A STATE OF JHARKHAND AND ORS.

v.

VOLTAS LTD., EAST SINGHBHUM

MAY 9, 2007

B [S.B. SINHA AND MARKANDEY KATJU, JJ.]

Sales Tax—Bihar Sales Tax Act—Section 21—Bihar Sales Tax Rules—Rule 13A—Taxable turnover in case of works contract—Permissible C *deductions—Held: It is not merely the labour charges which are deductible from the value of the works contract, but all other charges/amounts also, except the value of the goods sold in execution of the works contract—This is because only the value of the goods sold can be taxed as sales tax.*

Bihar Finance Act—s.24, proviso—Sales tax assessment proceedings in D *respect of works contract—Re-assessment pursuant to remand was to be done within two years—But actually made after more than six years—Held: Proceedings were clearly time barred.*

Respondent company is engaged in the execution of contracts of E **designing, supplying, installation, fabrication, testing and commissioning of air-conditioning plants. The assessing authority acknowledged that the contracts in question were works contracts and the material supplied in the execution of the works contracts only are liable to be taxed. However, the Sales Tax Authorities held that the incidence of tax is commensurate with actual transfer of property that takes place in the execution of works contract. Hence** F **the present appeal.**

An additional question raised in appeal to this Court is whether the assessment proceedings in question were beyond limitation.

Dismissing the appeal, the Court

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HELD: 1. It is not merely the labour charges which are deductible from the value of the works contract, but all other charges/amounts also, except the value of the goods sold in execution of the works contract. This is because only the value of the goods sold can be taxed as sales tax. [Para 13]

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Larsen & Toubro Ltd. **v.** *State of Bihar,* **134 STC 354, approved** A

Gannon Dunkerley and Co. & Ors. **v.** *State of Rajasthan & Ors.,* **[1993] 1 SCC 364, relied on.**

State of Madras **v.** *Gannon Dunkerley & Co. (Madras)* **[1959] SCR 379, referred to.** B

2. The proceedings in question were beyond limitation. It appears that against three assessment orders for the period 1990-91, 1991-92 and 1992-93, the respondent preferred three appeals before the Joint Commissioner, Commercial Taxes (Appeal). The appellate authority passed a common order on 31st August, 1998 and communicated the decision vide Memo No. 2177 C dated 5th November, 1998 to the assessing authority and other officers. The assessing authority was directed to make a re-assessment. As per the proviso to Section 24 of the Bihar Finance Act, the assessing authority was supposed to complete and pass the re-assessment order pursuant to the remand by 5th November, 2000, two years from the date of communication of such order to D the assessing authority. However, the assessment was not concluded and fresh assessment on remand was made on 27th November, 2004 i.e. after more than six years of communication of the said order. Hence, it was clearly time barred. [Para 15] [281-B, C, D, E]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2408 of 2007. E

From the Final Judgment and Order dated 22.06.2006 of the High Court of Jharkhand at Ranchi in W.P.(T) No. 482 of 2005, with W.P.(T) No. 467 of 2005 with W.P(T) No. 493 of 2005 and W.P.(T) No. 466 of 2005.

Nargendra Rai, B.B. Singh and Kumar Rajesh Singh for the Appellants. F

R.F. Nariman, Sr. Adv., Pratap Venugopal, Surekha Raman, E. Venu Kumar and Harshad V. Hamaad (for M/S. K.J. John & Co.) for the Respondent.

The Judgment of the Court was delivered by

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MARKANDEY KATJU, J. 1. Leave granted.

2. This appeal by special leave has been filed against the impugned judgment & order 22.6.2006 of the Jharkhand High Court in Writ Petitions Nos. 482, 467, 493 and 466 of 2005.

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A 3. Heard learned counsel for parties and perused the record.

4. The respondent, a company registered under the Indian Companies Act, 1913 is engaged inter alia in the execution of works contracts of designing, supplying, installation, fabrication, testing and commissioning of air-conditioning plants. The assessing authority acknowledged that the contracts B in question were works contracts and the material supplied in the execution of the works contracts only are liable to be taxed. However, the Sales Tax Authorities had sought to levy a uniform rate of tax @ 16% holding that in the instant case the incidence of tax is commensurate with actual transfer of property that takes place in the execution of works contract.

C 5. Although the respondent had deposited with the appellant the entire amount of the sales tax charged and demanded @ 16%, it passed on to its customers sales tax restricted to the rate of 8% because in terms of the Circular letter No. 3971 dated 18.5.1984 issued by the Government of Bihar, Finance (Commercial Tax) Department (Annexure P-4 of the affidavit on behalf D of the respondent with additional documents), the appellant was entitled to charge sales tax only @ 8%.

6. In *State of Madras* v. *Gannon Dunkerley & Co. (Madras),* [1959] SCR 379, this Court held that the State legislature cannot impose sales tax on a works contract because a works contract is an indivisible contract whereas E sales tax can only be imposed on a sale. The Court held that a works contract is not a sale.

7. Parliament, thereafter amended the Constitution of India by the Constitution (Forty Sixth) Amendment Act, 1982 introducing clause 29A (b) in Article 366 therein. The aforesaid clause 29-A states that the words *"tax* F *on the sale or purchase of goods"* include *inter alia* "(b) 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".

8. In *Gannon Dunkerley and Co. & Ors.* v. *State of Rajasthan & Ors.,* G [1993] 1 SCC 364, this Court specified the principles as to what could be taxed in a works contract. In paragraph 47 of the judgment it has been observed that the value of the goods involved in the execution of a works contract will have to be determined after taking into account the value of the entire works contract and deducting therefrom the charges towards labour and services which would cover

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(a) Labour charges for execution of the works; A

(b) Amount paid to a sub-contractor for labour and services;

(c) Charges for planning, designing and architect's fees;

(d) Charges for obtaining on hire or otherwise machinery and tools used for the execution of the works contract; B

(e) Cost of consumables such as water, electricity, fuel, etc. used in the execution of the works contract the property in which is not transferred in the course of execution of a works contract; and

(f) Cost of establishment of the contractor to the extent it is relatable to supply of labour and services; C

(g) Other similar expenses relatable to supply of labour and services;

(h) Profit earned by the contractor to the extent it is relatable to supply of labour and services".

The value of these items, therefore, have to be deducted from the value of D the entire works contract, because what can be taxed is only on the sale of goods and not anything else. The State legislature under Entry 54 of List II of the Seventh Schedule can tax only on the sale or purchase of goods. If an item does not come within List II or List III of the Seventh Schedule to the Constitution, then it can only be the Central legislature i.e. the Parliament E which can levy tax either under List I or under the residual provision contained in Article 248 thereof.

9. Section 21 of the Bihar Sales Tax Act, as amended states:

"Sec. 21. - Taxable Turnover (1) For the purpose of this part the F taxable turnover of a dealer shall be that part of his gross turnover which remains after deduction therefrom -

(a)(i) in case of the works contract the amount of labour and any other charges in the manner and to the extent prescribed".

10. Rule 13A of the Bihar Sales Tax Rules which was also amended by G a notification dated 1st February, 2000 read as follows:

"Rule 13A. *Deduction in case of works contract on account of labour charges.*—[if the dealer fails to produce any account or the accounts produced are unreliable] deduction under sub-clause (i) of H

A clause (a) of sub-section (1) of section 21 on account of labour charges in the case of works contract from gross turnover shall be equal to the following percentages."

11. The aforesaid provisions have been adopted by the State of Jharkhand vide notification dated 15.12.2000 and thus are applicable in the B State of Jharkhand.

12. Interpretation of the amended Section 21(1) and the newly substituted Rule 13A fell for consideration of a Division Bench of the Patna High Court in the case of *Larsen & Toubro Ltd.* v. *State of Bihar,* 134 STC 354. The Patna High Court in the said decision observed as under:

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"Rule 13A unfortunately does not talk of "any other charges". Rule 13A unfortunately does not take into consideration that under the Rules the deduction in relation to any other charges in the manner and to the extent were also to be prescribed. Rule 13A cannot be said to be an absolute follow-up legislation to sub-clause (i) of clause (a) of section 21(1). When the law provides that something is to be prescribed in the Rules then that thing must be prescribed in the Rules to make the provisions workable and constitutionally valid. In the matter of *Gannon Dunkerley & Co.* (1993) 88 STC 204 the Supreme Court observed that as sub-section (3) of section 5 and sub-rule (2) of rule 29 of the Rajasthan Sales Tax Act and the Rules were not providing for particular deductions, the same were invalid. In the present matter the constitutional provision of law says that particular deductions would be provided but unfortunately nothing is provided in relation to the other charges either in section 21 itself or in the rules framed in exercise of the powers conferred by section 58 of the Bihar Finance Act.

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In our considered opinion sub-clause (i) of clause (a) of section 21(1) read with rule 13A of the Rules did not make sub-clause (1) fully workable because the manner and extent of deduction relating to any other charges has not been provided prescribed by the State."

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13. We fully agree with the view taken by the Patna High Court in the aforesaid decision. It is not merely the labour charges which are deductible from the value of the works contract, but all other charges/amounts also,

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except the value of the goods sold in execution of the works contract. This is because only the value of the goods sold can be taxed as sales tax. It may be mentioned that the respondent had initially only claimed deduction of labour charges, but that was in view of the understanding of the law at that time. The matter became clear only after the decision of this Court in *Gannon Dunkerley & Co.* v. *State of Rajasthan* (supra).

14. It may further be mentioned that the observations made by the Division Bench of the High Court about the rate of tax were unnecessary, and they are therefore set aside.

15. We also agree with the view taken in the impugned judgment that the proceedings in question were beyond limitation. It appears that against three assessment orders for the period 1990-91, 1991-92 and 1992-93, the respondent preferred three appeals i.e. JUSTA 56/97-98, 57/97-98 and 58/97-98 before the Joint Commissioner, Commercial Taxes (Appeal), Jamshedpur Division, Jamshedpur. The appellate authority passed a common order on 31st August, 1998 and communicated the decision vide Memo No. 2177 dated 5th November, 1998 to the assessing authority and other officers. The assessing authority was directed to make a re-assessment. As per the proviso to Section 24 of the Bihar Finance Act, the assessing authority was supposed to complete and pass the re-assessment order pursuant to the remand by 5th November, 2000, two years from the date of communication of such order to the assessing authority. However, the assessment was not concluded and fresh assessment on remand was made on 27th November, 2004 i.e. after more than six years of communication of the said order. Hence, it was clearly time barred.

16. From the records, it appears that the appellate order passed on 31st August, 1998 was communicated to the assessing authority vide Memo No. 2177 dated 5th November, 1998. The respondent obtained a certified copy of the same in January, 1999. Memo No. 204 dated 6th August, 2003, as referred to by the counsel for the State is the second time communication, which was only a reminder. Thus, the appellate order having been communicated to the assessing authority vide Memo No. 2177 dated 5th November, 1998 for the purposes of limitation the period will start from 5th November, 1998 and will be complete on 5th November, 2000 i.e. two years from the date of communication of such order to the assessing authority. We accordingly hold that the assessment order made after remand on 27th November, 2004 and the consequential demand of notice raised in pursuance of such order of re-

A assessment, all dated 29th November, 2004 are time-barred under Section 24 of the Bihar Finance Act.

17. However, the contention of the respondent herein is that the assessment should be directed to be completed on the basis that the rate of tax would be 8%. As at present advised, this Court need not go into the said B question.

18. Thus we find no infirmity in the impugned judgment. The appeal is accordingly dismissed. No costs.

B.B.B. Appeal dismissed.