

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02.02.2021

CORAM

THE HON'BLE MR.JUSTICE C.SARAVANAN

W.P.Nos. 14472, 14534 & 15622 of 2015
and
M.P.Nos.1, 2, 1, & 1 of 2015

(Through Video Conferencing)

W.P.Nos. 14472 & 14534 of 2015

Sudhir Crane Services Private Limited,
Rep. by its Director,
No.5/363, MBT Road,
BHEL Anna Nagar,
Seegarajapuram - 632 515,
Ranipet, Vellore District.

... Petitioner
in both W.Ps.

Vs.

The Assistant Commissioner (CT),
O/o. The Assistant Commissioner (CT),
Ranipet (SIPCOT), Ranipet.

... Respondent
in both W.Ps.

Writ Petitions filed under Article 226 of the Constitution of India, to issue a Writ of Certiorari, calling for the records relating to the order passed by the respondent in his proceedings in Rc.B1/1418/2013 dated 05.12.2014 relating to the Assessment Years 2012-2013 and 2013-2014 and quash the same as without jurisdiction, illegal, arbitrary and error on the face of record.

For Petitioner : Mr.A.Thiagarajan, Senior Counsel
for Mr.S.Ramesh Kumar in both W.Ps.

For Respondent : Mr.M.Hariharan,
Additional Government Pleader in both W.Ps.

W.P.No.15622 of 2015

Sudhir Crane Services Private Limited,
(Sudhir Transports)
Rep. by its Director,
No.5/363, MBT Road,
BHEL Anna Nagar,
Seegarajapuram - 632 515,
Ranipet, Vellore District.

... Petitioner

Vs.

1.The Assistant Commissioner (CT),
O/o. The Assistant Commissioner (CT),
Ranipet (SIPCOT), Ranipet.

2.The Additional General Manager,
BAEL, Ranipet - 632 406.

... Respondents

Writ Petition filed under Article 226 of the Constitution of India, to issue a Writ of Certiorari, calling for the records relating to the order passed by the 1st respondent in his proceedings in Rc.A3/1418/2013 dated 10.03.2015 and quash the same as illegal, arbitrary and error on the face of record.

For Petitioner : Mr.A.Thiagarajan, Senior Counsel
for Mr.S.Ramesh Kumar

For Respondent : Mr.M.Hariharan,
Additional Government Pleader

C O M M O N O R D E R

By this common order, all the three Writ Petitions are being disposed of.

2. In these Writ Petitions, the petitioner has challenged the following impugned orders:-

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Sl. No.	Writ Petition No.	Impugned Order No. and Date	Prayer of the Writ Petition
1	14534/2015	Rc.B1/1418/2013 dated 05.12.2014	To call for the records relating to the order passed by the respondent in his proceedings in Rc.B1/1418/2013 dated 05.12.2014 relating to Assessment Year 2013-2014 and quash the same as without jurisdiction, illegal, arbitrary and error on the face of record.
2	14472/2015	Rc.B1/1418/2013 dated 05.12.2014	To call for the records relating to the order passed by the respondent in his proceedings in Rc.B1/1418/2013 dated 05.12.2014 relating to Assessment Year 2012-2013 and quash the same as without jurisdiction, illegal, arbitrary and error on the face of record.
3	15622/2015	Rc.A3/1418/2013 dated 10.03.2015	To call for the records relating to the order passed by the 1 st respondent in his proceedings in Rc.A3/1418/2013 dated 10.03.2015 and quash the same as illegal, arbitrary and error on the face of record.

3. Since the ranks of the respondents vary in these writ petitions, the names of the respondents are mentioned in this common order to avoid the confusion.

4. The impugned orders in the first two Writ Petitions pertain to levy of tax under Section 4 of the Tamil Nadu Value Added Tax Act, 2006 on the ground that the petitioner has effected sale within the meaning of extended definition of sale under Section 2(33) of the Tamil Nadu Value Added Tax Act, 2006 of transfer of right to use of goods and is liable to tax.

5. It is the contention of the learned senior counsel for the petitioner that the petitioner was supplying cranes under the agreement to the Bharath Heavy Electricals Limited (hereinafter referred to as BHEL for brevity). A specific reference was drawn to Clauses contained in the agreement dated 08.12.2011 signed between the petitioner and the said BHEL, wherein, it has been stated that the petitioner has entered a service agreement for material handling activities of

loading/unloading, stacking of materials, arrangement and re-arrangement of materials picking of loads from stacked position in wherever and whatever manner it was stacked, at shipping yard, fabrication yards, production, stores etc.

6. The petitioner in its reply to the notice dated 10.01.2014 had stated that the effective control over the material handling equipments was with it and that it has provided only service to BHEL.

7. The learned senior counsel for the petitioner further referred to the following conditions contained in the said agreement:-

Condition 4 :- BHEL reserves the right to demand the contractor to display more than the indicated number of cranes mentioned to copy up with the surge loading/unloading requirement.

Condition 6 :- The contractor shall supply the quantum of cranes indicated in TABLE 2 either through their owned cranes or acquired on valid lease bases.

Condition 8 :- A crane crew, consisting one trained operators and two riggers shall be provided for each crane.

Condition 11 :- Cranes shall be maintained in good working condition.

Condition 12 :- All the lifting tackles required for each crane for handling various type loads of BHEL are to be arranged by contractor and the lifting tackles are to be approved by BHEL compliant authority before put into use by BHEL. However for any special type of jobs/materials handling, BHEL at their discretion will provide the same under acknowledgement on returnable basis. Recovery will be made in case of non-retaining/damages. The tools and tackles of contractor shall not be mixed with BHEL tools and tackles.

Condition 17 :- Since the contract is for tonnage handle basis and the payment is as per MT handled basis, the contractor may loading in more cranes during enhanced handling requirement in order to complete the work faster and handle more tonnage.

Condition 18 :- Tenderers are permitted to deploy higher capacity cranes without any demand for extra charges. However, the capacity should not go below 10 tonnes and the requirement of number of cranes may be maintained as per para 3 in any one.

Condition 23 :- During the contract period the contractor shall maintain the crane always in good working condition to the fullest satisfaction of BHEL. BHEL reserves the right to terminate the contract in case they are not so maintained to the satisfaction of BHEL.

Condition 38 :- No crane shall be allowed to be parked inside BHEL premise after the stipulated hours.

Condition 39 :- The crane shall be reported in full readiness for the entire day's operation with sufficient fuel and other commerce with fitting crew. The crane and crew should be made available continuously throughout the contract period including holidays and Sundays without any break according to BHEL requirement.

44 (a) Arbitration:-

(IV) The Contractor shall, notwithstanding any disagreement, dispute, protest, request for arbitration, court or other proceedings, continue to perform the services in accordance with the determinations, instructions and clarifications of BHEL.

8. He further submits that no case was made out for levying tax under Section 4 of the Tamil Nadu Value Added Tax Act, 2006 as there was no "transfer of right to use goods" involved in the transaction.

9. On the other hand, defending the impugned orders, the learned Additional Government Pleader (T) submits that the impugned orders are well reasoned in as much as the effective control of the crane was with the BHEL and there is transfer of right to use under the extended definition of sale and therefore the petitioner was liable to tax under Section 4 of the Tamil Nadu Value Added Tax Act, 2006.

10. The learned Additional Government Pleader (T) placed reliance on the decision of the Division Bench of this Court in

Tvl. M/s. Vitan Departmental Stores & Industries Limited Vs. The State of Tamil Nadu, rep. by the Joint Commissioner (CT), 2013 SCC OnLine Mad 3184 and draw my attention to the following passages:-

26. On a perusal of the above conditions, it is evidently clear that the petitioner has transferred the right to use VITAN system, the licensed right of their names, marks, systems, insignia, symbols and goodwill. The Hon'ble Supreme Court in the case of Tata Consultancy Services (supra) held that goods for the purpose of sales tax may be intangible and incorporeal. But to qualify as an actionable claim in terms of the definition contained in Section 3 of the Transfer of Property Act, it should be only a claim, and every claim is not an actionable claim but it must be a claim to a debt or to a beneficial interest in movable property and such beneficial interest is not the movable property itself and may be existent, accruing, conditional, or contingent. The transaction done by the petitioner is not a claim nor it is a debt or a beneficial interest in the movable property but the right transferred by the petitioner is a transfer of a right in the trade mark, a trading style which are incorporeal rights and are intangible things and transfer of such incorporeal right is undoubtedly exigible to tax. Therefore, the decision of the Hon'ble Supreme Court in the case of Sunrise Associates (supra) does not lend any support to the case of the petitioner.

27. Similarly, the decision in the case of Yasha Overseas also which considered the judgment in Vikas Sales Corporation observed that the decision has not been over ruled by the decision of the Constitution Bench in Sunrise Associates and pointed out that DEPB has an intrinsic value that makes it a market commodity and therefore, DEPB like REP licence qualifies as 'goods' within the meaning of the sales tax laws and its sale is exigible to tax. We find that this decision is of no assistance to the case of the petitioner.

29. We have perused the conditions of the agreement, dated 27.09.2002 entered into by the petitioner from which we find that the

petitioner has transferred their right to use their trade mark, good will, reputation exclusively to the franchisee in respect of a particular outlet and any misuse of such exclusively licensed right rendered, the franchisee open to action which meant to include the termination of agreement in terms of XIV of the said agreement. Therefore, it is a case where goods which are in the nature of intangible or incorporeal goods were available for delivery there were consensus adidem to the identity of such goods as the transferee has a legal right to use the goods and during the period when the agreement was in force, namely for a period of 10 years it was an exclusive right given to the transferee by the petitioner in respect of a particular store and consequently a transfer of right to use and not merely a licence to use the goods and during the period when the agreement was in force, the petitioner as the transferor could not transfer such goods with particular reference to the exclusive right given in respect of a particular store to any other party. Thus, all the attributes to constitute transfer of right to use the goods have been fulfilled and therefore, we have no hesitation to hold that the tests laid down by the Hon'ble Supreme Court in BSNL's stands fully satisfied and the right given by the petitioner is undoubtedly a transfer of right to use incorporeal or intangible goods and therefore, exigible to sales-tax.

30. In S.P.S Jayam and Co., (supra), a Division Bench of this Court considered an identical question as in the case on hand. In the said decision, the assessee allowed an agency to use their trade mark and the receipts were shown in the books of accounts as royalty. In the original assessment, the turn over relating to the transaction was exempted accepting the claim that it was only royalty. Subsequently, the assessing authority took the view that the consideration was received for transfer of right to use the trade mark and hence, the same is taxable. Notice was issued to the assessee who failed to respond and the Assessing Authority proceeded on the basis that there was transfer in incorporeal goods which is taxable under the Sales Tax Act and passed

orders revising the assessment. The assessee preferred appeal and the First Appellate Authority who accepted the case of the assessee and held that the reassessment was not proper. The Joint Commissioner, exercising suo motu revisional power held that transfer of trade mark is a sale of incorporeal goods for consideration and therefore, taxable under the TNGST Act. Aggrieved by such order, the assessee preferred an appeal before the State Taxation Tribunal which dismissed his appeal and the assessee filed a writ petition before this Court challenging the order of the Tribunal. It was contended before this Court that the agency was given a mere right to enjoy the trade mark for a period and the amount received was only towards royalty and hence, should have been exempted while calculating the turnover. The Revenue submitted that the transaction is a sale of incorporeal goods. The Division Bench after referring to various clauses in the agreement between the parties therein took note of the decision of the Hon'ble Supreme Court in the cases of Rashtriya Ispat Nigam Ltd. v. Commercial Tax Officer, reported in 77 Sales Tax Cases 182; Vikas Sales Corporation v. Commissioner of Commercial Taxes, reported in 102 STC 106, Commissioner of Sales Tax v. Duke & Sons; Aggarwal Brothers v. State of Haryana, reported in 113 STC 317; 20th Century Finance Corporation Limited v. State of Maharashtra and held that the transfer was right to use and not a mere right to enjoy. It was pointed out that for transferring the right to use the trade mark, it is not necessary to hand over the trade mark to the transferee or give control or possession of the trade mark to him and it could be done merely by authorizing the transferee to use the same in the manner required by law and the right to use the trade mark could be transferred simultaneously to any number of persons. It was held that the assessee in the said case retained the liberty to use the mark in the event of the licensor started to manufacture the products equally it retained the liberty to grant licence to any other individual person or company to use the trade mark and such right being an intangible or incorporeal goods which can be merchandised by the registered owner and as pointed out by the Hon'ble Supreme

Court the word 'goods' is defined in a very wide terms so as to bring in both the tangible and intangible objects and trade mark right is intangible goods which could be subject matter of transfer. The above decision would squarely apply to the case on hand. Since the petitioner has retained the liberty to use the trade mark at the same time, the transfer right to use the incorporeal right exclusively in favour of the transferee in respect of specified outlet for a definite period of time. Therefore, it is not a mere licence or transfer of mere right to enjoy but transfer of right to use intangible goods.

11. Both the counsel placed reliance on the decisions of the Hon'ble Supreme Court in *Bharath Sanchar Nigam Limited and Another Vs. Union of India and Others*, (2006) 145 STC 91 : (2006) 3 SCC 1 and in *Aggarwal Brothers Vs. State of Haryana*, (1999) 113 STC 317 (SC) : (1999) 9 SCC 182.

12. Heard the learned counsel for the petitioner and the learned Additional Government Pleader (T) appearing for the respondents.

13. Though it is the contention of the learned counsel for the petitioner that they have paid the service tax and have registered with the Service Tax Authority, there are no records to substantiate the same before the this Court.

14. However, the Hon'ble Supreme Court in *Bharath Sanchar Nigam Limited and Another Vs. Union of India and Others*, (2006) 145 STC 91 : (2006) 3 SCC 1, has enumerated the situation, under which, there would be transfer of right to use. They are as follows:-

- (a) there must be goods available for delivery;
- (b) there must be a consensus ad idem as to the identity of the goods;
- (c) the transferee should have a legal right to use the goods—consequently all legal consequences of such use including any permissions or licences required therefor should be available to the transferee;
- (d) for the period during which the transferee has such legal right, it has to be the exclusion to the transferor—this is the necessary concomitant of the plain language of the statute viz. a "transfer of the right to use" and not merely a licence to use the goods;
- (e) having transferred the right to use the goods during the period for which it is to be

transferred, the owner cannot again transfer the same rights to others.

The lifts were in possession of the petitioner. Thus, there is no transfer of right to use.

15. In the facts of the case, there is no transfer of right to use and no case was made out for recovery of tax amount from the petitioner under Section 4 of the Tamil Nadu Value Added Tax Act, 2006. Therefore, the impugned orders are liable to be quashed and are accordingly quashed. These Writ Petitions stand allowed. No cost. Consequently, connected Miscellaneous Petitions are closed.

Sd/-
Asst.Registrar (CS IV)

/true copy/
Sub Asst. Registrar

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To

1.The Assistant Commissioner (CT),
O/o. The Assistant Commissioner (CT),
Ranipet (SIPCOT), Ranipet.

2.The Additional General Manager,
BAEL, Ranipet - 632 406.

+3 cc to M/s.S.Ramesh kumar Advocate sr5628/2021 dt 31/03/2021

W.P.Nos. 14472, 14534
& 15622 of 2015

and
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