

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE ALEXANDER THOMAS

TUESDAY, THE 28TH DAY OF JANUARY 2020 / 8TH MAGHA, 1941

WP(C).No.1764 OF 2020(U)

PETITIONER/S:

K. J. MATHEW,
AGED 58 YEARS
S/O. K. I. JOHN, KUNNEL HOUSE, KULAYATTIKARA,
KANJIRAMATTOM, ERNAKULAM DISTRICT, PIN-682 315.

BY ADV. SRI. N. P. PRAJEESH

RESPONDENT/S:

- 1 STATE OF KERALA,
REPRESENTED BY ITS SECRETARY, DEPARTMENT OF TAXES,
GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM, PIN-695
001.
- 2 UNION OF INDIA,
REPRESENTED BY ITS SECRETARY, DEPARTMENT OF TAXES,
GOVERNMENT OF INDIA, NEW DELHI, PIN-110 001.
- 3 HINDUSTAN NEWSPRINT LIMITED,
NEWSPRINT NAGAR, KOTTAYAM, PIN-686 616.
- 4 INTERIM RESOLUTION PROFESSIONAL,
SAI PRASAD, 1ST FLOOR, NO.11, 12 AVENUE, ASOKA NAGAR,
CHENNAI-600 083.
- 5 STATE TAX OFFICER, (IB),
OFFICE OF THE STATE TAX OFFICER (IB), STATE GOODS AND
SERVICE TAX DEPARTMENT, KOTTAYAM, PIN-686 002.

OTHER PRESENT:

SMT. M. M. JASMINE, GOVT. PLEADER

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON
28.01.2020, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ALEXANDER THOMAS, J.

W.P.(C.) No. 1764 of 2020

Dated this the 28th day of January, 2020

JUDGMENT

The case set up in the W.P.(C.) is as follows :

That the petitioner is engaged in the business of providing supply of man power to various establishments as per their respective requisitions. Petitioner is a tax assessee having GSTN 32AEMP3886J1Z1. The 3rd respondent is subsidiary of Hindustan Paper Corporation Limited, a Government of India Enterprise. The winding up proceedings of the 3rd respondent company has been initiated and the 4th respondent herein was appointed as the Liquidator.

The petitioner had entered in to an agreement with the 3rd respondent in the year 2015 for up-keeping of various plants. As per the terms of agreement, the petitioner has remitted tax for 42 items for the various services mentioned therein. Similarly, the petitioner had also entered in to an agreement with the 3rd respondent for 20 items of services. As per the terms of the contract, the petitioner is not remitting tax for 20 items. The said agreements were subsequently extended from time to time.

In the year 2017, when Goods and Service Tax (hereinafter called GST) was introduced, the 3rd respondent has issued two separate work

orders to the petitioner for two different types of services. With regard to the services of 42 items, as mentioned above, a work order has been issued with effect from 01.07.2017 till 31.03.2018. Similarly, with regard to the 20 items of services, the 3rd respondent has issued a separate work contract and the validity of the said work contract is also with effect from 01.07.2017 to 31.03.2018. Thereafter, on the expiry of those work contracts, the 3rd respondent has issued Exhibits-P1 and P2 work contracts for the period from 01.07.2018 to 31.03.2019 for the said 42 and 20 items of services respectively.

On a perusal of Exhibit P1 work contract, it can be seen that the liability to pay Goods and Service Tax has been included as a statutory liability from the part of the petitioner herein. In compliance of the said terms of agreement, the petitioner has remitted GST for the 42 items mentioned in Exhibit P1. At the same time in Exhibit P2 work contract, which pertains to 20 items of services, the liability to pay GST has not been stipulated as a liability from the part of the petitioner. The petitioner being the service provider is not liable to pay GST in respect the said 20 items of services as per the terms of contract. The 3rd respondent being the service recipient is obliged to remit the GST in respect of 20 items of services in compliance of the terms and conditions of Exhibit P2 work contract.

The petitioner was under the bonafide belief that the respondents 3 and 4 have strictly complied the terms and conditions of the work contracts

and are paid GST in respect of 20 items stated in Exhibit P2 work contract without any fail. However, now the 5th respondent has issued Exhibits-P3 and P4 notices under Section 122 of the State Goods and Services Act demanding penalty for the year 2017-2018 and 2018-2019.

Exhibits P3 and P4 have been issued by the 5th respondent overlooking the liability of the respondents 3 and 4 to remit the GST for the said periods in terms of work contract. However, the 5th respondent is of the opinion that unless it is clarified by a court of law, they are unable to exempt the petitioner from paying the amount as demanded in Exhibits P3 and P4. The petitioner is highly aggrieved by Exhibits P3 and P4 notices issued by the 5th respondent.

2. The main contentions urged by the petitioner are as follows :

(a) As per the terms of Exhibit P1, the work contract for 42 items of services, the petitioner is liable to pay all taxes and duties including GST at the prevailing rate. At the same the liability to pay GST is absent in Exhibit P2, the work contract for 20 items of services. Obviously, in terms of Exhibit P1 contract, the petitioner is bound to pay the GST applicable to him. On the other hand, in terms of Exhibit P2, petitioner is not liable to pay GST.

(b) That the Apex Court in **Rashtriya Ispat Nigam Limited V. M/s Dewan Chand Ram Saran reported in 2012 (5) SCC 306** has held that “Nothing in law prevents a statutory assessee from entering into

agreement with another party that burden of any indirect tax arising out of obligations of promisor under contract would be borne by promisor and the contractor is liable to bear service tax in discharge of his obligations under contract.” The dictum also says that “Service tax is an indirect tax, and it is possible that it may be passed on. Therefore, an assessee can certainly enter into a contract to shift its liability of service tax.” Here in the case on hand, by stipulating a condition that the petitioner has to bear all taxes and duties including GST, the burden of the respondents 3 and 4 has been shifted as per Exhibit-P1 contract. However, in the absence of such clause in Exhibit-P2 contract, it cannot be said that the burden of the respondents 3 and 4 has been shifted to the petitioner.

(c) That Section 51 (2) of the Central Goods and Services Tax Act, 2017 “the amount deducted as tax under this section shall be paid to the Government by the deductor within ten days after the end of the month in which such deduction is made, in such manner as may be prescribed.” Therefore, being the deductor (service recipient) the 3rd respondent is bound to pay GST to the Government. Hence the issuance of Exhibits-P3 and P4 issued to the petitioner (service provider) ignoring the terms of work contracts are illegal and unjustifiable.

(d) That as per the dictum laid by the Apex Court in **Assistant Commissioner, Ekm V. Hindustan Urban Infrastructure Ltd. And Others reported in 2015 (3) SCC 745**, Liquidator is a dealer

under the provisions of General Sales Tax Act. Hence being the liquidator, the 4th respondent cannot wriggle out from his liability to pay GST applicable for the 3rd respondent company.

3. In the light of these averments and contentions, the petitioner has filed the instant W.P.(C.) with the following prayers :

- (i) *“Issue a writ of certiorari or any other appropriate writ, direction or order, quashing Exhibits P3 and P4 notices,*
- (ii) *Declare that the petitioner is not liable to pay Goods and Service Tax as demanded in Exhibits P3 and P4 as the petitioner had already shifted his burden to pay the same to the 3rd and 4th respondents in terms of work contract,*
- (iii) *Issue a writ of mandamus or any other appropriate writ, direction or order, directing the respondent Nos. 1,2 and 5 to drop the coercive steps pursuant to Exhibits P3 and P4.*
- (iv) *Issue a writ of mandamus or any other appropriate writ, direction or order directing the 3rd and 4th respondents to remit the Goods and Service Tax as demanded in Exhibits P3 and P4 within a time frame to be fixed by this Hon'ble Court.*
- (v) *And grant such other and further reliefs as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.”*

4. Heard Sri.M.P.Prajeesh, learned counsel appearing for the petitioner, Smt.M.M.Jasmine, learned Government Pleader appearing for the respondents 1 and 5, Sri.V. Krishna Menon, learned counsel appearing for R3 and Sri.P.Vijayakumar, learned Assistant Solicitor General appearing for R2, Union of India. In the nature of the orders proposed to pass in this petition, notice to R4 will stand dispensed with.

5. The respondent No.5, who has issued impugned Exts. P3 and P4, was directed to furnish instructions. Today, when the matter has been taken up for consideration, Smt.M.M.Jasmine, learned Government Pleader appearing for respondents 1 and 5 would submit on the basis of instructions of the 5th respondent that Exts. P3 and P4 are only notices and

decisions thereon has not been finalized in accordance with the law and it is for the petitioner to immediately respond to the same by filing his written objections and submissions in the matter, if any, without any further delay and thereafter, the matter will be decided, after affording reasonable opportunity of being heard to the petitioner etc.

6. The learned counsel appearing for the petitioner has made certain submissions that this Court may also order that before finalization of Exts. P3 and P4 proceedings, further coercive steps for the enforcement of the said proceedings may be kept in abeyance. The learned Government Pleader would submit that the said submission made by the petitioner is based on a misconception of fact and that Exts. P3 and P4 are only notices and as the matter has not so far been finalized, there is no question of setting in motion any steps for enforcement of the proposal therein, as it is only at the notice stage, which is yet to be finalized and it could not be finalized only because the petitioner has not so far responded to the same by submitting his written submissions in the matter.

7. The petitioner's main contention appears to be that going by the terms and conditions of Ext.P2 works contract agreement that the petitioner is only the subject provider, who is not liable to pay GST in respect of 20 items of services mentioned in Ext.P2 as per the terms of the contract therein and that as per the said terms and conditions of Ext.P2, the 3rd respondent being the service recipient is legally obliged to remit GST

in respect of the said 20 services in compliance with the terms and conditions of Ext.P2 works contract.

8. In that regard, Sri.M.P.Prajeesh, learned counsel appearing for the petitioner would place strong reliance on the judgments of the Apex Court in ***Rashtriya Ispat Nigam Ltd v. M/s.Dewan Chand Ram Saran*** [2012 (5) SCC 306] that nothing in law prevents the statutory assessee from entering into agreement with another party that burden of any indirect tax arising out of obligations of the promisor under the contract would be borne by promisor and the contractor is liable to bear service tax in discharge of his obligations under contract and that therein it has also been held that service tax is also indirect tax and it is possible that it may be passed on and therefore, an assessee can certainly enter into contract to shift its liability of service tax etc.

9. Further, the counsel for the petitioner would point out that decisions of the Apex Court as in ***Asst. Commissioner, Ernakulam v. Hindustan Urban Infrastructure Ltd. and others*** [2015 (3) SCC 745], wherein it has been held that a liquidator of a company under liquidation, is a dealer under the provisions of General Sales Tax Act and accordingly, it is contended that the 4th respondent, who is now appointed as the liquidator by the company law tribunal as per the provisions of the Companies Act, 2013, cannot wriggle out from the liability to pay the GST applicable from the 3rd respondent-company for whom he is now appointed

as the liquidator.

10. After hearing both sides, this Court is of the view that there is no necessity for this Court to adjudicate the abovesaid contentions raised by the petitioner regarding the merits of the matter. As rightly pointed out by the learned Government Pleader, the petitioner has not so far responded to the impugned notice as per Exts.P3 and P4 and it is for the petitioner to immediately respond to the same by giving his written submissions/written objections in the matter without any delay, at any rate, within a period of 2 weeks from the date of production of the certified copy of this judgment.

11. Further it is also ordered that the 5th respondent will have to issue notices to the petitioner as well as to R3 (M/s. Hindustan Newsprint Ltd.) and R4 (who is stated to be the liquidator of R3 Company) and the 5th respondent in its notice may direct the 4th respondent to give a report regarding the factual aspects raised by the petitioner on the basis of Ext. P2 and also the constitutional contentions raised by the petitioner thereon as aforementioned. In that regard, it is also ordered that for the purpose of convenience and easy reference, the counsel for R3 will ensure that a copy of the memorandum of this W.P.(C.) along with the copy of this judgment is forwarded to R4, without any further delay, so that R4 can give written submissions in the matter to R5, without any further delay.

12. Thereafter, respondent No.5 will afford reasonable opportunity of being heard to the petitioner, R3 and R4 and after adverting to and

considering the various contentions of the petitioner as noted hereinabove and contentions and submissions, if any of the other parties concerned, may render a considerable decision on the matters raised in the impugned Exts. P3 and P4 notices, without much delay. The entire process in this regard may be duly completed by the 5th respondent within 3-4 months from the date of production of the certified copy of this judgment.

With these observations and directions, the above W.P.(C.) will stand finally disposed of.

Sd/-

**ALEXANDER THOMAS,
JUDGE**

SKS

