

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 05.02.2020

CORAM

THE HONOURABLE DR. JUSTICE ANITA SUMANTH

Writ Petition Nos.4428 & 10261 of 2018
and
W.M.P. Nos.5428 & 5429 & 12189 of 2018

M/s.Mcnally Bharath Engineering Company Ltd.,
Represented by its Vice-President (Finance & Accounts),
No.42-A, Ezhaimariamman Koil Street,
Muthialpet,
Puducherry - 605 003

... Petitioner in W.P. No.4428 of 2018
...2nd respondent in W.P. No.10261 of 2018

M/s.Marg Limited,
No.81/A, First Floor,
Maideeen Palli Street,
Karaikal,
Puducherry.

...Petitioner in W.P. No.10261 of 2018
... 2nd respondent in W.P. No.4428 of 2018

1.The Commercial Tax Officer,
Karaikal Assessment Circle,
1st Floor,Perunthalaivar Kamarajar
Administrative Complex,
Nagore Road,
Mathagadi,
Karaikal - 609 602,
Puducherry.

...1st respondent in both WPs.

2.The Commercial Tax Officer-I,
2nd Floor, Commercial Taxes Complex,
100 Feet Road,
Pudupalayam,
Ellaipillaichavady,
Puducherry 605 005.

...3rd respondent in W.P. No.4428 of 2018

3.Commissioner of Commercial Tax,
1st Floor, 100 Feet Road,
Ellaipillaichavady,
Puducherry 605 005.

...4th respondent in W.P. No.4428 of 2018

4.Government of Puducherry,
Represented by its Secretary
to Government (CT),
Beach Road,
French Consulate Office,
Puducherry, 605 001.

.. 5th respondent in W.P. No.4428 of 2018

Prayer in W.P. No.4428 of 2018: PETITION filed under Article 226 of The Constitution of India praying for the issuance of Writ of Certiorari, calling for the records relating to the Impugned Order No.34790010844/CTO/KKL/2017-18/1287 dated 29.11.2017 passed by the 1st respondent.

Prayer in W.P. No.10261 of 2018: PETITION filed under Article 226 of The Constitution of India praying for the issuance of Writ of Certiorarified Mandamus, calling for the records of the Respondent relating to the order dated 29.11.2017 bearing No.34790010844/CTO/KKL/2017-18/1287 and quash the same and consequently direct the Respondent to issue C-Forms to Petitioner.

For Petitioner

in W.P. No.10261 of 2018 :Mr.Akhil R.Bhansal

in W.P. No.4428 of 2018 :Mr.P.S.Raman, Senior Counsel

for Mr.Raghavan Ramabadrin in

For Respondents

in both W.Ps. : Mr.T.P.Manoharan, Senior Counsel

For Mr.J.Kumaran,

Additional Government Pleader (P)

C O M M O N O R D E R

Two Writ Petitions are before me, one filed by M/s.Marg Limited (in short 'Marg') and the other by M/s.Mcnally Bharath Engineering Co. Ltd. (in short 'Mcally').

2. The facts relevant to decide both Writ Petitions are set out herein:

(i) The Government of Puducherry had entered into a long term concession agreement with Marg in 2006 on Build, Operate and Transfer (BOT) basis for construction of the Karaikal Port. The transaction inter se Marg and Mcnally is a consequence of this parent agreement.

(ii) Mcnally is engaged in the business of executing turnkey contracts in the areas of power, steel, aluminium, material handling, mineral beneficiation etc. and is registered to Central Sales Tax in terms of the provisions of the Central Sales Tax Act, 1956 (in short 'CST Act') in Puducherry.

(iii) On 10.09.2010 Mcnally entered into a contract with Marg, arrayed as R2 in the Writ Petition filed by Mcnally, for the supply of goods for the execution of a project for design, supply, erection, commissioning and testing of two stacker cum reclaimers.

(iv) On 08.03.2011, Mcnally and Marg contracted for the execution of a project for design, supply, erection, commissioning and testing of a conveyor package and Purchase orders are stated to have been received by Mcnally from Marg.

(v) In turn, Mcnally places orders for supply on various vendors located outside Puducherry.

(vi) The terms of supply are such that the vendors would deliver the goods direct to Marg on a bill-to-ship model and sales are effected by Mcnally to Marg during the movement of the goods from vendor.

(vii) According to the petitioner, these transactions are inter-state sales in terms of Section 6(2) of the CST Act, being executed in transit.

(viii) Since the entire movement of goods comprises, in fact, of two distinct sales, from the vendor to Mcnally and from Mcnally to Marg though in one seamless process, both the vendor as well as Mcnally claim the benefit of inter-state sale in terms of Section 6(2) and entitlement to a lower rate of tax upon production of 'C' and 'E' Declaration Forms from their respective purchasers.

(ix) The provisions of Section 6(1) of the CST Act extend the benefit of a reduced rate of tax in regard to the inter-state sales upon production of a Declaration in Form 'C' from Marg.

(x) McNally states that it had supplied the requisite Forms to its vendors, who have enjoyed the benefit of concessional rate of tax in their sales tax assessments. This does not per se concern this matter, but is only stated for completion of the narration.

(xi) McNally filed returns under the CST Act and orders of assessment have been passed for the periods 2011-12, 2012-13 and 2013-14. Inter alia, the Officer states that the returns of turnover filed have been scrutinised and the transactions verified to be inter-state sales. However, since 'C' Declaration Forms were not produced by McNally, the benefit of concessional rate of tax was not granted.

(xii) The orders of assessment rejecting the request for reduced rate were challenged before the first Appellate Authority.

(xiii) At the time of assessment, efforts appear to have been made by Marg to obtain the C Forms from the Commercial Taxes Department for onward conveyance to McNally. However, McNally was informed by Marg that it was unable to generate Forms from the website of the Commercial Taxes Department.

(xiv) The reason for rejection was reflected in the website as 'seller TIN cannot be from Puducherry'. According to the petitioner, the TIN number of McNally, the seller, had been generated in Puducherry only for purposes of the CST Act, and the rejection of the request for 'C' Forms was thus erroneous.

(xv) Even pending appeal, the efforts of McNally and Marg to procure 'C' Forms continued, since in the absence of the 'C' Forms, the appeals would become a mere formality.

(xvi) Owing to there being no action upon their requests, McNally filed W.P.No.1772 of 2017 before this Court seeking a direction to R1 to issue 'C' Declaration Forms to Marg.

(xvii) Pending the aforesaid Writ Petition, the Appellate Assistant Commissioner (Commercial Taxes) (AAC(CT)) passed an order dated 12.06.2017 in common to the three years in question confirming the demands in assessment.

(xviii) W.P.Nos.18306 to 18308 of 2017 were filed by the petitioner challenging the aforesaid orders of the first appellate authority.

(xix) This court relegated the petitioner to alternate statutory remedy by order dated 06.12.2017 and appeals have been

filed by the petitioner challenging the orders of the AAC that are pending before the Tamil Nadu Sales Tax Appellate Tribunal.

(xx) As regards W.P.No.1772 of 2017, this Court noted that the representations of Marg had been considered by its Assessing Officer, (arrayed as R1 in this Writ Petition) on 29.11.2017 and rejected, and the Writ Petition was thus dismissed, however stating that the dismissal would not stand in the way of the petitioner working out its remedies in accordance with law. Order dated 29.11.2017 is impugned in this Writ Petition.

3. R1 denies the claim of McNally for reduced rate under Section 8(1) of the CST Act being of the view that the transactions inter se McNally and Marg do not constitute inter-state but local sales, liable to tax in terms of Section 24 of the Puducherry Value Added Tax Act, 2007 (in short 'PVAT Act'). In arriving at this conclusion, he expresses the view that the contracts inter se McNally and Marg cannot be bifurcated into separate supply and service components, but constitute a single, composite, indivisible and non-severable works contract. According to him, the orders passed in terms of the CST Act are entirely irrelevant, of no force and are, in fact, erroneous.

4. Mr.P.S.Raman, learned Senior Counsel appearing for Mr.Raghavan Ramabadrn, learned counsel for McNally argues that the impugned order ought not to have been passed by R1, who is the Assessing Officer of Marg and who holds no jurisdiction or sway over McNally. What the Officer seeks to do is to assess the transaction inter se McNally and Marg, which R1 is not entitled to examine or deal with under the Act.

5. According to the petitioner, the issuance of 'C' Form is an automatic act and does not call for any verification or prior enquiry. This position has long been settled by a series of decisions, such as i) Chanda Paints (Madras) Ltd. V. CTO (61 STC 335 (Mad), ii) Andhra Pradesh Gas Power Corporation Limited V. ACTO (109 STC 625), iii) Larsen and Toubro Ltd. V. CTO (85 STC 422), iv) Quality Enterprises V. Additional Deputy Commercial Officer (127 STC 504), v) City Tower Hotels (P) Limited V. CTO (131 STC 317), vi) Colour Graphs V. Sales Tax Officer (88 STC 347). Thus he would urge that the impugned order be quashed.

6. Marg has filed W.P.No.10261 of 2018 as a consequence of the view expressed by this Court in W.P.No.1772 of 2017 to the effect that no direction could be sought as against a third party Assessing Officer by McNally. Hence, in this Writ Petition, Marg, in addition to seeking a quash of the same impugned order as challenged by McNally, seeks a direction to the respondent, (arrayed as R1 in the Writ Petition filed by McNally) to issue 'C' Declaration Forms to it.

7. The thrust of the argument of Mr.T.P.Manoharan, learned Senior Counsel for Mr.J.Kumaran, learned Additional Government

Pleader (P) for the respondents/Commercial Tax Officers is that the transaction vis-a-vis Marg and McNally is a sham. According to him, several relevant documents have been suppressed both in the course of the CST assessment and the proceeding culminating in the impugned order and the petitioners have approached this Court with unclean hands. He would stress that the orders under CST were passed on a misapprehension by the Assessing Authority and were liable to be ignored by this Court.

8. In this context he places reliance upon the judgment of the Supreme Court in *State of Orissa and another V. Mamta Mohanty* ((2011) 3 SCC 436) for the proposition that if an order is bad at inception, it does not get sanctified at a later stage and no amount of progress in the proceedings or subsequent action would validate such an order. Thus since the CST orders have been passed on a misapprehension of relevant facts and the law, and on the wilful design of the petitioners to project an indivisible works contract as an inter-state sale and claim concessional rate of tax, nothing turns on the CST orders already passed and the same are liable to be ignored in deciding the issue at hand. For the proposition that fraud would vitiate all proceedings, he relies on *S.P. Chengalvaraya Naidu (Dead) vs Jagannath (Dead) By L.Rs* ((1994) 1 SCC 1 and *Prestige Lights Ltd. V. State of Bank of India* ((2007) 8 SCC 449).

9. On merits, he cites, and relies upon the judgement of the Constitution Bench of the Supreme Court in the case of *Kone Elevators India Private Limited V. State of Tamil Nadu* ((2014) 7 SCC 1) to the effect that a turnkey agreement, such as the present is a single, composite, indivisible works contract. Thus, according to him, the transaction is liable to tax in terms of Section 2(21) of the PVAT Act dealing with 'works contracts'. He points out that McNally had registered itself as a 'works contractor' in Puducherry on 14.03.2011 and thus, the works contract would be assessable only under the PVAT Act. The claim of 'transit sale' under Section 6(2) was wholly misconceived and contrary to law as there was no bifurcation of supply and service contemplated under contract. Thus, and since the transaction is liable to be assessed only to PVAT, the impugned order has been passed in line with both statutory prescription as well as the principles of natural justice.

10. The petitioner, per contra, cites a decision of the Division Bench of the Andhra Pradesh High Court in the case of *Larsen and Toubro Limited V. State of Andhra Pradesh* (2015-VIL-411-AP) that, according to it decided the issue as to whether, in an indivisible works contract, one could put forth a claim of interstate sale in favour of the assessee.

11. The petitioner would vehemently deny that there was any fraud at all and in fact, all relevant documents and details including Works Contract dated 14.08.2020, Purchase and Work

Orders of even date and contract agreements dated 10.09.2010 and 08.03.2011 had been furnished to the officer during the present proceedings. R3/R1, at paragraph 11 of the impugned order alleges suppression of the Agreements of works contract dated 14.08.2010 and Purchase and Work Orders issued by Marg, both dated 14.08.2010. However, at paragraph 11(iv), he goes on to say that the representatives of Marg produced the aforesaid documents for examination by him. In the light of the contradictory statements noticed aforesaid, thus does not appear to be any basis in the allegation of suppression.

12. The reference by Mr.Manoharan to suppression of facts, also relates to the CST proceedings and to test the same, the records of the CST proceedings were summoned. The records reveal that the proceedings were rather summary. Exemption from CST was sought in respect of the turnover returned by the petitioner and such exemption was granted by the officer for the mere asking and without demur. No details were sought for by the officer in support of the claim for exemption and none were furnished by the petitioner. Thus, while being conscious of the position that the CST orders are final as of date, it is apparent that the orders are non-speaking and have been passed without any examination as regards the nature of the transaction and taxability of the same.

13. The first issue to be answered is as to whether a claim of inter-state sale can be raised in an indivisible works contract and substantial reliance has been placed on the decision of the Andhra Pradesh High Court in the case of Larson & Toubro Ltd. V. State of Andhra Pradesh (supra) in this regard, specifically the following paragraphs:

.

(xii) CAN THERE BE AN INTER-STATE SALE IN AN INDIVISIBLE WORKS CONTRACT?

It is contended, on behalf of the revenue, that the facts of the present cases demonstrate that (a) there was no sale in the course of inter-state movement, as title did not pass during movement; (b) on a proper construction, the supply and erection contracts demonstrate an indivisible single composite works contract where title passes during incorporation; there cannot be a transit sale in an indivisible works contract, since the essential ingredient of a transit sale is that title passes during movement; and the petitioners have not been able to show a single precedent of a transit sale in an indivisible works contract.

While the submission, urged on behalf of the revenue, that there cannot be a transit sale (a subsequent sale exempt under Section 6(2) of the CST Act) in an indivisible works contract has considerable force, it is wholly unnecessary for us to examine this aspect in adjudicating the issues which arise for consideration in this batch of writ petitions. Suffice it to hold that, in the indivisible works contracts, which are the subject matter of these Writ Petitions, the various clauses of the contracts show that, notwithstanding the transit-sale clause, the parties intended to sell the goods (ie for the title in the goods to pass) only after completion of erection of the plant, and on issuance by the owner of a certificate as proof of having taken over the turnkey project.

14. The rival claims in the matter before me emanate from the Central Sales Tax Act, 1956 and the Puducherry Value Added Tax Act, 2007. Both enactments cover instances of execution of a works contract and include transfer of property involved therein, within the ambit of 'sale'. While the CST Act deals with a works contract in Section 2(g)(ii) to state that 'sale' would mean any transfer of property in goods by one person to another for cash or deferred payment or for any other valuable consideration and includes a transfer of property in goods (whether as goods or in some other form) involved in the execution of works contracts, the provisions of Section 2(ze) of the PVAT Act also echo the same language and definition. Thus a 'works contract' is construed to be a 'sale' for the purpose of both enactments and the turnover from such works contract equally liable to tax in both scenarios. Evidently, however, there cannot be a double levy both under the CST and PVAT Acts in regard to the same transaction and the deciding factor would be a determination as to where the sale has been occasioned, whether inter-state or domestic. This is a question of fact that has to be answered bearing in mind both the documentation entered into by the parties as well as the actual modus operandi employed.

15. My attention is drawn to the break-up of sale consideration in the contract between supply and services in support of the petitioners' submission that the contract is divisible into one of sale and service. This is, again, a question of fact, into which I do not propose to venture.

16. As to whether the furnishing of 'C' Declaration Forms by the assessing officer is automatic upon request by a purchasing dealer or whether it contemplate detailed examination of the transaction, normally, 'C' Forms are generated and issued by the Officer having jurisdiction, thus enabling the purchaser

to pass the same on to its vendor. In Chanda Paints (supra), this Court held as follows:

'2. The short question for consideration is, whether the petitioner, who has registered itself, under the provisions of the Central Sales Tax Act, is entitled to the supply of C forms and declarations, on request for the supply of such forms being made or whether the respondent is entitled to refuse to supply such forms on the ground that the materials to be bought from other States by use of such C forms, would be utilised in works contracts or defer the issue of such forms on the ground that a thorough investigation is to be made regarding the nature of the transaction carried on by the petitioner.

3. An identical question came up for consideration before a Bench of this Court in W.P. Nos. 1379 and 1380 of 1967 and 840 of 1971 (T. V. P. Nambiar v. State of Madras) and by order dated 27th April, 1971, the Bench held as follows :

"We are of the view that the petition is well-founded. There is no provision in the Act which authorised the Commercial Tax Officer to refuse to provide the assessee with C forms. If the assessee misused the C form, that will be punishable under section 10 of the Central Act. Beyond that, it has no effect, not even in tax. The Commercial Tax Officer was not constituted as a policeman to regulate and conduct the assessee along with virtuous path. If the assessee had registered himself under the provisions of the Central Act, he was, as a matter of right, entitled to get C forms from the officer, who had no authority to refuse the same. The petition is therefore allowed with costs."

17. Thus Courts have held that the Commercial Tax Officer is not a postman to regulate and conduct the assessee along a virtuous path and this view has been echoed many times over. In the case of Larsen & Toubro (supra), a learned single Judge of this Court considered the issuance of 'C' Forms in the context of a works contract and held at paragraph 12 that it would be pre-mature and inappropriate to enter into an enquiry postulated under Section 10A of the CST Act at the stage of issue of 'C' Forms. 'C' Forms were thus to be generated and supplied as requested by an assessee and the methodology set out under

Section 10 and 10A dealing with imposition of penalty for furnishing of a false declaration were to take their own course, if the mis-use of the Declarations was established at a later stage.

18. In the present case, the Union Territory of Puducherry alleges that the transaction was collusive, designed to evade payment of PVAT. A common counter has been filed by the Commercial Taxes Department at Puducherry on behalf of R1, who has passed the impugned order, R3, the Officer who has passed the CST assessment order, R4, the Appellate Assistant Commissioner, R5, the Commissioner of Commercial Taxes and R6, the Government of Puducherry.

19. The averments contained therein would exclusively protect the case of R1 alone. In fact, the affidavit, signed by R1 and filed on behalf of all the Officers as stated aforesaid, alleges at page 9 that the petitioner/contractor has filed false tax returns under the CST Act, 1956 for financial years 2011-12, 2012-13 and 2013-14 claiming exemption from payment of tax under Section 6(2) of the CST Act. This gives rise to a peculiar situation since this counter is filed on behalf of R3 also who has, passed orders of assessment accepting the allegedly false CST returns. By endorsing the aforesaid allegation, the Officer who has passed the CST orders casts a doubt upon the veracity of his own orders.

20. This unique situation opens the doors to, and necessitates a proper examination of the transaction de novo. In my considered view, in a case such as this, there must be appropriate enquiry and determination at the initial stage as to whether the transaction would fall within the contours of the CST Act at all as, in the alternative, one could arrive at an erroneous interpretation and classification of the transaction.

21. Moreover, the petitioner confirms that what has been offered to assessment under the CST Act is only the quantum of turnover relating to sale and not service. The petitioner has itself bifurcated the contract for the purpose of assessment.

22. Seeing as the petitioners' appeals are pending before the Sales Tax Appellate Tribunal, the final fact finding authority, it would be appropriate, and I direct the Tribunal to examine the (i) classification of the transaction inter se the parties and determine whether it is a 'works contract' under the CST or PVAT Acts or a transaction of 'sale' simpliciter in terms of the PVAT Act, taking note of the contract agreement, purchase order, work order and all other material particulars and documents as may be necessary for this purpose. Orders, in accordance with law, will be passed as expeditiously as possible after hearing the parties.

23. This writ petition is disposed in the above terms. Connected Miscellaneous Petitions are closed with no order as to costs.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

S1

1.The Commercial Tax Officer,
Karaikal Assessment Circle,
1st Floor,Perunthalaivar Kamarajar
Administrative Complex,
Nagore Road, Mathagadi,
Karaikal - 609 602,
Puducherry.

2.The Commercial Tax Officer-I,
2nd Floor, Commercial Taxes Complex,
100 Feet Road, Pudupalayam,
Ellaipillaichavady,
Puducherry 605 005.

3.Commissioner of Commercial Tax,
1st Floor, 100 Feet Road,
Ellaipillaichavady,
Puducherry 605 005.

4.The Secretary to Government (CT),
Government of Puducherry,
Beach Road, French Consulate Office, Puducherry 605 001.

+1 cc to M/s.Lakshmi Kumaran, Advocate Sr.No. 9577

+1 cc to The Government Pleader, Sr.No. 9269

Writ Petition Nos.4428 & 10261 of 2018
and

W.M.P. Nos.5428 & 5429 & 12189 of 2018

LN(CO)
RMP(19/11/2020)