

PETITIONER:
STATE OF U.P. & ORS

Vs.

RESPONDENT:
BRIDGE & ROOF CO. (INDIA) LTD.

DATE OF JUDGMENT: 20/08/1996

BENCH:
B.P.JEEVAN REDDY, K.S. PARIPOORNAN

ACT:

HEADNOTE:

JUDGMENT:
THE 20TH DAY OF AUGUST, 1996

Present:

Hon'ble Mr. Justice B.P. Jeeven Reddy

Hon'ble Mr. Justice K.S. Paripoornan

Rakesh Dwivedi, Additional Advocate General for the State of U.P., R.B. Misra, Sudhanshu and Kamendra Mishra, Advs. for the appellants.

A.K. Ganguli, Sr. Adv., Sudhir Chandra, Arvind Varma and Ms. Suruchi Aggarwal, Advs. with him for the Respondent

J U D G M E N T

The following Judgment of the Court was delivered:
STATE OF U.P. & ORS.

V.

BRIDGE & ROOF COMPANY (INDIA) LIMITED

J U D G M E N T

B.P. JEEVAN REDDY, J,
Leave granted.

This Appeal is directed against the judgment of a Division Bench of the Allahabad High Court disposing of the writ petition filed by the respondent with certain directions. The arguments before us ranged far and wide and several questions have been raised though none of them are reflected in the judgment under appeal. It is averred that all these contentions were indeed urged before the High Court. Be that as it may, having regard to the importance of the questions raised herein, which is said to be arising in that Court frequently, it has become necessary to refer to the contentions urged.

The respondent - Bridge & Roof Company (India) Limited - is a public sector corporation. It entered into a works contract with the Government of Uttar Pradesh for rehabilitation and improvement of a certain stretch of road in Uttar Pradesh. The tender notice was issued on September 1, 1990. The date of opening the tenders was specified as December 17, 1990. The tenders were opened and the respondent's tender was accepted on May 1, 1991. The work has since been completed. The dispute is only about certain payments which the respondent claims are due to it whereas the appellant Government of Uttar Pradesh - says that it is entitled to retain.

According to the terms of the contract, the rates quoted by the contractor were deemed to be inclusive of the sales tax, if any, on the constructional plant, material and supplies required for the purposes of the contract. The relevant clause Sub-clause (4-a) of Clause 78 of the Contract, quoted at Pages 25 and 26 of the Paper-book] stated in the; alia that "4(a): Nothing in the contract shall relieve the contractor from the responsibility to pay any Trade Tax that may be levied under the U.P. Trade Tax Act, 1948 as amended from time to time in performance of this contract; During pursuance of the contract the engineer in charge or any other person responsible for making payment to the contractor shall, at the time of making the payment to the contractor either in cash or in say other manner, deduct an amount equal to the amount specified in section 8-D of the aforesaid Act as in force, for the time being towards part, or as the case may be, full satisfaction of the tax payable under the said Act on account of the contract; the amount presently specified in the said section is 4% (four per cent) of the amount payable to the contractor." Another clause [sub-clause (2) of Clause 78 quoted at page 24 of the Paperbook] stated that "(2) The tendered amount by the contractor shall include, all excise duties, custom duties, import duties, sales tax, and other taxes that may be levied according to the laws said regulations for the time being in force as on the date 30 days prior to the closing date for submission of bids in the Employer's country on the constructional plants, materials and supplies(both permanent, temporary and consumable) acquired for the purpose of the contract.Nothing in the contract shall relieve the contractor his responsibilities to pay any tax that may be levied in the Employer's country on profits made by him in respect of the contract."Clause 70 of the contract provided for process adjustment.It would be sufficient if we notice sub-clause (4)of said clause (quoted at Page 47 of the Paperbook)- It reads:(4) If ,after the date thirty day priors to the date of Opening Of tenders for the work, there in India,changes to any National or state state ordinance Decree or their Law or any regulation or bye law of any local or other duly constituted authority or the introduction of any such state other than under subclause (1a),(2) and (3)of this clause, in the executing of the works such additional or reduced cost shall be certified by the Engineer after examining the records provided by the claimant and shall be paid by or credited to the employer and the contract process adjusted accordingly. notwithstanding the foreign input, such additional or reduced cost shall not be separately paid or credited of the same shall already have been taken into an accounted in the indexing of any input to the price adjustment Formula in accordance with sub-clause (1),(2) and (3) of this clause."

Section 3 of the U.P.Sales Tax Act,1948 [the Act]creates the liability to tax at the specified rates on the turn-over of sales of Purchases, of both,of every dealer.Section 3-F introduced by U.P.Act 25 of 1985 pursuant to the constitution 46th Amendement Act provides for rate of tax on the goods used or involved in the execution of a works contract.It reads:

"[3-F Rate of tax on the right to use any goods or goods involved in the execution of a works contract--Notwithstanding anything contained in Section 3-A, or Section 3-AAA, or Section 3-D, 15a.[Words "or Section 3-G",

omitted by U.P. Act 28 of 1991, S.6(w.e.f. 19.2.1991) and deemed to have been omitted (w.e.f. 13.9.1985).] the turnover relating to the business of transfer of the right to use any goods for any purpose or of transfer the property in the goods [whether as goods or in some other form] 15b involved in the execution of a works contract shall be determined in the manner prescribed and shall be liable to tax at such rate, not exceeding fifteen per cent, as the State Government may, by notification, declare, and different rates may be declared for different goods or different classes of dealers.]"

Section 7-D provides for composition of tax liability. Subject to the directions issued by the State Government, the Commissioner of Sales Tax is empowered to agree to accept a lumpsum in lieu of the amount of tax payable by the dealer under the Act. It reads:

"[7-D Composition of tax liability. Notwithstanding anything contained in other provisions of this Act, but subject to such directions as the State Government may from time to time issue in that behalf, the Commissioner of Sales Tax may agree to accept a lump sum in lieu of the amount of tax that may be payable by a dealer in respect of each goods or class of goods and for such period as may be agreed upon:

Provided that any change in the rate of tax which may come into force after the date of such agreement shall have the effect of making a proportionate change in the lump sum agreed upon in relation to that part of the period of agreement during which the changed rate remains in force.]"

Section 8-D provides for deduction of tax from the amount payable to works contractors. Sub-section (1) provides that every person responsible for making payment to any dealer/contractor shall deduct, at the time of making payment to the contractor, a sum equal to 4% of the sum mentioned therein. The Proviso to sub-section (1) inserted by U.P. Amendment Act 28 of 1991, with effect from February 19 1991, empowers the Commissioner to direct that the deduction provided by sub-section (1) shall be made at such lesser rate as may be specified in the order made by him or that no such deduction shall be made. Section 8-D further provides that the amount so deducted shall be remitted to the Government and shall be treated as tax paid by the contractor/dealer. Any failure to deduct the amount as provided by sub-section (1) makes the person [responsible for deducting] liable to pay the said amount. He is also liable to pay such penalties as may be imposed for his failure to deduct and/or remit. It would be appropriate to read sub-section (1) of Section 8-D alongwith its proviso.

"[8-D, Tax deduction from the

amount payable to works contractor - (1) Notwithstanding anything contained in sub-section (2) of Section 8-A, every person responsible for making payment to any dealer (hereinafter in this Section referred to as the contractor) for discharge of any liability on account of valuable consideration payable for the transfer of property in goods (whether as goods or in any other form) in pursuance of a works contract, not being a building contract of such class or value as may be notified by the State Government in public interest in this behalf, shall, at the time of making such payment to the contractor, either in cash or in any other manner, deduct an amount equal to four per centum of such sum towards part or as the case may be, full satisfaction of the tax payable under this Act on account of such works contract:

Provided that the Commissioner of Sales Tax may, if satisfied that it is expedient in the public interest so to do and for reasons to be recorded in writings order that in any case or class of cases no such deduction shall be made or, as the case may be, such deduction shall be made at a lesser rate."

It is stated before us that pursuant to Section 7-D of the Act the Government devised a composition scheme on April 5, 1991. It was amended late on November 20, 1991.

The respondent appears to have applied to the Commissioner of Sales Tax, U.P. for composition of his tax liability under the said contract and for reducing the rate of deduction of tax at source. This application was made in terms of section 7-D and the Proviso to Section 8-D (1). Upon this application, it is averred, an order of composition was passed. What is relevant is that the Deputy Commissioner (in exercise of the powers delegated to him by the Commissioner) ordered [vide his order dated May 27, 1992] that "at the time of payment of balance amount from the above contract price, the sales tax should be deducted at the rate of one per cent". A copy of this order was also communicated to the concerned Superintending Engineer of the P.W.D. It is admitted case of both the parties that the composition scheme devised by the Government on 5.4.91 [as amended on 20.11.91] is valid and effective only till and inclusive of 31st March, 1995 but not thereafter.

In September 1995, the respondent filed C.M.W.P.C 9 No.24837 of 1995 in the Allahabad High Court with the following prayer:

"(a) to issue a writ in the nature of Mandamus commanding the respondent No.2 (Superintending Engineer) restraining them from deducting a sum of Rs.82,24,969/- from the Bill No.44-RA Bill dated 20.5.95/31.7.95 (Annexure-4) of the

petitioner company."

After setting out the relevant facts, the respondent contended in the said writ petition that the proposed deduction of the sum of Rs.82,24,969/- from the petitioner's bills, purporting to act under Clause 70(4) of the contract is misconceived and untenable because the rate of sales tax has not been reduced in the present case as contemplated by Clause 70(4) but that only the rate of deduction at source has been reduced. The respondent's case was that the change in the rate of deduction at source or the composition of the respondent's liability to pay tax under Section 7-D is of no concern to the Government. The Government must deduct only one per cent upto 31.3.1995 as directed in the order dated May 27, -1992 and leave the rest to the respondent and the Sales Tax authorities. The respondents in the writ petition (appellants herein) filed a counter disputing the several contentions raised in the writ petition and justifying the retention of the sum of Rs.82,24,969/-. According to appellants, the said amount need not be paid to the sales Tax Department also. By virtue of the composition agreement between the respondent and the sales Tax department under section 7-D, read with the order of the Deputy Commissioner under the proviso to section 8-D (1), the tax liability of the respondent has been reduced with respect to the works contract between them, within the meaning of clause 70(4) of the contract and, therefore, they submitted, the benefit of said reduction should go to the Government as provided by the contract.

The High court did not deal with the several contentions aforesaid. It disposed of the writ petition observing that inasmuch as "the commissioner in his order has accepted the paper for composition as requested by the petitioner and has directed the deduction of one in lieu of four per cent, (and) only that amount is to be deducted from the amount required to be paid to the petitioner under the bill in question and the same will cover the period upto 31st March, 1995 and not thereafter and the payment under the bill shall be made accordingly." The High court then observed that inasmuch as the order of the commissioner under the Proviso to section 8-D (1) has not been challenged by the Government, the writ petition is liable to be disposed of with the direction aforesaid, viz., that the Government shall deduct only one per cent of the bill in question upto 31st March, 1995.

Mr. Rakesh Dwivedi, learned Additional Advocate General for the State of U.P., urged the following contentions:-

(1) Under the terms of the contract the tendered amount quoted by the respondent included sales Tax at 4%. The Government was under a statutory obligation to deduct this 4 per cent and remit the same to the sales Tax Department. The contractor was entitled only to the remaining 96 per cent of the contract amount since the rate of tax payable by the respondent-contractor has been reduced to one per cent from 4 per cent under an order of composition passed under section 7-D, it is a situation attracting sub-clause (4) of clause 70 of the contract. According to it the benefit of any reduction in the rate of sales tax shall operate to the benefit of the Government just as any enhancement in the rate of sales tax would be a liability upon the Government. The Government was, therefore, justified in retaining the said amount of Rs.82,24,969/-.

(2) The direction of the high court to deduct only one per cent is a case of stating the obvious. But that order is being construed by the respondent an order allowing the writ petition as prayed for. If so understood, the order of the

High court results in unjust enrichment of the respondent at the cost of public exchequer besides being contrary to the provisions of the statute and terms of the contract between the parties.

Shri A.K.Ganguli and Mr.Sudhir Chandra, learned advocates of the respondent, on the other hand, submitted that the Government is not concerned with the sales tax liability of the respondent. That is a matter between the respondent and the sales tax Department. The obligation of the Government under the contract was only to deduct 4 per cent from the amount payable to the respondent under the contract. But since the said obligation to deduct has been reduced from 4 per cent to one per cent by an order made under the proviso to section 8-D (1) the Government should deduct only at the rate of one per cent and pay over the balance of the contract amount rest to the respondent. The Government is not concerned with the order of composition made under section 7-D (1). What all has happened under the composition order is that instead of ascertaining the value of the goods transferred in the execution of the work contract. Counsel say that this has been done in the interest of simplification of assessment procedure and as a measure of government policy. This does not result in reduction in the rate of tax; it is only a convenient and simplified formula for quantifying the tax. Hence, they submit, there is no question of the Government getting the benefit of any reduction in the rate of tax.

In our opinion, the very remedy adopted by the respondent is misconceived. It is not entitled to any relief in these proceedings, i.e., in the writ petition filed by it. The High court appears to be right in not pronouncing upon any of the several contentions raised in the writ petition by both the parties and in merely reiterating the effect of the order of the Deputy commissioner made under the proviso to section 8-D (1).

Firstly, the contract between the parties is a contract in the realm of private law. It is governed by the provisions of the contract Act or may be, also by certain provisions of the sale of Goods Act. Any dispute relating to interpretation of the terms and conditions of such a contract cannot be agitated, and could not have been agitated, in a writ petition. That is a matter either for arbitration as provided by the contract or for Civil court as the case may be. Whether any amount is due to the respondent from the appellant-Government under the contract and, if so, how much and the further question whether retention or refusal to pay any amount by the Government is justified, or not are all matters which cannot be agitated in or adjudicated upon in a writ petition. The prayer in the writ petition, viz., to restrain the Government from deducting particular amount from the writ petitioner's bill(s) was not a prayer which could be granted by the High court under Article 226. Indeed, the High Court has not granted the said prayer.

Secondly, whether there has been a reduction in the statutory liability on account of a change in law within the meaning of sub-clause (4) of clause 70 of the contract is again not a matter to be agitated in the writ petition. That is again a matter relating to interpretation of a term of the contract and should be agitated before the arbitrator in the civil court, as the case may be. If any amount is wrongly withheld by the Government, the remedy of the respondent is to raise a dispute as provided by the contract or to approach the civil court, as the case may be according to law. Similarly if the Government says that any over-

payment has been made to the respondent, its remedy also is the same.

Accordingly, it must be held that the writ petition filed by the respondent for the issuance of a writ on Mandamus restraining the Government from deducting or withholding a particular sum, which according to the respondent is payable to it under the contract, was wholly misconceived and was not maintainable in law [See the decision of this Court in Assistant Excise Commissioner v. Isaac Peter (1994 (4) S.C.C.104), where the law on the subject has been discussed fully.] The writ petition ought to have been dismissed on this ground alone.

We must mention in this behalf that the order of composition of tax liability, if any, under Section 7-D of the Act has not been placed before us. [We presume that it is an order separate from the order dated May 27 1992. But, even if it is not, it makes no difference to what we were saying hereafter.] Whether such composition agreement results in reduction of tax liability within the meaning of Clause 70(4) of the Contract is again a matter concerning the interpretation of a term of the Contract. Accordingly, the question to whom the benefit of reduction in tax should go' is not a matter for a writ petition, for the very same reasons as are mentioned hereinbefore. Now coming to the order made by the Deputy Commissioner under the proviso to Section 8-D (1) of the Act, all that it says is that the Government shall deduct tax at source only at the rate of one per cent instead of at the rate of 4 per cent. The said order-, having been made under the statute, relieves the government of its obligation to deduct at source at the rate of 4 per cent. In other words, by virtue of the said order, no action can be taken against the government [Appellants] for not deducting at the rate of 4 per cent under Section 8-D. Learned counsel for the respondent contend that the order under the proviso to Section 8-D(1) does not determine the tax liability of the respondent, which liability, they say, will be determined only in the assessment proceedings. May be they are right or may be, not. We need not express any opinion on these submissions because, as already pointed out hereinabove, the said question depends upon the interpretation of the terms of the contract between the parties. Just because the interpretation of orders made under Section 7-D or Section 8-D(1) may also fall for consideration while construing the terms of the contract does not convert the controversy into a public law issue. It is yet a matter within the realm of private law and, therefore, outside the purview of the writ petition. The Arbitrator under the contract or the civil court, as the case may be - can go into and decide both questions of fact as well as questions of law.

There is yet another substantial reason for not entertaining the writ petition. The contract in question contains a clause providing inter alia for settlement of disputes by reference to arbitration [Clause 67 of the Contract]. The Arbitrators can decide both questions of fact as well as questions of law. When the contract itself provides for a mode of settlement of disputes arising from the contract, there is no reason why the parties should not follow and adopt that remedy and invoke the extra-ordinary jurisdiction of the High Court under Article 226. The existence of an effective alternative remedy - in this case, provided in the contract itself - is a good ground for the court to decline to exercise its extra-ordinary jurisdiction under Article 226. The said Article was not meant to supplant the existing remedies at law but only to supplement

them in certain well-recognised situations. As pointed out above, the prayer for issuance of a writ of mandamus wastes wholly misconceived in this case since the respondent was not seeking to enforce any statutory right of theirs nor was it seeking to enforce any statutory obligation cast upon the appellants. Indeed, the very resort to Article 226 - whether for issuance of mandamus or any other writ, order or direction - was misconceived for the reasons mentioned supra.

So far as the High Court's direction to deduct at the rate of one percent is concerned, it may be case of stating the obvious, as contended by the appellants. But it must also be realised that more than that could not have been legitimately granted in a writ petition. It must also be noticed that the declaration granted is effective only for a limited period, i.e., March 31, 1995. It does not apply to payments made on or after April 1, 1995, What does it mean in the facts and circumstances of the case, we do not know. Whatever it means, it cannot certainly be construed as a direction to the appellants to pay over the said sum of Rs.82,24,969/- to the respondent as claimed by it or as upholding the basis of the respondent's claim put forward in the writ petition.

Before parting with this appeal, we must mention that counsel for both the parties have urged several other contentions of fact and law and relied upon several other clauses of the Contract apart from those mentioned supra. We have not set them out herein because, in our opinion, they are outside the ken of a writ petition. It shall be open to the parties to urge and rely upon them at the proper stage and before the appropriate forum.

For the reasons mentioned hereinabove, the appeal is dismissed subject to the observations and clarifications aforementioned. It shall be open to the respondent, if it so chooses, to either raise a dispute and ask for reference of the dispute to arbitration as provide by the contract or to approach the civil court according to law, as the case may be, in the circumstances of the case there shall be no order as to costs.