

CASE NO.:
Appeal (civil) 7256 of 2005

PETITIONER:
State of U.P. and others

RESPONDENT:
M/s. P.N.C. Construction Co. Ltd. & others

DATE OF JUDGMENT: 08/08/2007

BENCH:
S. H. Kapadia & B. Sudershan Reddy

JUDGMENT:
J U D G M E N T

With
Civil Appeal Nos.7257, 7258, 7259, 7260, 7261, 7262, 7263, 7264 of 2005
Civil Appeal No.3553 of 2007 arising out of S.L.P. (C) No.13316 of 2005
Civil Appeal No.3555 of 2007 arising out of S.L.P. (C) No.13951 of 2005

KAPADIA, J.

Leave granted in Special leave petitions.

2 This batch of civil appeals is directed against the judgment and order dated 14.3.02 passed by the Allahabad High Court in Writ Petition No.741 of 2001.

3 Civil Appeal No.7256 of 2005 is the lead case in which the facts are as follow.

4 M/s. P.N.C. Construction Co. Ltd. (assessee) is a public limited company incorporated under the Companies Act, 1956. It is registered under the U.P. Trade Tax Act, 1948. It entered into a contract with National Highway Authority of India, New Delhi, for construction 4/6 lane of national highways of north, south, east and west of the Agra-Gwalior section of NH-3 and for laning of 24 to 41 kms. of Agra-Bholpur section of NH-3 in the State of U.P. Assessee was awarded work by the Construction Division, Agra and Mathura, for widening the roads, maintenance and repairs.

5 Assessee applied for grant of 'recognition certificate' under Section 4-B of the U.P. Trade Tax Act, 1948 (for short, 'the Act') for purchase of raw-materials for manufacture of Hot Mix. The Trade Tax Officer rejected the request of the assessee. Aggrieved by the said decision, an appeal was preferred before Dy. Commissioner (Appeals) which was also dismissed vide order dated 24.4.97. Aggrieved by the decision, the assessee preferred Second Appeal No.75 of 1997 before the Trade Tax Tribunal, Agra, which came to the conclusion that Hot Mix was manufactured by the assessee in the plant from cement, sand, bitumen, furnace oil, HSD, Lubricant etc. for the construction of roads. The Tribunal found that the A.O. had in fact granted recognition certificate to M/s. National Highway Construction Company, Mathura and M/s. Oriental Construction Engineers Ltd., Mathura, for manufacturing of Hot Mix. Therefore, the Tribunal allowed the assessee's appeal and directed the A.O. to grant recognition certificate for the purchase of cement, sand, bitumen, furnace oil, HSD, Lubricant etc. (raw-materials) against Form No.3-B at a concessional rate of tax. Consequently, the A.O. issued recognition certificate in favour of the assessee for the purchase of the aforesaid raw-materials. Pursuant to the recognition certificate, assessee purchased the said raw-materials against Form No.3B.

6 However, on 17.1.2001 the Commissioner, Trade Tax, U.P. issued a circular stating that purchase of raw-materials used in the construction of roads, cannot be made against Form No.3B. This circular dated 17.1.01 was followed by another circular dated 23.2.01 to the effect that recognition certificate under Section 4B of the Act with regard to purchase of bitumen, chemical compound etc. against Form No.3B should be reviewed by the A.O. (issuing authority). Pursuant to the aforesaid two circulars dated 17.1.01 and 23.2.01 (impugned circulars), show cause notice was issued on 9.5.01 to the assessee herein as to why the recognition certificate earlier granted to the assessee should not be revoked. The impugned notice dated 9.5.01 as well as the aforesaid two impugned circulars dated 17.1.01 and 23.2.01 were challenged by the assessee before the High Court vide Writ Petition No.741 of 2001.

7 The main contention of the assessee before the High Court was that the raw-materials used by the assessee in execution of works contract constituted 'deemed sale' under Article 366(29A) of the Constitution of India and, therefore, the assessee was entitled to the benefit of concessional rate of duty on the purchase of aforesaid raw-materials. Before the High Court, assessee further contended that it was open to the State to challenge the order of the Tribunal directing the A.O. to grant recognition certificate to the assessee; that the State did not challenge the decision of the Tribunal and, therefore, the impugned circulars dated 17.1.01 and 23.2.01 constituted colourable exercise of power by the Commissioner in order to get over the judgment of the Tribunal which was against the Department.

8 That, it was not open to the issuing authority to cancel the recognition certificate granted to the assessee by invoking the aforesaid impugned circulars dated 17.1.01 and 23.2.01. At this stage, we may point out that the assessee did challenge the validity of the said circulars dated 17.1.01 and 23.2.01 before the High Court. However, the High Court has focused its attention only to the validity of the show cause notice dated 9.5.01 by the A.O. threatening withdrawal of the recognition certificate. Before the High Court, it was contended on behalf of the State (Department) that the writ petition was premature and that the appropriate remedy available to the assessee was to raise the contentions in adjudication before the assessing authority. The Department further contended that in the meantime assessee was not entitled to sell Hot Mix either in the State or in the course of inter-State trade as provided under Section 4-B(2) of the Act as the final product was not the Hot Mix but the road to be constructed from the Hot Mix manufactured by the assessee. On behalf of the Department, it was submitted that road was the end product; that it was not saleable; that it was not the notified product and, therefore, assessee was not entitled to claim the benefit of concessional rate of duty on purchase of raw-materials under Section 4-B of the Act.

9 By the impugned judgment, the High Court came to the conclusion that the impugned notice dated 9.5.01 came to be issued on account of aforesaid two circulars dated 17.1.01 and 23.2.01 issued by the Commissioner, Trade Tax, U.P. The High Court further held that there was no allegation, in the show cause notice dated 9.5.01, of the assessee having violated any terms or conditions of the recognition certificate. According to the High Court, the impugned notice dated 9.5.01 was issued only on the basis of the aforesaid two circulars dated 17.1.01 and 23.2.01 much after the grant of recognition certificate and since the object behind the issuance of the aforesaid two circulars dated 17.1.01 and 23.2.01 was to overrule the decision of the Tribunal in favour of the assessee, the High Court took the view that the impugned show cause notice dated 9.5.01 was liable to be set aside. Aggrieved by the said decision, the State (Department) has come to this Court by way of civil appeals.

10 The said Act is enacted to provide for levy of tax on sale or purchase of goods in U.P. Under Section 2(bb) of the Act "Trade Tax" means a tax payable on sale or purchase of goods. Under Section 2(d) of the Act the

word "goods" is defined to mean every kind or class of moveable property including all materials, commodities and articles involved in the execution of works contract. Under Section 2 (e-1) of the Act the word "manufacture" is defined to mean producing, mining, extracting, altering, finishing or otherwise processing, treating or adapting any goods. Under Section 2(gg) of the Act "purchase price" is defined to mean valuable consideration paid or payable by a person for purchase of goods less cash discount given by the seller. Under Section 2(h) of the Act "sale" is defined to mean any transfer of property in goods for cash or deferred payment or for other valuable consideration including transfer of property in goods (whether as goods or in some other forms) involved in the execution of a works contract. Under Section 2(i) of the Act "turnover" is defined to mean the total amount for which goods are supplied or distributed by way of sale by a dealer on his own account or on account of others for cash or deferred payment or for any other valuable consideration. Under Section 2(ii) of the Act the expression "turnover of purchases" is defined to mean the total amount of purchase price paid or payable by a dealer in respect of purchases of goods made by him after stipulated production. Under Section 2 (m) of the Act the expression "works contract" is defined to include any agreement for carrying out building construction, manufacture, processing, fabrication, erection, installation, repair or commissioning of moveable or immoveable property for cash, deferred payment or in other valuable consideration. Section 2(n) of the Act defines the word "tax" to include additional tax and the composition money accepted under Section 7-D of the Act. Section 3 of the Act imposes liability to tax under the Act. Section 4-B refers to giving of special relief to certain category of manufacturers. It states that notwithstanding contained in Section 3, 3-A, 3-AAA and 3-D, where any goods are liable to tax under Section 3-D are purchased by a dealer who is liable to tax on the turnover of first purchases and the dealer holds a recognition certificate issued under sub-section (2) of Section 4-B he shall be liable in respect of those goods to tax at concessional rate or to exemption subject to conditions and restrictions specified in that behalf by the State Government. Under Section 4-B(2) of the Act where a dealer requires any goods, referred to in Section 4-B(1), for or in the manufacture by him in the State of any notified goods and such notified goods are intended to be sold by him in the State or in the course of inter-State trade or commerce or in the course of export out India, such dealer may apply to the A.O. in the prescribed form for grant of recognition certificate in respect thereof and if the applicant satisfies such requirements as may be prescribed, the A.O. shall grant to him in respect of such goods a recognition certificate. Under Section 4-B(2) there is also an Explanation which states that where goods are required for use in the manufacture of notified goods such goods shall mean raw-materials, processing materials, machinery, plant, equipment etc. and the word "notified goods" shall mean goods to be notified by the State Government in that behalf from time to time. In the present case, the aforesaid raw-materials, namely, cement, sand, bitumen, furnace oil, HSD, Lubricant etc. are the raw-materials required by the assessee for the manufacture of Hot Mix in the Hot Mix Plant of the assessee. In the present case, recognition certificate was granted in respect of the said raw-materials which has been subsequently withdrawn in view of the circulars dated 17.1.01 and 23.2.01 issued by the Commissioner. Assessee has purchased the aforesaid raw-materials at the concessional rate of duty. This was pursuant to the recognition certificate given by the A.O. (issuing authority) which is subsequently cancelled on account of the aforesaid two circulars dated 17.1.01 and 23.2.01. Hot Mix is a notified item. On 21.5.94 State of U.P. have issued Notification No.TT-2-1623/XI-7(159)/91-U.P.Act-15/48-Order-94 which stated that with effect from 1.6.94 tax shall be payable at the rate of 2 per cent, on the sale or purchase as the case may be, by a dealer holding a valid recognition certificate under Section 4-B(2) of any raw-material covered by such certificate which raw-material shall be used in the manufacture of notified goods. Similarly, by another Notification No.T.I.F.-2-2383/XI-9(251)/97-U.P. Act-15-48-Order-98 dated 23.11.98 the tax became payable in respect of declared goods (cement) at 2 per cent and at the rate of 2.5 per cent on other raw-materials like sand, bitumen, furnace oil, HSD, Lubricant etc. Further under the said notification apart from

chemical, fertilizer and electrical energy, all other goods were separately classified as notified goods. To the same effect is the Notification No.K.A.NI.-2-530/XI-7(159)/91-U.P.Act-15-48-Order 2000 dated 17.2.2000 which was subsequently amended by another Notification No.K.A.NI-2-3348/XI-7 (159)/91-U.P. Act-15-48-Order-(67)-2001 dated 30.10.2001. Therefore, it is clear that recognition certificate granted to the assessee was in respect of the aforestated raw-materials which attracted concessional rate of duty and it was granted to the assessee as the assessee had indicated in its application that they required the raw-materials for manufacture of Hot Mix which was a notified item under the above notifications.

11 The main contention advanced on behalf of the Department by Mr. Sunil Gupta, learned senior counsel, was that the High Court should not have interfered at the stage of show cause notice; that the question as to whether use of the above raw-materials in execution of the works contract constituted transfer of property in goods needed to be established by the assessee in the adjudication proceedings and, therefore, the High Court should have allowed the Department to proceed with the show cause notice. Learned counsel submitted that under the scheme of Section 4-B(2) of the said Act notified goods are goods which are intended to be sold in the State and since "roads" did not constitute notified goods and nor did they constitute saleable product, the Department was right in issuing show cause notice dated 9.5.01 for cancellation of the recognition certificate. Learned counsel submitted that in the present case the Commissioner had issued the aforestated circulars dated 17.1.01 and 23.2.01 as the assessee in the State of U.P. were using the aforestated raw-materials for the construction of roads. Learned counsel submitted that roads cannot constitute a notified item and use of raw-materials for construction of roads in the State cannot constitute a "deemed sale" as there was no transfer of property in the goods. Learned counsel urged that under the Act the word "sale" is defined to mean transfer of property in goods and it includes a transfer of property in goods involved in the execution of works contract. Learned counsel urged that by no stretch of imagination "roads" can constitute a notified item. It cannot also come in the definition of the word "goods" and, therefore, the assessee was not entitled to the recognition certificate under the Act. Learned counsel submitted that goods used in the works contract for construction of roads cannot come within the concept of "deemed sale" under Article 366(29A) of the Constitution of India. Learned counsel further submitted that in the present case the Department is not invoking the provisions of the Constitution. Learned counsel submitted that limited question involved in these civil appeals is : whether the case of the assessee came within Section 4-B(2) of the said Act. Learned counsel submitted that the very purpose of granting of recognition certificate is to give the benefit of concessional rate of duty to the assessee who buys raw-materials for the manufacture of goods like doors, windows etc. Learned counsel submitted that in the present case the assessee is buying the aforestated raw-materials for construction of roads which cannot by any stretch of imagination be treated as goods. Learned counsel further submitted that roads are not saleable commodities. In the circumstances, learned counsel submitted that the assessee was not entitled to the benefit of the concessional rate of duty. Learned counsel further submitted that consumption and use of Hot Mix in the manufacture of roads cannot fall under Section 4-B(2) of the Act as the said section contemplates goods (raw-materials) to be used in the manufacture of notified goods and such notified goods should be intended to be sold in the State. Learned counsel urged that roads cannot be sold in the State; that roads are not notified goods; that roads are not goods even by way of definition of goods under Section 2(d) and in the circumstances the assessee was not entitled to recognition certificate under Section 4-B(2) of the Act. In the alternative, learned counsel submitted that if it is the case of the assessee that the raw-materials, referred to above, were used/consumed in the manufacture of Hot Mix then that question was required to be looked into by the A.O. by way of adjudication and, therefore, the High Court should not have interfered under Article 226 of the Constitution at the stage of show cause notice.

12 We find no merit in the civil appeals filed by the State (Department). At the outset, we may state that there are no disputed facts which warrant adjudication. Assessee has entered into a contract to construct roads. In execution of the contract assessee is required to buy aforestated raw-materials which are used in the manufacture of Hot Mix. The said Hot Mix is used for construction of roads. The show cause notice dated 9.5.01 relies upon the aforestated two circulars dated 17.1.01 and 23.2.01 issued by the Commissioner. According to the Commissioner, if any contractor manufactures doors, windows, grills etc. from cement (one of the raw-materials herein) then such manufacturer would be entitled to avail of the facility of concessional rate of duty under Section 4-B of the Act. According to the Commissioner, doors, windows, grills and frames are self-manufactured goods which were taxable as sale and, therefore, Section 4-B(2) of the Act covers such type of goods and not roads. According to the Commissioner, if the contractor utilizes the said raw-materials for construction of the roads then the contractor-assessee would not be entitled to the benefit of Section 4-B of the Act. Further, according to the Commissioner, the contracted road is an immoveable property whereas under Section 4-B of the Act the facility of buying raw-materials was permissible only to the manufacturing who sold the manufactured commodity and since roads were not saleable the manufacture-assessee was not entitled to the benefit of Section 4-B.

13 In the present case, raw-materials are bought by the assessee which are used in the manufacture of Hot Mix which is utilized for road construction. These facts are not in dispute. The question before us is : whether on the said facts the Department was right in denying the benefit of Section 4-B of the Act to the assessee? Therefore, there was no need for adjudication.

14 "Value Addition" is an important concept which has arisen after the Forty-sixth Amendment to the Constitution. Prior to the said Amendment this Court had taken the view in State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd. \026 AIR 1958 SC 560, that "works contract" was an indivisible contract and the turnover of the goods used in the execution of the works contract could not, therefore, become exigible to sales tax. To overcome the effect of the said decision, the concept of "deemed sale" was introduced by the Parliament by introducing sub-clause (b) of Clause 29A in Article 366 of the Constitution which states that the tax on sale or purchase of goods would include a tax on transfer of property in goods involved in the execution of works contract. The emphasis is on the expression "transfer of property in goods (whether goods as such or in some other form)". Therefore, after the Forty-sixth Amendment to the Constitution, the works contract which was an indivisible contract is, by a legal fiction, divided into two parts \026 one for sale of goods and the other for supply of labour and services. Therefore, after the Forty-sixth Amendment, it became possible for the States to levy sales tax on the value of the goods involved in a works contract in the same way in which the sales tax was leviable on the price of the goods supplied in a building contract. This is where the concept of "Value Addition" comes in. It is on account of the Forty-sixth Amendment to the Constitution that the State Government is empowered to levy sales tax on the contract value which earlier was not possible. In the present case, the assessee has paid the tax under the scheme of composition at a stipulated percentage of the contract value. The assessee has paid the tax as defined under Section 2(n) of the Act. As stated above, "works contract" has been defined under Section 2(m) of the Act to include any agreement for carrying out building construction, manufacture, processing or commissioning of any moveable or immoveable property. These two definitions have been inserted in the said Act in conformity with the Forty-sixth Amendment to the Constitution [See: Builders' Association of India and others v. Union of India and others \026 (1989) 2 SCC 645]. To the same effect is the ratio of the judgment of this Court in the case of M/s. Gannon Dunkerley and Co. and others v. State of Rajasthan and others \026 (1993) 1 SCC 364, in which it has been held, vide para 36, that, if the legal fiction introduced by Article 366(29A)(b) of the Constitution is carried to its logical conclusion it follows

that even in a single and indivisible contract there could be a "deemed sale" of the goods in the execution of a works contract. Such a deemed sale has all the incidents of a "sale" in cases where the contract is divisible into two parts \026 one for sale of goods and the other for supply of labour and services. Similarly, in the case of State of Kerala and another v. Builders Association of India and others \026 (1997) 2 SCC 183, it has been held that after the Forty-sixth Amendment goods transferred in the course of execution of the works contract is chargeable to tax under the Kerala General Sales Tax Act, 1963.

15 In the present case, as stated above, the notifications issued by the State Government from time to time show that different rates were prescribed for declared goods and other raw-materials. 'Cement' fell in the category of declared goods whereas sand, bitumen, furnace oil, HSD, Lubricant etc. fell in the category of other raw-materials. The said notifications also indicate notified goods. 'Hot Mix' fell in the category of notified goods. Under Section 4-B(2) of the Act the recognition certificate enabled the assessee to buy the above raw-materials at concessional rate of duty provided they were used in the manufacture of notified goods and such notified goods were intended to be sold by the assessee in the State or in the course of inter-State trade or commerce or in the course of export out of India. Raw-materials came in the category of "goods" for the purposes of Section 4-B(2) of the Act. In the present case, the assessee has used cement, sand, bitumen, furnace oil, HSD, Lubricant etc. as raw-materials in the manufacture of Hot Mix. The show cause notice dated 9.5.01 impugned in the writ petition (before the High Court) proceeded on the basis that roads are not capable of being sold; that roads were not goods; and that roads were not moveables and, therefore, according to the Department the assessee was not entitled to the concessional rate of duty on purchase of raw-materials. In our view, the impugned show cause notice dated 9.5.01 was based on complete misreading of the provisions of the said Act. Under Section 2(h) of the Act the word "Sale" is defined to mean any transfer of property in goods for cash or deferred payment or for value consideration. The definition of the word "Sale" includes transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract. These words flow from the definition of the word "Sale" in the Act to Article 366(29A)(b) of the Constitution. The said words have been interpreted by this Court, as stated above, in the second Gannon Dunkerley's case (Supra) in following words vide para 36:

"36. If the legal fiction introduced by Article 366(29-A) is carried to its logical end it follows that even in a single and indivisible works contract there is a deemed sale of the goods which are involved in the execution of a works contract. Such a deemed sale has all the incidents of a sale of goods involved in the execution of a works contract where the contract is divisible into one for sale of goods and the other for supply of labour and services."

16 For the aforesaid reasons, we are of the view that the High Court was right in setting aside the above show cause notice dated 9.5.01 issued by the A.O. (issuing authority). The withdrawal of recognition certificate was erroneous as it was contrary to the definition of the word "sale" in Section 2(h) of the Act which had to be read with Section 4B(2) of the Act. Therefore, the aforesaid two circulars dated 17.1.01 and 23.2.01 issued by the Commissioner, Trade Tax, U.P., cannot constitute the basis for issuing the impugned show cause notice dated 9.5.01.

17 In the circumstances, the civil appeals filed by the State are dismissed with no order as to costs.