2002 be awaited. The matter was adjourned for some time but thereafter, the authority started persuading the petitioners and it was informed to the representative of the petitioners that the matter would not be adjourned any further thereafter, the assessing authority proceeded *ex parte* and passed the assessment order, contained in Annexure 7 impugned in CWJC No. 2740 of 2003.

8. For proper appreciation of the disputes between the parties, it would be necessary to refer to the history of the legislation. In the matter of the State of Madras v. Gannon Dunkerley & Co. and Ors. 1958 (9) STC 353, the Supreme Court held that a works contract was an individual indivisible contract and the turnover of the works used in execution of the works contract could not therefore, become excisable to sales tax. To overcome this difficulty and meet the judgment of the Supreme Court, the Parliament amended Article 366 of the Constitution of India by introducing Sub-clause (b) of Clause 29-A. The said clause reads as under:

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

(a) a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;

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

(c) a tax on the delivery of goods on hire-purchase or any system of payment by instalments;

(d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

(e) a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;

(f) a tax on the supply, by way of or as part of any service or in the any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service is for cash, deferred payment or other valuable consideration,

and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made."

9. Sub-clause (b) of Clause 29-A States that "tax on the sale or purchase of goods" includes among other things 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. It says that it is a tax on the sale or purchase of goods but it does not say that it is a tax on the amount paid to the labour for the execution of a works contract. In the matter of Builders Association of India and Ors. v. Union of India and Ors. 1989 73 STC 370, the Supreme Court has observed that it refers to a tax on the transfer of property in works (whether as goods or in some other form) involved in the execution of a works contract. According to the Supreme Court, the emphasis is on the transfer of property in works (whether as goods or

in some other form). It was also observed that while referring to the transfer, delivery or supply of any goods that taken place as per Sub-clause (a) to (f) of Clause 29A, the latter part of Clause 29-A 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 by the person to whom such transfer, delivery or supply is made. The Supreme Court also observed that since not less than one-half of the State Legislature had ratified the Constitution (46th Amendment) Bill, 1981 in accordance with the provisions of the proviso to Article 368(2) of the Constitution of India, the Constitution (46th Amendment) Act, 1982 is valid. The Supreme Court also observed that when the law creates a legal fiction such fiction should be carried out to its logical end. There should not be any hesitation in giving full effect to it. According to the Supreme Court 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(29-A) of the Constitution should also be subject to the same restrictions and conditions. Ordinarily unless there is a contract to the contrary in the case of a works contract the property in the goods used in the construction of a building passes to the owner of the land on which the building is constructed, when the goods or materials used are incorporated in the building. The contractor become liable to pay the sales tax ordinarily when the goods or materials are so used in the construction of the building and it is not necessary to wait till the final bill is prepared for the entire work. It was also observed by the Supreme Court that it would not be correct to say that the properties that are transferred to the owner in the execution of a works contract are not the goods involved in the execution of the works contract, but a conglomerate, that is the entire building that is actually constructed. It was also observed that the Forty-sixth Amendment simply made it possible for the States to levy sales tax on the price of goods and materials used in works contract as if there was a sale of such goods and materials. According to the Supreme Court Sub-clause (b) of Article 366(29A) should not 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. In light of the said judgment of the Supreme Court, the property in goods when passes in a works contract then the works contractor transfers the property and virtually effect a sale of goods and is liable to tax under the tax law.

10. For properly appreciating the disputes it would also be necessary to refer to the effect of Lumpsum turn key contract. Lumpsum turn key price' in the world, of construction contract means the total price of materials and the price of services required for establishing a fully functioning plant/unit which is the subject matter of the contract and the said price would mean that price, upon calculation of the entire payment payable to the contractor on satisfactory completion of the contract. The 'works contract' is defined u/s 2 (ww) of the Binary Finance Act, 1981. It reads as under:

"2(ww) 'Works contract' means any agreement for carrying out for cash or deferred payment or other valuable consideration the construction, fitting out, improvement or repair of any building, road, bridge or other immovable property."

11. From a perusal of this definition it would clearly appear that any and every agreement for carrying out for cash or deferred payment or other valuable consideration, the construction, fitting out, improvement or repair of any building, road, bridge or there immovable property. A turn key contract for construction and commissioning the unit which includes a civil and construction work would certainly be a works contract. The petitioners do not dispute that the contract entered into between the petitioners and the IOCL a works contract. The petitioners also admit they are dealers in accordance with Section 2 (e) of the Bihar Finance Act. The basic dispute is in relation to the gross turnover and applicability and workability of Section 21 (1) of the Bihar Finance Act. The word 'Gross Turnover' has been defined u/s 2 (j) of the Bihar Finance Act, which reads as under:

"2 (j) "Gross turnover" means:

(i) for the purposes of levy of sales tax, in respect of sale of goods, aggregate of sale prices received and receivable by a dealer including the gross amount received or receivable for execution of works contract or for the transfer of right to use any goods for any purpose (whether or not for a specified period) during any given period (and also including the sale of goods made outside the State and in the course of inter-State trade or commerce or export), but does not include sale prices of goods which have borne the incidence of purchase tax u/s 4;

(ii) for the purposes of levy of purchase tax, aggregate of purchase prices paid or payable by a dealer during any given period in respect of purchase of goods or class or description of goods which have borne the incidence of purchase tax u/s 4;

(iii) for the purposes of Section 3, the aggregate of the amounts under Sub-clauses (i) to (ii)."

12. It would also be necessary to refer to the judgment of Gannon Dunkerley & Co. and Ors. v. State of Rajasthan and Ors., 1993 88 STC 204 to appreciate that how the provisions are to be made workable and what particular items are taxable in a works contract and what particular deductions are to be given or extended in favour of the works contractor.

The Supreme Court in the present matter referred to the historic background leading to the enactment of 46th Amendment and also referred to the judgment of the Supreme Court in the matter of Builders Association of India (supra). It was contended before the Supreme Court on behalf of the appellants/contractors that while it was permissible for the State legislature to define the expression

'sale' in the sales tax legislation to include transfer of property in goods involved in the execution of a works contract it would not be permissible for the State legislature to locate the situs of such sale in manner as to treat a sale in the course of Inter-State trade or commerce or a sale outside the State or a sale in the course of Import and export, as a sale inside the State and thereby assume the power to impose a tax on sales which actually were sales in the course of Inter-State trade or commerce or outside sales or sales in the course of import and export. The Supreme Court observed that the State legislature cannot impose chargeability of tax on sales in the course of Inter-State trade or commerce since they fall outside the field of legislative competence of the State Legislature and will have to be excluded while assessing the tax liability under the State legislation. According to the Supreme Court, the same would be true on sales which are outside the State and sales in the course of import and export. The question 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 & 5 of the Central Sales Tax Act and the State Legislature while enacting the sales tax legislation for the State cannot make a departure from those principles. It was also submitted before the Supreme Court that in the execution of the works contract, the tax can be levied only on the value of the goods so involved and the value of the works contract cannot be made measure for levying the tax. The Supreme Court accepting the said argument- observed that measure for levying of the tax contemplated by Article 366(29-A)(b) is the value ;of the goods involved in the execution of a works contract. The Supreme Court further observed that the tax is imposed on the transfer of property in goods involved in the execution of a works contract, the measure for levy of such imposition is the value of the goods involved in the execution of a works contract. The Supreme Court, however, disagreed with the argument of the contractors that the value of such goods for levying the tax can be assessed only on the basis of the cost of acquisition of the goods by the contractor. According to the Supreme Court since the taxable event is the transfer of property in goods involved in the execution of a works contract and the said transfer of property in such goods takes place when the goods are incorporated in the works, the value of the goods which can constitute the measure for the levy of the tax has to be the value of the goods at the time of incorporation of the goods in the works and not the cost of acquisition of the goods by the contractor. The Counsel for the State submitted that a more convenient mode that such determination is to take the value of the works contract as a whole and deduct there from the cost of labour and services rendered by the contractor during the course of execution of the works contract. It was submitted on behalf of the contractors that in that event the particular deduction should be made from the value of the entire contract in order to arrive at the value of the goods involved in the execution of a works contract. The Supreme Court after appreciating the rival contentions observed that in view of the legal fiction introduced by the amendment, a single contract would become divisible one and to give the value of the goods involved in the execution of a

works contract on which tax is leviable must exclude the charges which appertain to the contract for supply of labour and services. The Supreme Court observed as under:

"Keeping in view the legal fiction introduced by the Forty-sixth Amendment whereby the works contract which was entire and indivisible has been altered into a contract which is divisible into one for sale of goods and other for supply of labour and services, the value of the goods involved in the execution of a works contract on which tax is leviable must exclude the charges which appertain to the contract for supply of labour and services. This would mean that labour charges for execution of works (item No. (i)), amounts paid to a subcontractor for labour and services (item No. (ii)), charges for planning, designing and architect's fees (item No. (iii)), charges for obtaining on hire or otherwise machinery and tools used in the execution of a works contract (item No. (iv)), and the cost of consumables such as water, electricity, fuel, etc., which are consumed in the process of execution of a works contract (item No. (v)) and other similar expenses for labour and services will have to be excluded as charges for supply of labour and services. The charges mentioned in (item No. (vi)) cannot, however, be excluded. The position of a contractor in relation to a transfer of a property in goods in the execution of a works contract is not different from that of a dealer in goods who is liable to pay sales tax on the sale price charged by him from the customer for the goods sold. The said price includes the cost of bringing the goods to the place of sale. Similarly, for the purpose of ascertaining the value of goods which are involved in the execution of a works contract for the purpose of imposition of tax, the cost of transportation of the goods to the place of works has to be taken as part of the value of the said goods. The charges mentioned in item No. (vii) relate to the various expenses which form part of the cost of establishment of the contractor. Ordinarily the cost of establishment is included in the sale price charged by a dealer from the customer for the goods sold. Since a composite works contract involves supply of materials as well as supply of labour and services, the cost of establishment of the contractor would have to be apportioned between the part of the contract involving supply of materials and the part involving supply of labour and services. The cost establishment of the contractor which is relatable to supply of labour and services cannot be included in the value of the goods involved in the execution of a contract and the cost of establishment which is relatable to supply of material involved in the execution of the works contract only can be included in the value of the goods. Similar apportionment will have to be made in respect of item No. (viii) relating to profits. The profits which are relatable to the supply of materials can be included in the value of the goods and the profits which are relatable to supply of labour and services will have to be excluded. This means that in respect of charges mentioned in items No. (vii) and (viii), the cost of establishment of the contractor as well as the profit earned by him to the extent the same are relatable to supply of labour and services will have to be excluded. The amounts so deductible would have to be determined in the light of the facts of a particular case on the basis of

the material produced by the contractor. The value of the goods involved in the execution of a works contract will, therefore, have to be determined by taking into account the value of the entire works contract and deducting therefrom, the charges towards labour and services which would cover:

- (a) labour charges for execution of the works:
- (b) amount paid to a sub-contractor for labour and services:
- (c) charges for planning, designing and architect's fees;
- (d) charges for obtaining on hire or otherwise machinery and tools used for the execution of the works contract;
- (e) cost of consumables such as water, electricity, fuel, etc. used in the execution of the works contract the property in which is not transferred in the course of execution of a works contract; and
- (f) cost of establishment of the contractor to the extent it is relatable to supply of labour and services:
- (g) other similar expenses relatable to supply of labour and services;
- (h) profit earned by the contractor to the extent it is relatable to supply of labour and services;

The amounts deductible under these heads will have to be determined in the light of the facts of a particular case on the basis of the material produced by the contractor.

We may, however, make it clear that apart from the deductions referred to above, it will be necessary or exclude from the value of the works contract the value of the goods which are not taxable in view of Sections 3, 4 and 5 of the Central Sales Tax Act and goods covered by Sections 14 and 15 of the Central Sales Tax Act as well as goods which are exempt from tax under the sales tax legislation of the State. The value of goods involved in the execution of a works contract will have to be determined after making these deductions and exclusions from the value of the works contract."

13. From this judgment of the Supreme Court it would be crystal clear that particular amounts are deductible and apart from that it would be necessary to exclude from the value of the works contract, the value of those goods which are not taxable in view of Sections 3, 4 & 5 of the Central Sales Tax Act and goods covered by Sections 14 & 15 of the Central Sales Tax Act as well as goods which are exempt from tax under the sales tax legislation of the State.

14. In the matter of Gannon Dunkerley & Co. and Ors. v. State of Rajasthan and Ors. 1993 88 STC 204, the Supreme Court was considering the effect of Sub-rule (2) of Rule 29 of the Rajasthan Sales Tax Rules as substituted by Notification dated 24th June, 1989, it reads as under:

"(2) In case of works contract, tax shall be computed on the turnover of the contractor after deducting:

(i) the value of the goods transferred in execution of works contract, whether as goods or in some other form which have already suffered tax at the rate prescribed u/s 5 or which are exempted from tax u/s 4 of the Act.

(ii) all sums towards labour charges which are directly correlated with the goods, property in which has passed in the execution of works contract, whether as goods or in some other form:

Provided that where the labour charges are not determinates from the accounts of the contractors, or are considered unreasonably high considering the nature of the contract, the deduction towards labour charges shall be allowed by the assessing authority according to the limits prescribed in column 3 for the type of contract specified in Column 2 of the table given below."

15. Sub-section (3) of Section 5 was also under consideration before the Supreme Court. It reads as under:

"(3) Notwithstanding anything contained in this Act, in the case of a works contract, the turnover of such contract shall be subjected to tax;

Provided that such deductions, as may be prescribed may be allowed to a contractor while determining his tax liability."

16. The High Court upheld the validity of Sub-section (3) of Section 5 after taking into consideration the provisions of Sub-rule (2) of Rule 29.

17. The Supreme Court, however, reversing the judgment observed that the High Court failed to notice that under Clause (i) of Sub-rule (2) of Rule 29, transfer of property in goods involved in the execution of a works contract, on which to tax is leviable u/s 5, are not required to be deducted from the turnover. According to the Supreme Court the High Court also failed to attach importance to the use of the word "turnover" (instead of the word "taxable turnover) in Sub-section (3) of Section 5 as a result of which the amplitude of the incidence of tax has been widened so as to include transactions which are outside the sphere of taxation available to the State Legislature under entry 54 of the State List. The Supreme Court observed that it must be held that Sub-section (3) of Section 5 transgresses the limits of the legislative power conferred on the State Legislature under entry 54 of the State List inasmuch as it enables tax being imposed on deemed sales resulting from transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract which take place outside the State or which take place in the course of import and export within the meaning of Sections 3, 4 and 5, respectively of the Central Sales Tax etc. The Supreme Court also observed that Clause (i) of Sub-rule (2) of Rule 29 of the Rajasthan Sales Tax Rules suffers with the same infirmity and therefore, Section 5(3) of the Act and Clause (i) of Sub-rule (2) of Rule-29 of the Rules must,, therefore, be held to be unconstitutional and void. The Supreme Court

observed that since the invalidity of Section 5(3) goes to the root of the imposition of tax and in the absence of the said provision the tax cannot be levied, the appellants before them were entitled to succeed. The Supreme Court quashed the assessment orders.

18. Section 21 of the Bihar Finance Act reads as under:

"21. Taxable turnover.--(1) For the purpose of this part the taxable turnover of a dealer shall be that part of his gross turnover which remains after deduction therefrom--

(a) (i) in case of the works contract the amount of labour and any other charges in the manner and to the extent prescribed:

(ii) sale price on account of sales exempted u/s 7.

(b) amount of sales tax actually collected as such, if any, along with the sale prices received or receivable in respect of sales of goods.

(c) sale prices on account of sales to a registered dealer other than a dealer liable to any tax under Sub-section (4) of Section 11 and specified in his registration certificate as being required for resale by him inside Bihar or in course of Inter-State trade or commerce:

Provided that in the case of such sales a declaration in the prescribed form duly filled up and signed by the registered dealer to whom the good are sold, or by his manager declared u/s 15 is furnished in the prescribed manner by the selling dealer.

(d) sale prices at the subsequent stages of sales of such goods as are specified by a notification issued under Sub-section (1) of Section 11 as being subject to tax at the first point of sale in Bihar, if necessary evidence as required by Sub-section (2) of Section 11, are produced in the prescribed manner before the prescribed authority.

(1 -A) Where any dealer claims that he is not liable to pay tax on any part of his gross turnover in respect of any goods by reason of transfer of such goods by him to any other dealer or to his agent or principal, as the case may be, for sale, the burden of proving this claim shall be on the dealer and for this purpose along with other evidence he shall furnish before the prescribed authority a declaration in the forms and in the manner prescribed.

(2) Where any goods or sales exempted from the levy of tax by a notification issued by the State Government in this behalf under Sub-section (3) of Section 7 are purchased by a dealer after furnishing a declaration as mentioned in or provided by the notification or where any goods specified in the certificate of registration of a dealer are purchased by him after furnishing a declaration as provided in Clause (c) of Sub-section (1) but are utilised by him for any purpose other than those specified in such a notification or specified in Clause (c) of Sub-section (1), as the case may be, the sale price of the goods so purchased shall,

without prejudice to any action which is or may be taken u/s 49, be deducted from the gross turnover of the selling dealer but shall be included in the taxable turnover of the purchasing dealer."

19. "Gross turnover" is defined under Clause (j) of Section 2 of the Act while "Taxable turnover" is described in Section 21 of the Act. According to Section 21 (1), the taxable turnover of a dealer shall be that part of his gross turnover which remains after deduction therefrom (a) (i) in case of the works contract the amount of labour and any other charges in the manner and to the extent prescribed (emphasis supplied).

20. From a perusal of Clause (a) (i) of Section 21 (1) it would appear that the deductions are to be given in case of the works contract of the amount of labour and any other charges. The said deductions are to be given in the manner and to the extent prescribed.

21. The word "prescribed" according to the Clause (r) of Section 2 of the Act means prescribed by rules made under the Act. When the State Legislature says that something is to be done in accordance with law then that is to be done in that manner and as prescribed and not otherwise. When the State Legislature says that the word 'prescribed' means prescribed by the Rules then whatever is to be prescribed for making each and every Section or any Section of the Act workable must be prescribed under the Rules. According to Sub-clause (i) of Clause (a) of Section 21 (1), the deductions must be in relation to the amount of labour and any other charges (emphasis supplied). The Labour is altogether a different thing and the labour charges are different to any other charges. One cannot confuse himself with the labour charges and other charges. When the legislature itself has provided different categories one as labour charges and the other general category as other charges then the State Legislature is obliged to go for a follow up legislation by prescribing manner and the extent of deductions in relation to any other charges.

22. Rule 13A of the Bihar Sales Tax Rule, 1983 provides that if the dealer fails to produce any account or the account produced are unreliable deduction under Sub-clause (i) of Clause (a) of Sub-section (i) of Section 21 on account of labour in case of works contract from gross turnover shall be equal to the percentage prescribed in Rule 13-A in respect of different types of works contract. Rule 13-A simply provides an alternative mode or assessment. It does not prescribe that in what manner and to what extent the labour charges would be deducted from the gross turnover to reach to a taxable turnover.

23. Rule 13 A unfortunately does not talk of "any other charges" Rule 13-A unfortunately does not take into consideration that under the Rules the deduction in relation to any other charges in the manner and to the extent were also to be prescribed. Rule 13-A cannot be said to be an absolute follow up legislation to Sub-clause (i) of Clause (a) of Section 21(1). When the law provides that something is to be prescribed in the Rules then that thing must be prescribed in

the Rules to make the provisions workable and constitutionally valid. In the matter of Gannon Dunkerley & Co. (supra), the Supreme Court observed that as Sub-section (3) of Section 5 and Sub-rule (2) of Rule 29 of the Rajasthan Sales Tax Act and the Rules were not providing for particular deductions the same were invalid. In the present matter the constitutional provision of law says that particular deductions would be provided but unfortunately nothing is provided in relation to the other charges either in Section 21 itself or in the Rules framed in exercise of the powers conferred by Section 58 of the Bihar Finance Act.

24. It is contended by the authorities and the learned Counsel for the State that whatever deductions were claimed by the petitioner, if are given to him in relation to labour and other charges and if the judgment of the Supreme Court in Gannon Dunkerley & Co. (supra) is observed in its full spirit while granting exemption then the petitioner would have no say. According to them, the assessing officer has given fullest deductions in favour of the petitioner and therefore, if the manner and extent of deductions relating to any other charges even if is not provided or provided or prescribed then too it would not help the case of the petitioner. This argument though appears to be impressive and lucrative but an identical argument was rejected by the Supreme Court in the matter of Gannon Dunkerley & Co. and Ors. v. State of Rajasthan and Ors., (1993 Vol. 88 STC 204). In the said matter it was submitted by the State of Rajasthan that the words "which have already suffered tax at the rates prescribed by Section 5" are wide enough to permit deduction in respect of goods on which no tax is leviable under Sub-section (1) of Section 5 of the Act. The Supreme Court observed that the said words only referred to the goods which have already been subject to tax under the Act at the rate specified u/s 5 and their value is to be excluded from the turnover. The Supreme Court observed that the legislature have made a distinction between a sale of goods on which no tax was leviable and sale of goods which was already been subjected to tax under the Act. The Supreme Court observed that it would be not be possible to construe Clause (i) of Sub-rule (2) of Rule 29 to mean that sales on which no tax is leviable under subsection (1) of Section 5 are to be excluded from the turnover for the purpose of computing tax on such turnover in relation to a works contract. We are referring to this passage of the very judgment of the Supreme Court because the Supreme Court observed that if the legislature makes a distinction between two items of sale of goods on which no tax is leviable and a sale of goods which has already been subjected to tax under the Act then such a distinction would carry its own importance. In the present matter, Sub-clause (i) of Clause (a) of Section 21 (1) clearly provides two distinct and defined items one is labour charges while the other is any other charges. The labour charges would not include other charges in view of the specific entry relating to labour charges. The entry/words 'other charges' would not include labour charges in its sweep. A fair understanding of Sub-clause (1) should be to read it that the deductions should be made from the gross turnover in case of a works contract relating to the amount of labour charges in the manner and to the extent

prescribed 'and' deductions in case of works contract in relation to any other charges in the manner and to the extent prescribed. When the law requires that the extent and the manner is to be prescribed in relation to the labour charges then it must be provided in relation to the labour charges. When the law says that the manner and extent must also be prescribed in relation to any other charges then it must be so prescribed under the Rules or must be provided under the body of the Act itself.

25. We have already observed that Section 21 does not provide the manner and the extent of the amount required to be deducted in relation to any other charges. Similarly, Rule 13A does not prescribe the deductions in relation to any other charges nor the manner and the extent.

26. There is submission of the respondents that the benefits can be given to the petitioners even if there is no rule to prescribe the manner and the extent relating to the deductions in relation to the other charges. We are of the view that this argument should not detain us unnecessarily because if the law requires a thing to be done then the State cannot say that it stands above law and would not provide/prescribe a particular thing in the rules and would simply observe the directions issued by the Supreme Court.

27. In the matter of Gannon Dunkerley & Co. (supra) the Supreme Court has observed that particular deductions must be prescribed/provided. The State Legislature cannot say that it would simply prescribe one and without providing or prescribing the other deductions and the extent and manner would go on giving the benefits. The law is not the handmaid of the State Government. The law governs the State and its individuals/citizens equally. No State has the authority to go contrary to law enacted by it. No State/No Government can say that after providing a particular law it would not observe it but would do the things after following certain judgments of the Supreme Court. When such arguments are raised it does not take into consideration that every State is governed by the Constitution of India and every State is obliged to observe the laws made under the Constitution of India. If the State does not observe the provisions of the Constitution then nobody would observe the laws made by the State. For making a particular tax law, the State derives its authority from the Constitution and if the State itself does not observe the provisions of the Constitution as interpreted by the Supreme Court then it cannot be allowed in the matter to say that the citizens of the State would be subject to tax even if there is no authority of law behind the tax laws.

28. In the matter of Orissa State Prevention and Control of Pollution Board v. Orient Paper Mills and Anr. 2003 AIR SCW 1463, a question came up before the Supreme Court that what would be meaning of the words "as may be prescribed". The Supreme Court observed that in Section 19 of the Air (Prevention and Control of Pollution) Act, 1981, the words "as may be prescribed" connote "if any" prescribed. Sub-section (1) of Section 19 of the said Act reads as under:

"The State Government may, after consultation with the State Board, by notification in the Official Gazette, declare in such manner as may be prescribed any area or areas within the State as Air Pollution Control Area or areas for the purposes of this Act" (Emphasis supplied).

The question before the Supreme Court was that what would be the meaning of the words "as may be prescribed". The Supreme Court observed as under:

"12. Section 19 says"..... such manner as may be prescribed" and not "in the manner prescribed", or ".....in the prescribed manner." The expression used leaves some lever or play in the working of the provision. We would like to lay emphasis on the use of the word 'as' which is significant. The manner is dependent upon "as" may be prescribed if it is not prescribed, there is no manner available such as to be followed. The meaning of the word 'as' has been indicated in 'Concise Oxford English Dictionary, Tenth Edition 2002" amongst others to mean as follows:

"Used in comparison to refer to the extent or degree of something, used to indicate by comparison the way that something happens; during the time of being" (Emphasis supplied).

In "Words and Phrases Permanent Edition 4" 1969 Edition, in general amongst others, at page 514 its meaning has been indicated as follows:

"As" means "to the extent", "in the manner" and "when"; and may be employed to indicate a combination of time with extent or manner. Moore v. Coates, DC Mun App 40 A 2d 68, 70." (Emphasis supplied). It is further indicated to mean importing a contingency and at page 520, it is indicated as follows:

"When, importing a contingency, a devise to certain children "as" they arrive at the age of 21 means "when" they arrive at such age." (Emphasis supplied) Further we find at page 549 the phrase "as may be prescribed" has been indicated to mean as follows:

"The phrase "as may be prescribed" in constitutional amendment authorizing certain cities to adopt or amend their charters, subject to such limitations as may be prescribed by Legislature means that future legislation, as well as that existing when city first takes out or emends charter may limit its action" Vernon's Ann St Const Art. 11 § 5. Dry v. Davidson, Tex Civ App. 115 SW 2d 659, 691. (Emphasis supplied).

In "Law Lexicon" by P. Ramanatha Aiyar, 2nd Edition, Reprint 2000 at page 147, it is indicated as under:

"used as an adverb etc. means like similar to, of the same kind, in the same manner, in the manner in which. It may also have the meaning of because, since or it being the case that; in the character or under the name of with significance of in degree; to that extent; so far (Black's Law Dictionary)".

(Emphasis supplied).

In one of the cases decided by this Court, to be referred later in this judgment, as may be prescribed" has been held to mean that "if any". It is thus clear that such expression leave the scope for some play for the workability of the provision under the law. The meaning of the word "as" takes colour in context with which it is used and the manner of its use as prefix or suffix etc. There is no rigidity about it and it may have the meaning of a situation of being in existence during a particular time or contingent, and so on and so forth. That is to say something to happen in a manner, if such a manner is in being or exists, if it does not, it may not happen in that manner. Therefore, the reading of the provision under consideration makes it clear that manner of declaration is to be followed as may be prescribed' i.e. "if any" prescribed."

29. In the said matter the Supreme Court observed that the words "as may be prescribed" would be different from the words "in the manner prescribed" or "in the prescribed manner". The Supreme Court observed that the words "as may be prescribed" leave some lever or play in the working of the provision. The Supreme Court observed that the manner is dependent upon "as" may be prescribed, if it is not prescribed there is no manner available such as to be followed. In the present matter Sub-clause (i) of Clause (a) of Section 21 (1) does not use the phrase "as may be prescribed". If this was the phrase then there would have been no difficulty in holding that if the State Legislature has not prescribed the manner etc. then nothing would be wrong. In the present matter unfortunately for the State the phrase says "in case of the works contract", the deductions are of the amount of labour and any other charges in the manner and to the extent prescribed. In paragraph 12 of the judgment of the Supreme Court, the Supreme Court has found a distinction between the words/phrase "as may be prescribed" and the phrase "in the manner prescribed". Sub-clause (i) does not leave any lever or play in the working of the provision. It gives a mandate against the State to prescribe the manner and the extent of the deduction. The provision does not say "as may be prescribed" or "if prescribed". One could understand the indication/non-action on the part of the State if the provisions say "as may be prescribed" or "if prescribed". The State when has undertaken a task to prescribe the manner and the extent of the deduction in relation to any other charges then it cannot simply provide the manner and the extent relating to labour charges and go in hibernation and say that the assessing officer would observe the judgment of the Supreme Court and proceed further in the matter. When the law requires a thing to be done in a particular manner then it must be so done.

30. In the matter of Surinder Singh Vs. Central Government and Others, , the Supreme Court observed that where a statute confers powers on an authority to do certain act or exercise powers in respect of certain matters, subject to rules, the exercise of power conferred by the statute does not depend on the existence of rules unless the statute expressly provides for the same. The Supreme Court observed that the expression "subject to the rules" only means, in accordance with the rules, if any. In the present matter, it would clearly appear that the

State Government did not have any room to itself either to have a leverage in its favour or play the game. The State Government in clear term said that for the purpose of this part, the taxable turnover of a dealer shall be that part of his gross turnover which remains after deduction there from in case of works contract, the amount of labour and any other charges in the manner and to the extent prescribed (Emphasis supplied). The word 'and' has not been used as a superfluous word. It is not even superficial. The word 'and' has not been used as a disjunctive, it has been used as a conjunctive. The State under, these circumstances is required to provide or prescribe the manner and the extent of deduction of the amount relating to labour charges and also of the other charges. If that is not done then the provisions become unworkable. When the Supreme Court said that particulars articles, items and expenses are to be deducted then all such articles, amounts etc. are to be prescribed and provided. The Supreme Court simply said that the provisions would become workable and would be valid and in accordance with the Act and the Constitution, if particulars things are provided. If those things are not provided then the law of interpretation must act against the State Government. The rights of the State Government to recover the tax remains intact but in absence of a workable provision it would not be possible for the State to assess any dealer.

31. In our considered opinion Sub-clause (i) of Clause (a) of Section 21 (1) read with Rule 13 A of the Rules did not make Sub-clause (1) fully workable because the manner and extent of deduction relating to any other charges has not been provided/prescribed by the State.

32. The assessment orders in view of the discussions aforesaid cannot be allowed to stand. The same deserve to and are accordingly quashed. Consequently no recovery proceedings can be initiated against the petitioners nor any coercive action can be taken against them.

33. It is, however, made clear that the liability of the dealer shall survive and continue and he would be liable to be taxed after the provisions are made workable.

34. Before parting with the case, we must also observe that the assessing officer in passing the order of assessment did not act fairly. In cases of turnover worth crores it is not expected of the assessing officer that he would act in a hot haste and just to earn the revenue in favour of the State or to show to his Senior Officers that he is a Competent Officer, he would play fraud with the provisions of the Act. It appears from the records that the present petitioners were asking the officer to give some time to time to produce the records. The officer was giving short time very time and thereafter, observed that the present petitioners were involved in delaying tactics. Present was not a case of a small local dealer, who have the complete records available to him. The petitioners are contractor of national level, they do not have the complete records available with them. In case like present where liability would be in crores, it is not expected of an assessee that he would simply file a document or two and leave himself at the

merely of the assessing officer. It is true that the Assessing Officer has to assess a dealer and recover tax from him and impose penalty also, if he finds a foul play but that does not mean that by passing such orders, he should coerce a citizen or a dealer to pay the tax.

35. It would also be necessary to observe that during pendency of CWJC No. 3827/2002, second assessment proceedings started. The assessee petitioner informed the officer that the question is pending consideration before this Court but the Assessing Officer for the reasons best known of him proceeded ex parte, assessed the petitioner and decided the artificial liability of the petitioner. We cannot approve the manner in which the two assessment orders were passed. When the petitioner/petitioners was/were saying before the Assessing Officer that particular items were tax paid items, particular goods were tax paid goods, particular items were obtained in Inter-State sale then proper opportunity ought to have been given to the petitioner/petitioners to prove his/their case. The manner in which the ex parte orders of assessment were passed was also bad. On that short count, these assessment orders could also be quashed and the matter could be remitted to the authority for re-assessment. In any case, the matters are not required to be remitted to the Assessing Officer in view of the decision on the larger question.

36. Both the petitions are allowed. There shall be no order as to costs.