(2021) 06 OHC CK 0025

In the Orissa High Court

Case No : Writ Petition (Civil) No.14924 Of 2020

M/s.Harish Chandra Majhi APPELLANT

Vs

State Of Odisha & Others RESPONDENT

Date of Decision : 07-06-2021

Acts Referred:

Constitution Of India, 1950 — Article 226, 227, 286(3)(b), 366(29A)(b)
Central Sales Tax Act, 1956 — Section 3, 4, 5
Rajasthan Sales Tax Act, 1994 — Section 5(3)
Rajasthan Sales Tax Rules, 1995 — Rule 29(2)(1)
Odisha Goods And Services Act, 2017 — Section 2(119), 7(1)(d), 17(5)(c), 18(1), 61

Citation : (2021) 06 OHC CK 0025

Hon'ble Judges : Dr. S. Muralidhar, CJ;B. P. ROUTRAY, J

Bench : Division Bench

Advocate : P.C.Nayak, Kananbala Roy Choudhury, Jashobanta Dash, P.K.Muduli, Sunil Mishra

Final Decision : Dismissed

Judgement

,

B.P. Routray,J.",

1. The Office Memorandum dated 10th December, 2018 of the Finance Department under Annexure-3 prescribing guidelines for the implementation",

of GST (Goods and Services Tax) in works contract in post-GST regime with effect from 1st July, 2017, the Revised Schedule of Rates-2014",

(Revised SoR-2014) under Annexure-8 and the demand notice issued under Section 61 of the Odisha Goods and Services Act (OGSTÂ Act)Â,

hasÂ beenÂ questionedÂ inÂ theÂ presentÂ writÂ petitionÂ and connected batch of cases. The prayers in the present petition read as under:,

â??i. why the action and decision of the Opp.Parties shall not be declared illegal, unconstitutional and violative of legal right of the Petitioner on account of the",

Taxes being shared and borne by the Petitioner on post enactment Goods and Services Tax Act, 2017?",

ii. the Opp.Parties shall not be directed to restitute the benefit of GST to the Petitioner along with interest within a stipulated period in respect of work in which the,

estimated was prepared under VAT law.,

iii. the Office Memorandum dated 10.12.2018 issued by the Opp.Party No.4 under Annexure-3 shall not be declared illegal, arbitrary, unreasonable and same shall not",

be quashed.,

iv. further the process adopted by the Opp.Parties in preparation of revised SoR dated 15.09.2017 under Annexure-8 shall not be declared illegal, arbitrary and same",

shall not be quashed.,

v. why the notice issued by the Opp.Party No.9 under Annexure-9 shall not be declared illegal, arbitrary and same shall not be quashed?",

vi. why the Opp.Party shall not be directed to prepare a fresh schedule of rates considering rapidly change of rate and price and calculate the differential amount of,

GST on the contract in which estimate was prepared under VAT?â??,

2. The Petitioner is a registered work contractor and is stated to have executed many works contracts during the pre-GST period as well as post-GST,

period. The petitioner claims to have executed twenty-one contracts for different departments in the Government of Odisha where tenders were,

invited and estimates made prior to 1st July, 2017 but were completed after 1st July, 2017. But on verification of the tabular chart mentioned in the",

writ petition as well as in the affidavit dated 14th August 2020, it is seen that four numbers of works were completed prior to 1st July, 2017 and the",

rest of the works were commenced and completed after 1st July, 2017.",

3. According to the Petitioner, the Tender Call Notice for all those works were issued in pre-GST period and the estimated value of contracts were",

arrived basing on pre-revised SoR-2014 when Odisha Value Added Tax Act (OVAT Act) was in operation. Such rates mentioned in SoR-2014 (pre-,

revised) were inclusive of value added tax. After implementation of GST, revised

SoR-2014 was issued with effect from 1st July, 2017 wherein the",

rates prescribed are exclusive of tax components. As a result the estimated value of contract was reduced. The GST component with applicable rate,

was required to be added over the contract value.,

4. Accordingly the Petitioner makes a grievance that a heavy financial burden in the form of differential tax amount falls on it as the rate quoted was,

according to pre-revised SoR-2014 prevailing at the time of inviting tender. Such reduction in the cost of materials and labour charges in the revised,

SoR-2014 along with imposition of GST amount on the contract value imposes an extra financial burden on the Petitioner.,

5. The State-Opposite Parties, including the Finance Department, have filed their respective replies. According to them, under the GST law,â??works",

Contract? is subject to tax liability with effect from 1st July, 2017 at the rate of 5% or 12% or 18% of the contract value depending on the nature of",

contract. In the present case, it is 12%. For effective implementation of the tax liability, the contract value as determined in the pre-GST regime using",

SoR-2014, was required to be revised. Accordingly, the rates mentioned in SoR-2014 were also revised with effect from 1st July, 2017 under",

Annexure-8 since the earlier rates were inclusive of the tax components prevailing in the pre-GST era. Correspondingly, instructions/guidelines were",

issued under Annexure-3 prescribing the mode and manner of calculation of GST in respect of works contract executed after 1st July, 2017, either",

partly or fully.,

6. The Central Goods and Services Tax Act (CGST Act) and the OGST Act came into force with effect from 1st July, 2017. The CGST & the OGST",

inter alia subsume the Value Added Tax and Service Tax in vogue during the pre-GST period. Sec. 2 (119) of the CGST Act defines â??Works,

Contract? as follows:,

â??(119)â??works contractâ? means a contract for building, construction, fabrication, completion, erection, installation, fitting out, improvement, modification, repair,",

maintenance, renovation, alternation or commissioning of any immovable property wherein transfer of property in goods (whether as goods or in some other form) is",

involved in the execution of such contract;â??, Â,

7. Further, Clauses 5 and 6 of Schedule-II to the CGST Act define â??supply of services? as under:",

â??5. Supply of services,

The following shall be treated as supply of services, namely:",

(a) renting of immovable property;,

(b) construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the",

entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is",

earlier.,

Explanation : For the purposes of this clause-,

(1) the expression â??competent authorityâ? means the Government or any authority authorised to issue completion certificate under any law for the time being in,

force and in case of non-requirement of such certificate from such authority, from any of the following, namely:-",

(i) an architect registered with the Council of Architecture constituted under the Architects Act, 1972 (20 of 1972); or",

(ii) a chartered engineer registered with the Institution of Engineers (India); or,

(iii) a licensed surveyor of the respective local body of the city or town or village or development or planning authority;,

Â (2) theÂ Â expressionÂ Â â??constructionâ??Â Â includes,

additions, alterations, replacements or remodeling of any existing civil structure;",

xxÂ Â,

xxÂ xx,

6. Composite Supply,

The following composite supplies shall be treated as a supply of services, namely:-",

(a) works contract as defined in clause (119) of section 2; and,

(b) Â xx Â xx,

Â xxâ??,

8. Section 7(1)(d) and 7 (1-A) define the â??scope of supply? as under:,

â??7. Scope of supply,

(1) For the purposes of this Act, the expression",

â??supplyâ?? includes-,

xx Â xx,

Â xx,

(d) the activities to be treated as supply of goods or supply of services as referred to in Schedule II,

xx Â,

Notification dtd.06.06.2018 issued by NRIDA, MoRD.GoI","Finance Deptt. Office Memorandum

dtd.10.12.2018

Para.4:

Implication of GST on PMGSY work has been divided into

4 categories.

Category-A Works sanctioned prior to 01.07.2017 and are

ongoing/subsisting.

Category-B Works sanctioned after 01.07.2017 and

Tenders have been completed.

Category-C Works sanctioned after 01.07.2017 and tender

process has not been initiated.

Category-D All new works proposed and yet to be

proposed.","Para.3 :

Where the tender was invited before 01.07.2017 but payments made for balance work or full work

after implementation of GST.

To cull out GST component of the existing contracts (i.e.

The value of taxes subsumed under GST). The bench mark

date for this purpose will be 01.07.2017, i.e. GST will be

applicable on the portions of the contracts that are being

paid from 01.07.2017. (Clause (iii) & (iv) of Para4(A))","Item-wise quantity of work done after 30.06.2017

(i.e. the Balance Work) and its work value as per

the original agreement basing on the pre-revised

SoR-2014 is to be ascertained first. (Para-3(i))

The value of the portion of the work not completed or not

paid for as on 01.07.2017 shall be divided into two

components.

Â (a) Value of work including taxes and duties such as

Custom Duty, taxes on petroleum products and other non-

VAT taxes that have not been subsumed into GST should

be worked out.

(b) The balance will be the value of taxes subsumed into

GST such as Central Excise Duty and VAT i.e. GST

Component. (Para.4(A)(v))","The revised estimated work value for the Balance

work is to be determined as per the Revised SoR-

2014. (In case of rates of any goods of service

used in execution of the Balance work not

covered in the Revised Sor-2014, the tax-

exclusive basic value of that goods or services

shall be determined by removing the embedded

tax incidences of VAT, Entry Tax, Excise Duty,

Service Tax, etc. from the estimated Price/quoted

Price). (Para.3(ii))

The value of subsumed taxes under GST needs to be

separated out from the contracted amount to arrive at the

value of work. (Para.4(A)(vi))","The revised estimated work value for the Balance

Work shall then be enhanced or reduced in the

same proportion as that of the tender

premium/discount. (Para.3(iii))

To estimate the value of the subsumed tax an indicative

Excel format is attached. (Para.4(A)(vii))","A model formant for calculation of the

GSTinclusive work value for the Balance Work is

attached. (Para.3(v))

Once the value of work sanctioned and GST taxes are

arrived, the employer may enter in to supplemental

agreement with revised agreement value that will be

original contracted value minus the value of subsumed tax

arrived as above plus GST of 12%. (Para.4(A)(viii))","A supplementary agreement shall be signed with

the works contractor for the revised GST-

inclusive work value for the Balance Work.

(Para.3 (vi))

The contractor pays GST on the value of work partly

using the input tax credit that represents the taxes he has

already paid through the inputs and partly using tax

collected from the procuring entity concerned. Thus the

supplier cannot claim to have incurred loss on account of

embedded taxes that has been paid on the inputs.

(Para.4(A)(xii) & (xiii))","In case the revised GSTinclusive work value for

the Balance Work is more than the original

agreement work value for the Balance work, the

works contractor is to be reimbursed for the

excess amount. (Para.3 (vii))

In case the revised GST inclusive work value for

the Balance Work is less than the original

agreement work value for the Balance Work, the

payment to the works contractor is to be reduced

accordingly. In case excess payment has already

been made to the works contractor in pursuance

of the original agreement, the excess amount paid

will be recovered from the works contractor.

(Para.3 (viii))

such a representation is filed, the authority will consider and dispose of the same, in the light of the aforesaid revised guidelines dated 10.12.2018 issued by the",

Finance Department, Government of Odisha, as expeditiously as possible, preferably by 31.03.2019.",

If the petitioner(s) will be aggrieved by the decision of the authority, it will be open for the petitioner(s) to challenge the sameâ?¦â?¦â?¦â?¦â?¦â?¦xxxâ??",

25. Thus there was no determination of the issue raised on merits.,

26. The Petitioner next cites the decision in M/s.Gannon Dunkerley and Co. v. State of Rajasthan (1993) 1 SCC 364, to contend that the",

contractor is liable to pay the tax on material component only after deducting labour and service charges from the works component. But the position,

has changed after the amendment to the relevant provisions of the Finance Act, 1994 with effect from 1st June, 2007 and upon the coming into force",

of the CGST Act and the OGST Act with effect from 1st July, 2017. The Supreme Court has in Larsen and Toubro Limited v. State of Karnataka",

(2014) 1SCC 708 held as follows:,

â??64. In Gannon Dunkerley, this Court, inter alia, established the five following propositions:",

64.1. As a result of 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 the other for supply of labour and service and as a result of such contract which was single and indivisible has been brought on a par with a,

contract containing two separate agreements;, 64.2. If 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 the 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;,

64.3. In view of sub-clause (b) of clause 29-A of Article 366, the State Legislatures are competent to impose tax on the transfer of property in goods involved in the",

execution of works contract. Under Article 286(3)(b), Parliament has been empowered to make a law specifying restrictions and conditions in regard to the system of",

levy, rates or incidents of such tax. This does not mean that the legislative power of the State cannot be exercised till the enactment of the law under Article 286(3)(b)",

by Parliament. It only means that in the event of law having been made by Parliament under Article 286(3)(b), the exercise of the legislative power of the State under",

Entry 54 in List II to impose tax of the nature referred to in sub-clauses (b), (c) and (d) of clause (29-A) of Article 366 would be subject to restrictions and conditions",

in regard to the system of levy, rates and other incidents of tax contained in the said law;",

64.4 While enacting law imposing a tax on sale or purchase of goods under Entry 54 of the State List read with Article 366 (29-A)(b), it is permissible for the State",

Legislature to make a law imposing tax on such a deemed sale which constitutes a sale in the course of the inter-State trade or commerce under Section 3 of the,

Central Sales Tax Act or outside under Section 4 of the Central Sales Tax Act or sale in the course of import or export under Section 5 of the Central Sales Tax Act;,

and,

64.5. The measure for the levy of tax contemplated by Article 366 (29-A)(b) is the value of the goods involved in the execution of a works contract. Though 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. 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 works and not the cost of acquisition of the goods by the contractor.,

65. In Gannon Dunkerley, sub-section (3) of Section 5 of the Rajasthan Sales Tax Act and Rule 29(2)(1) of the Rajasthan Sales Tax Rules were declared as",

unconstitutional and void. It was so declared because the Court found that Section 5(3) transgressed the limits of the legislative power conferred on the State,

Legislature under Entry 54 of the State List. However, insofar as legal position after Forty-sixth Amendment",

is concerned, Gannon Dunkerley holds unambiguously that the States have now legislative power to impose tax on transfer of property in goods as goods or in some",

other form in the execution of works contract.,

XX â?¦â?¦ â?¦â?¦. XX â?¦â?¦.. â?¦â?¦.. â?¦â?¦.. XX,

72. In our opinion, the term â??works contract? in Article 366(29-A)(b) is amply wide and cannot be confined to a particular understanding of the term or to a",

particular form. The term encompasses a wide range and many varieties of contract. The Parliament had such wide meaning of â??works contractâ? in its view at the,

time of Forty-sixth Amendment. The object of insertion of clause 29-A in Article 366 was to enlarge the scope of the expression â??tax of sale or purchase of goodsâ??,

and overcome Gannon Dunkerley. Seen thus, even if in a contract, besides the obligations of supply of goods and materials and performance of labour and services,",

some additional obligations are imposed, such contract does not cease to be works contract. The additional obligations in the contract would not alter the nature of",

contract so long as the contract provides for a contract for works and satisfies the primary description of works contract. Once the characteristics or elements of,

works contract are satisfied in a contract then irrespective of additional obligations, such contract would be covered by the term â??works contract?. Nothing in",

Article 366(29-A)(b) limits the term â??works contractâ? to contract for labour and service only. The learned Advocate General for Maharashtra was right in his,

submission that the term â??works contractâ? cannot be confined to a contract to provide labour and services but is a contract for undertaking or bringing into,

existence some â??worksâ?. We are also in agreement with the submission of Mr. K.N. Bhat that the term â??works contractâ? in Article 366(29-A)(b) takes within its,

fold all genre of works contract and is not restricted to one specie of contract to provide for labour and services above. The Parliament had all genre of works contract,

in view when clause 29-A was inserted in Article 366.,

XX â?¦.. â?¦â?¦ â?¦ XX â?¦â?¦ â?¦â?¦. â?¦â?¦ XX,

97. In light of the above discussion, we may summarise the legal position, as follows:",

97.1. For sustaining the levy of tax on the goods deemed to have been sold in execution of a works contract, three conditions must be fulfilled: (i) there must be a",

works contract, (ii) the goods should have been involved in the execution of a works contract and (iii) the property in those goods must be transferred to a third party",

either as goods or in some other form.,

97.2. For the purposes of Article 366(29-A)(b), in a building contract or any contract to do construction, if the developer has received or is entitled to receive valuable",

consideration, the above three things are fully met. It is so because in the performance of a contract for construction of building, the goods (chattels) like cement,",

concrete, steel, bricks etc. are intended to be incorporated in the structure and even though they lost their identity as goods but this factor does not prevent them",

from being goods.,

97.3. Where a contract comprises of both a works contract and a transfer of immovable property, such contract does not denude it of its character as works contract.",

The term â??works contractâ? in Article 366 (29- A)(b) takes within its fold all genre of works contract and is not restricted to one specie of contract to provide for,

labour and services alone. Nothing in Article 366(29-A)(b) limits the term â?? works contractâ??.,

97.4. Building contracts are species of the works contract.,

97.5. A contract may involve both a contract of work and labour and a contract for sale. In such composite contract, the distinction between contract for sale of",

goods and contract for work (or service) is virtually diminished.,

97.6. The dominant nature test has no application and the traditional decisions which have held that the substance of the contract must be seen have lost their,

significance where transactions are of the nature contemplated in Article 366(29-A). Even if the dominant intention of the contract is not to transfer the property in,

goods and rather it is rendering of service or the ultimate transaction is transfer of immovable property, then also it is open to the States to levy sales tax on the",

materials used in such contract if such contract otherwise has elements of works contract. The enforceability test is also not determinative.,

97.7. A transfer of property in goods under clause 29-A(b) of Article 366 is deemed to be a sale of the goods involved in the execution of a works contract by the,

person making the transfer and the purchase of those goods by the person to whom such transfer is made.,

97.8. Even in a single and indivisible works contract, by virtue of the legal fiction introduced by Article 366(29-A)(b), there is a deemed sale of goods which are",

involved in the execution of the works contract. Such a deemed sale has all the incidents of the sale of goods involved in the execution of a works contract where the,

contract is divisible into one for the sale of goods and the other for supply of labour and services. In other words, the single and indivisible contract, now by Forty-",

sixth Amendment has been brought on par with a contract containing two separate agreements and States have now power to levy sales tax on the value of the, material in the execution of works contract.,

97.9. The expression â??tax on the sale or purchase of goodsâ? in Schedule VII List II Entry 54 when read with the definition clause 29-A of Article 366 includes a tax,

on the transfer of property in goods whether as goods or in the form other than goods involved in the execution of works contract.,

97.10. Article 366 (29-A) (b) serves to bring transactions where essential ingredients of â??sale? defined in the Sale of Goods Act, 1930 are absent within the ambit of",

sale or purchase for the purposes incorporation of of levy of sales tax. In other words, transfer of movable property in a works contract is deemed to be sale even",

though it may not be sale within the meaning of the Sale of Goods Act.,

97.11. Taxing the sale of goods element in a works contract under Article 366(29-A)(b) read with Entry 54 List II is permissible even after incorporation of goods,

provided tax is directed to the value of goods and does not purport to tax the transfer of immovable property. 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 works even though property passes as between the,

developer and the flat purchaser after goods.â??,

27. In Kone Elevator India Private Limited v. State of Tamil Nadu, (2014) 7 SCC 1, the Supreme Court held as follows:",

â??69. Considered on the touchstone of the aforesaid two Constitution Bench decisions in Buildersâ?? Assn. of India and Gannon Dunkerly, we are of the",

convinced opinion that the principles stated in Larsen and Toubro as reproduced by us hereinabove, do correctly enunciate the legal position. Therefore, â??the",

dominant nature testâ? or â??overwhelming component testâ? or â??the degree of labour and service testâ? are really not applicable. If the contract is a composite,

one which falls under the definition of works contracts as engrafted under clause (29-A)(b) of Article 366 of the Constitution, the incidental part as regards labour and",

service pales into total insignificance for the purpose of determining the nature of the contract.â??,

28. Further, in Mathuram Agrawal v. State of M.P. (1999) 8 SCC 667 ,it has been held that the statute should clearly and unambiguously convey",

three components of the tax law i.e., the subject of the tax, the person who is liable to pay the tax and the rate at which the tax is to be paid. In the",

instant case, three components of the tax, i.e., subject of tax, person liable to pay the tax and rate of tax has been clearly defined in the statute. The",

OM dated 10th December, 2018 only prescribes the manner/procedure of calculation to determine the amount of tax in a particular eventuality in the",

transitional period of migration to GST Act with effect from 1st July, 2017. Consequently, the Court finds no merit in the Petitioner?s challenge to the",

said OM in law.,

29. At this juncture, it is necessary to take note of the fact that the Petitioner has filed the present writ petition after receipt of a notice (Annexure-9)",

of demand of recovery of excess payment. The notice has been issued under Section 61 of the OGST Act and the order passed pursuant thereto is,

appealable under the OGST Act. Therefore, the Court refrains from expressing any opinion at this stage on the merits of the said notice and leaves",

open all the contentions of the parties in relation thereto to be urged at the appropriate stage in those proceedings.,

30. For all of the aforementioned reasons, the Court finds no merit in the writ petition, and it is accordingly dismissed. There shall be no order as to",

costs.,

31. As the restrictions due to resurgence of COVID-19 situation are continuing, learned counsel for the parties may utilize a printout of the order",

available in the High Court?s website, at par with certified copy, subject to attestation by the concerned advocate, in the manner prescribed vide",

Court?s Notice No.4587, dated 25th March, 2020 as modified by Court?s Notice No.4798, dated 15th April, 2021.",

â?¦â?¦â?¦â?¦â?¦â?¦â?¦â?¦â?¦â?¦â?¦â?¦â?¦â?¦â?¦,

