

Orient Engineering Construction Vs. State of Bihar and ors.

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Court : Patna

Decided On : Feb-27-1998

Judge : B.M. Lal, C.J. and Shashank Kumar Singh, J.

Acts : [Constitution of India](#) - Articles 226 and 265; Bihar Finance Act, 1981 - Sections 25A and 42

Appeal No. : Civil Writ Jurisdiction Case No. 2149 of 1988

Appellant : Orient Engineering Construction

Respondent : State of Bihar and ors.

Advocate for Def. : O.P. Agrawal, Standing Counsel II and N.K. Sharma, Junior Counsel to Standing Counsel II

Advocate for Pet/Ap. : H.N. Singh, Adv.

Judgement :

B.M. Lal, C.J.

1. The judgment passed in this writ petition shall govern the disposal of following writ petitions as well :

(1) C.W.J.C. No. 1581 of 1988 (Nityanand Dubey v. State of Bihar)

(2) C.W.J.C. No. 1598 of 1988 (Umesh Kumar Jaiswal v. State of Bihar)

- (3) C.W.J.C. No. 1462 of 1988 (Ram Prasidh Singh v. State of Bihar)
- (4) C.W.J.C. No. 1476 of 1988 (Krishna Enterprises v. State of Bihar)
- (5) C.W.J.C. No. 2117 of 1988 (Deepak Construction v. State of Bihar)
- (6) C.W.J.C. No. 2192 of 1988 (Arvind Kumar Mishra v. State of Bihar)
- (7) C.W.J.C. No. 1672 of 1988 (Ajay Kumar v. State of Bihar)
- (8) C.W.J.C. No. 1582 of 1988 (Vikash Engineering Company v. Union of India)
- (9) C.W.J.C. No. 1575 of 1988 (Bhrugu Nath Pandey v. State of Bihar)
- (10) C.W.J.C. No. 1569 of 1988 (Shankar Prasad v. State of Bihar)
- (11) C.W.J.C. No. 1562 of 1988 (Baleshwar Prasad v. State of Bihar)
- (12) C.W.J.C. No. 1535 of 1988 (Ajay Construction v. State of Bihar)
- (13) C.W.J.C. No. 2189 of 1988 (Chandrasah Rai v. State of Bihar)
- (14) C.W.J.C. No. 1658 of 1988 (Sidhnath Prasad v. State of Bihar)
- (15) C.W.J.C. No. 1656 of 1988 (Langeshwari Prasad Singh v. State of Bihar)
- (16) C.W.J.C. No. 2154 of 1988 (Nagendra Kumar Singh v. State of Bihar)
- (17) C.W.J.C. No. 2156 of 1988 (Ram Kishun Singh v. State of Bihar)
- (18) C.W.J.C. No. 1765 of 1988 (Baleshwar Singh v. State of Bihar)
- (19) C.W.J.C. No. 2095 of 1988 (Kumar Singh v. State of Bihar)

- (20) C.W.J.C. No. 1580 of 1988 (Sona Construction v. State of Bihar)
- (21) C.W.J.C. No. 1597 of 1988 (Anand Shankar Tiwary v. State of Bihar)
- (22) C.W.J.C. No. 1501 of 1988 (Lal Babu Tiwary v. State of Bihar)
- (23) C.W.J.C. No. 1596 of 1988 (Harendra Prasad Sharma v. State of Bihar)
- (24) C.W.J.C. No. 1576 of 1988 (Ram Swarath Singh v. State of Bihar)
- (25) C.W.J.C. No. 1538 of 1988 (Ajay Kumar Singh v. State of Bihar)
- (26) C.W.J.C. No. 1542 of 1988 (Bijendra Kumar Singh v. State of Bihar)
- (27) C.W.J.C. No. 1543 of 1988 (A.K. Engineering v. State of Bihar)
- (28) C.W.J.C. No. 1579 of 1988 (Ajex India v. State of Bihar)
- (29) C.W.J.C. No. 1574 of 1988 (Arvind Kumar v. State of Bihar)
- (30) C.W.J.C. No. 1570 of 1988 (Uday Kumar Singh v. State of Bihar)
- (31) C.W.J.C. No. 4689 of 1988 (Nagendra Mishra v. State of Bihar)
- (32) C.W.J.C. No. 1549 of 1988 (Hare Ram Upadhyaya v. State of Bihar)
- (33) C.W.J.C. No. 2092 of 1988 (Rabindra Construction v. State of Bihar)
- (34) C.W.J.C. No. 1583 of 1988 (R.N. Lahiri and Company v. State of Bihar)
- (35) C.W.J.C. No. 1537 of 1988 (Ram Suyash Singh v. State of Bihar)
- (36) C.W.J.C. No. 1670 of 1988 (Gulab Mistri v. State of Bihar)

- (37) C.W.J.C. No. 1644 of 1988 (Prem Kumar Singh v. State of Bihar)
- (38) C.W.J.C. No. 1646 of 1988 (Satya Narain Ram v. State of Bihar)
- (39) C.W.J.C. No. 1207 of 1988 (Konark Construction v. State of Bihar)
- (40) C.W.J.C. No. 1901 of 1988 (Ashok Kumar Choudhary v. State of Bihar)
- (41) C.W.J.C. No. 1963 of 1988 (A.K. Singh v. State of Bihar)
- (42) C.W.J.C. No. 1917 of 1988 (Gopal Himat Singhka v. State of Bihar)
- (43) C.W.J.C. No. 1920 of 1988 (Lal Babu Yadav v. State of Bihar)
- (44) C.W.J.C. No. 1924 of 1988 (Kameshwar Pd. Singh v. State of Bihar)
- (45) C.W.J.C. No. 1928 of 1988 (Palamau Construction v. State of Bihar)
- (46) C.W.J.C. No. 1930 of 1988 (Shri Shital Prasad Jaiswal v. State of Bihar)
- (47) C.W.J.C. No. 1938 of 1988 (Vijay Construction v. State of Bihar)
- (48) C.W.J.C. No. 1952 of 1988 (Rajendra Singh v. State of Bihar)
- (49) C.W.J.C. No. 1959 of 1988 (Bindeshwari Singh v. State of Bihar)
- (50) C.W.J.C. No. 1958 of 1988 (Sri Sukhraj Kumar v. Union of India)
- (51) C.W.J.C. No. 1954 of 1988 (Maurya Construction v. Union of India)
- (52) C.W.J.C. No. 1992 of 1988 (Ram Sanjivan Chaudhary v. State of Bihar)
- (53) C.W.J.C. No. 1500 of 1988 (Nripendra Kumar Sinha v. State of Bihar)

- (54) C.W.J.C. No. 1546 of 1988 (Sushil Kumar Sinha v. State of Bihar)
- (55) C.W.J.C. No. 1502 of 1988 (Chandra Lal v. State of Bihar)
- (56) C.W.J.C. No. 1591 of 1988 (Ramdeo Kumar and Company v. State of Bihar)
- (57) C.W.J.C. No. 1885 of 1988 (H.M. Builders & Fabricators v. State of Bihar)
- (58) C.W.J.C. No. 1647 of 1988 (Rajdeo Prasad v. State of Bihar)
- (59) C.W.J.C. No. 1715 of 1988 (Ram Chandra Prasad Singh v. State of Bihar)
- (60) C.W.J.C. No. 1719 of 1988 (Umesh Kumar Verma v. State of Bihar)
- (61) C.W.J.C. No. 1720 of 1988 (North Bihar Construction v. State of Bihar)
- (62) C.W.J.C. No. 1704 of 1988 (Sheo Nandan Pandit v. State of Bihar)
- (63) C.W.J.C. No. 1578 of 1988 (Dasrath Pandey v. State of Bihar)
- (64) C.W.J.C. No. 2186 of 1988 (Bashisth Rai v. State of Bihar)
- (65) C.W.J.C. No. 2155 of 1988 (Ram Sumiran Singh v. State of Bihar)
- (66) C.W.J.C. No. 2143 of 1988 (Prayag Singh v. State of Bihar)
- (67) C.W.J.C. No. 185 of 1988 (New India Construction Company v. State of Bihar)
- (68) C.W.J.C. No. 272 of 1988 (Shri Trilok Nath v. State of Bihar)

(69) C.W.J.C. No. 281 of 1988 (Arora Construction Co. v. State of Bihar)

(70) C.W.J.C. No. 244 of 1988 (Motilal Agrawal v. State of Bihar)

(71) C.W.J.C. No. 273 of 1988 (Arora Construction Co. v. State of Bihar)

(72) C.W.J.C. No. 243 of 1988 (Bashamal v. State of Bihar)

(73) C.W.J.C. No. 245 of 1988 (Harpal-das Maldhyani v. State of Bihar)

(74) C.W.J.C. No. 246 of 1988 (Sudamamal.v. State of Bihar)

(75) C.W.J.C. No. 742 of 1988 (Babu Lal Bhagat v. State of Bihar)

(76) C.W.J.C. No. 741 of 1988 (E.B.I. Construction Agency v. State of Bihar)

(77) C.W.J.C. No. 4536 of 1988 (G.S. Construction v. State of Bihar)

(78) C.W.J.C. No. 2234 of 1988 (Amritesh Kumar Roy v.State of Bihar)

(79) C.W.J.C. No. 4004 of 1988 (Rajendra Prasad Singh and Company v. State of Bihar)

(80) C.W.J.C. No, 4580 of 1988 (Sri.Jai Shankar Singh v. State of Bihar)

(81) C.W.J.C. No. 4574 of 1988 (Universal Engineering Construction v. State of Bihar)

(82) C.W.J.C. No. 4534 of 1988 (Baban Singh v. State of Bihar)

(83) C.W.J.C. No. 4568 of 1988 (Kapildeo Singh v. State of Bihar)

(84) C.W.J.C. No. 1630 of 1991 (Pradip Kumar v. State of Bihar)

(85) C.W.J.C. No. 1216 of 1988 (Bharat Heavy Electricals Limited v.

State of Bihar)

(86) C.W.J.C. No. 4002 of 1988 [S.K. Anwar (Syed Khursheed Anwar) v.

State of Bihar]

2. The matter in issue involved in this batch of writ petitions is about the validity of the provisions of Section 25A of the Bihar Finance Act, 1981 (hereinafter to be referred to as 'the Act'). It is contended that in the case of Geeta Prasad Singh and Co. v. State [1986] 63 STC 337 (Pat) ; 1986 PLJR 451, the validity of the provision of Section 25 A of the Act is upheld declaring it intra vires. But it is submitted that while considering the validity in Geeta Prasad Singh and Co. [1986] 63 STC 337 (Pat) ; 1986 PLJR 451, the provision of Section 3 of the Act was not taken into consideration and, therefore, the decision in Geeta Prasad Singh and Co. [1986] 63 STC 337 (Pat.) ; 1986 PLJR 451, suffers from the doctrine of per incuriam. Hence, the matter was referred to the Full Bench of this Court. The Full Bench of this Court in the case of Builders Association of India v. State of Bihar [1992] 85 STC 362 ; (1992) 1 PLJR 1, held that the provisions of Section 25A of the Act is ultra vires.

3. Another set of writ petitions which were listed before us in the last month, on the basis of decision in Builders Association case [1992] 85 STC 362 (Pat) [FB] ; (1992) 1 PLJR 1 [FB] have been disposed of rendering those petitions infructuous inasmuch as the provisions of Section 25A of the Act has been declared ultra vires in the said decision and hence the question of realising sales tax from the petitioners, who are carrying on business of works contract does not arise.

4. In Builders Association case [1992] 85 STC 362 (Pat.) [FB] ; (1992) 1 PLJR 1 [FB], since the matter has been decided declaring the provision of Section 25A of the Act ultra vires, therefore, in our opinion, these bunch of writ petitions also

render infructuous and are accordingly disposed of.

5. However, learned counsel appearing for the petitioners submitted that tax paid in pursuance of the assessment in accordance with the provision of Section 25A of the Act, which ultimately has been declared ultra vires, be directed to be refunded to the petitioners-contractors.

6. In this regard, it is needless to say that any tax shall only be collected if permitted by the authority of law. This is what the provision of Article 265 of the Constitution manifests.

7. Learned counsel appearing for the petitioners, in support of his contention, strongly relied upon the decisions in this regard, pronounced by the apex Court, in the cases of *Salonah Tea Company Ltd. v. Superintendent of Taxes, Nowgong* [1988] 69 STC 290, *D. Cawasji and Co. v. State of Mysore* AIR 1975 SC 813 and *Shree Baidyanath Ayurved Bhawan Pvt. Ltd. v. State of Bihar* AIR 1996 SC 2829, which lay down that any tax recovered without the authority of law may be directed to be refunded to the persons from whom the same is recovered.

8. The provisions of Section 42 of the Bihar Finance Act also takes care of in this regard if proper application is made before the concerning authority for the refund of tax. However, it is submitted that this provision only applies to the registered dealers. In the instant batch of cases most of the petitioners are not registered dealers and, therefore, the legal difficulty felt is that the provision of Section 42 of the Act will be of no avail to them who are not registered dealers under the Act.

9. We have already observed that if unlawful tax is recovered, it will be violative of the provisions of Article 265 of the Constitution and, therefore, the State is obliged to refund the amount which has been unlawfully recovered. This legal position is not at all disputed. But at the same time, it is also not disputed that tax on sale is a shifting tax and if the same is realised from the consumers and paid to the State exchequer by the dealers/agents (or contractors in the instant cases) and ultimately the said tax is found to have been illegally realised, a moot question would arise as to whom the said amount of tax be directed to be refunded. If the said amount is directed to be refunded to the contractors, who have realised the

same by virtue of works contract from the consumers, would it not result in 'unjust enrichment' ?

10. However, it is also submitted that it is not that in all these petitions amount was so realised towards the works contract from the consumers and, therefore, as held in above referred cases, i.e., in *Salonah Tea Co. Ltd.* [1988] 69 STC 290 (SC), *D. Cawasji and Co.* AIR 1975 SC 813 and *Shree Baidyanath Ayurved Bhawan Pvt. Ltd.* AIR 1996 SC 2829 as also in a recent decision of the Supreme Court in the case of *Mafatlal Industries Ltd. v. Union of India* [1998] 111 STC 467 ; (1997) 5 SCC 536, this Court may direct for refund.

11. Whether the tax amount is paid by the petitioners without realising or after realising the same from the consumers is a question which requires detailed investigation of facts and so the same cannot be gone into or adjudicated upon in writ jurisdiction.

12. In *Mafatlal Industries Ltd. case* [1998] 111 STC 467 (SC) ; (1997) 5 SCC 536 it has been ruled that if statutorily amount is required to be refunded, order can be passed in writ jurisdiction as well or the same can be realised by making suitable application under the relevant statutory provision before the authority concerned if the requirement of that provision is fulfilled, even by way of civil suit also the amount so paid can be recovered. But where the refund leads to 'unjust enrichment', indeed the amount cannot be directed to be refunded. It can only be refunded to the persons from whom the amount of tax is actually realised.

13. In this regard we have already observed that under the facts stated above, refund in the instant cases being based on disputed question of facts, cannot be gone into in writ jurisdiction, therefore, if the petitioners are so advised, it is for them to choose the appropriate forum for the redressal of their grievances by proving that the amount so paid under Section 25A of the Act has not been realised towards works contract from the consumers but has been paid from their own pocket and doctrine of 'unjust enrichment' does not apply in their cases.

14. For the reasons aforesaid, the submission made by the learned counsel for the petitioners for directing refund is repelled leaving it open to the petitioners

themselves to choose appropriate forum.

15. With the above direction, the writ petitions being covered by the decision rendered in Builders Association case [1992] 85 STC 362 (Pat) [FB] ; (1992) 1 PLJR 1 (Pat) [FB] are disposed of.

Shashank Kumar Singh, J.

16. I agree.

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