

(2011) 12 PAT CK 0039

In the Patna High Court

Case No : LPA No. 1336 of 2011 in CWJC No. 16774 of 2010 with I.A. No's.
7042 and 7243 of 2011 in 1336 of 2011

M/s HPCL Biofuels Ltd. and Another

APPELLANT

Vs

The Saraswati Industrial Syndicate Limited

RESPONDENT

Date of Decision : 14-12-2011

Acts Referred:

Constitution of India, 1950 — Article 226
Entry Tax Act, 1976 — Section 3, 3(1)

Citation : (2012) 1 PLJR 430

Hon'ble Judges : R.M. Doshit, C.J;Birendra Pd. Verma, J

Bench : Division Bench

Advocate : Chitranjan Sinha and Rajeev Prakash, for the Appellant; Dr. Debi Prasad Pal, S.D. Sanjay, Amamath Sen and Mr. Vikash Kumar for the State, for the Respondent

Final Decision : Allowed

Judgement

Hon"ble R.M. Doshit Chief Justice

Re: I.A. No. 7042 of 2011

1. This application is made by the appellant for permission to bring on record the correspondence (pp 44 to 49). The respondents have no objection, if the said documents are placed on record. Permission is granted,

2. Interlocutory Application is allowed.

Re: L.P.A. No. 1336 of 2011

3. This Appeal under Clause 10 of the Letters Patent is preferred by the M/s HPCL BIOFUELS LTD., a wholly owned subsidiary of Hindustan Petroleum Corporation Limited, a public sector undertaking of the Central Government, against the judgment and order dated 7th July, 2011 passed by the learned Single Judge in above CWJC No. 16774 of 2010.

4. The respondent no. 1, the writ petitioner, is one Saraswati industrial Syndicate Limited, a Company incorporated under the Companies Act, 1956 (hereinafter referred to as "the Company"). The Company claims that it is the proprietor of M/s ISGEC John Thomson (hereinafter referred to as "the Firm"). The Company entered into the agreement with the HPCL BIOFUELS LTD. for installation and commission of a Sugar Mill in the State of Bihar through the Firm. A contract was entered into by the Firm and the appellant. Letter of intent was issued on 22nd October, 2009. Admittedly, for execution of the contract certain machineries have been purchased and brought in the State of Bihar in the name of the appellant. For bringing the said machineries in the State of Bihar, the appellant has been charged the entry tax and such entry tax paid by the appellant has been recovered by the appellant from the Firm from the contractual amount. It is the said action of the appellant which was the subject matter of challenge in above CWJC No. 16774 of 2010 filed by the Company.

5. According to the Company, the machinery in question was manufactured by the Company in its plant situated in the State of Haryana. The Machinery was sold to the appellant at Haryana. The property in the said machinery passed over to the appellant in Haryana. It was the appellant which brought the said machinery in the State of Bihar for installation. The appellant was, therefore, liable to pay the entry tax under The Bihar Tax on Entry of Goods in the Local Areas for Consumption, Use or Sale Therein Act, 1993 (hereinafter referred to as The Entry Tax Act").

6. The petition was contested by the appellant. According to the appellant, the appellant has entered into a contract with the Firm for installation and commission of a Sugar Mill in the State of Bihar. The appellant has no privity of contract with the Company. The Company is a stranger to the said contract. Under the terms and conditions of the contract the Firm was liable to incur all expenses including various taxes. Further, under the contract, the appellant and the Firm had agreed upon an arbitration agreement. The dispute, therefore, was referable to the Arbitration. The writ petition under Article 226 of the Constitution was not maintainable.

7. The learned Single Judge was of the opinion that the alternative remedy of arbitration was not a rule of law or compulsion, but was a matter of caution and discretion. In view of the infraction or violation of the fundamental right, the alternative remedy cannot be pressed into service. Besides, in the matter of entry tax the State Government would be vitally interested. The State Government being not a party to the agreement, the matter relating to the entry tax cannot be referred to the Arbitration. In view of the said findings and the finding that the appellant was liable to pay entry tax for the machinery imported" in the State of Bihar, the learned Single Judge allowed the writ petition. The appellant is restrained from recovering the amount of entry tax paid by it from the contractual amount. Therefore, the present Appeal.

8. Learned counsel Mr. Chitranjan Sinha has appeared for the appellant He has

taken us through the contract to buttress the argument that under the agreement it was the Firm which was liable to pay all taxes and fees. He has particularly relied upon paragraph 7.d,1 to support his submission that the Firm was liable to pay all statutory taxes, fees etc, He has also relied upon the arbitration agreement contained in paragraph-14 of the Contract.

9. The Appeal is contested by the Company. Learned counsel Mr. Debi Prasad Pal has appeared for the Company. He has submitted that the contract entered into with the appellant is in three parts; one for supply of materials and articles; second, works contract for installation and commission of sugar plant and; third, the service contract. Under the works contract, the Firm did agree to pay all the statutory taxes and fees, which the Firm has paid till the date. The matter at issue is the supply contract. Under the supply contract the machinery in question has been sold to the appellant at Haryana. It is the appellant who brought the materials from Haryana to the construction site in the State of Bihar. Any tax or fees leviable for import of the machinery is the statutory liability of the appellant. Besides, he has also submitted that the arbitration agreement, contained in paragraph-14 of the contract, refers to the works contract alone. Any dispute arising from the supply contract is not arbitrable. He has submitted that the entry tax being statutory tax, the Government being -vitally interested, the only remedy available was that of writ petition under Article 226 of the Constitution.

10. In support of his submission Mr. Pal has relied upon the judgments *Sukanya Holdings Pvt. Ltd. Vs. Jayesh H. Pandya and Another*, *Harbanslal Sahnia and Another Vs. Indian Oil Corpn. Ltd. and Others*, *Indian Oil Corporation Ltd. Vs. The State of Bihar and Others* and *Noble Resources Ltd. Vs. State of Orissa and Another*, .

Order dt. 14.12.2011

11. Section 3 of the Entry Tax Act is the charging provision. Under sub-section (1) of the said Section 3, the scheduled goods brought in the State of Bihar or to the local areas for consumption, use and sale is chargeable with an entry tax. Clause (2) of the third proviso to sub- section (1) of Section 3 provides, inter alia, that the entry tax shall be paid by the dealer liable to pay tax under the Bihar Finance Act, 1981 or by the person bringing the goods in the local area. We agree with Mr. Pal that it is the liability, of the person who brings the goods in the local area to pay the entry tax under the Entry Tax Act. But the question in the present proceeding is not the event of taxability or liability to pay tax to the State Government. The simple issue is who, under the terms of the contract, is liable to bear the incidence of entry tax. The dispute falls within the realm of the construction of the terms and conditions of the contract,

12. We do not agree with Mr. Pal that the parties have entered into three separate agreements, one for supply of material and machinery; one for installation and commission of the Sugar Plant; and the one for rendering services. The contract entered into by the appellant and the Firm is one

composite contract providing for supply of the goods and materials, installation and commission of the Sugar Mill and for rendering service. The composite contract cannot be divided into three separate agreements as submitted by Mr. Pal. Paragraph-14 of the general terms and conditions of the contract provides for arbitration. It says that all disputes and differences of whatever nature shall be referred for adjudication to the sole Arbitrator.

13. In our view, the parties having agreed to refer any dispute to an Arbitrator, the dispute shall be referred to the Arbitrator. In view of the arbitration agreement entered into between the parties, neither a suit in the civil court nor a writ petition under Article 226 of the Constitution before the High Court shall lie. The dispute arising from the terms and conditions of the contract shall not be entertained by the High Court under Article 226 of the Constitution. In our opinion, the finding recorded by the learned Single Judge that the State Government is a necessary party; the State Government not being a party to the arbitration agreement the dispute cannot be referred to the arbitration is manifestly wrong and unsustainable.

14. Indeed the State Government is entitled to recover the entry tax on the goods brought in the local area as envisaged by the Entry Tax Act. However, it does not make the State Government a necessary party to the contract between two private parties. In the present case the State Government has recovered the amount of entry tax from the appellant, the importer of the goods. Neither the provisions contained in the Entry Tax Act nor the conduct of the appellant in paying the entry tax as required, precludes the appellant from claiming that under the terms and conditions of the contract the amount of entry tax was payable by the Firm.

15. As it is apparent, the dispute revolves around the construction of the terms and conditions of the contract as to who will bear the burden of the entry tax. May be, under the Entry Tax Act it is the importer who is liable to pay such tax to the State Government, the parties to the agreement may still agree that such liability may be born by the one or the other party. Thus, merely because the appellant has paid up the entry tax, the dispute does not stand resolved.

16. In our view, the learned Single Judge is not right in holding that in view of the infraction of the fundamental right the petition under Article 226 of the Constitution was maintainable. None of the fundamental rights of the Firm can be said to have been violated by recovery of the amount of entry tax paid by the appellant. The submission made by Mr. Pal is wholly misconceived.

17. We are of the opinion that in view of the arbitration agreement between the parties, the petition under Article 226 of the Constitution ought not to have been entertained by the learned Single Judge. Parties are bound to refer their dispute for arbitration.

18. Moreover, the petition also involves disputed facts. The locus standi of the Company itself is in question. Whether the Company can set up the claim on

behalf of the Firm is a question that requires adjudication. For the aforesaid reasons, we allow this Appeal. The impugned judgment and order dated 7th April, 2011 passed by the learned Single Judge in CWJC No. 16774 of 2010 is set aside. CWJC No. 16774 of 2010 is dismissed. Parties will resolve their dispute by recourse to the arbitration as agreed under paragraph 14 of the general terms and conditions of the contract.