

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 1775 OF 2018

Leighton India Contractors	}	
Pvt. Ltd.	}	
Tower No. 3, 6 th floor,	}	
Equinox Business Park,	}	
BKC Complex, Mumbai	}	Petitioner
versus		
1. The State of Maharashtra	}	
through the Government	}	
Pleader, High Court, Mumbai	}	
	}	
2. The Commissioner of Sales	}	
Tax, having his office at	}	
3B-7, 3 rd floor, GST Bhavan,	}	
Mazgaon Mumbai - 400 010	}	
	}	
3. Deputy Commissioner of	}	
Sales Tax (E-705), Refund	}	
and Refund Audit-I, Mumbai	}	
having his office at Mazgaon,	}	
Mumbai - 400 010	}	Respondents

Mr. Prakash Shah with Mr. B. N. Mehta
i/b. M/s. PDS Legal for the petitioner.

Mr. V. A. Sonpal-Special Counsel with
Mr.B. V. Samant-AGP for State.

**CORAM :- S. C. DHARMADHIKARI &
PRAKASH. D. NAIK, JJ.**

DATED :- APRIL 4, 2018

ORAL JUDGMENT :- (Per S. C. Dharmadhikari, J.)

1. By this petition under Article 226 of the Constitution of India, the petitioner challenges an interim order of the tribunal.

The tribunal's interim order dated 11th August, 2017 directs the petitioner to pay a sum of Rs.8 crores for the period 2009-10 and Rs.4 crores for the period 2010-11. This is a pre-condition, on which there will be a stay against recovery of the tax pending the statutory appeal.

2. The petitioner before us filed appeals to the tribunal under the Maharashtra Value Added Tax Act, 2002 (hereinafter referred to as “the MVAT Act”) styled as the Maharashtra Sales Tax Tribunal at Mumbai being VAT Second Appeal Nos. 560 to 563 of 2017. The four appeals were filed against the order dated 31st March, 2017 passed by the Joint Commissioner of Sales Tax (Appeals) (hereinafter referred to as the “first appellate authority”).

3. The petitioner states before us that it is one of the leading contractors and project developers engaged in the activities such as offshore oil and gas exploration, commercial and industrial construction etc. The respondents before us are exercising powers and discharging duties under the MVAT Act. A works contract was awarded to the petitioner by the Oil and natural Gas Corporation Limited (hereinafter referred to as the “ONGC”). That was awarded by the ONGC's Engineering Services for pipeline replacement project-2. The said contract, *inter alia*, includes

laying and completion of 39 pipeline segments (208.8 kms.), which entails conducting project management surveys, design engineering, procurement, fabrication, anti-corrosion and weight coating etc. This was a contract with a consortium. The terms and conditions of the contract are referred to and it is urged that the contract work is carried out at the offshore platforms located beyond territorial waters. The petitioner imports most of the goods/materials used in the execution of the said contract and the same were directly sent to the offshore platform from the port of landing. Thus, the said imported goods never crossed the customs frontiers of India and accordingly were never brought into the State of Maharashtra. After setting out the procedure in para 9 of the petition, it is stated that three assessment proceedings were initiated under section 23 of the MVAT Act. That was because of the returns filed by the petitioner. The VAT returns being scrutinised, resulted in the assessment order dated 20th January, 2016 for the period 1st April, 2009 to 31st March, 2010. The value added tax (VAT) was demanded at Rs.4,26,94,89,037/-, including tax, interest and penalty. On the same day, another assessment order, for the period 1st April, 2009 to 31st March, 2010 under the Central Sales Tax Act (CST), disallowing the deduction claimed by the petitioner and taxing the entire turnover under the MVAT Act was passed. The

argument of the petitioner that the sale in the aforesaid contract is in the course of export under Section 5(1) of the CST Act is not acceptable. The whole activity or transaction was determined as taxable local sale.

4. Aggrieved and dissatisfied with this assessment order, four separate appeals were filed. There was another assessment order for the period 1st April, 2010 to 31st March, 2011, in which, identical findings were rendered, but the MVAT demand was Rs.2,28,50,15,227/-. The deduction claimed under the CST Act was disallowed. The Joint Commissioner, before whom the appeals were brought (the first appellate authority), decided them by a set of orders styled as Exhibits 'J-1' and 'J-2' and Exhibits 'K-1' and 'K-2' of this petition.

5. Being aggrieved by these orders, four separate appeals were filed before the appellate tribunal, namely, Maharashtra Sales Tax Appellate Tribunal. The impugned order has been passed on the four applications seeking stay of recovery of tax during the pendency of appeals.

6. Mr. Prakash Shah appearing for the petitioner argued that the order of the tribunal suffers from a patent error of law. This error of law is apparent on the face of the record. The tribunal has overlooked the fact that the petitioner is engaged in a works

contract. That works contract is of performing the works for the ONGC. The works have to be performed beyond 12 nautical miles. It is stated that we must look at some of the terms and conditions of the contract. Though a works contract involving transfer of property in goods, whether as goods or in some other form, involved in execution of the works contract have been brought within the definition of the term "sale" as defined in clause (24) of section 2 of the MVAT Act, still, the execution of the works contract in this case would have a material bearing on the issue at hand. Our attention has been invited to the terms and conditions, on which the contract has been awarded.

7. A copy of the contract is at Exhibit 'B' to the paper book. That is dated 14th April, 2008. It is clearly stated, according to Mr. Shah in this contract that the ONGC is desirous of having the works mentioned in the contract carried out, but on the terms and conditions. The terms and conditions begin with the scope of work. Mr. Shah would submit that the scope of the work shall include in general but not limited to laying and completion of 39 pipeline segments (208.8 kms.), which includes project management, surveys and that is set out in clause 2.1.1 of the contract but for our purpose, the other clauses would have a material bearing on the nature of the work. Our attention is

invited to clauses 5.2.3, 5.2.41 and 5.10 to urge that the contract shall not be considered as complete until a discharge certificate has been signed by the company's representative on behalf of the company (ONGC) and delivered to the contractor stating that the works have been completed and made good to the satisfaction of the company's representative in accordance with the contract. Clause 5.13 and 5.14 are, therefore, relied upon. Clause 7.1 is in respect of transfer of ownership, which is expressly relevant. The argument of Mr. Shah, based on this clause, is that if "sale" also includes the transfer of property in goods, whether as goods or in some other form involved in execution of a works contract, then, in terms of the aforementioned clause, ownership of materials shall be transferred to the ONGC upon the date of issuance of a certificate towards part completion or completion and acceptance of the work. The ownership of construction equipment used by the contractor and its sub-contractors in connection with the works shall remain with the contractor and its sub-contractors. Thus, ownership of materials, which are styled as goods, are then transferred, but the title in the same is not transferred, according to Mr. Shah, until the compliances as above are made. It is in these circumstances, he would submit that if the whole transaction is beyond 12 nautical miles, the materials are procured not in Maharashtra, but imported from outside

Maharashtra are not brought in and are never sold in the State of Maharashtra, then, this tax was not leviable. Our attention has been invited to the findings in the order of assessment and in that of the first appellate authority, which, according to Mr. Shah, are erroneous. It is argued by Mr. Shah that the tax liability was worked out by the first appellate authority, but without assigning any reasons. He may have modified the assessment orders in exercise of his powers as a first appellate authority, but he has not adverted to any of these arguments and materials relied upon by the petitioner.

8. In fact, before the tribunal, a specific ground was raised and that is that the materials supplied to offshore sites of ONGC are in the form of export and hence not liable to tax in Maharashtra. Yet, the Deputy Commissioner/the first appellate authority has erroneously held that since the goods supplied to the ONGC are consigned for ONGS supply at Nhava and handed over to ONGC, the property in such goods is transferred within the State of Maharashtra. Such sale is complete within the State of Maharashtra and hence liable to VAT in the State. This is a completely erroneous finding, according to Mr. Shah and no part of the transaction has taken place, much less a transfer within the State. There is no concluded sale in the State of Maharashtra.

9. Mr. Shah has brought to our notice, which, according to him, is patent inconsistency in the tribunal's findings. The tribunal was aware of the primary argument, yet, while recording it, it has relied upon only one statement of the counsel. It is that statement, which resulted in the conclusion that this is a sale taxable in Maharashtra. However, the other contentions, which are summarised in para 4 of the order under challenge have not been considered at all. Even the alternate argument was not based on any concession, but pointing towards the inconsistency in the approach of the tribunal. In almost identical case of *M/s. J. K. Surface Coatings vs. The State of Maharashtra*¹, decided on 1st July, 2017, the tribunal did not insist on a part payment, whereas, in this matter, the part payment is directed. Even if that is to the tune of Rs.8 crores and Rs.4 crores for two distinct periods, still, that is a heavy burden bearing in mind the financial crunch prevailing in the industry. Hence, we must allow this petition.

10. Mr. Shah places strong reliance upon a judgment of the Hon'ble Supreme Court in the case of *Commissioner, Delhi Value Added Tax vs. ABB Limited*². Mr. Shah also submits that the tribunal erroneously placed reliance on a Division Bench

¹ Second Appeal Nos. 110 to 111 of 2017

² (2016) 6 SCC 791

judgment, to which, one of us (S. C. Dharmadhikari, J.) was a party, in the case of *Raj Shipping vs. State of Maharashtra*³.

11. On the other hand, Mr. Sonpal would submit that the tribunal concluded that the Division Bench judgment in the case of *Pure Helium India Ltd. vs. Commissioner of Sales Tax, Maharashtra*⁴, pertains to the same issue and was dealing with a contract of ONGC. Mr. Sonpal then submits that there is no inconsistency in the approach of the tribunal for the facts in *M/s. J. K. Surface Coatings* (supra) are not identical. Mr. Sonpal would submit that in the present case, the tribunal, on par with other matters, brought to tax the goods sold within the State. The goods may have been brought during the execution of the works contract, but still, the title in the same has passed in the State of Maharashtra. The parties are situated in Maharashtra. The goods have moved from the State of Maharashtra. Therefore, there is sufficient nexus to hold that the goods are liable to tax under the MVAT Act. The further correct finding, according to Mr. Sonpal, is that section 4(2) of the CST Act would have no application to the facts and circumstances of this case. Thus, according to Mr. Sonpal, this is only an interim order rendering a tentative and *prima facie* finding. The condition imposed is also

³ (2016) 89 VST 460 (Bom)

⁴ (2012) 49 BST 14

not onerous, but reasonable. In these circumstances, we must proceed to dismiss the writ petition.

12. We have heard both sides at some length and *prima facie*, we find that the MVAT Act has been applied by terming the transaction as a sale. Section 2(24) defines the term “sale”. By virtue of the Explanation contained in (b) (ii), even the transfer of property in any goods involved in execution of a works contract is deemed to be a sale. The Act defines the “State” to mean the State of Maharashtra. The “tax” is defined to mean a tax, namely, sales tax or purchase tax leviable or as the case may be, payable, under this Act and includes any amount payable by way of composition. The term “place of business” is defined in clause (18) and what is then material for our purpose is the definition of the term “goods” appearing in section 2(12) and the definition of the term “dealer” appearing in section 2(8). Therefore, the law postulates that there is an incidence or levy of tax when the transaction concerned is not falling within section 8. Section 8 says that certain sales and purchases are not liable to tax. The issue is whether the present transaction is covered by this exception carved out in section 8.

13. The tribunal found that the petitioner before us and appellant before it has been awarded a works contract by the

ONGC. The scope of the work is referred by the tribunal and it is stated that the assessment orders denied the claim of the petitioner before us that the contract has not resulted in a sale in the State of Maharashtra. However, it was in the course of export. The Joint Commissioner (first appellate authority) decided the matter by confirming the finding in the assessment order that the sale of goods, originated from the State of Maharashtra and it is not an export sale exempt from the tax. It is liable to tax in the State of Maharashtra.

14. While considering the arguments of both sides on the stay application, the tribunal has expressed a prima facie opinion. Firstly, the tribunal holds that it is its consistent view that in respect of sales effected to ONGC, in a case where the goods are appropriated to the contract at the supply base at Nhava Sheva, then, such sales are held liable to tax as sales completed within the State of Maharashtra. There are two judgments/orders, which are referred in paras 5 and 6 of the impugned order. The argument of the present petitioner was that the activity carried out by the petitioner is an execution of a works contract. The argument was that the goods are used in execution of the works contract at the site, which is beyond 12 nautical miles from the State of Maharashtra. The transfer of property took place outside

the State of Maharashtra and hence not liable to tax. Reliance was also placed on section 4 of the CST Act. Pertinently, section 4 of that Act refers and deals with such cases where a sale or purchase of goods can be said to be taken place out side the State. Thus, Chapter II is titled as “Formulation of Principles for Determining a Sale or Purchase of Goods Takes Place in the Course of Inter-State Trade or Commerce or Outside a State or In the Course of Import or Export. That is a matter exclusively covered by the CST Act, 1956. Section 3 enables determination of the issue or question as to when is a sale or purchase of goods said to take place in the course of inter-state trade or commerce. That carves out a deeming fiction, but for that to come into play, there are certain conditions. The sale must occasion the movement of goods from one State to another or is effected by a transfer of document of title to the goods during their movement from one State to another. Then, there are various explanations and section 4 says by sub-section (1) that subject to the provisions contained in section 3, when a sale or purchase is determined in accordance with sub-section (2) to take place inside a State, such sale or purchase shall be deemed to have taken place outside all other States. Sub-section (2) of section 4 says that a sale or purchase of goods shall be deemed to take place inside a State if the goods are within the State in the case of specific or

ascertained goods, at the time of contract for sale is made and in the case of un-ascertained or future goods at the time of their appropriation to the contract of sale by the seller or by the buyer, whether assent of the party is prior or subsequent to such appropriation. Then, the *Explanation* deals with a single contract.

15. The tribunal holds that in the present case, though such an argument is canvassed, but in the case of *Raj Shipping* (supra), this precise argument was considered by this court and negatived.

16. The tribunal holds that both parties in the present case are situate and registered in the State of Maharashtra. The goods have moved from the State of Maharashtra as per the contract executed between them. Therefore, there is a sufficient nexus to hold that the impugned sales are liable to tax under the provisions of the MVAT Act. In any event, only those goods have been considered for the purpose of levy of tax, which have moved from the State of Maharashtra. The argument based on section 4 of the CST Act is rejected, but by applying the nexus theory.

17. Mr. Shah pointed out that even section 5 of the CST Act is a material provision and that has completely been ignored by the

tribunal. Mr. Shah would rely heavily on the judgment in the case of *ABB Limited* (supra). *ABB limited* was a case where the Commissioner, Delhi Value Added Tax was aggrieved by the finding of the High Court that the inter-state movement of goods was in pursuance of and incidental to a contract for supply of goods used in the execution of the works contract between the assessee and Delhi Metro Railway Corporation Ltd. The terms and conditions of the contract, according to Mr. Shah have a very material bearing and it is on facts that the legal principles would have to be applied. In that regard he relies upon paras 16 to 18 of the Hon'ble Supreme Court judgment.

18. We must first see the facts in the case of *Raj Shipping* (supra). There, the petitioner was registered as a dealer under both, the MVAT Act and the CST Act. It was engaged in the business known as "Bunker Supplies". Bunker supplies mainly consist of supply of petroleum products such as High Speed Diesel Oil, Light Diesel Oil and Furance Oil to various incoming and outgoing vessels within or beyond the port limits of Mumbai Port. The shipping vessel places an inquiry for required quantity of High Speed Diesel with the assessee. Pursuant to the inquiry made by the customer, the assessee gives a quote for their supplies. On approval of quote, the shipping vessel places a

purchase order/nomination with the assessee for the required quantity and the name of the vessel to which the supplies are to be made. On receipt of the purchase order from the shipping vessel, the assessee in turn places a back to back purchase order of the same quantity on any of the oil marketing companies such as M/s. Indian Oil Company Ltd., M/s. Bharat Petroleum Corporation Limited etc. to be sold to the vessel nominated in the purchase order. The controversy in that case was when such order is placed on the oil marketing company and it supplies the said high speed diesel, that gets loaded on to a barge. The barges have pumps fitted on it with a flow meter in order to pump out the high speed diesel to the vessel. After taking delivery of the high speed diesel from the oil marketing company, the barges sail to the anchorage point of the nominated vessel. After reaching the anchorage point of the nominated vessel, the high speed diesel is pumped out of the barge into the fuel tank or bunker of the nominated vessel. Such a transaction, according to M/s. Raj Shipping takes place beyond 1.5 nautical miles from the base line to deliver the high speed diesel to the vessels anchored therein and therefore, cannot be subjected to the MVAT. It is such a transaction and the argument based on it, which came to be rejected by applying the nexus theory. There, the nexus theory was applied because the oil marketing companies are in Mumbai.

Their tanks are in Mumbai. From the tanks, the high speed diesel is collected and then that is loaded on the tanks styled as cargo tanks of the barges owned by the petitioner. That barge thereafter sails to the anchorage point of the nominated vessel. It is in these circumstances that the nexus theory was invoked and applied and the argument of the Revenue based on that came to be upheld. Whether that could have been applied to the facts and circumstances of the case is the real issue.

19. Here, the contract is for pipelines replacement/laying project between the ONGC and consortium of companies. The agreement is that a tender was floated and the petitioner and others represented that they have expertise and technical know-how in respect of the said work and which is of laying and completion of 39 pipeline segments, including all the steps as per the agreement and for a lumpsum price. The scope of the work is laying and completion of 39 pipeline project, which includes project management, survey, design, engineering, procurement, fabrication etc. The dates of commencement and completion of the work are stipulated. Then, there is an access provided to installation site. Then, there are conditions for procurement/selection of makes and vendors. The contractor has to select the equipment and material from the vendor list and thereafter,

there is an approval, which has to be given also for sub-contracting arrangement and procurement of plant/equipment/materials. That is only when the compliance by the contractor of the conditions stipulated in paras 5.2.2 and 5.2.3 of the contract is made. The miscellaneous and the certification following the same would result in the performance of contract/discharge certificate being issued.

20. The petitioner in this case raised specific grounds to challenge the assessment order and the order of the first appellate authority. The petitioner pointed out that it is responsible for the goods imported and procured until their use for executing the contract and during the course of which, an approval has to be granted by the ONGC. It is submitted that the goods supplied under the contract with ONGC for carrying out turnkey project on offshore sites is beyond 12 nautical miles. The entire finding in the order of assessment and the order of the first appellate authority is termed as vague because the matter has been approached in general terms. It is specifically alleged that the materials and equipments supplied are in the course of export and hence, not liable to VAT in Maharashtra. The petitioner specifically urged that the goods supplied to ONGC offshore site need to be transported to such sites by a sea vessel. The ultimate

risk of the goods supplied to ONGC offshore site lies with the petitioner until the ONGC representative provides with final acceptance certificate to the petitioner for the work done. These facts were ignored and the goods were held to be supplied to the ONGC because they are assigned for ONGC supply base at Nhava Sheva and handed over to ONGC. The argument is that the property in such goods has not been transferred within the State of Maharashtra. That is how the judgment and having a nexus theory is inapplicable. It is only because the goods are despatched to the supply base, but subject to acceptance by the ONGC that this matter is distinct from the other cases and dealt with by the tribunal.

21. To our mind, therefore, this was a highly debatable issue. If the tribunal was required to refer to not only the legal principles, but whether they are applicable will have to be eventually determined on the basis of the terms and conditions of the contract, then, in the given facts and circumstances of the case, there was no reason to impose any condition of part payment. The legal issues and raised either way ought to be answered on the basis of the nexus theory involved in the judgment of the Hon'ble Supreme Court and this court, whether that can be applied to the given facts and circumstances and to a works

contract, unmindful of its peculiarity, demands an unconditional stay of recovery. This was not a case where the tribunal was confronted with purely factual matters and it was not required to consider anything further, but apply a settled principles to the facts and an attempt is made by the dealer to get out of this settled legal position. The legal position, as is emerging from the judgments rendered in two distinct cases, namely a sale and by applying a nexus theory to it or a sale in the course of execution of a works contract would, therefore, need a deeper consideration. That justifies, to our mind an unconditional stay of recovery pending disposal of the appeal. This is a case where the tribunal could have decided the legal issues and finally instead of insisting on part payment. This is an exception, which enables us to interfere in the impugned order.

22. Consequently, the writ petition succeeds. The impugned order is quashed and set aside. The tribunal shall now decide the matter finally within a period of four months from the date of communication of this order. We clarify that we have not expressed any final opinion on the rival contentions. Beyond highlighting the nature of the controversy, we have not done anything, which should either influence the final conclusion of the tribunal or guide the same. With this clarification and direction of

expeditious disposal of the appeal within a period of four months, we have said nothing.

23. The writ petition is allowed accordingly. There would be no order as to costs.

(PRAKASH.D.NAIK, J.)

(S.C.DHARMADHIKARI, J.)