(2011) 06 GAU CK 0012

In the Gauhati High Court

Case No : Writ Appeal No. 41 of 2000

National Hydro Electric Power Co.Ltd. APPELLANT

Vs

State of Manipur & Ors. RESPONDENT

Date of Decision : 24-06-2011

Acts Referred:

Citation : (2012) 6 GLR 219 : (2011) 5 GLT 388

Hon'ble Judges : B.P.Katakey, J and B.D.Agarwal, J

Bench : Division Bench

Advocate : Mr. K.P. Pathak, Sr. Advocate & Mr. S. Agarwal., Advocates appeared for the Respondents: Mr. N. Kotiswar, A G, Mr. Th. Rajkisore, Mr. H.S. Paonam, Sr. Advocate & Mr. Bipin., Advocates appearing for Parties

Judgement

B.P. Katakey, J.—This appeal is directed against the judgment and order dated 23rd February, 2000 passed by the learned Single Judge in Civil Rule No. 1667/1989 (Guwahati), which was renumbered as Civil Rule No.143/1991 (Imphal), whereby and whereunder the writ petition filed by the appellant challenging the notice of demand dated 27th July, 1989 for Rs.71,21,27,675/ (Rupees Seventy One Crores Twenty One Lakhs Twenty Seven Thousands Six Hundred Seventy Five) issued by the Chief Engineer, Electricity Department of Government of Manipur, towards the sales tax payable under the provisions of the Manipur Tax on Sale of Electricity Act, 1984 (in short," 1984 Act") has been partly allowed while refusing to set aside the said demand notice.

2. The appellant filed the said writ petition contending inter alia that the Government of India issued the Office Memorandum requiring the appellant to supply the electricity generated by it in Loktak Hydro Electric Power Project in the State of Manipur to all the States in the North Eastern Region, as per requirement and thereafter, in view of the subsequent decision of the Ministry of Energy, Government of India taken on 13th November, 1990 allocating the quantum of power to be supplied to different North Eastern States, as the power purchase agreements were entered into with those States including the States of

Assam and Nagaland, apart from the State of Manipur for supply of the allocated quantum of power, no tax can be levied by the State of Manipur under the provisions of 1984 Act, in respect of the sale of power to the States of Assam and Nagaland, such sale being the interStates sale. According to the appellant, the electricity generated in Loktak Hydro Electric Power Project was transmitted to Dimapur in Nagaland and Mariani in Assam, apart from transmission to Imphal in Manipur and hence for sale of the electricity to the consumers outside the State, pursuant to the purchase agreements entered into for consumption outside the State of Manipur, no sales tax under the Act can be levied and realized, such sale being the interState Sale and outside the purview of the 1984 Act. The appellant, therefore, has prayed for, apart from others, declaration that Section 2(g) of the 1984 Act is ultravires the Constitution, as the definition of'' sale'' within the meaning of the said Act, also includes the transmission and supply of electricity outside the State. The appellant in the said writ petition also contended that in any case, the Government of Manipur, without framing the rules laying down the manner of levy and collection of tax on sale of electricity in Manipur, cannot levy any tax and realize the same, as sought to be done in the case in hand. The imposition of the penalty for non payment of the tax, as levied, has also been challenged on the same ground.

3. The respondent Nos. 1 and 2 contested the writ proceeding by filing affidavitinopposition contending inter alia that as the sale of electricity to different North Eastern States including the State of Manipur was completed within the territorial limit of the State of Manipur, the State Government is authorized to levy tax on sale of such electricity to the States other than the State of Manipur, as in the agreements entered into between the appellant/writ petitioner and the respondent Nos.3 and 4, the delivery point for supply of energy to the bulk power customers is stipulated as 132 KV Bus Bar at Loktak Station in the State of Manipur. In the affidavitinopposition filed by the said respondents, it has also been contended that since the 1984 Act has been enacted for levy and collection of tax for sale of electricity in Manipur, if any portion of the definition of ''sale'' under Section 2(g) of the Act is repugnant to the preamble of the Act, such portion is to be struck out and not the entire definition of'' sale''. The said respondents, however, in the affidavitinopposition has admitted non framing of rules for levy and realization of tax.

4. The learned Single Judge, upon hearing the learned counsel appearing for the parties, partly allowed the said writ petition declaring the part of the definition of ''sale'' under Section 2(g) of 1984 Act, so far as it relates to transmission or supply of electricity outside the State of Manipur, as unconstitutional and ultravires the Constitution. The learned Single Judge, however, has refused to set aside the demand notice by holding that the sales of electricity to the States of Assam and Nagaland were completed in the State of Manipur. as in the contracts between the writ petitioner and the respondent Nos. 3 and 4, the delivery point is shown as Loktak Station in the State of Manipur and as such, the State of Manipur can levy and collect sales tax under the provisions of 1984 Act. The

question whether the tax can be levied and collected under the provisions of the said Act without framing rules has, however, not been gone into. Hence, the present appeal.

5. We have heard Mr. K.P. Pathak, learned Sr. Counsel for the appellant, Mr. N. Kotiswar, learned Advocate General, Manipur appearing for the respondent Nos. 1 and 2 and Mr. H.S. Paonam, learned Sr. Counsel appearing for the respondent No.4. 6. Referring to the provisions contained in Article 246 of the Constitution and Entry92A of the ListI in the Seventh Schedule, it has been contended by Mr. Pathak that only the Parliament can make law for levy and collection of tax on the sale or purchase of goods other than the newspapers, where such sale or purchase takes place in the interState trade or commerce and as such, the State Legislature has no legislative competence to enact any law for levy or collection of tax in respect of interState sale of goods. According to Mr. Pathak, ''sale'' as defined in Section 2(g) of 1984 Act also takes in its fold the transmission or supply of electricity outside the State, i.e. the interState sale, thereby authorizing the State Government to levy and collect sales tax for transmission and supply of electricity even outside the State, i.e. in respect of the sale which constitute the interState trade or commerce. Drawing the attention of the Court to the contracts entered into between the appellant and the respondent Nos.3 and 4, it has been submitted by Mr. Pathak that though the electricity is generated in the Loktak project in the State of Manipur, part of it is transmitted to the different North Eastern States, apart form the State of Manipur, in terms of the allocation made by the Government of India on 13th November, 1990 and as such, the transmission of electricity to the States, other than the State of Manipur, would constitute interState trade or commerce, therefore, the State of Manipur has no authority to levy and collect any tax on the sale of such electricity to other States. Mr. Pathak further submits that in the matter of transmission of electricity, as the events of sale and consumption are inseparable, the State Legislature has no legislative competence to enact law for imposition of tax on sale of electricity, if the consumption is outside the State, as in the case in hand. The learned Sr. Counsel further submits that under Entry53 of ListII in the Seventh Schedule, though the State Legislature has the legislative competence to make law for levy and collection of tax on the consumption or sale of electricity, the same, however, is subject to the provisions of Entry92A of ListI and V hence for sale or consumption of the electricity outside the State, only the Parliament has the legislative competence to make law for levy and collection of tax, such sale being the interState sale. The State Legislature, according to Mr. Pathak, can make law for levy and collection of tax on the consumption or sale for consumption of electricity within the meaning of Entry53 of ListII when such consumption is within the State and not beyond the territory of the State. It has also been submitted that any other sale of electricity shall be subject to the limit provided by Entry54 of ListII in the Seventh Schedule, since the ''goods'' includes electricity. The learned Sr. Counsel, therefore, submits that the State Government has no authority to levy and collect tax in respect of the

transmission of electricity to the State of North Eastern Region other than the State of Manipur, as has been levied and sought to be collected by the impugned demand notice dated 27"1 July, 1989. The learned Sr. Counsel, however, has submitted that the appellant is paying the tax, as levied by the State of Manipur under the provisions of 1984 Act in respect of the sale and consumption of electricity within the state and would continue to do so on the basis of the demand raised. In support of his contention, Mr. Pathak, learned Sr. Counsel for the appellant has placed reliance on a constitution bench judgment of the Apex Court in State of Andhra Pradesh Vs. National Thermal Power Corporation Limited & Ors. reported in (2002) 5 SCC 203.

7. It has also been submitted by the learned Sr. Counsel that no tax can be levied or collected by the State Government, except by authority of law, as enshrined in Article 265 of the Constitution of India. According to the learned Sr. Counsel, though Section 15 of the 1984 Act empowers the State Government to frame rules laying down the procedure for levy and collection of tax, no such rule, admittedly, has been framed and as such, levy and collection of tax without framing such rule is contrary to the provisions of Article 265 of the Constitution.

8. The learned Advocate General, on the other hand, supporting the impugned judgment and order passed by the learned Single Judge has submitted that it is apparent from the contracts for sale between the appellant/writ petitioner and the respondent Nos. 3 and 4 that the sale was complete in the State of Manipur and as such, the tax for sale of electricity under the provisions of the 1984 Act has rightly been levied by the State Government. It has also been submitted that to constitute the interState sale, 3 (three) conditions are required to be fulfilled, which also includes the movement of goods from one State to another where the sale concludes and in the instant case, the sale of electricity having been concluded in the State of Manipur and not in the State where it is transmitted, such sale would not constitute interState sale, though there was movement of electricity outside the State of Manipur after the sale was complete within the State. Relating to the levy and collection of tax under the provisions of 1984 Act, without framing the rules, it has been submitted by the learned Advocate General that though such rule has not been framed, since there is no dispute relating to the sale of electricity and the amount of tax payable for such sale by the appellant/writ petitioner, non framing of such rule will have no bearing in the case in hand. The learned Advocate General further submits that the appellant/ writ petitioner is continuing to pay the tax under the 1984 Act in respect of electricity consumed in the State of Manipur and as such, non framing of the rules may not be a ground for interference with the decision of the Government to levy and collect tax under 1984 Act.

9. Mr. Paonam, learned Sr. Counsel appearing for the respondent No.4 supporting the arguments advanced by the learned Sr. Counsel for the appellant/writ petitioner has also submitted that since in the matter of sale of electricity, the events of sale and consumption are inseparable, the State Legislature has no

legislative competence to make law for levy and collection of tax on sale of electricity if the consumption of such electricity is outside the State, as it amounts to interState sale of electricity. The learned Sr. Counsel, therefore, submits that the levy of tax by the Government of Manipur in respect of sale of electricity to the respondent Nos. 3 and 4 is not valid in law.

10. We have considered the submissions of the learned counsel for the parties and also perused the materials made available on record apart from the judgment and order passed by the learned Single Judge which is under challenge in the present appeal.

11. The learned Single Judge, as noticed above, has declared the part of the definition of'' sale'' in Section 2(g) of 1984 Act, so far it relates to the transmission or supply of electricity outside the State, as unconstitutional being ultravires the Constitution., by holding that in view of Entry92A of ListI read with. Entries53 and 54 ListII, only the Parliament has the legislative competence to enact the law for levy and collection of tax on sale of electricity outside the State of Manipur. The learned Single Judge, however, applying the situs principle has held that since the sale of the electricity has completed within the State of Manipur, the State Government is empowered to levy and collect tax on such sale under 1984 Act, even though the electricity was subsequently transmitted to the territory outside the State of Manipur.

12. The allocation of power to different North Eastern States by the Government of India on 13th November, 1990, out of the electricity generated by the appellant in Loktak Hydro Electric Power Project is not in dispute. Out of the Electricity generated 34.6%; 28.95%, 11.52%, 5.81% and 4.76% were allocated to the States of Assam, Manipur, Tripura, Nagaland and Arunachal Pradesh, respectively. 14.29% of such electricity generated, however, remains unallocated. The appellant/writ petitioner pursuant to such allocation executed 2(two) agreements with the respondent Nos. 3and 4, apart from other agreements with the other States. It is also not in dispute that the electricity is generated in the said project within the State of Manipur and pursuant to the aforesaid agreements part of such generated electricity was transmitted for consumption in the States of Assam and Nagaland, apart from the consumption in the State of Manipur itself.

13. Article 246 of the Constitution of India provides that the Parliament shall have exclusive power to make laws with respect to any of the matters enumerated in ListI in the Seventh Schedule. Similarly the State Legislature shall have the exclusive power to make laws for the State or any part thereof with respect to any of the matters enumerated in ListII in the Seventh Schedule. Entry92A of the ListI, which has been inserted by the Constitution (6th Amendment) Act, 1956, with effect from 11th September, 1956, empowers only the Parliament to make law relating to the levy and collection of tax on the sale or purchase of goods, other than the newspapers, where such sale or purchase takes place in course of interState trade or commerce. Entry53 of List11

empowers the State Legislature to make law for levy and collection of tax on the consumption or sale of electricity. Entry54 of ListII, which has been inserted by Constitution (6th Amendment) Act, 1956, with effect from 1 st November, 1956, however, has provided that the State Legislature will have the legislative competence to make law for levy and collection of tax on the sale or purchase of goods, other than newspapers, subject to the provisions of Entry92A of ListI.

14. Article 286 of the Constitution puts an embargo on the State from making any law imposing or authorizing the imposition of a tax on the sale or purchase of goods where such sale or purchase takes place (a) outside the State; or (b) in the course of the import of the goods into, or export of the goods out of, the territory of India. The question, therefore, is whether the State Legislature can make law for imposition of tax on consumption or sale of electricity, even though such sale constitute interState safe. Entry92A of ListI authorizes the Parliament only to make law for imposition of taxes on sale or puchase of goods other than newspapers, where such sale or purchase takes place in course of trade or commerce. Entry54 of ListII, as noticed above, also empowers the State Legislature to enact law for imposition of tax on sale or purchase of goods other than the newspapers, however, subject to the provisions of Entry92A of ListI. In Burmah Shell Oil Storage & Distribution Company of India Limited Vs. Belgaum Borough Municipality, reported in (1963) SC 906, the Apex Court while considering the word ''sale'' as occurring in Entry52 of ListII has held that the Act of sale is merely the means for putting the goods in the way of use or consumption. It is an earlier stage, the ultimate destination of the goods being ''use or consumption'' and hence the same meaning should be assigned to the word ''sale1 in Entry53 of ListII. It has also been held that in the context of electricity there can be no sale of electricity excepting by its consumption, for it can neither be preserved nor stored, which was the reason to hold that the word ''supply'' should be interpreted to include sale or consumption of electricity. The Apex Court further held that Entry53 should, therefore, be held as ''taxes on the consumption or sale for consumption of electricity''.

15. In CST Vs. MP Electricity Board, Jabalpur, reported in (1969) I SCC 200, the Apex Court has held that the electric city is ''goods''. While considering the definition of ''goods'', as given in Article 366(12) of the Constitution, which is an inclusive definition, it has also been held that the definition in terms is very wide according to which ''goods'' means ali kinds of movable property. The term ''movable property'' when considered with reference to ''goods'' as defined for the purpose of sales tax cannot be taken in a narrow sense and merely because electrical energy is not tangible or cannot be moved or touched like, for instance, a peace of wood, or a book, it cannot cease to be movable properly when it has all the attributes of such property. The Apex Court further opined that if there can be sale and purchase of electrical energy like any other movable object, there cannot be any difficulty in holding that electric energy was intended to be covered by the definition of" goods''. Concurring with the said view, a Constitution Bench of the Apex Court in National Thermal Power Corporation

Limited (supra) case has also held that electricity is ''goods'' within the meaning of Article 366(12) of the Constitution.

16. In National Thermal Power Corporation Limited (supra), the Apex Court, while tracing the legislative history of 1956 Amendment to the Constitution and also considering Entry 92A of ListI, apart from Entries53 and 54 of ListII in the Seventh Schedule, has held that the power to make law by a State Legislature in the matter of sale of electricity in view of Entries53 and 54 of ListII would be subject to provisions of Entry92A of ListI. It has also been held that since the electricity is'' goods'', and the sale of electricity has to be construed and read as sale for consumption within the meaning of Entry53, the conflict, if any, between Entry53 and Entry54 ceases to exist and the 2(rwo) can be harmonized and read together and because the electricity is ''goods'', it is covered by Entry54 also. It has also been held that the taxes on the consumption or sale for consumption of electricity within the meaning of Entry53 must be the consumption within the State and not beyond the territory of the State and any other sale of electricity shall continue to be subject to the limits provided by Entry54. The Apex Court further held that in case of electricity, the events of sale or consumption being inseparable, the situs of sale or purchase is wholly irrelevant so far its interState character is concerned and to ascertain as to whether the transaction is interState sale or not, in the matter of electricity, it has to be seen whether the sale and consumption is outside the State or not.

17. In the present case, it is not in dispute that there are contracts for sale of electricity generated in the Loktak Hydro Electric Power Project in the State of Manipur, between the appellant and the respondent Nos. 3 and 4, to the extent of the allocation made by the Government of India on 13th November, 1990 and such power generated is put into the transmission system of Power Grid Corporation of India Limited and the transmission systems of other bulk power beneficiaries, wherefrom the buyers draw the power purchased by them. Though under the aforesaid agreements, the delivery point is at Loktak Station (Manipur), since those are admittedly transmitted outside the State of Manipur for consumption in other States, it constitute interState sale, as in case of electricity, the events of sale and consumption are inseparable. Hence fixation of delivery point in the State of Manipur would not be the determining factor in the matter of interState sale of electricity, as the situs of sale or purchase is wholly irrelevant so far as the interState character is concerned. The contention of the learned Advocate General, as noticed above, therefore, cannot be accepted.

18. It is evident from the demand notice dated 27th July, 1989 that demand for tax under 1984 Act has been raised in respect of the sale and consumption of electricity outside the territory of the State of Manipur, apart from imposition of penalty. The State Government, in view of the aforesaid discussion, cannot impose tax on the sale of electricity to the respondent Nos.3 and 4, under 1984 Act, which are transmitted for consumption outside the territory of the State of Manipur, such sale being the interState sale, tax on which is only leviable under

the provisions of the Central Sales Tax Act, 1956. The demand of the State of Manipur, in so far as it relates to the sale and consumption of electricity to the respondent Nos.3 and 4 is, therefore, set aside being illegal. The appellant/writ petitioner, v however, shall continue to pay the tax under the 1984 Act for sale and consumption of electricity in the State of Manipur, as they have not disputed their liability to pay such tax. The question whether the tax can be levied and collected under the provisions of 1984 Act, without framing the rules, in view of the aforesaid discussion, has not been gone into in the present case, being not required, as the appellant/writ petitioner has no objection in paying the tax to the Government of Manipur under the provisions of 1984 Act in respect of the sale and consumption of electricity in the State of Manipur.

19. The judgment and order dated 23rd February, 2000 passed by the learned Single Judge in Civil Rule No. 1667/1989 (Guwahati), which was renumbered as Civil Rule No. 143/1991 (Imphal), in so far as it relates to the refusal to interfere with the demand notice, is set aside. The writ appeal is accordingly allowed to the extent indicated above. No costs.