Hardeo Singh Vs. State of Bihar and ors.

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Court : Jharkhand

Decided On : Sep-12-2003

Reported in : 2003(3)BLJR2099; [2003(4)JCR15(Jhr)]

Judge : S.J. Mukhopadhaya,; Tapen Sen and; Vikramaditya Prasad, JJ.

Acts : Constitution of India - Article 226

Appeal No. : CWJC Nos. 93, 94 and 95 of 1995

Appellant : Hardeo Singh

Respondent : State of Bihar and ors.

Advocate for Def. : K.K. Jhunjhunwala, G.P. III and; Himesh Patwari, Adv.

Advocate for Pet/Ap. : S.B. Gadodia, Sr. Adv. and; Sumit Gadodia, Adv.

Disposition : Writ dismissed

Judgement :

S.J. Mukhopadhaya, J.

1. As all the writ applications have been preferred by common petitioner and common question of law is involved, they were heard together and are disposed of by this common judgment.

The petitioner, a registered partnership firm obtained one work order for construction of Ajoy Barrage from the then State of Bihar in pursuance of tender notice No. 1189 dated 14th September, 1988 and executed ah agreement with the State of Bihar No. 1-LCV/89-90. The petitioner completed the job and handed over the barrage to the State Government.

The Assistant Commissioner, Comercial Taxes Department, Deoghar Circle, Deoghar subsequently assessed the tax in the execution of 'works contract' for the period 1990-91, 1991-92 and 1992-93 and asked the petitioner to pay it. These orders issued by the Assistant Commissioner, Commercial Taxes Department, Deoghar Circle, Deoghar for the three financial years have been challenged by the petitioner in three separate writ petitions.

2. Counsel for the petitioner made following submission to challenge the orders and in support of petitioner's claim :

(1) Transfer of property in goods is an essential ingredient for constituting 'sale', in absence of which, a transaction cannot be deemed to be a 'sale' and no sales tax can be levied on such transaction.

(2) As per law, levy of sales tax in respect of the works contract can be made at the point of time when the goods are incorporated and used in the construction of the structure etc. as transfer of property in goods only takes place at that point of time. There is no subsequent transfer of property, nor 'sale' takes place at the time of handing over of completed job to the Government.

(3) Transfer of property in goods in respect to materials supplied by the Department to the contractor as well as transfer of property in goods from the contractor to the Department passed only at one point of time when goods are incorporated or used in the construction etc. Therefore, there being one transaction and the Government Department being the owner of the material supplied by it to the contractor without any break of ownership, no second transfer of property takes place at the time of handing over of structures, materials etc.

(4) In view of specific terms and conditions as agreed upon between the petitioner and the Government Department, incorporated in the agreement, no transfer of property of goods had taken place when the goods were handed over by the Government Department to the petitioner or constructed structure works is handed over by petitioner (contractor) to the Government.

(5) Under the facts and circumstances of the present case, the position of the petitioner (contractor) is that of a bailee and/or trustee in respect of the goods supplied to it for using the same in the works contract, specially because the petitioner (contractor) never became the owner of those goods as those goods was never transferred.

(6) Admittedly, the Government Department has purchased Iron, Steel and Cement material under Section 13(1)(g) of the Bihar Finance Act, 1981 on payment of concessional sales tax for the purpose of Government use, as such the Department cannot sell those materials.

(7) Iron, Steel and Cement being taxable at one point of time, at the time of first sale, under the provisions of Bihar Finance Act, 1981, the Government Department being the first purchaser and the Department paid sales tax under Section 13(1)(g) of the Act, 1981. Therefore, those materials, such as Iron, Steel and Cement cannot be subjected to further sales tax.

(8) Under Section 13(1)(g) of the Bihar Finance Act, 1981, the Government Department being liable to pay sales tax @ 3% irrespective of higher rate of sales tax otherwise applicable on such sales, levy of sales tax @ 11% in respect of Cement, as imposed is illegal.

(9) The Assessing Officer should have given reasonable opportunity to petitioner to procure and submit Form IXC and IXA and the State Government should have provided such Form to the petitioner.

3. Counsel for the State submitted that the State Government has levied Sales Tax on the price of goods and materials used in works contract, there being a deemed sale of such goods and materials, which the petitioner purchased from the

Government Department.

4. At Clause 16 of General Condition of Contract dated 1st January, 1990 between the petitioner and the State of Bihar through the Executive Engineer, irrigation Division, Saktia, District-Deoghar, the parties agreed that certain materials will be supplied by the State Government. Provir, sions relating to Sales Tax was also made at Clause 42 of the Agreement, relevant portion of which reads as follows :

'26. Supply of Materials by the Government.--The quantity actually required for works and reasonable requirements for all preliminary and enabling work incidental to the works, will be supplied by the Department as per stipulations in Schedule-II.

....42. Sates Tax.--The rates quoted by the contractor shall be inclusive of 4% Sales Tax which will be deducted from the bills. In case of any increase in Sales Tax during the period of contract, it will be paid by the department. The increase in Sales Tax will be allowed extra but deducted from the bills, Contractor will not claim any refund on account of Sales Tax deducted from the bills. If, however, any refund is allowed after final assessment of the returns submitted by the contractor the same shall be credited to Government account.'

At Chapter-IV of the Agreement, special conditions for supply of Portland Cement (Clause-4.13.1) and Iron & Steel (Clause 4.13.2) were also made :

'4.13.1 Portland Cement.--(a) The department will supply cement accord-Ing to I.S.S. for use In concrete and masonry work in standard cement bags from the departmental store at rates specified. The Contractor shall have to submit his phased monthly requirement of cement so that the department may make arrangement accordingly.

....4.13.2 Iron and Steel.--(a) The mild steel rods, bars and structural steel will be provided by the department at the rate specified in para 4.13.4. the Contractor will have to submit phased requirement of re-inforcement bars so that the department may take arrangement accordingly.' ....

5. The issue relating to levy of tax on the sale or purchase of goods by States on the transfer of property in goods involved in execution of works contract as inserted by Clause (b) of Article 366(29-A) has already been decided by the Supreme Court in the case of Builders Association of India and Ors. v. Union of India and Ors., reported in (1989) 2 SCC 645 : (1989) 73 STC 370 (SC). In the said case, the Supreme Court held as follows :

'Even after the decision of this Court in the State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd. it was quite possible that where a contract entered into in connection with the construction of a building consisted of two parts, namely, one part relating to the sale of materials used in the construction of the building by the contractor to the person who had assigned the contract and another part dealing with the supply of labour and services, sales tax was leviable on the goods which were agreed to be sold under the first part. But sales tax could not be levied when the contract in question was a single and indivisible works contract. After the 46th 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 as stated above. It could not have been the contention of the revenue prior to the 46th Amendment that when the goods and materials had been supplied under a distinct and separate contract by the contractor for the purpose of construction of a building the assessment of sales tax could be made ignoring the restrictions and conditions incorporated in Article 286 of the Constitution. If that was the position can the States contend after the 46th Amendment under which by a legal fiction the transfer of property in goods involved in a works contract was made liable to payment of sales tax that they are not governed by Article 286 while levying sales tax on sale of goods involved in a works contract? They cannot do so. 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 366(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. In all the cases In hand, the levy of sales tax relates to period subsequent to 46th Amendment, after insertion of Clause (29-A) of the Article 366 of the Constitution of India. The relevant clause of Agreement, as quoted above show that the State Government supplied Portland Cement and Iron and Steel to petitioner for which it paid the consideration amount.

In this background, after execution of works and transfer of property in goods involved in execution of works, there being deemed transfer of Cement and Iron & Steel on handing over of structure in question to the State Government, it is open to the State to levy sales tax on such deemed transfer of property in goods in execution of works contract.

7. In the circumstances, there being no merit, all the writ petitions are dismissed. However, there shall be no order, as to costs.

Tapen Sen, J.

I agree.

Vikramaditya Prasad, J.

I agree.