THE HON'BLE SRI JUSTICE M. SEETHARAMA MURTI

Writ Petition No.3353 of 2006

ORDER:

This writ petition, under Article 226 of the Constitution of India, by the petitioner is filed seeking verbatim the following relief:

> '..to issue writ order or direction in the nature of writ of mandamus by declaring that the recovery ordered in the final bill dated 18.10.2005 issued by the 1st respondent for Rs.2,17,956/- being the Central Excise Duty is void, with directions to the 1st respondent to release the recovered amounts with interest immediately with all consequential benefits and to pass such other order..'

2. I have heard the submissions of *Sri V.N. Srivatsa,* learned counsel representing *Ms. S. Tripura Sundari*, learned counsel appearing for the writ petitioner, and of learned Government Pleader for Irrigation representing the respondents. I have perused the material record.

3. From the pleadings of the parties and the submissions made before this Court, the facts that surface for consideration, in brief, are as follows:

After due tendering process, the work of fabrication, supply and erection of E.M. parts, Regulator gates, off-take sluice gates, Hoist bridge and equipment for Regulator cum off-take sluices for 4-L major and 5-L major at Km 18.599 on 5th branch canal was awarded to the petitioner-Company. Thereafter, the estimate for the said work was sanctioned for a sum of Rs.21,31,000/- by the Superintending Engineer concerned *vide* his proceedings, dated 26.08.2003. In the agreement it is noted that the rates arrived based on tender percent shall include all construction materials; the tenderer has to quote the tender price considering all the aspects of tender to complete the work as per the APSS, the special specifications, appended drawings etcetera. There are also other terms like the offer made in Schedule 'A' price bid shall be for the finished work in site inclusive of all incidental and contingent charges; all taxes such as sales tax, seigniorage, and royalties in respect of materials to be used on the work must be born by the contractor. As per the agreement, the rate shall also include safety of workers, first aid equipment and suitable accommodation for the staff and the workmen, with adequate sanitary arrangements, the effecting and maintenance of all insurances, the payment of wages, salaries, fees, royalties, duties or other charges arising out of erection of work. On completion of work by the petitioner Company, the final bill was raised by the petitioner company for an amount of Rs.6,26,717/-. However, an amount of Rs.2,17,956/- was recovered from the bill by the Superintendent Engineer, terming it as Central Excise Duty. The said amount was recovered as it was brought to the notice of the said Officer that the Assistant Pay and Accounts Officer, Telugu Ganga Project, Nellore, *vide* letter dated 30.12.2004 stated that during inspection of the office records by the Accountant General's inspection party they have pointed out about non recovery of Central Excise Duty at 15% on the value of the work done and that such a provision is also made in the abstract estimate. The copy of the said letter was also marked to the Executive Engineer concerned, that is, the 1st respondent herein. In response to the said letter of the Assistant Pay and Accounts Officer, the Superintending Engineer informed him that the rate furnished in Schedule A items are inclusive of royalties and duties arising out of the works as per paragraph 6 of Schedule A preamble of the agreement and that, therefore, he instructed the division to effect the recovery of Central Excuse Duty @ 15% of the finished item of work. Aggrieved thereby the petitioner filed this writ petition and challenged the said recovery as illegal and void; the petitioner also sought a direction to the 1st respondent to release the recovered amount with interest.

4. In this setting of facts, the case of the petitioner company is this: 'The job work completed by the petitioner is not covered by the terms and

conditions indicated in the tender notice or in the agreement. Central Excise Duty is governed by Section 3 of the Central Excise Act, 1944. It is applicable only to a manufacturer of excisable goods. Excisable goods being manufactured, on completion must take clearance under the Excise Act. There is no provision in the Central Excise Act or in the Central Excise Rules that central excise duty is to be paid on job work completed viz., fabrication and erection of EM parts, regulator gates, hoist bridge etcetera. No new product was manufactured or sold in the market by the petitioner Company. The materials purchased were utilised for completion of the job work. The goods fabricated and erected are not excisable goods as they do not satisfy the test of marketability. They are not products which are generally bought and sold in the open market. Therefore, they do not attract excise duty. The recovery of Rs.2,17,956/- in the final bill caused hardship to the petitioner. The said recovery is bad in law. The said recovery was made without giving an opportunity of hearing to the petitioner. The principles of natural justice are violated. Unless goods are marketable and are capable of being marketed, the excise duty is not leviable.'

5. Per contra, the submissions made on behalf of the respondents, in brief, are as follows:

Clause no.5 of the agreement states that in case of over payment or wrong payment made to any contractor or firm due to wrong interpretation of the provisions of the contract or APSS or otherwise, such unauthorised payments are liable for deduction in the subsequent bills or final bills for the work or at any time thereafter from the deposits available with the Government. Any recovery or recoveries by the Government department either State or Central due to non fulfilment of any contract entered into with them by the contractor or firm shall be recovered from any bill or deposit of the contractor or firm. No claim shall be entertained if the same is not represented in writing to the Executive Engineer within 15 days of its occurrence. The petitioner company has not produced any evidence that it has paid Central Excise Duty for the steel purchased by it and as such the amount was recovered and was credited towards Central Excise Duty while passing the final bill. The said amount was credited to the head 8658-Central Excise Duty. The contractor has not represented in writing within 15 days to the Executive Engineer complaining against the recovery of the Central Excise Duty from the final bill. The same was recovered as per agreement conditions and instructions of audit party and higher authorities.

6. Before proceeding further, it is necessary to state that this Court carefully considered the clauses which are referred to in the succeeding paragraphs and also the copy of the tender notice and other relevant clauses, which are pointed out from the material papers.

7. There is no specific clause anywhere specifically referring to the Central Excise Duty and its recovery. However, in Schedule A preamble, term '6' postulates that the rates shall also include '.....the effecting and maintenance of all insurances, the payment of all wages, salaries fees, royalties, duties or other charges arising out of the erection of works and the regular clearance of rubbish, reinstatement and clearing-up of the site as may be required on completion of works safety of the public and protection of the works and adjoining land.' There is also a specific clause that the petitioner company shall produce income tax clearance certificate. Both the parties understood that no central excise duty is payable by and recoverable from the petitioner-Company. Therefore, until a claim for the final bill amount was made by the petitioner-Company, no excise duty was recovered. However, after receiving the final bill for Rs.6,26,717/- from the petitioner company, the recovery of the disputed amount of Rs.2,17,956/- was made from the final bill towards 15%central excise duty as admittedly after the inspection of

the Accountant General's inspection party, the said aspect was pointed out by the Assistant Pay and Accounts Officer, Telugu Ganga Project, Nellore, and as the higher authorities directed for such recovery in view of the instructions of the audit party. Admittedly, the said recovery was noted in the final bill, on 18.10.2005, by the 1st respondent. The said amount is more than Rs.50,000/-. In-fact, the petitioner addressed a letter, dated 30.07.2005, to the Executive Engineer concerned stating that there is no obligation on the part of the Central Excise department to accord the petitioner-Company any certificate regarding the eligibility to exemption of duty on the goods produced and supplied by the petitioner-Company as the petitioner-Company was not required to file any declaration with the said department and that the petitioner-Company is entitled to exemption from duty on the goods produced and therefore, if necessary, a clarification may be sought by the Executive Engineer by addressing a letter to the Central Excise Department. The petitioner also addressed a legal notice, dated 09.01.2006, to the Executive Engineer for release of the said amount recovered towards Central Excise Duty. To the said legal notice a reply was sent that the estimated rates were also inclusive of Central Excise Duty vide Estimate No.CR.24/2003-04.

8. The question that falls for consideration is as to whether the work entrusted to the petitioner attracts Excise Duty. In the case on hand, the work entrusted on tender basis to the petitioner company is fabrication, supply and erection of E.M. parts, Regulator gates, off-take sluice gates, Hoist bridge and equipment for Regulator cum off-take sluices for 4-L major and 5-L major at Km 18.599 on 5th branch canal. The said fabrication and erection shall be as per the specifications in the tender & the agreement and the drawings. The fabricated parts, Gates etcetera are only useful for erection on the branch canal and are not fit for use anywhere for any other purpose other than the purpose for which they are intended. Therefore, the fabricated and erected materials, parts, equipment are not marketable and

are also not capable of being brought to the market. The fabricated material and parts to be erected are required to be attached to the earth and become immovable once erected. Therefore, the fabrication and erection work done by the petitioner company cannot be held to be manufacture and sale of excisable goods. The above view finds support from the decision in M/s.Cadila Laboratories PVt., Ltd., v. C.C.E. Vadodara[1] wherein the Supreme Court held as follows:

> 'In order to be excisable, not only goods must be manufactured i.e. some new product brought into existence, but the goods must be marketable. By marketable it does not mean that the goods must be actually bought and sold in the market. But the goods must be capable of being bought or sold in the market. The law also is that goods which are in the crude or unstable form and which require a further processing before they can be marketed cannot be considered to be marketable goods merely because they fall within the Schedule to the Excise Act.'

In the case on hand, it is to be noted that the fabricated materials are not usable for any other purpose and serve any purpose unless erected as per requirement, specifications and sketch.

9. On the above analysis, this Court finds that the recovery of Rs.2,17,956/- in the final bill terming it as Central Excise Duty is unsustainable, under facts and in law, and therefore, the petitioner is entitled for release of the said amount.

10. Before parting it is to be noted that as per the terms of the agreement, settlement of certain claims above Rs.50,000/- in value shall be decided by a civil Court of competent jurisdiction by way of a regular civil suit and not by arbitration. Therefore, the learned Government Pleader contends that an efficacious alternative remedy is available to the petitioner and hence, writ petition is not maintainable.

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[1] AIR 2003 SC 1700

10.1 He placed reliance on the following decisions:

(i) Rajastan Steel Industrial Development and Investment Corporation and another v. Diamond & Gem Development Corporation Limited and another[2] is relied upon in support of the proposition that when there is an efficacious alternative remedy by way of a civil suit, the writ petition without exhausting the said remedy is not maintainable. The facts of the case show that a huge area of land stood notified under Section 4(1) of the Rajasthan Land Acquisition Act, 1953, for a public purpose, that is, industrial development to be executed by the Rajastan State Industrial Development and Investment Corporation (RIICO). The said RIICO made allotment of some land out of the said land to the 1st respondent to facilitate the establishment of a Gem industrial estate for manufacturing of gemstones. A lease deed was also executed between the RIICO and 1st respondent Company on 22.5.1989 and the land was allotted on 'as is where is' basis with a direction to complete the project within 5 years. The possession of the land was taken by the said respondent Company and construction was carried out only on a portion of the land allotted to it. The question of accessibility to the property has arisen. Therefore, a writ petition was filed to provide accessibility through a road. Another writ petition was also filed challenging the cancellation of the lease. The High Court allowed the writ petitions filed by the 1st respondent quashing the order of cancellation of allotment of land and directing the appellants to provide approach access road. The Supreme Court held that the respondent Company ought to have resorted to arbitration clause provided in the lease deed in the event of dispute and that the District Collector, Jaipur, would have decided the case and that the respondent Company did not resort to the statutory remedy and filed the writ petition which could not have been entertained by the High Court. On facts, the said decision is not applicable to the case on hand.

[2] (2013) 5 SCC 470

(ii) State of UP and others v. Bridge & Roof company (India) Ltd.,[3] The facts of the cited case show that the dispute is about deduction of sales tax and sales tax liability of the respondent. The issue that fell for consideration related to interpretation of terms and conditions of the contract. The prayer in the writ petition was to restrain the Government from deducting a particular amount from the writ petitioner's bill(s) and the question was whether there has been a reduction in the statutory liability on account of a change in law within the meaning of the terms of the contract; and, the issues revolved around interpretation of terms of the contract between the parties. Therefore, it was held that the matter is within the realm of private law and, therefore, outside the purview of the writ petition and that 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.

(iii) Government of AP and others v. Sri Rama Engineering Constructions (Engineers and Contractors), Hyderabad[4] was relied upon in support of the contention that seriously disputed question of fact, if involved, the writ petition is not maintainable. The facts of the cited case show that the transaction is a commercial transaction arising out of non-statutory contract for excavation of Srisailam Right Branch Canal and the dispute is with regard to the payment for excessive work executed beyond estimated works.

10.2 On facts of the instant case, the ratios in the decision have no application to the facts of the instant case. In the case on hand, the question is about excisability of the fabrication and erection work entrusted to the petitioner-Company by the respondents. Since the issue is with regard to the recovery of excise duty without jurisdiction and as the duty was recovered without any authority of law and as the respondents had no authority to retain the money collected without the authority of law, this court has the

[3] (1996) 6 SCC 22
[4] 2005 (3) ALD 281 (DB)

power to direct refund in a writ petition. (See: Salonah Tea Co. Ltd., v. Supdt. Of Taxes [(1988) 1 SCC 401]).

11. In the result, the Writ Petition is allowed directing the respondents to refund to the petitioner Rs.2,17,956/-. The refund as ordered shall be made within 2 months from the date of receipt of a copy of this order.

Miscellaneous petitions pending, if any, shall stand closed. There shall be no order as to costs.

JUSTICE M. SEETHARAMA MURTI

20.04.2017
Vjl