

IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) No. 33627 of 2021

Sk Kashim
proprietor of
M/s. Kashim Constructions

...

Petitioner

Mr. Prabodha Chandra Nayak,
Advocate for the petitioner

-versus-

State of Odisha & others

...

Opposite Parties

Mr. Lalatendu Samantaray,
Additional Government Advocate
for opposite parties

CORAM:
JUSTICE JASWANT SINGH
JUSTICE M.S. RAMAN

ORDER

04.04.2022

Order No.

02. 1. This matter is taken up by virtual/physical mode.
2. In the garb questioning the propriety of Revised Guidelines relating to works contract *vide* the Office Memorandum bearing No.38535-FIN-CT1-TAX-0045-2017/F., dated 10.12.2018 issued by the Government of Odisha in Finance Department, the petitioner has sought for issue of writ of *mandamus* by invoking jurisdiction under Article 226 of the Constitution with the following reliefs:

“It is, therefore, prayed that, this Hon’ble Court may be graciously pleased to issue Rule NISI, in the nature of any appropriate writ/writs and/or direction/directions calling upon the opposite parties to show cause as to why—

P.T.O.

- i. *The action and decisions of the opposite parties shall not be declared illegal, unconstitutional and violative of legal right of the petitioner on account of the taxes being shared and borne by the petitioner on post enactment Goods and Services Tax Act, 2017, thereby infringing the Goods and Services Tax, 2017;*
 - ii. *The opposite parties shall not be directed to restitute the benefit of GST to the petitioner along with interest within a stipulated period in respect of work in which the estimated was prepared under the VAT law;*
 - iii. *The Office Memorandum dated 10.12.2018 issued by the opposite party No.2 under Annexure-2 shall not be declared illegal, arbitrary, unreasonable and same shall not be quashed;*
 - iv. *The opposite party No.5 shall not be directed to realize the GST amount from the principal employer and be restrained not to take any coercive against the petitioner till benefit granted by the opposite party Nos.1 to 3;*
 - v. *The opposite parties shall not be directed to prepare a fresh schedule of rates considering rapidly change of rate and price and calculate the differential amount of GST on the contract in which estimate was prepared under VAT.”*
3. The petitioner, Sk. Kashim, works contractor, claiming to be proprietor of M/s. Kashim Constructions, by enclosing copies of different agreements *vide* Annexure-1 series in respect of works undertaken pleads that at the time of supplying estimate to the department concerned, he furnished estimated cost inclusive of value added tax. The Revised Guideline *vide* the Office Memorandum bearing

No.38535-FIN-CT1-TAX-0045-2017/F., dated 10.12.2018 issued after introduction of the Central Goods and Services Tax Act, 2017 (for brevity, “CGST Act”) and the Odisha Goods and Services Tax Act, 2017 (abbreviated, “OGST Act”) with effect from 01.07.2017 specified that incomplete/balance work shall have to be estimated by excluding component of GST in terms of Revised Schedule of Rates, 2014 (in short referred to as “SoR, 2014”).

4. Sri Prabodha Chandra Nayak, counsel for the petitioner submits that in order to comply with the provisions of GST Act relating to works contract the State Government have revised the SoR, 2014 *vide* Works Department Office Memorandum No.13827/WD, dated 16.09.2017 with effect from 01.07.2017. It is further submitted by Mr. Nayak that the revised estimated work value for the balance works spilled over after 01.07.2017 is required to be determined as per the SoR, 2014 as revised, *i.e.*, in case of rates of any goods as service used in execution of the balance work not covered in the revised SoR, 2014, the tax exclusive basic value of that goods or service shall be determined by removing the embedded tax incidences of VAT, Entry Tax, Excise Duty, Service Tax, etc. from the estimated quoted price. Counsel for the petitioner, therefore, relied on paragraph 15 of the writ petition wherein it has been contended as follows:

“That as per the GST Act the liability of the petitioner is 12%, which is not achieved due to such faulty circular as

well as the post GST schedule SoR. Further there is no dispute that the petitioner is not liable to pay 12% of GST as a works contractor. As such the said revised SoR is arbitrary, as such, this Hon'ble Court may direct to the opposite parties to prepare fresh SoR and calculate the differential GST to minimize the problem."

5. *Per contra*, Mr. Lalatendu Samantaray, Additional Government Advocate appearing for opposite party No.1 argued that the petition challenging the *vires* of Office Memorandum bearing No.38535-FIN-CT1-TAX-0045-2017/F., dated 10.12.2018 is not maintainable in view of the fact that by very many works contractors on the advent of the GST statute with effect from 01.07.2017, Office Memorandum bearing No.36116-FIN-CT1-TAX-0045-2017/F., dated 07.12.2017 was challenged. During the pendency of the writ petitions, being *W.P.(C) No. 6178 of 2018 : All Orissa Contractors Association Vrs. State of Odisha*, and other cases, the Government of Odisha in Finance Department brought out Revised Guidelines for works contract *vide* Office Memorandum bearing No.38535-FIN-CT1-TAX-0045-2017/F., dated 10.12.2018. This Court *vide* Order dated 12.12.2018 disposed of said writ petition(s) by extracting the Revised Guidelines *in extenso* and held as follows:

*“*** In that view of the matter, the Petitioner shall make a comprehensive representation before the appropriate authority within four weeks from today ventilating the grievance. If such a representation is filed, the authority will consider and dispose of the same, in the light of the*

aforesaid revised guidelines dated 10th December, 2018 issued by the Finance Department, Government of Odisha, as expeditiously as possible, preferably by 31.03.2019.

If the petitioner(s) will be aggrieved by the decision of the authority, it will be open for the petitioner(s) to challenge the same.

No coercive action shall be taken against the petitioner(s) till 31.03.2019.

The writ petition is disposed of accordingly.”

- 5.1. Subsequently aforesaid direction of this Court being carried out by the authority concerned, amongst many, one of such works contractors viz. Harish Chandra Majhi, by way of petition being W.P.(C) No.14924 of 2020, challenged the Revised Guidelines vide Office Memorandum No.38535-FIN-CT1-TAX-0045-2017/F., dated 10.12.2018 (Annexure-2). This Court disposed of said case vide Judgment dated 07.06.2021 [reported as *Harish Chandra Majhi Vrs. State of Odisha and others, 2021 SCC OnLine Ori 643 = (2021) 51 GSTL 113 = (2021) 93 GSTR 354 (Ori)*] by observing thus:

“1. The Office Memorandum dated 10 December, 2018 of the Finance Department under Annexure-3 prescribing guidelines for the implementation of GST (Goods and Services Tax) in works contract in post-GST regime with effect from 1 July, 2017, the Revised Schedule of Rates-2014 (Revised SoR-2014) under Annexure-8 and the demand notice issued under Section 61 of the Odisha Goods and Services Act (OGST Act) has been questioned in the present writ petition and connected

batch of cases. The prayers in the present petition read as under:

- 'i. why the action and decision of the Opp. Parties shall not be declared illegal, unconstitutional and violative of legal right of the Petitioner on account of the Taxes being shared and borne by the Petitioner on post enactment Goods and Services Tax Act, 2017?*
- ii. the Opp. Parties shall not be directed to restitute the benefit of GST to the Petitioner along with interest within a stipulated period in respect of work in which the estimate was prepared under VAT law.*
- iii. the Office Memorandum dated 10.12.2018 issued by the Opp. Party No. 4 under Annexure-3 shall not be declared illegal, arbitrary, unreasonable and same shall not be quashed.*
- iv. further the process adopted by the Opp. Parties in preparation of revised SoR dated 15.09.2017 under Annexure-8 shall not be declared illegal, arbitrary and same shall not be quashed.*
- v. why the notice issued by the Opp. Party No. 9 under Annexure-9 shall not be declared illegal, arbitrary and same shall not be quashed?*
- vi. why the Opp. Party shall not be directed to prepare a fresh schedule of rates considering rapidly change of rate and price and calculate the differential amount of GST on the contract in which estimate was prepared under VAT?'*

11. *The basic price of materials as per SoR-2014 was inclusive of VAT, entry tax and other tax components. Since 1 July 2017 GST is payable on the value of the contract, the value of tax components in the price of the materials in SoR-2014 was revised and reduced by excluding such tax components prevalent during pre-GST period. As such, the revised SoR-2014 was issued on 16 September, 2017.*
12. *The Petitioner complains that the procedure adopted in the preparation of the revised SoR-2014 dated 16 September, 2017 (Annexure-8) is illegal, arbitrary and contrary to the provisions of Odisha Public Works Department Code (OPWD Code) and that the rates have not been determined on the basis of actual rates prevailing in different areas of the State.*
13. *The said submission of the Petitioner is not found acceptable because the rates of materials are to be maintained uniformly all over the State. Further, if there is any difference in the actual rate and scheduled rate in any particular area, the Petitioner could submit the same to the employer and this has nothing to do with the GST.*
14. *A further ground urged on behalf of the Petitioner is that the tender was floated prior to 1 July, 2017. The price quoted for the items and labour was as per the then prevailing market rate. Therefore, the revised SoR-2014 brought into force on 1 July, 2017 at a reduced rate is illegal and discriminatory.*
15. *This contention of the Petitioner is not found convincing for the reason that, first, nothing has been brought on record to show any comparison of market rate in 2014 when SoR-2014 was issued and the market rate in 2017 when revised SoR was issued. Secondly,*

no dispute has been raised against the rates mentioned in pre-revised SoR-2014. The price difference in the revised SoR-2014 is to the extent of the changed tax amount only. Undoubtedly, the rates in revised SoR-2014 are applicable for the works all over the State.

16. *Works contract is a composite supply of services and is taxable under the GST. The earlier SoR-2014 issued on 10 November, 2014 was inclusive of taxes like Central Excise Duty, Service Tax, VAT, Entry Tax etc. After the GST regime only some of the tax components needed to be included. This necessitated a revision of SoR-2014 to arrive at the GST exclusive work value. The GST component is to be added to the work value. As the revised SoR is exclusive of the tax components, the estimated value of the work gets reduced to that extent. This was prepared under the recommendation of a Code Revision Committee and after verification of tax rate in the pre-GST period of each of the items including the hire charges of machineries.*

29. *In the instant case, three components of the tax, i.e., subject of tax, person liable to pay the tax and rate of tax has been clearly defined in the statute. The OM dated 10th December, 2018 only prescribes the manner/procedure of calculation to determine the amount of tax in a particular eventuality in the transitional period of migration to GST Act with effect from 1st July, 2017. Consequently, the Court finds no merit in the Petitioner's challenge to the said OM in law."*

- 5.2. Mr. Samantaray, Additional Government Advocate, referring to paragraph 10 of the writ petition, wherein the

petitioner has attacked the Office Memorandum bearing No.38535-FIN-CT1-TAX-0045-2017/F., dated 10.12.2018 on the specious ground that said Memo is not in conformity with the Guidelines issued by the National Rural Infrastructure Development Agency, Ministry of Rural Development, Government of India *vide* File No. NRRDA-GO21(17)/32017-FA, dated 06.06.2018, submitted that the same does not hold water in view of the fact that this Court threadbare comparing said Office Memorandum being NRRDA-GO21(17)/32017-FA, dated 06.06.2018 *vis-à-vis* Office Memorandum No.38535-FIN-CT1-TAX-0045-2017/F., dated 10.12.2018 in the matters of *Harish Chandra Majhi Vrs. State of Odisha and others*, 2021 SCC OnLine Ori 643 = (2021) 51 GSTL 113 = (2021) 93 GSTR 354 (Ori) upheld the impugned Office Memorandum.

- 5.3. Therefore, Mr. Samantaray submitted that the writ petition is liable to be dismissed with cost inasmuch as all the grounds of challenge has already been set at rest by this Court on earlier occasion.
6. Mr. Prabodha Chandra Nayak, Advocate for the petitioner has conceded to the aforesaid position as set forth by this Court and placed by Mr. Samantaray, Additional Government Advocate. This Court, therefore, finds merit in the submission of the learned Additional Government Advocate. Having the opportunity to go through the Judgment of this Court in the case of *Harish Chandra Majhi*

Vrs. State of Odisha and others, 2021 SCC OnLine Ori 643 = (2021) 51 GSTL 113 = (2021) 93 GSTR 354 (Ori) and Order dated 12.12.2018 in the case of *All Orissa Contractors Association Vrs. State of Odisha* being *W.P.(C) No. 6178 of 2018*, we have no option left but to accept the argument of the learned Additional Government Advocate Mr. Lalatendu Samantaray and reject the grounds set out by the petitioner.

7. Mr. Lalatendu Samantaray, learned Additional Government Advocate also placed for consideration of this Court that the prayer for restitution of benefit of GST along with interest is misleading inasmuch as the cause of action for the petitioner has already become time barred. He has pointed out that close scrutiny of copies of the Agreements *vide* Annexure-1 series appended to the writ petition would depict that against the column heading “Stipulated date of completion” in each of such Agreements, the date has been mentioned prior to enforcement of GST statutes.

- 7.1. This Court has perused said documents and found the contention of the Additional Government Advocate correct. The counsel for the petitioner, being confronted with such fact, argued that the contract period was extended beyond 01.07.2017 and execution of works was completed during GST regime. Such oral statement without corroborative material cannot be accepted at this stage. This Court,

therefore, proceeds with the evidence enclosed to the writ petition supported by affidavit.

- 7.2. This Court in identical situation being the case of *Chandra Sekhar Jena Vrs. State of Odisha and Others, W.P.(C) No.23703 of 2021* vide Order dated 30.10.2021 held as follows:

“1. Although learned counsel for the Petitioner seeks to have the order similar to the one passed by this Court on 13th January, 2021 in W.P.(C) No.23906 of 2020, it is seen that the agreement in question is dated 26th April, 2016 with the time for completion being 11 months. Clearly, therefore, any claim now raised arising from the said contract would be time barred. It is, therefore, not possible to accede to the prayer of the Petitioner.

2. The writ petition is dismissed.”

- 7.3. The instant matter being similar to that of the case decided by this Court in *Chandra Sekhar Jena Vrs. State of Odisha and Others, W.P.(C) No.23703 of 2021* vide Order dated 30.10.2021, the present writ petition is hereby dismissed in the similar fashion and, thus, this Court hold that the claim of the petitioner is hit by law of limitation.

8. Before parting, this Court wishes to observe that the petitioner has made a prayer to restrain the opposite party No.5-CT&GST Assessment Unit, Rairangpur, CT&GST Circle, Mayurbhanj, from taking any coercive steps against the petitioner to recover amount of GST. *Qua* such a prayer,

it is noteworthy to record that the task of determining the differential GST, *i.e.* segregating labour, material, *etc.* is of the Authority vested with power under the CGST/OGST Act and not within the domain of any other. Such segregation can be made keeping in view *inter alia* Revised Guidelines dated 10th December 2018 issued by the Finance Department, Government of Odisha.

- 8.1. The question whether, in fact, any amount is owed to the Petitioner by Opposite Parties on account of GST deducted from its bills or *vice versa*, has become a highly disputed question of fact. The claim of the Petitioner ultimately, in simple terms, is one for money which it seeks as reimbursement from Opposite Parties. It is not possible for this Court in its writ jurisdiction under Article 226 of the Constitution to calculate on a case to case basis which component of the work executed by the Petitioner for reimbursement on account of GST and which is not. This being a disputed question of fact, the Court declines to undertake this exercise in the writ jurisdiction and leaves it to the Petitioner to seek other appropriate remedies available to him in accordance with law. In such proceedings it would be open to either of the parties to rely on the pleadings of the present petition. This is what has been precisely laid down in the case of *M/s. Maa Vaishno Devi Construction Vrs. The Executive Engineer, Bhubaneswar R&B Division-IV, Bhubaneswar, W.P.(C) No.7956 of 2019 vide Order dated 22.02.2021.*

9. In view of the aforesaid discussion and for the various reasons stated above, this court while declining to exercise its power under Article 226 of the Constitution, dismisses the writ petition.

(Jaswant Singh)
Judge

(M.S.Raman)
Judge

Laxmikant

April 04, 2022
Cuttack

