

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 07.02.2017

CORAM

THE HONOURABLE Mr.JUSTICE RAJIV SHAKDHER

W.P.Nos.41443 to 41445 of 2016
and W.M.P.Nos.35420 to 35428 of 2016

M/s.Coastal Oil and Gas Infrastructure
Private Limited,
Rep. by Deputy General Manager-Projects,
No.7, E.I.D.Parry Compound,
Judge Bungalow Road,
Cuddalore-607 001.

...Petitioner in
all WPs

Vs

1.Assistant Commissioner, [CT],
Cuddalore Town Circle,
Cuddalore-607 001.

2.The Branch Manager,
Bank of India,
Corporate Banking Branch Chennai,
C.B.B. 4th Floor, Tarapore Towers,
Mount Road,
Chennai-2.

3.The Branch Manager,
State Bank of India,
Rajbhavan Road,
Somajiguda,
Hyderabad-500 082

....Respondents in
all WPs

COMMON PRAYER : Writ Petitions filed under Article 226 of the
Constitution of India praying for a Writ of Certiorari to call
for the records on the file of the first respondent herein in
TIN.33524383769/2010-11, 2011-12 and 2012-13 respectively dated
18.07.2016 and quash the same.

For Petitioner : Mr.N.Sri Prakash
in all WPs for Mr.C.Bakthasiromoni
For 1st Respondent : Mr.Kanmani Annamalai,
in all WPs

C O M M O N O R D E R

1. These writ petitions pertain to Assessment Years 2010-11, 2011-12 and 2012-13. Via the captioned writ petitions, challenge is laid to three separate orders of even date, i.e., 18.07.2016.

2. The reasoning given in the impugned orders is similar; the variation is only qua the amounts referred to in the said orders.

3. For the purpose of adjudicating these writ petitions, the following, broad facts, are required to be noticed :

3.1. The petitioner herein is a Company, which entered into an agreement, apparently, with another entity by the name : M/s.Nagarjuna Oil Company Limited [in short "NOCL"]. This agreement was executed on 26.05.2010 and is titled as "Terminalling Service Agreement" [in short "the agreement"]. By virtue of the said agreement, the petitioner, was required to build storage terminals for the benefit of NOCL. Admittedly, the land, on which, the terminal was required to be constructed, was owned by NOCL.

3.2. Broadly, the agreement required the petitioner to design; to provide engineering; to procure the requisite construction materials; and to erect the terminal; as indicated above, for the use of NOCL.

3.3. The first respondent, being of the prima facie view that, what was in the offing, was a works contract, issued three separate notices of even date, i.e., 03.10.2014, qua each of the Assessment Years.

3.4. As per these notices, issued to the petitioner, in substance, the agreement envisaged the following :

"..... The essence of the contract is they have to design, engineering, procurement construction and installation of

- d] Crude oil tank, farm and associated facilities.
- e] Intermediate and finished product tankings.
- f] Interconnecting pipelines within the specified battery limits formation of roads and drainages.

"

3.5. A perusal of the terms of the agreement would show that it enabled NOCL, in effect, to store the crude oil imported by it, for a period of 20 years. The agreement, apparently, involves, I am told by the counsel for the petitioner, receipt of compensation for the value of the terminal, based on the period for which, the agreement survives. Thus, if, the

agreement survives the entire period of 20 years, no compensation is payable, towards the cost incurred by the petitioner, qua the terminal. This aspect of the matter comes through, upon a perusal of Article 22 along with Schedule 8 of the Agreement.

3.6. Furthermore, under the agreement, NOCL is required to pay terminalling charges to the petitioner, in terms of Article 7 of the agreement.

4. The record also shows that the construction of the terminal has been sub-contracted by the petitioner to an entity by the name : M/s.ABIR Infrastructure Pvt. Ltd. [in short "ABIR"], which is registered under the Tamil Nadu Value Added Tax Act, 2006 [in short "the Act"].

5. Based on the aforesaid broad facts, it is contended on behalf of the petitioner that the agreement is in the nature of Build Own Operate and Transfer contract (in short a "BOOT Contract") and not a works contract, as has been sought to be portrayed by the first respondent.

5.1. The petitioner also contends that by virtue of provisions of Rule 8(5)(c) of the Tamil Nadu Value Added Tax Rules, 2007 (in short 2007 Rules), the payments made to the sub-contractor, i.e., ABIR will have to be adjusted, even if, one were to accept the stand taken by the first respondent that agreement executed between the petitioner and NOCL is a works contract.

5.2. This submission, though, is made on behalf of the petitioner, in the alternative, to the primary submission that the agreement in issue, is not a works contract.

5.3. The first respondent, however, despite protestation to the contrary, has come to the conclusion that the agreement executed between the petitioner and NOCL is in the nature of works contract. The reasoning given in that behalf is common to all three impugned orders, and therefore, for the sake of convenience, I am taking the liberty of extracting the reasoning given, in one of the orders, which is, as in the case of other two orders, dated 18.07.2016, and pertains to assessment year 2010-11.

" 1. The dealers in their application for registration as a dealer in Col.4. against the commodities dealt/to be dealt, they have furnished as works contract.

2. For the works contract activities, the dealers have got registration under TNVAT Act 2006. In the contract, the assessee had purchased and supplied the

goods to the sub-contractors.

3. The dealers have effected purchases of goods both local and Inter-State to the value of Rs.11,41,01,970/- and transferred the goods to the works spot of ABIR by making material issue voucher. This shows the dealers is doing contract works.

4. The dealers have purchased goods locally for which they have claimed ITC on the purchases. But they have not reported the disposal of goods in the return. The transfer of goods might have been reported in the return. Thus the Terminalling Service Agreement is defected (SIC).

5. These are all the normal conditions for contract agreements. But there is violations of provision of TNVAT Act 2006.

6. The dealers are works contractor according to our records.

7. The Section 5 of the Act is extracted in this para. There is transfer of property in goods during the assessment year.

8. There is transfer of property in goods. But the dealers have not reported the deemed sale value of goods. They have extracted the Sec.2[43] the definition for works contract.

9. This is not the reply to the notice.

10. The notice dated 03.10.2014 was issued on this basis of recorded evidences. There is no willful misleading of T.S.A.

11. There is proof for purchases of goods and transfer of goods in the contract. The notice is properly issued.

12. Even though the assessee received payment on Terminating Service Agreements, the records filed to this office was not supported the above statement.

After issue of notice, the dealers have decided to reverse the claim of ITC in their letter dated 24.2.2015. After the detection by the department, the dealers have come to this conclusion to reverse the amount. The dealers have stated that they have reversed the claim of ITC in the returns for the month

of February 2015.

Finally they have requested to drop the proposal in the notice dated 03.10.2014.

On the basis of the above discussions, the objection filed is overruled and the proposal is confirmed."

6. The Revenue, which is represented by Mr.Kanmani Annamalai contends that, if, the definition of the "dealer", as contained in Section 2(15), and that, of "works contract" as adverted to in Section 2(43) of the Act is taken into account along with the facts obtaining in this case, it will be clear that the agreement executed between the petitioner and NOCL is a works contract.

6.1. It is submitted by the learned counsel that the mere fact that the payments are deferred cannot lead to the conclusion that the subject agreement is not in the nature of a works contract. This apart, Mr.Annamalai says, that the matter involves determination of disputed facts and therefore, the petitioner should be relegated to an alternate remedy by way of an appeal.

6.2. Insofar as the issue raised by the petitioner, with regard to adjustment of the payments made to ABIR under Rule 8 (5)(c) of the 2007 Rules is concerned, Mr.Annamalai says, even this aspect can be dealt by the appellate authority. At this juncture, counsel for the petitioner indicates to me, that the petitioner had approached this Court, by way of the instant writ petitions, after the appeal period was over, and therefore, there may be difficulty in approaching the appellate authority. Furthermore, counsel for the petitioner also submitted that, it may be difficult to comply with the condition of pre-deposit, which is a necessary pre-requisite to prefer an appeal.

7. I have heard the learned counsel for the parties and perused the records.

8. According to me, the primary issue, which requires consideration is, whether the agreement entered into between the petitioner and NOCL is, in the nature of works contract. By virtue of the impugned orders, the first respondent has ruled otherwise.

9. As correctly argued by Mr.Annamalai, since, there is a dispute with regard to facts, an exercise to ascertain the correct facts may have to be undertaken. The appellate authority is the authority, which can deal with both, facts and law, in the first instance. Therefore, in my view, the appropriate forum would be the appellate authority, where the issues raised in the captioned writ petitions can be agitated by the petitioner.

However, given the fact that the petitioner approached this Court, in the first instance, instead of the appellate authority, I have put to Mr.Annamalai as to whether, the Revenue would oppose the appeal, if, preferred by the petitioner on the ground of delay. Mr.Annamalai's, reply is nebulous, to say the least.

10. Given this stand, in my opinion, since, the Revenue has raised the objection with regard to the maintainability of the petition on the ground of alternate remedy, I find the stand of the Revenue unfair.

10.1. To my mind, the fact that time was spent by the petitioner in prosecuting the writ petitions in this court would have to be taken into account, if, appeal(s) are preferred by the petitioner, vis-a-vis, the impugned orders. In this regard, the petitioner can have recourse to, if not Section 14 of the Limitation Act, 1963 (in short the 1963 Act), surely, to the principles analogous to the said provision.

10.2. That Section 14 of the 1963 Act, applies to quasi judicial authorities is now settled by the judgment of the Supreme Court in M.P.Steel Corporation Vs. Commissioner of Central Excise, 2015 (5) Scale 505. In so far as the proposition set forth above, with regard to the application of principles analogous to Section 14 of the 1963 Act is concerned, the judgment of the Supreme Court passed in J.Kumaradasan Nair V. IRIC Sohan, (2009) 12 SCC 175, would, clearly, be applicable.

10.3. In these circumstances, the writ petitions are dismissed, giving liberty to the petitioner to approach the concerned statutory authority by way of the remedy available under the statute.

10.4. The other submission of the counsel for the petitioner that the petitioner does not have requisite funds to make a pre-deposit of 25% of the disputed tax, cannot be accepted. In my opinion, the appeal(s), if, filed, can only be entertained, in accordance with the prescribed procedure. The submission that the petitioner has no money to make over a deposit towards tax can be no answer, as it should, to my mind, either find the resources, or else have itself declared insolvent.

10.5. Clearly, in so far as the pre-deposit of tax is concerned, the writ court may not be able to come to the aid of the petitioner. See observations of the Supreme Court in : Raj Kumar Shivhare Vs. Assistant Director, Directorate of Enforcement, (2010) 4 SCC 772, in paragraph 31 at page 781.

11. Resultantly, the pending Miscellaneous Petitions shall stand closed. There shall, however, be no order as to costs.

Sd/-
Asst.Registrar

/true copy/

Sub Asst. Registrar

To

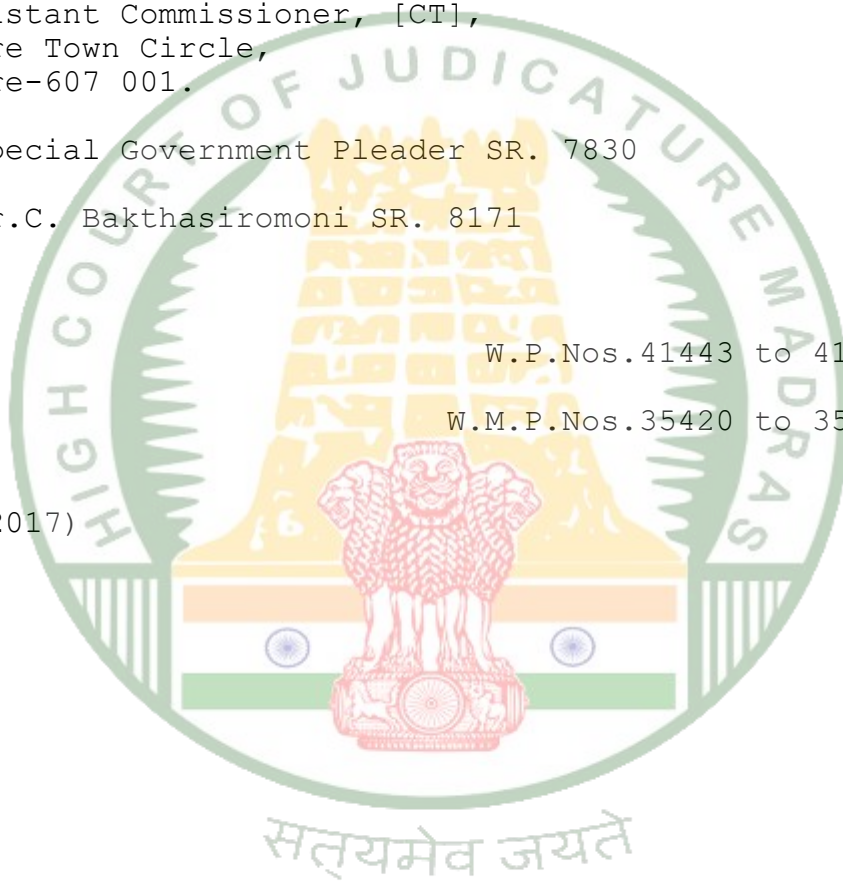
1.The Assistant Commissioner, [CT],
Cuddalore Town Circle,
Cuddalore-607 001.

+1cc to Special Government Pleader SR. 7830

+1cc to Mr.C. Bakthasiromoni SR. 8171

W.P.Nos.41443 to 41445 of 2016
and
W.M.P.Nos.35420 to 35428 of 2016

VSN(CO)
VR(24/02/2017)



WEB COPY