

(2001) 06 AP CK 0034

In the Andhra Pradesh High Court

Case No : Writ Petition No's. 10991, 10995 and 10999 of 2001

V.P.R. Constructions

APPELLANT

Vs

Superintending Engineer, Roads and Buildings Department

RESPONDENT

Date of Decision : 13-06-2001

Acts Referred:

Andhra Pradesh General Sales Tax Act, 1957 — Section 2(1)
Constitution of India, 1950 — Article 335(29A), 366

Citation : (2001) 124 STC 186

Hon'ble Judges : S.R. Nayak, J;S. Ananda Reddy, J

Bench : Division Bench

Advocate : K. Gurivi Reddy, for the Appellant; The Special Government Pleader for Taxes, for the Respondent

Final Decision : Dismissed

Judgement

S. Ananda Reddy, J.—These writ petitions are filed by the petitioners praying for the issue of a writ of mandamus declaring the inclusion of "works contractor" in the definition of "dealer" in Section 2(1)(e) of the Andhra Pradesh General Sales Tax Act, 1957 (hereinafter referred to as "the Act") and consequent application of the amended provisions of Sections 5-F, 5-G and 5-H of the said Act to the petitioners, who are works contractors as illegal, arbitrary, unwarranted, null and void and consequently direct the respondents to refund to the petitioners the sales tax amounts already collected from them in respect of the contract work done by them.

2. The learned counsel for the petitioners contended that the inclusion of "works contractor" within the definition of "dealer" is illegal. According to the learned counsel, the contractors purchase materials required for carrying out the works entrusted to them by various Government departments and use the material purchased while executing them. In the process of execution of those works, the works contractors do not make any sale so as to make them liable for payment of sales tax. Therefore the inclusion of the "works contractor" in the definition of

"dealer" in Section 2(1)(e) of the Act and consequent application of the amended provisions for deduction of tax is illegal and arbitrary.

3. The learned counsel in support of his contentions relied upon the following judgments :

> M/s. Rainbow Colour Lab and Another Vs. The State of Madhya Pradesh and Others [OVERRULED], , Hindustan Aeronautics Ltd. v. State of Karnataka [1984] 55 STC 314 (SC) and Steel Authority of India Ltd. Vs. State of Orissa and Others etc. etc.,

4. The learned Special Government Pleader for Sales Taxes on the other hand, opposed the contentions of the learned counsel for the petitioners. It is stated that the said amendment to the definition of the "dealer" in Section 2(1)(e) is consequent upon the amendment made to Article 466 of the Constitution by the 46th Amendment, as a result of which the scope of the term "dealer" was widened by inclusion of a deemed sale in respect of the materials used by the "works contractors" while executing the works. The learned counsel also contended that the amendment to the Constitution was upheld by the Supreme Court in the case of Builders Association of India and Others Vs. Union of India (UOI) and Others, and consequently the amendment made to the definition of "dealer" in Section 2(1)(e) is in conformity with the said amended provisions of the Constitution.

5. The core contention of the petitioners in this batch of writ petitions is that the amended provision of Section 2(1)(e) of the Act by inclusion of the "works contractor" in the term "dealer" is arbitrary, illegal and consequently sought for mandamus to the respondents not to give effect to the amended provisions, so as to deduct the tax in respect of the works contracts executed by the petitioners. The basis of the argument advanced by the learned counsel for the petitioners is that the petitioners make purchases of the articles or things that are required for the purpose of execution of the works contracts that are entrusted to them and the petitioners-contractors use those articles or things while executing those contracts and there is no sale effected by them either directly or indirectly in respect of the materials that are purchased and used by the petitioners-contractors while executing the works. Though the petitioners have stated that the said amendment is illegal and arbitrary, they did not elaborate how the said provision is illegal or arbitrary. In so far as the issue whether there was a sale of the materials that are purchased by the works contractors, which are used in the execution of the works, the same is covered by the amended Article 466, which was upheld by the Supreme Court in the case of Builders Association of India and Others Vs. Union of India (UOI) and Others, . As a result of the insertion of Sub-clause (b) of Clause (29-A) of Article 466 of the Constitution of India, the parliament has enlarged the scope of tax on sale or purchase of goods, by including 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. By virtue of the said enlargement of the scope of

tax on the sale or purchase of the goods, the inclusion of "works contractor" within the definition of "dealer" in Section 2(1)(e) is perfectly in conformity with the amended provisions of the Constitution. It would be appropriate to refer to the relevant part of the judgment of the apex Court in the case of Builders Association of India [1989] 73 STC 370.

"It was in order to overcome the effect of the decision of the Supreme Court in *The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd.*, wherein it was held that a works contract was an indivisible contract and the turnover of the goods used in execution of the works contract could not, therefore, become exigible to sales tax, that Parliament amended Article 466 of the Constitution of India by introducing Sub-clause (b) of Clause (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 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 466 of the Constitution makes the position very clear. While referring to the transfer, delivery or supply of any goods that takes place as per Sub-clauses (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. The object of the new definition introduced in Clause (29-A) of Article 466 of the Constitution is, therefore, to enlarge the scope of "tax on the sale or purchase of goods" wherever it occurs in the Constitution so that it may include within its scope the transfer, delivery or supply of goods that may take place under any of the transactions referred to in Sub-clauses (a) to (f) thereof wherever such transfer, delivery or supply becomes subject to levy of sales tax. So construed the expression "tax on the sale or purchase of goods" in entry 54 of the State List, therefore, 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 also.....

After the Forty-sixth Amendment the works contract which was an indivisible one is by a legal fiction altered into a contract which is divisible into one for sale of goods and the other for supply of labour and services. After the 46th Amendment, it has become possible for the States to levy sales tax on the value of goods involved in a works contract in the same way in which the sales tax was leviable on the price of the goods and materials supplied in a building contract

which had been entered into in two distinct and separate parts.....

When the law creates a legal fiction such fiction should be carried to its logical end. There should not be any hesitation in giving full effect to it.

If the power to tax a sale in an ordinary sense is subject to certain conditions and restrictions imposed by the Constitution, the power to tax a transaction which is deemed to be a sale under Article 466(29-A) of the Constitution should also be subject to the same restrictions and conditions. Ordinarily unless there is a contract to the contrary in the case of a works contract the property in the goods used in the construction of a building passes to the owner of the land on which the building is constructed, when the goods or materials used are incorporated in the building. The contractor becomes liable to pay the sales tax ordinarily when the goods or materials are so used in the construction of the building and it is not necessary to wait till the final bill is prepared for the entire work."

6. From the above it is clear that the contractor becomes liable to pay sales tax when the goods or materials are so used in the construction or used in the execution of the works contract. In fact, the term "dealer" referred to in Section 2(1)(e) was amended by Act 18 of 1985 with effect from July 1, 1985, which was made in conformity with the amended provisions of the Constitution of India. Therefore, there is no illegality or arbitrariness insofar as the incorporation of the term "works contractor" within the definition of "dealer" in Section 2(1)(e) of the Act.

7. The learned counsel for the petitioners relied upon various decisions in support of his contention. The first decision is in the case of M/s. Rainbow Colour Lab and Another Vs. The State of Madhya Pradesh and Others [OVERRULED], . In this case the apex Court considered the liability to impose sales tax on the value of material used by a photographer in developing and printing films to his customers. Though the liability to sales tax in respect of the material used for developing and printing films was upheld by the Madhya Pradesh High Court, the apex Court reversed the said judgment holding that the work done by a photographer is only in the nature of service contract and not involving any sale of goods. Accordingly, allowed the appeal of the assessee. It was clearly held in that case that materials used by the photographer is only incidental to the service rendered by him. It was also observed that photo prints supplied by them to their customers are not marketable commodities and as goods they have no value. In the light of the said findings as to the facts of that case, the ratio laid down by the apex Court in that case is of no assistance to the petitioners.

8. In the case of Hindustan Aeronautics Ltd. [1984] 55 STC 314 (SC), the assessee entered into an agreement to accomplish the servicing and maintenance of certain Air Force planes to the specified standard. For the works to be carried out, payment was to be made by the Government at cost plus 10 per cent profit basis or at the standard rates fixed by the appellant wherever

applicable. Clause 3 of the agreement provided that the Government will provide all the necessary spare parts and materials. Where, however, there was delay the appellant was to provide them wherever possible either by purchase or manufacture, within an expenditure authorised by the Government's Deputy Financial Adviser, All items provisioned by the appellant were to be the property of the Government and were to be issued on contract loan and the Government agreed to pay : (a) for items manufactured by the appellant, cost plus 10 per cent and (b) for items purchased from indigenous or overseas sources, actual invoice price plus all other charges plus 5 per cent. After each work was completed a final inspection of the repair done was checked by the Works Inspection Department and thereafter a delivery order and a bill were prepared. Since it was required by the defence audit, the labour charges and material charges were shown separately. The question was whether the equivalent to the money value of the spare parts of the aircraft which the appellant had supplied to the Air Force as a result of their use in the process of repairing, servicing and overhauling the aircraft, could be subjected to tax. The assessee claimed that there had been no contract for the sale of spare parts to the Air Force and that the spare parts were used during the course of execution of the works contract relating to servicing, repairing and overhauling of the aircraft, etc. The said claim was rejected by the Tribunal, which was confirmed by the High Court. On appeal the Supreme Court held, reversing the decision of the High Court, "that the contract was to accomplish for the Government the servicing and maintenance of aircraft of the Air Force and works required on visiting aircraft according to the specified standard. The Government undertook to supply the bulk of the materials and it was only because the aircraft had to be kept in readiness and there should be no delay in getting materials, that the contract provided for the appellant to carry on the works by manufacturing or buying the requisite materials in case of delay, the expenditure therefore being authorised by the Government's Deputy Financial Adviser. The expression "all items provisioned will be the property of the Government and will be issued on contract loan" indicated that though gathered and processed or manufactured by the appellant, the appellant would have no property in those goods and would not be able to dispose of or deal with them but they would be treated as the property of the Government. The fact that those materials were separately placed at cost plus 10 per cent profit was to ensure quick and proper execution of the work and was a neutral factor. Therefore, the spare parts and materials were supplied by the appellant in the course of execution of works contracts, there was no sale thereof and their turnover was not exigible to sales tax.

Where passing of property was merely ancillary to the contract for the purposes of the works such a contract does not thereby become a contract of sale."

The learned counsel also relied upon an unreported Reported in [2000] 118 STC 306. judgment of the apex Court in the case of Nathpa Jhakri Jt. Venture v. State of Himachal Pradesh in Civil Appeal No. 8468 of 1997, dated March 14, 2000. In this case the appellant before the apex Court challenged the vires of Section 12-

A of the Himachal Pradesh General Sales Tax Act, 1968 and Rule 31-A of the Himachal Pradesh General Sales Tax Rules, 1970 before the High Court. The said provisions provided for deduction of an amount from the bills or invoices of the works contractors purporting to be tax payable towards transfer of goods involved in works contract. The High Court took the view that the relevant amount is the valuable consideration payable for the transfer of property in goods and not the entire value or consideration for the entire works contract and what was directed to be deducted is only an amount not exceeding four per cent as may be prescribed purporting to be a part or full of the tax payable on such sales which would necessarily mean tax payable under the charging provisions of the Act. The High Court held that the State Legislature has not exceeded its competence in enacting Section 12-A of the Act. The said judgment was assailed before the apex Court. The apex Court reversed the judgment of the High Court of Himachal Pradesh. The relevant part of the judgment is as under :

"A bare perusal of the two provisions will make it clear that in either provision there is an obligation to deduct from transactions relating to works contract on bills or invoices raised by the works contractor an amount not exceeding four per cent or two per cent, as the case may be. Though the object of the provision is to meet the tax in respect of the transactions on all works contract on the valuable consideration payable for the transfer of property in goods involved in the execution of the works contract, the effect of the provision is that, irrespective of whether the sales are inter-State sales or outside sales or export sales which are outside the purview of the State Act and those transactions in respect of which no tax can be levied even in terms of the enactment itself, such deductions have to be made in the bills or invoices of the contractors. To say that if a person is not liable for payment of tax inasmuch as on completion of the assessment refund can be obtained at a later stage is no solace, as noticed in *Bhawani Cotton Mills Ltd. Vs. State of Punjab* and Another, , Further, there is no provision for certification of the extent of the deduction that can be made by the authority. Therefore, we must hold that arbitrary and uncanalised powers have been conferred on the concerned person to deduct up to four per cent from the sum payable to the works contractor irrespective whether ultimately the transaction is liable for payment to any sales tax at all. In that view of the matter, we have no hesitation in rejecting the contention advanced on behalf of the State."

In the case of *Steel Authority of India Ltd. Vs. State of Orissa and Others etc. etc.*, , the provisions of Section 13-AA of the Orissa Sales Tax Act, 1947 providing for deduction of tax at source from the payments to works contractors was assailed. The appellant Steel Authority of India Ltd. has entered into a works contract with Mukund Iron & Steel Works Limited for modernisation of its steel plant at Rourkela in the State of Orissa. Pursuant to the above, the contractor purchased certain equipment from outside the State as well as from outside the country and supplied the same to the appellant-company. The bills submitted to the appellant-company include the above materials besides supply of steel by

appellant-company, services for design, engineering and fabrication, erection, structural construction, civil construction, etc. The appellant-company, while deducting tax u/s 13-AA of the Orissa Sales Tax Act, 1947 has not deducted tax at source in respect of payments made relating to inter-State sales, outside sales and import sales. The Commercial Tax Officer passed proceedings levying penalty for the year 1994-95 under Sub-section (5) for contravention of Sub-section (1) of Section 13-AA. Thereupon the appellant filed writ petition in the Orissa High Court. The High Court held that Section 13-AA was not ultra vires of the Constitution. On appeal, the apex Court reversed the judgment of the Orissa High Court and held as under :

"There can be no doubt, upon a plain interpretation of Section 13-AA, that it is enacted for the purposes of deduction at source of the State sales tax that is payable by a contractor on the value of a works contract. For the purposes of the deduction neither the owner nor the Commissioner who issues to the contractor a certificate u/s 13-AA(5) is entitled to take into account the fact that the works contract involves transfer of property in goods consequent upon of an inter-State sale, an outside sale or a sale in the course of import. The owner is required by Section 13-AA(1) to deposit towards the contractor's liability to the State sales tax four per cent of such amount as he credits or pays to the contractor, regardless of the fact that the value of the works contract includes the value of inter-State sales, outside sales or sales in the course of import. There is, in our view, therefore, no doubt that the provisions of Section 13-AA are beyond the powers of the State Legislature for the State Legislature may make no law levying sales tax on inter-State sales, outside sales or sales in the course of import.

Accordingly, Section 13-AA of the Orissa Sales Tax Act, 1947 was struck down as beyond the purview of Orissa State Legislature and such amounts should be refunded forthwith by the State holding that "Section 13-AA should have been precisely drafted to make it clear that no tax was levied on that part of the amount credited or paid that related to inter-State sales, outside sales and sales in the course of import, particularly after the previous Section 13-AA had been struck down by the Orissa High Court for the reason that it was couched in terms wider than were permissible to the State Legislature and that judgment was accepted".

9. In all the above judgments relied upon by the learned counsel for the petitioners, the issue that was considered by the apex Court was with reference to the nature of the contract and with reference to the provisions imposing or providing for deduction of tax, in respect of the materials used while executing the works contract. In all the above cases, the legality or otherwise of inclusion of "works contractor" within the term "dealer" was not the subject-matter. Mere inclusion of the "works contractor" within the term "dealer" does not imply that the works contractor is liable to sales tax in respect of each and every works contract executed. The liability to sales tax is only when the works contractor

used certain materials for execution of the works contract and when the property in such goods is passed on to the contractee by the contractor while executing such works. The petitioners have not placed any material before this Court to show that no transfer of property in the goods is involved in execution of the works contract. Therefore, the claim of the petitioners is liable to be rejected.

10. The validity of a provision in the statute can be assailed only on two grounds, as held by the apex Court in *State of Andhra Pradesh and others, etc. Vs. McDowell and Co. and others, etc.*, viz., (1) lack of legislative competence and (2) violation of any of the fundamental right guaranteed in Part III of the Constitution or any other substantive constitutional provisions. No argument has been advanced in respect of any of the above grounds.

11. Under the above circumstances, we do not find any merit in these writ petitions and accordingly the writ petitions are dismissed. No costs.