(1989) 09 PAT CK 0007

In the Patna High Court

Case No : C.W.J.C. No. 317 of 1989 (R)

Pest Control India Ltd. APPELLANT

Vs

The Union of India (UOI) and Others RESPONDENT

Date of Decision : 14-09-1989

Acts Referred:

Bihar Finance Act, 1981 — Section 13(5), 17, 18, 2, 22(3)
Constitution of India, 1950 — Article 29A, 366

Citation : (1990) 1 PLJR 615

Hon'ble Judges : S.B. Sinha, J;B.P. Singh, J

Bench : Division Bench

Advocate : Debi Pal and M.S. Mittal, for the Appellant; Narayan Roy, for the Respondent

Final Decision : Allowed

Judgement

B.P. Singh, J.—The instant writ application was filed by the Petitioner-company praying for a declaration that the Constitution (Fortysixth Amendment) Act, 1982 is ultra vires the Constitution of India as also the Bihar, Finance Act, 1981 in so far it seeks to impose tax on the works contracts. It was further prayed that this Court may declare that the provisions with regard to imposition of sales tax on the works contracts were not applicable to the nature of the services rendered by the Petitioner-company namely, pest control, house hold disinfection, anti-termite treatment etc. It accordingly sought quashing of the. order dated 9.12.83 (Annexure 5) by which responded No. 4, the Deputy Commissioner, Commercial Taxes, Circle Jamshedpur, held that the provisions of works contracts were applicable to the Petitioner company well in regard to the services rendered by it under agreement with the Tata Iron & Steel Co. Ltd. Consequently, it sought quashing of the notices dated 22.12.88 and 23.1.89 Annexures 6 and 7 requiring the Petitioner to produce its books of accounts for the purpose of hearing u/s 13(5)(ii), 17, 18(i) and 22(3) of the Bihar Finance Act, 1981.

2. At the hearing of this writ application, Dr. Debi Pal appearing for the Petitioner,

did not challenge the vire.s of the Constitution (Fortysixth Amendment) Act, 1982 and the Bihar Finance Act, 1981 - insofar as it seeks to impose sales tax on works contract. He, however, submitted that having regard to the nature of services rendered by the Petitioner-company, there being no sale of goods, the provisions relating to works contracts did not apply and the Petitioner-company was not liable to pay any sales tax having regard the nature of services rendered.

3. According to the Petitioner, it is a. company engaged in the business of rendering services such as anti-termite treatment rodent control, general past control, household disinfection etc. For this purpose, the Petitioner-company has been engaged by M/s. Tata Iron & Steel Co. Ltd. for treating the existing buildings including wooden and other furniture with pest control and anti termite treatment. The activity of the Petitioner-company is only in the nature of service and no sale of goods is involved in any form whatsoever. According to it, the entire transaction is for rendering services only and in fact, no goods are transferred in any form whatsoever. The treatment or service rendered by the Petitioner is mainly curative or propivlectic/preventive in nature and there is no supply of goods to the client. The chemicals used by the Petitioner are in the form of treatment against pests and are consumed in the process of rendering services. The chemicals used are not identifiable in any way as goods and hence there is no transfer of property in goods by the Petitioner in the course of pest control services for their clients. The application of chemicals to protect property against attack by pests does not in any way add to the value of the property nor does it add any ornamental or additional quality to the buildings, godowns or any place which is treated with chemicals. In other words, it is a pure contract for rendering services and no question of transfer of property in goods in any form is involved. Since the Petitioner is not selling or supplying any materials, commodities or articles, its job is purely to render a service in the form of treatment against pests which cannot even be classified as a works contract.

4. The grievance of the Petitioner is that despite these facts; it received a notice u/s 33(a) of the Bihar Finance Act from the office of Respondent No. 4 asking it to appear and to explain why it had not filed returns under the provisions of the Act relating to works contract. The Petitioner''s representative appeared before Respondent No. 4 and explained that the Petitioner was engaged in the business of rendering services of pest control and was charging their clients only for services rendered. Since no goods were supplied in any form and its activities was confined to rendering services only, there was no question of payment of sales tax for rendering such service as no sale of goods was involved.

5. Respondent No. 4 by order dated 9.12. 88 Annexure 5 held that four facts were clearly established from the materials placed before him : (1) that the work done by the Petitioner clearly came within the definition of works contract because there was an agreement with M/s. Tata Iron & Steel Co. Ltd. for doing the work at pre-determined rates; (2) the work involved, chemicals process for the purpose of making a. place free of pests such as, white ants and other

insects; (3) since in the process of doings such works, chemicals are used and only by use of such chemicals any place is rendered free of pests, it is clear that in executing this type of work, chemicals are used (4) without use of, chemicals, the job cannot be accomplished.

He further held the work was done enhancing the speciality and usefulness of a particular place and this was being done by use of a machines which vapourised the chemical substances so that they may treat all places where required for which payment is made according to specified rates, and the job was done by use of chemicals which destroyed the pests. In these circumstances, the contract was in the nature of a works contract which was not free from levy of sales tax under the Bihar Finance Act. He therefore, held that such a contract amounted to a works contract and that Petitioner company was liable to pay sales tax under the Bihar Finance Act for which necessary action should be initiated.

6. Pursuant to the aforesaid order Annexure-5, notices Annexures-6 and 7 were issued to the Petitioner. A supplementary affidavit has been tiled on behalf of the Petitioners reiterating its contentions in the writ application and emphasizing the fact that having regard to the nature of services rendered by the Petitioner, the chemicals used are consumed in the process and therefore, it cannot be conceived that the property in such chemicals is transferred because the goods themselves ceased to exist.

7. No counter-affidavit has been filed on behalf of the Respondents controverting the facts stated in the writ petition and the supplementary affidavit filed on behalf of the Petitioner.

8. I may notice that the submission urged before us was also one of the submissions urged before the Supreme Court in Builders Association of India v. Union of India 1989 B.L.T.151 : 1989 PLJR (SC) 31. It was urged in Builders Association''s case that if goods for example fuel and power, are used in the process of executing a works contract, but are consumed in the process, the property in such goods cannot conceivably be transferred, because the goods themselves ceased to. Exist. Such goods cannot be subject matter for the levy of sales tax at all. Their Lordships did not deal with this particular submission as it was not considered necessary.

9. Clause 29A was inserted in Article 366 of the Constitution of India by the Constitution (Forty Sixth Amendment) Act, 1982. Under Clause 29A(b) "tax on the sale or purchase of goods" includes 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; 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. I am not referring to the other Sub-clauses of 29A since in the instant case, it was contended that the transaction in question was covered by Sub-clause (b) of Clause 29A of Article 366, the contract being in the nature of a

works contract.

10. The definition of "tax on the sale or purchase of goods" inserted by the Constitution (Forty Sixth Amendment) Act, 1982 is an inclusive definition and the transactions covered by Sub-clauses (a) to (f) of Clause 9A could not be treated as a transaction of sale or purchase for the inclusive definition provided by the Constitution (Forty Sixth Amendment) Act. Legislature was aware of the clever devices resorted to by interested parties which resulted in large scale avoidance of sales tax by making the transaction appear as one which did not come within the definition of sale or purchase of goods even though they really involved transfer of property in goods. The Supreme Court has referred to these transactions which necessitated the passing of the Constitution (Forty Sixth Amendment) Act, 1982. So far as Sub-clause (b) of Clause 29A of Article 366 of the Constitution is concerned the court observed as follows:

Article 366 is the definition clause of the Constitution. It says that in the Constitution unless the context otherwise requires, the expressions defined in that article have the meanings respectively assigned to them in that article. The expression ''goods'' is defined in clause (12) of Article 36o of the Constitution as including all materials, commodities and articles. It is true that in the State of Madras v. Gannon Dunkerley &, Co. (Madras) Ltd. (supra) this Court held that a works contract was an indelible contract and the turnover of the goods used in the execution of the works contract could not, therefore, become exigible to sales tax. It was in order to overcome the effect of the said decision Parliament amended Article (29-A). 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 the goods (whether as goods or in some other form) involved in the execution of a works contract. It does not say that a tax on the sale or purchase of goods included a tax on the amount paid for the execution of a works contract. It refers to 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. The emphasis is on the transfer of property in goods (whether as goods or in some other form). The latter part of clause (29-A) of Article 366 of the Constitution makes the possition very clear. While referring to the transfer delivery or supply of any goods that takes place as per Sub-clause (a) to (f) of clause (29-A), 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. Hence, a transfer of property in goods under Sub-clause (b) of clause (29-A) is deemed to be a sale of the goods involved in the execution of a works contract by the person making the transfer and a purchase of those goods by the person to whom such transfer is made.

11. The expression ''goods'' is defined in Clause 12 of Article 366 as follows:

"goods" includes all materials, commodities and articles

In the Bihar Finance Act, 1981 ''goods'' has been defined in section 2(h) of the Act as follows:

"goods'' means all kinds of movable property, including livestock and all materials, commodities and articles as such or in some other form but excluding electricity, newspapers, actionable claims, stocks'' shares or securities

Explanation I?Materials, commodities 4 and articles attached to or forming part of an immovable property which are agreed to be severed under the contract of sale shall be deemed to be goods within the meaning of this clause.

Explanation II?Materials commodities and article sold or supplied as such or in some other form in execution of works contract shall be deemed to be goods with in the meaning of this clause.

12. From the plain reading of Sub-clause (b) of Clause 29A of Article 366 of the Constitution of India it appears that there must be a transfer of property in goods whether as goods or in some other form involved in the execution of a works contract Clause 12 of''. Article 366 and Section 2(h) of the Bihar Finance nee Act 1981 gives some indication as to what is meant by ''goods''. The inclusive definition in the Constitution as well as in the Bihar Finance Act refer to materials commodities and articles or all kinds of movable property, all materials, commodities and articles, as such or in some J other form. Before a tax can be levied on a works contract, it must be established that there is transfer of property in goods involved, in the execution of a works contract. The'' goods may have undergone a change of form. But in whatever form, there must be transfer of property in goods. This presupposes that the goods existed and that either in its original form or in some other form it is transferred to the principal by the contractor. If the goods do not exist in any form whatsoever and are consumed in the process of execution of the work, can it be said that in such a case there is a transfer of property in goods? In my view, the transfer of goods implies the existence of the goods in some form or the other. If the goods do not exist, there is no question of transfer of property in goods. In Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi (1978) 1 S.C.R. 557, the Supreme Court quoted with approval a passage from Elects B. Merrill v. James W. Hodson 1915 BL. R.A. 481, dealing with a case of supply of food or drink to customers wherein it was held that such supply did not partake the character of a sale of goods, It was observed: ''the necessary incident of this service or ministry is the consumption of the food required. This consumption involves destruction and nothing remains of what is consumed to which the right of principal can be said to attach. Before consumption title does not pass; after consumption there remains nothing to become the subject of title.

13. While it is true that in view of the Constitution (Forty Sixth Amendment) Act, 1982, what was earlier considered to be one indivisible contract is by legal fiction altered into a contract which is divisible into one for the sale of goods and the other for supply of labour and services. It is not possible for the State to levy

sales tax on the value of goods involved in a works contract. But even so this presupposes the existence of goods, because there can be no transfer of property in goods unless the goods themselves exist. In the instant case, it is not disputed that the chemicals are used for the purpose of eradicating pests. The chemicals are sprayed through machines so that when the process ends, nothing tangible remains in which property is transferred. By the process of spraying or applying chemicals, a place is treated against insects and pests but in the process the chemicals are themselves consumed and there remains nothing in which property is transferred. I am of the view that a transaction as the one in question is really, does not involve transfer of any goods as understood in Sub-clause (b) of Clause 29A of Article 366 of the Constitution of India or under the provisions of the Bihar Finance Act, 1981. It is a service contract pure and simple and does not involve any sale of goods since there arc no goods in which property can be transferred. I am, therefore, of the view that the contract between the Petitioner-company and M/s. Tata Iron & Steel Co. Ltd. is a mere service contract for eradication of pests, rodents, termites etc, and does not fall within the purview of a contract for supply of goods as envisaged under the Constitution of India and the Bihar Finance Act, 1981. In such a transaction, there being no transfer of property in goods, no sales tax is leviable under the provisions of the Bihar Finance Act, 1981.

14. In this view of the matter, this writ application must be allowed. Consequently, I quash Annexure-5, the order of the Deputy Commissioner of Commercial Taxes dated 9.12.1988 as also the notices Annexures 6 and 7 issued purusant thereto. In the facts and circumstances of the case, here will be no order as to costs.

