(2009) 08 BOM CK 0107

In the Bombay High Court

Case No : Writ Petition No''s. 496, 4885 and 4886 of 1990

Sudhakar S. Pangol APPELLANT

Vs

State of Maharashtra and Another RESPONDENT

Date of Decision : 07-08-2009

Acts Referred:
Constitution of India, 1950 — Article 14, 19(1), 246(2), 366

Citation : (2010) 3 ALLMR 900 : (2009) 25 VST 369

Hon'ble Judges : Ferdino I. Rebello, J;D.G. Karnik, J

Bench : Division Bench

Advocate : A.V. Anturkar, for the Appellant; V.A. Sonpal, A.G.P., for the Respondent

Final Decision : Dismissed

Judgement

D.G. Karnik, J.—In each of these three petitions, the petitioners challenge the constitutional validity of Maharashtra Sales Tax on the Transfer of Property in Goods involved in the Execution of Works Contract (Re-enacted) Act, 1989 (for short "the Works Contract Act, 1989") and pray for a declaration that the Works Contract Act, 1989 is unconstitutional and ultra vires the provisions of Articles 14 and 19(1)(g) as well as Article 246(2) read with Entry No. 54 List II in Seventh Schedule read with Article 366 of the Constitution of India.

2. Mr. Anturkar, learned Counsel appearing for the petitioners, submitted that the grounds of challenge in all the three petitions are common. He took us through the facts stated in Writ Petition No. 496 of 1990 and submitted that decision on that petition would also be applicable to the other two petitions.

3. Mr. Anturkar in fairness invited our attention to a decision of this Court in Writ Petition No. 485 of 1990 (Builders Association of India v. State of Maharashtra and Ors., decided on 25th August 1994 ? Coram: Pendse, J.), wherein the constitutional validity of the Works Contract Act, 1989 was upheld by this Court. He however submitted that the grounds of challenge to the constitutional validity

of the Works Contract Act, 1989 raised in this petition were not raised before the Court in that petition and, therefore, this Court can again go into the question of constitutional validity independent of that decision. He further submitted that in any event the points raised in these petitions are not covered by the previous decision and, therefore, the points raised herein would be required to be considered independently by this Court. We are afraid this is not permissible. A decision of a Court in a writ petition challenging the constitutional validity of a statute, if not akin to a judgment in realm ,would certainly amount to a stare decisis. The challenge to the constitutional validity may be on a different ground or grounds or in addition to the grounds raised in the earlier petition would not ordinarily be permissible before the same Court. The same Court cannot be moved again and again by one and other petitioners challenging the issue of constitutional validity of the same statute on different grounds. Even otherwise, we are satisfied that no grounds exist to declare the Works Contract Act, 1989 to be constitutionally invalid for the reasons indicated below.

4. In The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd., , the Supreme Court examined the ambit of Entry 48 of List II of the Seventh Schedule to the Government of India Act, 1935 and held that the expression "sale of goods" connotes essential ingredients being an agreement to sell movables for a price and property therein passing pursuant to that agreement. The Supreme Court further held that in a works contract, which is entire and indivisible, there is no sale of goods and no tax could be imposed on the supply of material used in such a contract treating it as a sale. After the decision of the Supreme Court, with regard to the taxability of goods involved in the execution of the works contract, the Law Commission in its 61st Report made a suggestion to insert in Article 466 a wide definition of "sale" so as to include works contracts. Keeping in view the recommendations of the Law Commission, the Constitution was amended by 46th Amendment. The 46th Amendment made it possible for the State to levy sales tax on the price of goods and materials used in a works contract. In its judgment in Builders Association of India and Others Vs. Union of India (UOI) and Others, , the Supreme Court upheld the validity of the 46th Amendment to the Constitution. The petitioners therefore have not challenged the constitutional validity of the 46th Amendment to the Constitution, but have restricted the challenge to the Works Contract Act, 1989.

5. Mr. Anturkar, learned Counsel for the petitioners, submitted that the Works Contract Act, 1989 seeks to charge tax on the goods purchased outside the State and was void to the extent it sought to levy tax on purchase of goods outside the State. He invited our attention to Section 3 of the Works Contract Act, 1989 which is the charging Section and creates a liability on every dealer on turnover of all purchases or sales. Turnover of sales has been defined u/s 2(p) of the Works Contract Act, 1989 to mean aggregate of the amount of sale price received or receivable by a dealer in respect of any transfer of property in the goods involved in the execution of any works contract whether executed fully or partly during any period. "Sale price" has been defined u/s 2(m) as follows:

2(m) "Sale price" means-

(i) the amount of purchase price of the goods or, as the case may be, the value of the goods, brought or transferred from a place outside the State where such goods are sold in the same form in which they were purchased, brought or transferred; and

(ii) where the goods have been sold in the form other than the form in which they were purchased or, as the case may be, brought or transferred from a place outside the State, then the purchase price of the goods or, as the case may be, the value of the goods brought or transferred from a place outside the State, and so sold.

6. Mr. Anturkar submitted that under Sub-clause (i) of Clause (m) of Section 2 of the Works Contract Act, 1989 lays down that in respect of goods brought or transferred by a dealer from a place outside the State, the purchase price of the goods outside the State would be regarded as the sale price for the purpose of determination of incidence of tax payable under the Works Contract Act, 1989. He submitted that thus the price of the goods paid by a dealer in respect of a purchase transaction which has taken outside State is regarded as price for the purpose of determination of the incidence of tax. The Legislature has thus sought to bring to tax the purchase effected by the dealer outside the State. The Legislature has no power or competence to tax purchase or sale which takes place outside the State of Maharashtra and, therefore, the Act is void for lack of legislative competence.

7. Mr. Anturkar further submitted that the petitioners purchase goods outside the State and bring them to the State of Maharashtra, where they are used in works contracts with their customers. The property in the goods purchased outside the State of Maharashtra passes on to the customers in the execution of the works contracts. The Legislature of Maharashtra may be competent to impose tax the value of the goods which are purchased by the petitioners in the State of Maharashtra and used in the execution of a works contract. However, by seeking to tax the goods which are purchased by the petitioners outside the State of Maharashtra and which are transferred in execution of works contract in the State of Maharashtra on the basis of the purchase price paid outside the State, the Legislature of Maharashtra has exceeded its power by imposing tax on the purchases of the goods effected outside the State of Maharashtra.

8. In its decision in Builders Association of India v. State of Maharashtra (supra), this Court has upheld the constitutional validity of the Works Contract Act, 1989 and has held that the Legislature of Maharashtra has a power to impose tax on the value of goods which are transferred by a person to another while executing the works contract. In determining value of the goods as transferred, a dispute may arise as to how the value of goods which have been transferred by a person to another in execution of works contract, is to be determined. The property in which it is transferred may have been purchased by the dealer/contractor either

within the State or from outside the State. While there may be no dispute between the parties as to the computation of the price of the goods purchased by the dealer or the contractor or a dealer in the State of Maharashtra and used in execution of the work, a dispute may arise as to the value of the goods purchased by the dealer or the contractor outside the State and used in execution of a works contract. In order to obviate such dispute, the Legislature has defined the word "sale price" in Section 2(m). By that definition, it is provided that in respect of the goods brought by a contractor or a dealer from outside the State and used in the works contract, the price of the goods at which they were purchased would be the sale price for computation of the "turnover of sale" in Section 2(p). The combined effect of Section 2(p) read with 2(m) is to consider the price at which the goods were purchased by the dealer or the contractor outside the State and brought into the State for execution of the works contract as the price for the purpose of computing the turnover of a works contract. Undoubtedly, the State is competent to tax the goods, whether purchased within the State or outside the State and brought in the State, the property in which is transferred to another in execution of a works contract within the State of Maharashtra. For the purpose of taxation, it matters not where from the goods have been brought by the contractor/dealer and used in execution of a works contract. Section 2(p) read with 2(m) of the Works Contract Act, 1989 only provides the mechanism of determining the value of the goods which have been purchased outside the State and used in a works contract in the State. By doing so, the Legislature has not taxed the sale transaction which has taken place outside the State, but has only provided a mechanism as to how the value of the goods, the property in which it is transferred by the contractor/ dealer in execution of works contract, is to be determined. This definition is introduced to obviate any dispute in ascertaining the price of the goods which form the total turnover of the contractor/dealer.

9. No other point was urged challenging the constitutional validity of the Works Contract Act, 1989.

10. For the reasons stated above, we are of the view that there was no lack of legislative power in the Legislature of Maharashtra in taxing the goods brought into the State from outside the State and the property in which it is transferred in execution of a works contract. The petitions accordingly fail and are dismissed with no order as to costs.

11. Rule discharged with no order as to costs.