

REPORTABLE**IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION****CIVIL APPEAL NO. 2686 OF 2011
(Arising out of SLP(C) No. 34840 of 2010)****COMMR.OF COMMERCIAL TAXES & ORS.****Appellant(s)****VERSUS****CHITRAHAR TRADERS****Respondent(s)****O R D E R**

Delay condoned.

Leave granted.

This appeal arises out of the judgment and order passed by the Division Bench of the Madras High Court dismissing the writ appeal filed by the Appellants herein whereby the Division Bench affirmed the judgment and order passed by the learned Single Judge allowing the writ petition filed by the respondent herein. Since the facts leading to filing of the aforesaid writ petition by the respondent are not disputed, we are not required to set out herein the entire factual position at length. However, for the purpose of deciding the present appeal, whatever facts are required to be dealt with and stated are being stated hereinafter.

The N.L.C., namely, Neyveli Lignite Corporation is a Government of India enterprise and a company, and is involved in the activity of generation and supply of electric energy to various State Electricity Boards. The said company set up a plant to produce Leco, which is a form of lignite in the year 1965. The

said plant, however, was having frequent breakdowns and was incurring huge losses. Consequently, an effort was made to upgrade the plant which, however, turned out to be a failure due to which the entire plant was closed down on 4.4.2001 as unviable. Thereafter the company proceeded to dispose of the entire plant and machinery as according to the company, the plant was of not marketable value and also because it had lost its use and outlived its utility and had no value except as scrap. The said company thereafter appointed M/s. Metal Scrap and Trading Corporation Ltd. (hereinafter referred to as 'MSTC') on 3.11.2004, a Government of India enterprise, engaged in the business of scrap to arrange for disposal of condemned plant.

An agreement was entered into between the said company and MSTC. Clause 2.0 of the said agreement reads as follows:-

"2.0 Whereas MSTC has approached the Principal with a request to engage MSTC as Selling Agent for disposal of Iron & Steel Scrap and Rejected/Condemned/obsolete Secondary arisings (ferrous & non-ferrous) as well as surplus obsolete Stores, equipments and miscellaneous articles etc."

Reference may also be made to Clause 4.1 which reads as follows:-

"This Agreement covers disposal of all scraps, secondary arisings, surplus stores and equipment misc. items etc, as mentioned in Clause 2.0 before."

Since reliance was also placed on Clause 5.0, we extract the same as under:-

"Duration of Contract

The Contract will remain valid for Three years from 17-11-2004 to 16-11-2007 which could be extended for such further period on such terms and conditions as mutually agreed upon by the parties hereto."

Pursuant to the aforesaid agreement arrived at, the aforesaid plant and machinery, which according to the company became scrap as obsolete and unviable, was sold through the process of e-auction and the respondent herein offered its bid which came to be accepted by the MSTC. The acceptance letter is also placed on record. The said letter is dated 16.2.2005 which states that the tender offer of respondent was accepted on "as is where is" basis for purchase of B & C Plant one lot and machinery as a whole lot as per the terms and conditions of the e-auction. In the said document it was also indicated that sales tax would be charged @ 12% with surcharge @ 5%. It was also made clear therein that the sales tax which is being levied would be provisional one and subject to any change. It was also specifically indicated therein that the material value along with taxes and duties including income tax and educational cess on IT would be paid on total value of the scrap.

However, a dispute arose thereafter as to whether sales tax is leviable and payable on the said articles @ 4% as the plant and machinery was sought to be sold as scrap or whether the respondent is liable to pay sales tax @ 12% with 5% surcharge also. In view of the aforesaid dispute which arose, the respondent wrote a letter dated 7.4.2005 to the sales tax authorities mentioning

therein about the details and manner of the transaction that had taken place regarding purchase of the scrap by the respondent pursuant to the e-auction conducted by MSTC. In the said letter the entire background facts leading to the e-auction and acceptance of the tender were stated. A Form being Form No. XIV was also filled up by the respondent wherein it was mentioned by it that they had purchased plant and machineries as a whole in one lot but the same also enclosed another declaration made by the respondent herein indicating the full particulars of the goods and stating therein that the total sale value ex-taxes and duties as a whole in one lot is Rs.70,01,00,019.00. While giving the said particulars of the case, it was also specifically mentioned by the respondent that what was purchased was scrap material and thereafter the details of such scrap materials were given in the said declaration.

As against the aforesaid letter written by the respondent, the sales tax authorities sent a letter to the respondent on 29.4.2005 stating therein that if the plant and machinery has been sold as scrap and the bidder was asked to dismantle and transport as scrap, such sales of scrap is taxable @ 4% without surcharge under Entry IV (1) (a) of the Second Schedule to the Tamil Nadu General Sales Tax Act, 1959. However, thereafter the Sales Tax Department appears to have changed their stand and held that the respondent is liable to pay sales tax @ 12% along with 5% surcharge.

Being so situated, two writ petitions came to be filed before the Madras High Court, one by the respondent herein and the other by Neyveli Lignite Corporation Ltd. In the writ petition filed by the aforesaid Corporation, a stand was taken that what was sought to be sold to the respondent company was scrap of the condemned plant and machineries, but sales tax and surcharge was realized from the respondent @ 12% and 5% on provisional basis, and subject to change at later stage. It was also pointed out that the aforesaid parts of the machineries were removed by issuance of 100 delivery notes-cum-gate passes. In paragraph 11 of the affidavit enclosed with the writ petition, the following statement was made by the said company: -

"I state that the items under Sale and Delivery relates to condemned plant and machinery disposed as scrap. In the impugned order of the First Respondent, there is an allegation that a few Delivery Notes issued by the Despatch Section, it was noted that here was sale of B & C plant machinery on as-is-where-is basis, and sales tax and surcharge was mentioned at 12% and 5% respectively. There is an alleged reference to more than 100 Delivery Notes-cum-Gate Passes. This issue was never discussed and the preponderance of materials is entirely to the contrary. It is respectfully submitted that initial delivery notes of the Despatch Section issued from 05.05.2005 to 19.05.2005 bearing upto Serial Nos. 52, the description was mechanically states as B & C plant as-is-where-is with 12% S.T. (based on the sale order). The Buyers were all along contesting the rate of tax since the goods under sale was only condemned machinery disposed as scrap. Therefore, from Delivery Note Nos. 53 dated 20.05.2005, apart from the pre-printed words "B & C Plant & Machineries", it was, inter alia, specifically remarked by hand "Iron Scrap". It was also mentioned that the goods were delivered in lots even from Delivery Note No.1 dated 5.05.2005 with corresponding loads in the lorry. The finding that the sale was a plant and machinery as if there was intention

to buy and sell plant and machinery is perverse and overlooks the dispute with regard to 12% sales tax at every stage between the Petitioners and buyers. Based on the communication of the Commercial Tax Officer, Cuddalore, the Second Respondent dated 10.05.2005 to the First Respondent, during the period of sale, only 4% tax was charged to the Buyers in view of the protest of the Buyers. The Petitioners state that the difference over and above 4% was subsequently recovered on 22.11.2005 from the EMD of the Buyers and paid under protest to the Second Respondent, the Commercial Tax Officer, Cuddalore, on 23.11.2005 consequent to later developments."

The Sales Tax Department contested the writ petitions and the learned Single Judge after hearing the counsel appearing for the parties allowed the writ petitions holding that the respondent is liable to pay sales tax @ 4% only. Being aggrieved by the aforesaid judgment and order passed by the learned Single Judge, the Appellants herein filed two writ appeals which were registered and numbered as Writ Appeal Nos. 639 and 640 of 2008. The Division Bench took notice of the submissions made by the counsel appearing for the parties and thereafter dismissed both the appeals holding that what was sold was scrap and not plant and machineries as such and therefore the learned Single Judge was justified in holding that the respondent is liable to pay sales tax only @ 4%. The aforesaid findings and conclusions of the Division Bench are being assailed in this appeal on which we have heard the learned counsel appearing for the parties.

Counsel appearing for the Appellants has submitted that what was sold was plant and machineries and not scrap at the

agreement stage as is indicated from the acceptance letter and that it is only subsequently and during the post-contract period only, the said plant and machineries were removed as scraps after dismantling them and dividing the articles into several lots and taking away the same by getting 100 gate passes and challans issued. He has specifically drawn our attention to the acceptance letter which is annexed with the paper book and also to the various communications issued between the parties to substantiate his submissions that it was plant and machineries which was sold and therefore the respondent is liable to pay tax @ 12% with 5% surcharge.

Counsel appearing for the Appellants also relies upon the decision of this Court titled as Rainbow Steels Ltd. & Anr. Vs. The Commissioner of Sales Tax, Uttar Pradesh, Lucknow and Anr. reported in 1981 (47) STC 298.

Counsel appearing for the respondent, however, drew our attention to the various documents on record and on the basis thereof submitted before us that the documents on record clearly indicate that what was sought to be sold was scrap and not the functional plant and machineries and therefore there should be no interference with the judgment and order passed by the Madras High Court.

In the light of the submissions of the counsel appearing for the parties, we have ourselves scrutinized the records. We

have already extracted the relevant portion of the agreement between Neyveli Lignite Corporation and MSTC. The said agreement clearly proves and establishes that what was sought to be sold was iron and steel scrap and rejected/condemned and obsolete secondary arisings, etc. The said position is also reiterated in Clause 4.1 which also indicates that what was being sold through the e-auction was scraps and secondary arisings. In the acceptance letter on which heavy reliance was placed by the counsel appearing for the Appellants mentions the goods sold as plant and machineries but it is also indicated therein that it is sale of plant and machineries as per the terms and conditions of the e-auction. Terms and conditions of e-auction indicated from the agreement indicates that what was being sold was scrap. The said position is also reiterated in the said acceptance letter when it refers to the total value of the scrap. In the clarification issued by the Department itself, at one stage, i.e., by their letter dated 29.4.2005, it was clearly mentioned that if the plant and machineries has been sold as scrap and the bidder was asked to dismantle and transport as scrap, such sales of scrap would be taxable @ 4% without surcharge.

There is yet another important factor which should not be lost sight of and that is using of explosives by the respondent for removing the aforesaid scrap from the premises in question. An application was submitted by the respondent to the District

Collector for using explosives for the purpose of dismantling the machinery. The District Collector vide communication dated 21.2.2006 permitted the use of explosives consequent upon which machineries were dismantled by using the explosives and were transported out of the premises in trucks as steel scrap.

The sale in question was also made by a public sector undertaking and the said sale was conducted for and on behalf of another public sector undertaking. The selling agent is also engaged in the business of metal scraps.

The plant and machineries were installed as far back as 1965 and have to be closed in the year 2001 as it was found that even after updating it could not be made functional. The sale has taken place after about 36 years of the purchase of the machineries and the affidavit of the Neyveli Lignite Corporation clearly proves and establishes that those machineries have become obsolete and the plant and machineries have become condemned articles. All these contemporaneous documents and factual position make it abundantly clear that what was sold and purchased by the respondent are nothing else but scrap and, therefore, we find no reason to interfere with the findings and conclusions arrived at by the Madras High Court. Consequently, we find no merit in this appeal, which is dismissed.

We have already referred to the judgment relied upon by the counsel appearing for the appellants. A perusal of the aforesaid

decision on which reliance is placed would indicate that the factual situation in which the said judgment was rendered was completely different than the facts of the present case. In the said case, the decision was rendered in the context of sale of old thermal power plant which was in perfect working and running condition. The same, however, is not the case here. Here is a case of sale of a plant and machineries which were condemned. It is also established from the contemporaneous documents that the plant and machineries had outlived its utility and has no value except scrap. Therefore, the aforesaid decision is clearly distinguishable on facts and has no application to the facts and circumstances of the present case.

The respondent has paid sales tax and surcharge at the higher rate of 12% and 5% while taking out the goods out of the factory premises. In view of the present order passed today, the respondent becomes entitled for refund of overpaid amount which shall be assessed by the Department within a period of three months from today and the amount found due and payable to the respondent shall be refunded back to the respondent along with interest as payable in accordance with law within two months thereafter.

The appeal is dismissed with the aforesaid observations.

.....J
(Dr. MUKUNDAKAM SHARMA)

.....J
(ANIL R. DAVE)

NEW DELHI,
MARCH 16, 2011.

