

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***ORDINARY ORIGINAL CIVIL JURISDICTION*****WRIT PETITION NO. 202 OF 2020**

HAL Offshore Ltd.)
A public limited company)
incorporated under the)
Indian Companies Act, having its)
registered office at 4B,)
32. Corporate Avenue, Off.Mahakali)
Caves Road, Andheri East,)
Mumbai – 400 093) **..... Petitioner**

VERSUS

1. The State of Maharashtra,)
Through the Ministry of Finance,)
3rd Floor, Mantralaya,)
Mumbai – 400 032)

2. The Commissioner of States Tax,))
8th Floor, Room No. 831, GST Bhavan,))
Mazgaon, Mumbai – 400 010) **..... Respondents**

Mr. Ishaan Patkar, a/w. Ms.Jindagi Shah, Ms.Nidhi Shah for the Petitioner.

Ms.Jyoti Chavan, Assistant Government Pleader, a/w. Mr.Himanshu Takke, Assistant Government Pleader for the State – Respondents.

CORAM : R. D. DHANUKA AND
S.M.MODAK, JJ.

RESERVED ON : 16th FEBRUARY, 2022

PRONOUNCED ON : 15TH JUNE, 2022

JUDGMENT:- (Per R.D. Dhanuka, J.)

Rule. Learned A.G.P. for the respondents waive service.

Rule is returnable forthwith.

2. The Assessment Order in this case for the period 1st April, 2005 to 31st March, 2006 was passed on 30th December, 2015 by the Assessing Authority under section 23(4) of the Maharashtra Value Added Tax Act, 2002 (for short the MVAT Act). The petitioner filed an appeal against the said Assessment Order. The Appellate Authority passed an order remanding the matter back for a fresh assessment.

3. The petitioner is a works contractor and service provider mainly for ONGC platform at ONGC, Bombay High Site. According to the petitioner, the petitioner had provided the services of the production of water at ONGC platform. On that platform, the sea water i.e. salt water was converted into potable water. The machinery performing the said process belongs to ONGC. The petitioner had only provided the labour and the chartered ship on the higher basis. The petitioner had its own chartered ship and the possession and control of the ship always remained with the petitioner.

4. It is the case of the petitioner that these activities provided

by the petitioner were duly served. The petitioner had purchased the raw material in Maharashtra State and execution of works contract on ONGC platform to ONGC on turnkey basis. According to the petitioner the transfer of property took place on the ONGC platform which was not the part of the State of Maharashtra. The State of Maharashtra had no jurisdiction to levy tax on the goods involved in the execution of work contract, executed on the ONGC platform.

5. The Assessing Officer passed an Assessment Order on 29th June, 2019 rejecting the contention of the petitioner that the transfer of the property in this case took place on the ONGC platform which were not part of the State of Maharashtra. The Assessing Officer held that the work contract was executed between the ONGC and the petitioner and both were registered under the said MVAT Act. It is held that the continental self/exclusive economic zone/Mumbai High are comprised within the territory of India. The movement of goods from the State of Maharashtra to Mumbai High does not constitute the movement from one State to another State as no any other State is involved in this contract activities.

6. It is held that a sale by export involves a series of integrated activities commencing from the agreement of sale with foreign buyer and ending with the delivery of such goods to a common carrier for transport out of the country by land or sea. It is held that in case of export, there is always a foreign buyer to whom the goods are ultimately sent. In this case the buyer did not export the goods to foreign country but purchased them for execution of works contract on ONGC platform at Bombay High. It is held that in case of export, goods must have a foreign destination where they can be said to be imported. In this case, the goods are not exported. It has no destination where it can be said to be imported. The delivery of the goods had been taken by the ONGC at Nhava Sheva which is part of the State of Maharashtra. Thus the sales/works contract is completely within the territory of the taxing State i.e. Maharashtra.

7. It is held by the Assessing Officer that in this case the movement of goods from the State of Maharashtra to Mumbai High is (1) not sale in course of export, (2) the sale is not occasioned by movement of goods from one State to another State hence it is not Interstate sale and (3) in the absence of the foreign buyer to whom the

goods were ultimately sent, export is not allowable. The Assessing Officer accordingly came to the conclusion that the State would be entitled to treat the receipts as a local works contract receipts and levy tax as per provisions under MVAT Act, 2002.

8. The Assessing Officer also gave various factual findings based on the documents produced by the petitioner and held that the total VAT payable came to Rs.1,77,47,239/- and imposed penalty under section 29(2A) and determined the total amount of Rs. 5,42,40,802/- from the petitioner.

9. It is the case of the petitioner that the ONGC platform is located in the exclusive economic zone i.e. outside State of Maharashtra. The transfer of the property in goods imported in execution of the work contract is outside the State of Maharashtra and thus the State of Maharashtra has no jurisdiction to levy tax thereon in view of Article 286 of the Constitution of India. According to the petitioner, the transactions in the present case are 'works contract'.

10. It is the case of the petitioner that the appropriation of the goods to the contract happens at the time of incorporation or accretion

in a work contract which is the point of the transfer of property. There is no concept of a separate delivery of such goods in such a contract.

11. This Court by an order dated 10th September, 2020 directed that no coercive steps shall be taken by the respondents against the petitioner on the basis of the order of assessment impugned.

12. Mr. Ishaan Patkar, learned counsel for the petitioner made the following submissions :-

(a) The Assessing Officer in the Assessment Order dated 29th June, 2019 for the period 2005-06 has levied tax under the Maharashtra Value Aided Tax Act, 2002 on the 'deemed sale' of transfer of property in goods involved in the works contract executed in Bombay High which is outside the territory of State of Maharashtra. He submits that the term 'deemed sale' is 'outside the State' and thus cannot be taxed in view of Article 286(1)(a). The 'deemed sale' is 'in the course of export' and thus cannot be taxed in view of Article 286(1)(b) of the Constitution of India.

(b) Learned counsel pointed out the findings from the assessment order and submits :-

(i) Contracts between the petitioner and the ONGC are 'works contracts' executed at Bombay High. Application of Rule 58

of MVAT Rules, 2005 reinforces this finding.

- (ii) The delivery of the goods takes place in Nhava Sheva and thus the works contract is completed within the State of Maharashtra. Finding no.(i) is not disputed. However, finding no.(ii) regarding delivery, the Assessing Officer has not recorded any reasons or given particulars in the impugned order. The petitioner has specifically challenged the said finding in the Grounds by relying upon the relevant contract clause which would show that the material is merely transported in ONGC vessels at Nhava Sheva upto the offshore site, because access to Bombay High is restricted due to security reasons. The respondents have not controverted these averments made in the writ petition in their affidavit-in-reply. Respondents have setup new case in the affidavit-in-reply i.e. (i) the appropriation is in the State of Maharashtra. (ii) Reliance is placed on the judgment of this Court in case of ***Raj Shipping v/s. State of Maharashtra, (2015) SCC Online Bom 5071*** in support of the submission that both the parties are situated and registered in the State of Maharashtra and have moved from Maharashtra.

13. Learned counsel placed reliance on paragraphs 1, 2, 6.2, 8.2, 17, 24, 38 of the sample contract annexed in the compilation of documents and made various submissions that assessment order is contrary to the said provision.

14. Learned counsel placed reliance on Sections 3, 6 and 8 of the Central Sales Tax Act, 1956 and would submit that the case of the petitioner does not fall under these provisions. Sections 3 and 4 have to be read together. He submits that Section 4 does not apply in the present case since the works contract awarded to the petitioner by ONGC was executed at Bombay High. The only recourse is to the judge-made law under Article 286(1)(a) of the Constitution of India.

15. Learned counsel invited our attention to paragraphs 2, 7 to 14 and 16 of the judgment of this Court in case of **Pure Helium** (supra) holding that the Bombay High located in the Continental Shelf/Exclusive Economic Zone is neither a 'State' nor a part of territory of India. India has only limited sovereignty for the purposes specified in the Maritime Zones Act, 1976.

16. It is submitted that the nexus theory does not revive. The judge made law under Article 286(1)(a) did not cover a particular sale, a situs of

the sale was fixed by the judge made law – where transfer of property takes place. Nexus theory cannot be applied. He also relied upon the paragraphs 6 to 13 of the judgment in case of ***Indian Copper Corporation*** (supra) and paragraphs 9 and 10 of the judgment in case of ***A. V. Thomas*** (supra).

17. It is submitted that assuming but not admitting that the nexus theory could be applied to a works contract in Bombay High, the mischief of multiple taxation will be revived. The respondents in paragraph 2 of the affidavit-in-reply have put-forth two nexus as ‘sufficient nexus’ i.e. (i) That the parties are registered and situated in State of Maharashtra and (ii) That the goods moved from State of Maharashtra. He submits that in today’s world, corporation have branches in many States and are also registered under the VAT laws of many States. If arguments of the respondents are accepted, if goods are purchased from Delhi and they have to move across Madhya Pradesh to reach Maharashtra, then all three States will levy tax.

18. It is submitted that in this case, the petitioner can replace the goods at any time till point of incorporation. The inspection and testing of any goods by ONGC do not give ONGC right to insist that the same goods should be incorporated into the works. If the petitioner replaces the goods at any point of time, the new goods will have to undergo inspection and testing. The goods involved in the execution of a works contract cannot be said to be

‘deliverable state’ as understood in Section 2(3) of the Sale of Goods Act, 1930. There was no contract between the petitioner and the ONGC for delivery of goods of certain specification. The contract is for delivery of the works as a whole and the materials are the ‘deliverable state’ when they assume their final form after incorporation into the works.

19. It is submitted that whether the common law of ‘appropriation’ in works contract is applied or the principles in Sale of Goods Act, 1930, the result is the same i.e. the appropriation is at the time when the incorporation takes place. Since, the incorporation in this case has taken place at Bombay High outside the State of Maharashtra, no tax under the said MVAT Act can be levied at all. He relied upon the judgment of Hon’ble Supreme Court in case of ***Telco v/s. Asst. Commissioner*** (supra) in support of the submission that ‘appropriation’ takes place when it can be said that the seller cannot replace the goods with some other goods.

20. Learned counsel for the petitioner relied upon the Entry 48 of the Provincial List prescribed under the Government of India Act, 1935 which provided for ‘Taxes on the sale of goods and on advertisements’. He relied upon Draft Article 246A as on 16th October, 1949 (Article 286 of the final Constitution) proposing 4 types of sales which could not be taxed by the States i.e. (i) Sale outside State, (ii) Sale in the course of import, (iii) Sale

in the course of export and (iv) Sale in the course of inter-state trade and commerce except in accordance with Parliamentary legislation. Learned counsel placed reliance on Entry 54, List II of the Constitution of India which provides 'Taxes on the sale or purchase of goods other than newspapers'.

21. Learned counsel placed reliance on the judgment of Hon'ble Supreme Court in case of ***Indian Copper Corporation v/s. State of Bihar*** (supra) and would submit that the said judgment deals with sales which were not covered by the Explanation to Article 286(1)(a) and held that the State where the transfer of property takes place can only tax it. Nexus theory is not applicable. He relied upon the 61st Law Commission Report submitted in May 1974 recommending that the judgment of the Hon'ble Supreme Court in case of ***Gannon Dunkerley*** 1 and 5 other decisions need to be overruled.

22. Learned counsel placed reliance on the judgment of Hon'ble Supreme Court in case of ***Gannon Dunkerley*** (supra) and would submit that Article 366(29A)(b) is subject to Article 286 and Article 269 read with 92A of List I. The tax is leviable at the time of incorporation/accretion and the value which can be taxed is only the value at the time of incorporation of goods into the works and not beyond that. He relied upon definition of 'sale'

in Section 2(g) of the Central Sales Tax Act, 1956 and would submit that the said definition was amended on 11th May, 2002 to include all the deemed sales covered by Article 366(29A), but no amendments are carried out in Sections 3, 4 and 5 which were enacted decades prior to Article 366(29A) to cover normal sales.

23. Learned counsel for the petitioner relied upon the judgment of Hon'ble Supreme Court in case of ***Builders' Association of India v/s. Union of India*** (supra) holding that (i) the tax on transfer of property and goods involved in the execution of works contract under Article 366(29A)(b) is also subject to the restrictions in Article 286 and (ii) such tax is restricted to the goods which are incorporated into the works and not on the entire works contract.

24. It is submitted that this Court in case of ***Raj Shipping v/s. State of Maharashtra*** (supra) has held that the sale within the territorial waters can be taxed by the State of Maharashtra on the basis of nexus theory. He submits that the said judgment relied upon by the respondents is *per-incuriam* for various reasons and is thus not binding on this Court.

25. It is submitted that this Court in the said judgment in case of ***Raj Shipping v/s. State of Maharashtra*** (supra) also did not notice the

binding judgments in case of **Indian Copper Corporation** (supra) and **Bengal Immunity Co. v/s. State of Bihar** (supra) which hold that nexus theory was abrogated by Article 286 of the Constitution of India.

26. It is submitted that the learned Counsel for the Revenue in case of **Raj Shipping v/s. State of Maharashtra** (supra) has based case on Section 4 of Central Sales Tax Act, 1956 and did not invoke the nexus theory at all, except for pointing out brief history of Section 4 of the Central Sales Tax Act, 1956. In support of this submission, he invited our attention to paragraphs 70 to 72 of the said judgment.

27. It is submitted by the learned counsel that the judgment of this Court in case of **Raj Shipping v/s. State of Maharashtra** (supra) revives the very mischief that Article 286 was brought into. Every transaction covered by Section 3, 4 and 5 of the Central Sales Tax Act, 1956 is liable to be covered by the nexus theory and the 4 bans in Article 289 read with Article 269 will effectively collapse.

28. Learned counsel for the petitioner placed reliance on Rule 58 of the Maharashtra Value Added Tax Rules, 2005 and submits that the judgment of this Court in case of **Central Sales Tax v/s. Steel Plant Pvt. Ltd.** (supra) was held good till prior to the date of carrying out amendment. He

relied upon paragraphs 1 to 3 and 6 to 16 of the said judgment. He submits that the contract entered into between the petitioner and ONGC was an individual works contract and was not for sale or supply of goods. He invited our attention to judgment of Supreme Court in case of ***Commissioner of Commercial Taxes v/s. K. T. C. Automobiles*** (supra) and in particular paragraphs 2 to 4 and 22 to 27 and would submit that in the said judgment, the Supreme Court had considered Article 286(2) of the Constitution of India and also Section 4(2) of the Central Sales Tax Act, 1956.

29. Insofar as the issue of alternate remedy raised in the affidavit-in-reply by the respondents is concerned, it is submitted by the learned counsel that since the petition has raised jurisdictional issue on levy of tax by the respondents on the works contract, where the property has passed offshore, the powers of this Court to entertain this writ petition under Article 226 of the Constitution of India are not taken away.

30. Learned counsel for the petitioner placed reliance on the following judgments :-

- (a) Sale of Goods Act, 1930 – relevant extracts
- (b) State of Madras vs. Richardson & Cruddas, (1968) 21 STC 245

- (c) Seath vs. Moore, (1886) 13 R.(HL) 57
- (d) In re Blyth Shipbuilding, (1925) Ch 494
- (e) Hyder Consulting vs. Governor, (2015) 2 SCC 189
- (f) Shiv Kumar vs. Union of India, (2019) 10 SCC 229
- (g) CST vs. Moonlight, (2010) SCC Online Bom 672
- (h) B. Narsamma vs. Dy. Commr., (2016) 15 SCC 167
- (i) Atkinson vs. Bell, 8 B & C 276 (1046)
- (j) CCT vs. KTC Automobiles, (2016) 4 SCC 82
- (k) TELCO vs. Asst. Commr., (1970) 1 SCC 622
- (l) CST vs. Steel Plant, 1995 SCC Online Bom 550

31. Ms.Jyoti Chavan, learned AGP for the State, on the other hand submits that this writ petition is not maintainable on the ground that there is alternate efficacious remedy available to the petitioner under Section 26 of the MVAT Act. There are disputed factual aspects pertaining to the terms of contract/agreement executed by the petitioner with ONGC that cannot be adjudicated in this writ petition filed under Article 226 of the Constitution of India. In support of this

submission, learned AGP placed reliance on the judgment of the Supreme Court in case of ***Commissioner of Income Tax & Ors. Vs. Chhabil Dass Agarwal, (2014) 1 SCC 603*** and in particular paragraph 15 thereof.

32. Learned AGP for the State also invited our attention to the judgment of Karnataka High Court in case of ***M/s. Leighton India Contractors Pvt. Ltd. Vs. Deputy Commissioner of Commercial Taxes & Ors.***, delivered on 22nd February 2017 in Writ Petition No.46807 of 2016 and other connected writ petitions. She also placed reliance on the judgment and order passed by the Supreme Court in case of ***Genpact India Private Limited Vs. Deputy Commissioner of Income Tax & Anr.*** delivered on 22nd November 2019 in Civil Appeal No.8945 of 2019 on the issue of maintainability of writ petition.

33. Learned AGP submits that the agreement entered into between the petitioner and the ONGC was executed at Mumbai. As per the agreement, the delivery of the said goods had taken place at Nhava-Sheva and/or Victoria Docks. She relied upon clause 17.2.2.3 of the said agreement and would submit that upto 80% of the cost of

materials inclusive of all taxes and duties including duty, if any, limited to 60% of the total contract value to be released against receipt of materials at ONGC Yard Nhava Sheva after satisfactory inspection by certification agency and proof of receipt of materials in good condition at ONGC Nhava/Heli base.

34. Learned AGP placed reliance on clause 22.0 of the said agreement and submits that the lumpsum unit prices of stages/items of Work contained in the price schedule was to include price for procurement and supply and delivery of items at ONGC site/Nhava inclusive of all taxes, duties, fees including custom duties, excise duty, sales tax as applicable etc. for execution of the Works under the said agreement.

35. It is submitted that situs of the agreement to transfer goods was at Mumbai within State of Maharashtra. The terms and conditions of the agreement executed between HAL offshore and ONGC when considered in entirety would establish that the entire transaction of deemed sale has taken place in State of Maharashtra. There is a nexus at the place where the goods are delivered. As it is the place where it

can be said that the goods are appropriated. As per the terms of agreement the goods are to be checked, verified by ONGC at Nhava-Sheva and the goods can be rejected by ONGC and returned at Nhava-Sheva and substantial payment i.e. upto 80% of the cost of goods/materials was released to the petitioner by ONGC under the said agreement.

36. Learned AGP for the State placed reliance on Clause 2.18, 5.2, 8.2, 8.3, 17 and of the said agreement and would submit that the point of delivery of material was at Nhava Sheva and thus levy was proper and was within the jurisdiction of the State of Maharashtra.

37. Learned AGP for the State placed reliance on Clause 17 of the agreement which provides for 'Contract Price' and would submit that the said contract entered into between the petitioner and ONGC is a firm price and the petitioner was bound to keep the same firm and without escalation on any ground whatsoever until completion of entire works against the said agreement. She relied upon Clause 17.2.2 of the agreement and would submit that the petitioner was required to submit bills to Engineer-In-Charge along with third

party or ONGC/EIL inspection report of materials, equipments for verification, certification and onward transmission to Finance & Accounts Section for release of payment. The payments to the petitioner was agreed to be released on basis of progress of work.

38. Learned AGP relied upon Clauses 17.2.2.2, 17.2.2.3, 17.2.3.3 and 17.2.3.4 of the said agreement and would submit that the payments for material were to be made at various stages under the said provisions and had nothing to do with the installation of such material offshore. She submits that the petitioner could have charged the value added tax to the ONGC in the invoice. She submits that the Assessing Officer has already given set-off of various amounts to the petitioner in the impugned assessment order. She submits that under Clause 17.2.3.3, ONGC had agreed that upto 20% of the contract value shall be released against installation, testing, mechanical completion after certification by third party/ONGC representative. Learned AGP for the State placed reliance on Clause 23 of the said agreement which provides for 'Duties, Fees and Taxes etc.' She submits that the contract price is inclusive of taxes and duties quoted by the petitioner.

39. Learned AGP for the State submits that it is also not the case of the petitioner that any of the items supplied by the petitioner to ONGC under the said agreement amounted to export and thus on that ground, the respondents have no jurisdiction to levy any tax on the petitioner for supply of material under the said agreement. She submits that the petitioner has accepted that the judgment of this Court in case of *Commissioner of Sales Tax Vs. Pure Helium (supra)* is against the petitioner.

40. Learned AGP for the State invited our attention to some of the provisions of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976 and the Maharashtra Marine Fishing Regulation Act, 1981. She relied upon definition of 'State under clause 'k' of the said Maharashtra Marine Fishing Regulation Act, 1981 and would submit that the State of Maharashtra includes the territorial water along the entire coast line of that State. She submits that territorial would include not only land but also water. The petitioner as well as ONGC have themselves submitted to the jurisdiction of the State of Maharashtra.

41. Learned AGP relied upon the judgment of Karnataka High Court in case of the ***Great Eastern Shipping Company Limited Vs. State of Karnataka, ILR 2004 KAR 3750*** and in particular paragraphs 5 and 6 thereof. She also relied upon the judgment of Madras High Court in case of ***A.M.S.S. V.M. and Co. Vs. The State of Madras, AIR 1954 MADRAS 291*** in which the judgment of Karnataka High Court in case of ***Great Eastern Shipping Company Limited (supra)*** has been followed. She submits that the definition of 'State' under the State of Karnataka Act is identical to the provisions of MVAT Act. She relied upon the finding of Karnataka High Court on issue no.2 at page 67 of the said judgment and would submit that since the material supplied by the petitioner to ONGC was at Nhava-Sheva, even if the goods or material passes in High seas, it was within the territory of State of Maharashtra having jurisdiction to levy VAT on the petitioner.

42. Learned AGP for the State relied upon the judgment of the Supreme Court in case of ***Great Eastern Shipping Company Limited Vs. State of Karnataka & Ors., (2020) 3 SCC 354*** and in particular paragraphs 40, 43 and 65 to 68 and would submit that even

in the said judgment, Supreme Court has considered the issue of 'situs.'

43. Learned AGP for State strongly placed reliance on the judgment of this Court in case of ***Raj Shipping Vs. State of Maharashtra (2015) SCC OnLine Bom 5071*** and would submit that all relevant judgments of this Court and the Supreme Court on the issue of 'situs' have been considered by this Court in the said judgment and in no manner, the said judgment of this Court can be considered as *per incuriam*. Learned AGP placed reliance on paragraph 68, 95, 96 of the said judgment and would submit that the judgment of Karnataka High Court referred to aforesaid has been referred in the said judgment in case of ***Great Eastern Shipping Company Limited (supra)***.

44. It is submitted that there can be two sets of laws applicable to the said transaction as sought to be canvassed by the learned counsel for the petitioner. The petitioner as well as ONGC have subjected themselves to the State Laws for all other purposes. She submits that none of the judgments cited by the petitioner would

support the case of the petitioner and are distinguishable on facts.

45. Mrs.Jyoti Chavan, learned A.G.P. to the State relied upon following judgments in support of her rival contentions :-

(a) Coram : Ashok Bhan & Dalveer Bhandari, JJ.
(Supreme Court) dated 11th April, 2008.

(b) Coram : Dr. D.Y.Chandrachud & A.A.Sayed, JJ.
(Bombay High Court) dated 6/9th January, 2012.

(c) Coram : S.C.Dharmadhikari & G.S.Kulkarni, JJ.
(Bombay High Court) dated 19th October, 2015.

46. Mr.Patkar, learned counsel for the petitioner in his rejoinder arguments submits that the respondents have sought to argue that all the agreements mentioned in the assessment order were the works contract. There were three separate activities i.e. (i) Contract for operation and maintenance (O&M) for chlorinator which was a pure service contract with no goods element involved at all; (ii) Charter Hire of MSV support vehicles - this was not a contract for executing any works contract, but a Charter Hire of vessels which is fundamentally different type of contract. Petitioner has succeeded on this issue and therefore no dispute arises in respect of the Charter Hire contracts in this petition; (iii) works contracts involving the activities forming part

of the agreement between the petitioner and ONGC which are the subject matter of this petition.

47. It is submitted that the Assessing Officer has not classified the contracts at Sr.nos.(i) and (ii) of the works contract in his order. It is also not the case of the respondents in their Affidavit-in-Reply that the contracts at Sr.nos.(i) and (ii) were the works contract. The petitioner is not undertaking any activity of laying down any pipes for this operation and maintenance of chlorinator contract. No such finding is recorded by the Assessing Officer in the impugned Assessment Order.

48. It is submitted that the sample contract annexed to the compilation relates only to works contracts and is not representative of the other two activities, which are operation and maintenance of chlorinator or charter hire of vessels.

49. It is submitted by the learned counsel that the petitioner has not claimed any deductions under Rule 58 at all. He relied upon the judgment of the Supreme Court in case of Gannon Dunkerley (supra). He submits that it is clearly held that an indivisible works contract is

not a “sale of goods” as per Sale of Goods Act, 1930 and that the transfer of property in goods in an indivisible works contract took place on the principle of incorporation/accretion. He submits that paragraph 36 of the said judgment would apply to the facts of this case as there is a single and indivisible contract and two independent contracts, though embodied in a single instrument.

50. It is submitted that if there are two separate contracts, the contract for sale can be taxed by the States. At this stage, there was no question of taxing the contract for service, because that would anyways be beyond Entry 54 List II which allowed tax only on “sale of goods”. He submits that the contract for sale should be capable of being specifically performed (as per the general law on specific performance r/w. provisions of Sale of Goods Act, 1930) separately from the contract of service, so that even if the contract for service fails, the contract for sale survives independently.

51. It is submitted by the learned counsel that Article 366(29A)(b) was intended to cover only “*indivisible*” works contracts, since contracts with independent sale and service obligations were

anyways protected by Para 36 of **Gannon Dunkerley I (supra)**. He also relied upon paragraph 36 of the judgment in case of **Builders' Association of India & Ors. Vs. Union of India & Ors., (1989) 2 SCC 645** and would submit that Supreme Court in the said judgment has held that Article 366(29A)(b) has altered an indivisible works contract into one for sale of goods and one for supply of services.

52. It is submitted that since the contract in question is indivisible at the contractual level, the stage is set for the legal fiction in Article 366(29A)(b) to apply and to effect divisibility *by operation of law*. This is the only change brought about by the 46th Constitutional Amendment. Earlier there was no divisibility by operation of law and the matter would end once the contract is found indivisible at the contractual level. He submits that the principles and formula for effecting this divisibility by operation of law are laid down in paragraph 45 to 47 in case of **Gannon Dunkerley II (supra)**.

53. It is submitted that though the Hon'ble Supreme Court in case of **Builders' Association of India (supra)** has held that the indivisible contract is altered into a contract for sale of goods and

supply of services, the Hon'ble Supreme Court in case of **Gannon Dunkerley II (supra)** still did not recognize the *chattel qua chattel* transfer principles of Sale of Goods Act, 1930 for determining the point of transfer of property under Article 366(29A)(b).

54. It is submitted by the learned counsel that the formula in Gannon Dunkerley II for determining the value of the goods at the time of incorporation is applicable whether the works contract is one for lumpsum consideration or whether separate amounts were set out for the materials or stipulation for payment of consideration on receipt of materials at site as was the case in **Commissioner of Sales Tax vs. Steel Plant (supra)**.

55. Learned counsel for the petitioner submits that after Service Tax regime was introduced under Chapter V of the Finance Act, 1994, it has been held in **Commissioner, Central Excise and Customs, Kerala vs Larson and Toubro (2016) 1 SCC 170** that "labour and services" portion can be taxed exclusively by Parliament. In this case, it was held that there is a clear segregation in the Constitution relating to the taxing power of the States and the Union qua an

indivisible works contract and neither can trespass into the other's field. This case arose under Service Tax law and one of the issues was that before 2007, there was no formula to bifurcate goods and services element in works contract. Supreme Court noted that after 2007, a formula was enacted on the lines of the formula suggested in paragraph 47 in case of Gannon Dunkerley II.

56. It is submitted by the learned counsel that the Assessing officer has applied Rule 58 of MVAT Rules in the present case which is applicable solely and exclusively to the indivisible works contract under Article 366(29A)(b). However, during the course of oral arguments, the respondents argued contrary to the view taken by the Assessing Officer in the impugned assessment order and to come up with a new case that the works contract in the present case are divisible as per the clauses in the contract itself and held that the delivery of goods is effected at Nhava Sheva.

57. It is submitted that the concept of "delivery" is not generally applicable to works contracts as can be seen from Article 366(29A) itself where the word "delivery" is used in sub-clause (c)

relating to hire purchase contracts, but is consciously not used in sub-clause (b). He submits that in the facts of this case, the inspection of materials at Nhava Sheva, transport by ONGC and payment of instalment does not amount to “delivery” even as per Sale of Goods Act. “Delivery” is defined in the Sale of Goods Act, 1930 as the voluntary transfer of possession from one person to another. He relied upon Clauses 8.2 and 17.2.2.3 of the said agreement and submits that neither clause speaks of any transfer of the right of possession, much less any actual transfer of possession. If the delivery is already complete in Nhava Sheva then there is no question of any “surplus material” being ferried back. The goods also remain entirely at Petitioner’s risk during the sea journey and the entirety of the works.

58. In so far as the claim for deductions for labour and service charges under Rule 58 of the MVAT Rules, 2005, sales in the course of imports is concerned, he disputed the statement of the learned AGP that deductions were claimed in the returns filed by the petitioner. He invited our attention to the returns filed by his client and more particularly the description at Serial No.5 onwards and submits that the said description would show “0” i.e. no return was

filed in the first place and therefore, no claims were lodged. The petitioner was not registered under the MVAT Act, 2002 for the period in issue in this Petition, that is 2005-06 and therefore no returns were filed at all. He also invited our attention to Row 6(a), Row 6(r), 14(f) and would submit that neither was any set off on purchases claimed, nor was it allowed. The Assessing Officer himself has nowhere said that the deductions were claimed.

59. In so far as the “sales in the course of import” is concerned, it is submitted that the “sales in the course of import” cannot be taxed by the State due to the prohibition in Article 286(1)(b). It is submitted that Supreme Court in case of ***Indian Copper Corporation (supra)*** has recognized that even if a sale is held to be within a State, the power to tax the sale will be unavailable to that State if it is in the course of import.

60. In so far as the “set off of tax paid on purchase of goods” is concerned, learned counsel disputed that any set off of tax paid on purchase of goods was claimed by Petitioner and submitted that no set off is even allowed. The petitioner is being an unregistered dealer for

the period 2005-06, no set off could have been claimed/allowed at all. Rule 52 of the MVAT Rules, 2005 specifically states that set off can be claimed only by a registered dealer. He submits that even in the assessment order, the Assessing Officer has not held that the petitioner has “claimed” any such set off. On the contrary, it is held by the Assessing Officer that the petitioner being unregistered dealer at the relevant time, no set off is admissible. Learned counsel disputed the submissions made by the AGP on various factual issues.

61. In so far as the judgment of the Karnataka High Court and the Supreme Court in case of ***Great Eastern Shipping Company Limited (supra)*** relied upon by the learned AGP is concerned, it is submitted that in case of ***Commissioner of Sales Tax Vs. Pure Helium (supra)***, it has been noted by this Hon’ble Court that Bombay High is situated 150 nautical miles from the baseline and is therefore situated in what is called the Continental Shelf/Exclusive Economic Zone.

62. In so far as reliance placed on paragraph 68 of this Court in case of ***Raj Shipping (supra)*** by the learned AGP is concerned, it

is submitted that in the said paragraph, this Court mainly recorded the submission made by the learned counsel for the revenue. He relied upon paragraphs 97 to 107 of the said judgment and submits that this Court has expressly declined to express any view on this matter.

63. It is submitted that there cannot be two transfers of property, one at the stage of execution of contract and another at the stage of incorporation/accretion. He submits that it cannot be said that the “transfer of property in goods involved in the execution of works contract” is even remotely complete on execution of the works contract. The taxable event in the works contract is the point of incorporation/accretion. In the case of transfer of right to use goods, the last act required to complete the transfer of the right to use as per general law/common law is the execution of contract. It cannot be said that the last act for completing a deemed sale in a works contract is the mere execution of the contract.

64. It is submitted that the Explanation to Article 286(1)(a) has since been replaced by Section 4 of the CST Act, 1956 r/w. Article 286(2) which enacts fundamentally different principles for determining

situs of sale. Where Section 4 Central Sales Tax Act, 1956 does not apply, the rule of situs continues to be where the transfer of property takes place as declared in *Indian Copper Corporation (supra)*. It is stated that the peculiar issue of there being a “State” required for delivery for consumption which can shift the situs away from the State where transfer of property takes place does not arise after the deletion of the Explanation to Article 246(1)(a).

65. It is submitted by the learned counsel that the submission of the respondents that labour has been taken from Maharashtra and PF and ESI are subject to jurisdiction of Maharashtra is entirely irrelevant to the question at issue in this case. Both the parties filed their written arguments in addition to the oral submissions made across the bar.

REASONS AND CONCLUSION :

66. Learned counsel for the petitioner as well as the respondents have addressed this Court on various issues, most of which are summarized in the earlier part of this judgment. Learned AGP for the respondents vehemently urged before this Court that this petition is not maintainable on the ground that there is an alternate efficacious remedy available to the petitioner under section 26 of MVAT Act and

there being disputed factual aspects pertaining to the terms of the contract / agreement executed by the petitioner with ONGC, which cannot be adjudicated upon in this writ petition filed by the petitioner under Article 226 of the Constitution of India.

67. Learned counsel appearing for the parties relied upon various judgments in support of their rival contentions on the issue of maintainability of the petition. Since we have proposed to dispose of this writ petition on the ground of there being an alternate efficacious remedy available to the petitioner under section 26 of the MVAT Act and there being disputed factual aspect pertaining to the terms of the contract / agreement executed by the petitioner with ONGC and on other issues, we do not propose to deal with the Other submissions advanced by the parties in this judgment.

68. It is not in dispute that the petitioner has filed this writ petition under Article 226 of the Constitution of India impugning the order of assessment passed by the assessing officer on 30th December, 2015 under section 23(4) of MVAT Act. Under section 26 of the MVAT

Act, the remedy of filing an appeal against the assessment order passed by the assessing officer under section 23(4) of MVAT Act is available.

69. The Supreme Court in case of ***Commissioner of Income Tax & Ors. vs. Chhabil Dass Agarwal*** (supra) while dealing with the order of assessment passed under section 148 of the Income Tax Act, 1961, held that it is settled law that non-entertainment of petitions under writ jurisdiction of High Court when an efficacious alternative remedy is available is a rule self-imposed limitation. It is essentially the rule of policy, convenience and discretion rather than the rule of law. High Court must not interfere if there is an adequate efficacious alternative remedy available to the petitioner and he has approached the High Court without availing the same unless he has made out an exceptional case warranting such interference or there exist sufficient grounds to invoke the extraordinary jurisdiction under Article 226.

70. The Supreme Court adverted to the judgment of the constitution Benches in case of ***K.S. Rashid & Sons vs. Income Tax Investigation Commission***, AIR 1954 SC 207, ***Sangram Singh vs.***

Election Tribunal, Kotah, AIR 1955 SC 425, Union of India vs. T.R. Varma, AIR 1957 SC 882, State of U.P. vs. Mohd. Nooh, AIR 1958 SC 86 and K.S. Venkataraman & Co. (P) Ltd. vs. State of Madras, AIR 1966 SC 1089 in which it was held that though Article 226 confers a very wide powers in the matter of issuing writs on the High Court, the remedy of writ is absolutely discretionary in character. If High Court is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere, it can refuse to exercise its jurisdiction. The High Court in extraordinary circumstances, may exercise the power if it comes to the conclusion that there has been a breach of principles of natural justice or procedure required for decision has not been adopted.

71. It is held by the Supreme Court that the Act provides complete machinery for the assessment / re-assessment of tax, imposition of penalty and for obtaining the relief in respect of any proper orders passed by the Revenue Authorities and the assessee could not be permitted to abandon that machinery and to invoke the jurisdiction of the High Court under Article 226 of Constitution of India when it had adequate remedy open to him by an appeal to the Commissioner of Income Tax (Appeals).

72. The Supreme Court in ***Genpact India Private Limited vs. Deputy Commissioner of Income Tax & Anr.*** in Civil Appeal No9.8945 of 2019 delivered on 22nd November, 2019 has followed the principles laid down in case of ***Commissioner of Income Tax & Ors. vs. Chhabil Dass Agarwal*** (supra) and also in case of ***Authorized Officer, State Bank of Travencore & Anr. vs. Mathew K.C. (2018) 3 SCC 85*** and upheld the view taken by the High Court refusing to entertain the writ petition on the ground of the petitioner not having exercised alternative efficacious remedy available to the petitioner. The principles of law laid down by the Supreme Court in case of ***Commissioner of Income Tax & Ors. vs. Chhabil Dass Agarwal*** (supra) and in case of ***Genpact India Private Limited*** (supra) apply to the facts of this case. The petitioner has not availed of an alternative efficacious remedy of appeal prescribed under section 26 of the MVAT Act and has impugned the assessment order directly in this writ petition under Article 226.

73. The Karnataka High Court in case of ***M/s.Leighton India Contractors Pvt. Ltd. vs. Deputy Commissioner of Commercial Taxes***

& Ors. in its judgment delivered on 22nd February, 2017 in Writ Petition Nos.46807 & 47320-30/2016 has considered the writ petition impugning the order of re-assessment passed by the Assessing Officer under section 39(1) of the Karnataka Value Added Tax Act. The Karnataka High Court adverted to the judgment of the Supreme Court in case of ***Commissioner of Income Tax & Ors. vs. Chhabil Dass Agarwal*** (supra) and held that when an alternative remedy is available and the petition is entertained by this Court, the petitioner later cannot approach the appellate authority by way of appeal or revision as the case may and thus the petitioner would be to its disadvantage. For this reason also entertaining the petition without allowing the petitioner to avail an alternative remedy is not in the best interest of the petitioner.

74. It is held that even in case of violation of affording the opportunity before the Assessing Authority the Appellate Authority itself could consider the the same and if it is satisfied that further opportunity need to be given to the petitioner, the Appellate Authority could afford such an opportunity to the petitioner. But without going into the factual aspects and without considering the merits of the matter which are disputed facts, it cannot be concluded one way of the other, for which writ petition is not the remedy. The principles laid

down by the Karnataka High Court in case of ***M/s.Leighton India Contractors Pvt. Ltd.*** (supra) apply to the facts of this case. We are in agreement with the view taken by the Karnataka High Court in the said judgment.

75. In paragraphs (b) and (c) of the writ petition, the petitioner has prayed for a declaration that section 26 of the MVAT Act is *ultra virus* to extent it has constituted the First Appellate Authority and seeks further declaration that section 26 (6A) of the MVAT Act is *ultra virus* the Constitution of India. Both these issues raised by the petitioner are being dealt with by a Full Bench of this Court in case of ***United Projects vs. The State of Maharashtra & Anr.*** in Writ Petition No.2883 of 2018. The said issues are thus not required to be dealt with by the Division Bench of this Court in this writ petition.

76. If this Court entertains this petition impugning the assessment order without directing the petitioner to avail alternative remedy available under section 26 of the MVAT Act and if the petition is rejected on its own merits, the petitioner in that event would not be

able to subsequently avail of alternative remedy by way of an appeal under section 26 of the MVAT Act which would be prejudicial to the interest of the petitioner. On this ground also we are not inclined to entertain this writ petition impugning the assessment order directly in this writ petition.

77. Be that as it may, the argument advanced by both the parties in detail before this Court in this writ petition and already summarized in the earlier paragraphs of this judgment would clearly indicate that there are several disputed questions of fact agitated by both the parties while advancing their rival contentions. The petitioner has advanced various submissions across the bar while arguing this petition which were not advanced before the Assessing Officer, are beyond the submission made before the Assessing Officer and even beyond the order passed by the Assessing Officer.

78. At the same time, learned AGP for the State also has urged various submissions, relied upon various documents and various provisions of contract entered into between the petitioner and the

ONGC before this Court which were not forming part of record of the Assessing Officer, for consideration of this Court across the bar. This Court while exercising the writ jurisdiction under Article 226 of the Constitution of India cannot entertain or adjudicate upon such issues based on additional facts raised across the bar, not forming part of the submissions advanced before the Assessing Officer, whose order is impugned in this writ petition. In our view, the writ petition cannot record any additional findings of fact based on the fresh submissions across the bar either to challenge the validity of the assessment order on merits or otherwise or to defend the impugned order not forming part of the record of the assessment order. All factual disputes between the parties can be adjudicated upon by the petitioner before the Appellate Authority and not in this writ petition.

79. The petitioner has not made out any exceptional circumstances to entertain the petition for entertaining the writ petition without availing alternative efficacious remedy available to the petitioner. The Appellate Authority can also deal with the questions of law arising out of the said order. Though the petitioner has raised several issues as already referred to aforesaid which are summarized by this Court in the earlier paragraphs of the judgment, since we are not

inclined to entertain this writ petition on the ground of the petitioner not having availed of alternative efficacious remedy available under section 26 of the MVAT Act, We are not dealing with those contentions raised by the petitioner.

80. We accordingly pass the following order :-

i). The writ petition is dismissed as not maintainable on the ground of alternative efficacious remedy under section 26 of the Maharashtra Value Added Tax Act, 2002 not availed by the petitioner. The prayer clauses (b) and (c) of the petition challenging the validity of section 26 of the Maharashtra Value Added Tax Act, 2002 are being decided in the case of ***United Projects vs. The State of Maharashtra & Anr.*** in Writ Petition No.2883 of 2018 and are thus not required to be decided in this petition.

ii). Interim relief granted by this Court on 10th September, 2020 to continue for a period of

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four weeks from today.

(S.M. MODAK, J.)

(R.D. DHANUKA, J.)

VASANT
ANANDRAO
IDHOL

Digitally signed by
VASANT ANANDRAO
IDHOL
Date: 2022.06.15
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