

GAHC010042892017



**THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)**

Case No. : WP(C)/6138/2017

M/S ATANU GANGULY AND ANR
A PROPRIETORSHIP FIRM HAVING ITS PLACE OF BUSINESS AT I/IA,
VANSITTART ROW, ROOM NO. 7, 1ST FLOOR, KOLKATA-700001, REP. BY
ONE OF ITS PROPRIETOR SRI ATALANTIC GANGULY, R/O DR. GOPAL
CHATTERJEE, ROAD, SUKCHAR KOLKATA-700115

VERSUS

THE STATE OF ASSAM AND 7 ORS
REP. BY THE COMMISSIONER and SECRETARY TO THE GOVT. OF ASSAM,
FINANCETAXATION DEPTT., ASSAM SECRETARIAT, DISPUR, GUWAHATI-6

Advocate for the Petitioners : Ms. N. Hawelia, Advocate

Advocate for the respondents : Mr. B. Gogoi, SC,
Finance & Taxation Deptt.
Mr. S. C. Keyal, SC
Service Tax Department,
Govt. of India
Mr. B. Sarma, SC, Railways

BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH

Date of Hearing : 16.02.2024

Date of Judgment : 01.04.2024

JUDGMENT AND ORDER (CAV)

Heard Ms. N. Hawelia, the learned counsel for the petitioners and Mr. B. Gogoi, the learned Standing Counsel appearing on behalf of the Finance and Taxation Department of the Government of Assam as well as Mr. S. C. Keyal, the learned counsel appearing on behalf of the Service Tax Department of the Government of India.

2. The issue involved in the instant writ petition pertains to whether the transactions in relation to the hiring of two numbers of launch vehicles in connection with construction of the Bogibeel Bridge Project across the river Brahmaputra near Dibrugarh on the basis of the contract agreements dated 08.06.2009 and 04.07.2012 would come within the ambit of 'sale' as defined in Section 2 (43) of the Assam Value Added Tax Act, 2003 (for short, 'the Act of 2003') or it would be 'service' in terms with Section 65 (105) (zzzzj) of the Finance Act 1994.

3. Before dealing with the said question, this Court finds it relevant to take note of the brief facts which led to the filing of the instant writ petition.

4. The petitioner herein entered into an agreement on 08.06.2009 with Northeast Frontier Railway (Construction Organization) (hereinafter for short referred to as 'the Railway') whereby the petitioner agreed to supply two launch vehicles on hire charge basis in connection with the construction of the Bogibeel Bridge Project across the river Brahmaputra near Dibrugarh for two years. In terms with the said agreement, it was mentioned that the construction work has to be done on or before 29.12.2010. However, as the work was not completed, a fresh agreement was entered into containing similar terms and conditions on 04.07.2012. During the period of the said contracts, the respondent No.5, i.e. the Service Tax Department of the Government of India demanded from the petitioners to pay service tax on the whole contract value. On the other hand, the Finance and Taxation Department of the

Government of Assam also deducted tax on account of VAT from the petitioners. Under such circumstances, the petitioner filed an application before the Respondent No.2, i.e. the Commissioner of Taxes on 11.05.2015 seeking clarification in respect to the contract agreement dated 04.07.2012 as to whether the VAT was required to be paid in respect to the charges received from the respondent Nos.6 to 8. The respondent No.2 gave a clarification to the petitioners vide an order dated 06.06.2015 stating inter-alia that the VAT was not applicable on the charges received in respect to the said contract agreement. Thereupon, the petitioner filed another application on 21.07.2015 seeking clarification in respect to the contract agreement dated 08.06.2009 and the respondent No.2 gave a clarification to the petitioner vide order dated 28.08.2015 that the VAT was not applicable on the charges received in respect to the said contract as the same was purely a service contract.

5. The said two orders providing clarification was in terms with Section 105 of the Act of 2003. The petitioners thereupon applied for refund of an amount of Rs.30,09,287/- . The respondent No.3, i.e. the jurisdictional Superintendent of Taxes vide letter dated 09.09.2015 asked the petitioners or the legal representative to appear before him personally along with all relevant documents on 30.09.2015. The respondent No.3 thereafter vide the letter dated 30.09.2015 asked the Officers of the Railway to furnish the TDS certified challans in respect to the petitioner's firm. The TDS challans were accordingly submitted before the respondent No.3. The respondent No.3 instead of granting the refund vide another letter dated 01.10.2015 asked the proforma respondents, i.e. the Railway to provide the details of the cheque and the amount along with the date of submission of the cheque in respect to the TDS certificate of the petitioner. These documents were also furnished by the proforma respondent No.3 on 05.10.2015. Thereupon, the respondent No.3 vide another letter dated 05.10.2015 asked the petitioner to submit the details of the bills submitted to the Railway, copies of the TDS certificates and the rectified TDS certificates and the TDS challans. The respondent No.3 further informed the petitioner that the Form by which the said application was filed seeking refund was not in the proper manner and therefore the petitioner was asked to submit the application in the proper Format. The petitioner thereupon submitted again all available documents to the respondent No.3 and made a fresh application for refund under Form-37. The respondent No.3 thereupon referred the refund petition for suggestion to

the Commissioner of Taxes vide the communication dated 20.11.2015 as to whether the refund could be granted to the petitioner. Thereupon, it is seen from the averments made in the writ petition that there were no effective steps taken by the respondent authorities for refund of the entitlement to the petitioner except issuing a letter on 21.04.2016 informing certain clarifications have been sought from the Commissioner of Taxes.

6. It is further seen from a perusal of the writ petition that the Commissioner of Taxes- Respondent No.2 thereafter referred the matter to the Commissioner and Secretary to the Government of Assam, i.e. the Respondent No.4 for permission to review the clarificatory orders dated 06.06.2015 and 28.08.2015 wherein it was categorically mentioned that the two contracts in question were purely service contracts and did not involve any sale within the meaning of Section 2 (43) of the Act of 2003.

7. The permission was duly granted by an order dated 18.03.2017 for review of the clarificatory orders and the respondent No.2, i.e. the Commissioner of Taxes thereupon issued a clarificatory order dated 03.04.2017 thereby setting aside the earlier clarificatory orders dated 06.06.2015 and 28.08.2015.

8. It is under such circumstances, the instant writ petition was filed challenging the order dated 18.03.2017 by which the permission was granted by the respondent No.4 to review the earlier clarificatory orders and the order dated 03.04.2017 by which the earlier clarificatory orders were reviewed thereby holding that the contracts in question were 'sale' within the meaning of Section 2 (43) of the Act of 2003. The petitioners have also sought for other consequential reliefs on the basis thereof.

9. The instant writ petition was filed on 19.09.2017. This Court vide an order dated 22.09.2017 issued notice and further directed that no coercive measure should be taken against the petitioners pursuant to the impugned review order dated 03.04.2017 of the Commissioner of Taxes, Assam.

10. The record reveals that the respondent No.2 filed an affidavit-in-opposition wherein the order dated 03.04.2017 was stated to be in accordance with law on the ground that the perusal of terms and conditions of both the contracts dated 08.06.2009 and 04.07.2012

would come within the ambit of 'sale' within the meaning of Section 2 (43) of the Act of 2003.

11. The records further show that an additional affidavit-in-opposition was filed by the respondent No.2 whereby the order dated 26.11.2010 was brought on record. In addition to the above pleadings, the petitioners have filed an additional affidavit on 12.02.2024 to bring on record certain documents depicting that the vessel which was earlier provided pursuant to the agreements was replaced on requirement and request made by the proforma respondent authorities. It was further mentioned in the said additional affidavit that the proforma respondent does not have a right over a particular vehicle and the vehicle is not the main criteria but performance of the work is the main criteria through the launch vehicle provided by the petitioners as per the specifications. This Court also finds it relevant to take note of the additional affidavit filed on 15.02.2024 whereby the entire set of contract agreements dated 08.06.2009 and 04.07.2012 were brought on record.

12. In the backdrop of the above, let this Court to take note of the submissions made on behalf of the learned counsels for the parties.

(A). Ms. N. Hawelia, the learned counsel for the petitioners submitted that the test to be applied as to whether there was any element of sale within the meaning of transfer of right to use goods or was it purely a service contract has to be discerned on the basis of stipulations in the contract. The learned counsel for the petitioners submitted that in the case of *Bharat Sanchar Nigam Ltd. and Another vs. Union of India and Others*, reported in (2006) 3 SCC 1, the Supreme Court categorically dealt with the issue as regards the essence of the right under Article 366 (29A)(d) of the Constitution and opined that the essence of the right under the said Article is that it relates to user of goods. It may be that the actual delivery of the goods is not necessary for effecting the transfer of the right to use the goods but the goods must be available at the time of transfer, must be deliverable and delivered at some stage. The learned counsel for the petitioner further drawing the reference to paragraph No.75 of the said judgment submitted that if the goods or what is claimed to be goods are not deliverable at all by the provider to the

user, the question of the right to use those goods, would not arise. On the basis of that, the learned counsel for the petitioner drawing reference to various terms and conditions stipulated in the special conditions of contract submitted that the possession of the launch vehicle remained with the petitioner. The learned counsel for the petitioners further drew the attention of this Court to the concurrent opinion of His Lordship, Dr. A. R. Lakshmanan, J. (as His Lordship then was). The learned counsel submitted that in the concurring opinion, various attributes to constitute a transaction for transfer of the right to use the goods were detailed out. The learned counsel for the petitioners further submitted that the said attributes which would constitute a transaction for transfer of the right to use goods have been applied and approved by the Supreme Court time and again in various judgments. In that regard, the learned counsel referred to *Great Eastern Shipping Co. Ltd. vs. State of Karnataka*, reported in (2020) 3 SCC 354; *Commissioner of Service Tax vs. M/s Adani Gas Limited*, reported in (2020) 81 GSTR 1 (SC); *Commissioner of Service Tax, Delhi vs. Quick Heal Technologies Ltd.*, reported in (2023) 5 SCC 469 as well as also the recent judgment of the Supreme Court in the case of *M/s K. P. Mozika vs. Oil and Nature Gas Corporation Ltd.*, reported in (2024) 122 GSTR 1 (SC). The learned counsel for the petitioners therefore submitted that if test which has been laid down at paragraph No.97 of the judgment rendered by the Supreme Court in the case of *Bharat Sanchar Nigam Ltd.* (supra) are applied to the various terms of contracts, it would be seen that the contracts in question do not satisfy the attributes to constitute a transaction for transfer of right to use goods.

(B). On the other hand, Mr. B. Gogoi, the learned counsel appearing on behalf of the Finance and Taxation Department of the State of Assam submitted that on a plain reading of Sub-Clause (d) of Article 366 (29A) of the Constitution would show that the contract for transfer of right to use is taxable under the VAT regime and the perusal of the terms and conditions of the contracts between the petitioners and the Railway would show that it would be a deemed sale for which VAT is applicable as per the Schedule

rate of tax. The review order dated 03.04.2017 was supported by the learned Standing Counsel stating that the said review was made as per the provisions of the Act of 2003. He further submitted that the contracts in question would be deemed sale in view of the fact that the launch vessels were hired by the Railway and therefore there is transfer of the right to use against the payment made by the Railway. The learned Standing Counsel relied upon the judgment of the Supreme Court in the case of ***Great Eastern Shipping Co. Ltd.*** (supra) and submitted that the instant case is squarely covered by the said judgment rendered. He submitted that this judgment of the Supreme Court in ***Great Eastern Shipping Co. Ltd.*** (supra) was a judgment rendered by a larger Bench than the Bench rendering the judgment in the case of ***M/s K. P. Mozika*** (supra) for which the judgment in the case of ***Great Eastern Shipping Co. Ltd.*** (supra) was binding upon this Court.

(C). Mr. S. C. Keyal, the learned counsel appearing on behalf of the Service Tax Department of the Government of India submitted that the contract in question involves service and as such service tax is liable to be paid and the petitioners have duly paid the service tax.

13. In the backdrop of the above submissions, let this Court therefore decide as to whether the contracts dated 08.06.2009 and 04.07.2012 are transactions for transfer of right to use the goods. For deciding the same, this Court finds it apposite to take note of the development of law in respect to the tax on transfer of the right to use any goods. Prior to the 46th Amendment to the Constitution of India, composite contracts such as work contracts, hire purchase contacts and catering contracts were not assessable as contract for sale of goods. The law which was holding the field at that point of time was the law declared by the Supreme Court in the case of ***State of Madras vs. Gannon Dunkerley & Co. (Madras) Ltd.***, reported in ***(1958) 9 SCC 353*** wherein the scope of Entry 48 in List II of Schedule **VII to the Government of India Act, 1935** was dealt with. It was observed that the words “sale of goods” in the said Entry would not cover the sale sought to be

taxed by the State Government under the Madras General Sales Tax Act, 1939. It was observed that the classical concept of sale was to apply to the Entry in the Legislative List wherein there has to be three essential components to constitute a transaction of sale, namely:-

- (i) an agreement to transfer title,
- (ii) supported by consideration, and
- (iii) an actual transfer of title in the goods.

The Supreme Court further held in the said judgment that in absence of any one of these elements, there was no sale. The said proposition of law was followed by the Supreme Court as well as by the High Courts, in subsequent judgments.

14. A problem arose therefore relating to the power of the State to levy tax on sale of goods on works contract, hire purchase transactions and on transfer of controlled commodities for which a reference was made to the Law Commission by the Government of India seeking recommendations. The Law Commission submitted its Report on 1974, on a consideration of the scope of levy of sales tax by the State Government in respect of work contracts, hire purchase transactions and also transfer of control commodities by virtue of statutory orders. The Law Commission in its report noted that these transactions resemble sales in substance and suggested three drafting devices for conferring the power of taxing these transactions on the States, viz.:-

- (i) amending the State List, Entry-54, or
- (ii) adding a fresh Entry in the State List, or
- (iii) inserting in Article 366 a wide definition of “sale” so as to include work contract.

The Law Commission in its recommendation preferred the last alternative. On the basis thereof, the Constitution (Forty Sixth Amendment) Act, 1982 was brought in force and Article 366 (29A) was amended. The said Article 366 (29A) read as under:-

“(29A) "tax on the sale or purchase of goods" includes—

(a) a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;

(b) a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;

(c) a tax on the delivery of goods on hire-purchase or any system of payment by installments;

(d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

(e) a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;

(f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration, and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made;”

15. Let this Court briefly analyse what Article 366 (29A) deals with. Sub-clause (a) of the said Article covers a situation where the consensual element is lacking and therefore the said Clause normally takes place in the case of involuntary sale. Sub-clause (b) covers cases relating to works contract. This Clause was brought into the fold of the tax on sale of purchase of goods in order to take care of the situation which arose in view of the difficulties faced on account of the judgment in the case of **Gannon Dunkerley** (supra). The effect of Sub-clause (b) therefore is that the transfer of property in goods involved

in execution of works contract was deemed to be a sale. Sub-clause (c) deals with the hire-purchase where the title to the goods is not transferred. However, by fiction of law, it is treated as sale. In terms with Sub-clause (d), which the most pertinent, for the purpose of the instant proceedings, stipulates that the title of the goods remains with the transferor who only transfer the right to use the goods to the purchaser. Sub-Clause (e) covers the cases which in law may not have amounted to sale because the member of an unincorporated association would have in a sense be both the supplier and the recipient of the supply of goods. However, by virtue of Clause (e) such transactions comes within the ambit of deemed sale. Sub-Clause (f) pertains to contracts pertaining to supply, by way of or as part of in service or in any other manner whatsoever of goods being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration. The said sub-clause (f) was inserted in order to overcome the decision of the Supreme Court in the case of *State of Punjab vs. Associated Hotels of India Ltd.*, reported in *(1972) 29 STC 474*.

16. Therefore, from the above Sub-clauses of Article 366 (29A) of the Constitution, it would be seen that they serve to bring transactions where one or more of the essential ingredients of ‘sale’ as defined in the Sale of Goods Act, 1930 are absent, within the ambit of the purchase and sale for the purpose of levy of sales tax. By the said amendment, it now specifically allows specific composite contracts, viz., works contract; hire-purchase contracts; catering contracts by legal fiction to be divisible contracts where the sale element could be isolated and be subject to sales tax. On the basis of the amendment so carried out to Article 366 (29A) of the Constitution, the State Sales Tax Legislation had also adopted substantially a similar definition as would be seen from a perusal of Section 2 (43) of the Act of 2003.

17. In the backdrop of the above, let this Court deal with Article 366 (29A) (d) of the Constitution which deals with the transfer of right to use the goods. The majority

opinion of the Supreme Court in the case of *Bharat Sanchar Nigam Ltd.* (supra), held that the essence of the right under Article 366 (29A) (d) of the Constitution is that it relates to user of the goods. It was observed that the actual delivery of the goods is not necessary for affecting the transfer of right to use the goods but the goods must be available at the time of transfer, must be deliverable and delivered at some stage. The Supreme Court further observed that if the goods, or what is claimed to be goods by the respondents, are not deliverable at all by the providers to the user, the question of the right to use those goods, would not arise. From, the above observations, not only it is clear that the goods are required to be delivered at some stage but another aspect is implicit as regards the identity goods or for that matter the goods are specifically required to be identified as per the consensus of the parties in order to come within the ambit of transfer of right to use the goods.

18. At this stage, this Court finds it very pertinent to take note of Article 366 (12) of the Constitution which defines the word ‘goods’ for the purpose of the Constitution as including “all materials, commodities, and articles”. In Section 2 (7) of the Sales of Goods Act, 1930 the word “goods” is defined as every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale. In the Act of 2003, the term “goods” has been defined in Section 2 (20) of the Act of 2003 to mean all materials, commodities and articles and all other kinds of movable property, whether tangible or intangible and includes as per sub-clause (iii) all materials (whether as goods or in some other forms involved in the execution of works contract, transfer of the right to use or hire purchase or payment by installments or those to be used in the fitting out, improvement or repair of movable or immovable property properties.

19. The concurring opinion in *Bharat Sanchar Nigam Ltd.* (supra) is equally important to note, if not more, in view of the fact that in the concurring opinion, the five attributes

to constitute a transaction for transfer of right to use the goods was clearly delineated. It was observed at paragraph No.97 of the said judgment that for constituting a transaction for transfer of the right to use of goods, the transactions must have the following five attributes, namely:-

- (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 the legal right to use the goods-consequently all legal consequences of such use including any commission or licenses required therefore should be available to the transferee;
- (d) for the period during which the transferee has such legal right, it has to be to the exclusion of the transferor. It was observed that this was a concomitant the necessary commitment of the plain language of the statute, viz. a “transfer of right to use” and not merely a license 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 right to others.

20. It was further observed in the concurring opinion that all these attributes are required for constituting a transaction for transfer of right to use the goods. The said five attributes test constituting the transfer of the right to use the goods had been applied and approved by the Supreme Court in its subsequent judgments rendered in the cases of *Great Eastern Shipping Co. Ltd.* (supra); *M/s Adani Gas Limited*, (supra); *Quick Heal Technologies Ltd.*, (supra) as well as also in *M/s K. P. Mozika* (supra).

21. This Court finds it very relevant at this stage to take note of paragraph No.53 of the judgment in the case of *Quick Heal Technologies Ltd.*, (supra) wherein the Supreme Court while approving the five attributes test laid down in the concurrent opinion in the case of

Bharat Sanchar Nigam Ltd. (supra) summed up the various principles in respect to transfer of right to use the goods which being relevant are reproduced herein under:-

“53. The following principles to the extent relevant may be summed up:

53.1. The Constitution (Forty-sixth Amendment) Act intends to rope in various economic activities by enlarging the scope of “tax on sale or purchase of goods” so that it may include within its scope, the transfer, delivery or supply of goods that may take place under any of the transactions referred to in sub-clauses (a) to (f) of clause (29-A) of Article 366. The works contracts, hire purchase contracts, supply of food for human consumption, supply of goods by association and clubs, contract for transfer of the right to use any goods are some such economic activities.

53.2. The transfer of the right to use goods, as distinct from the transfer of goods, is yet another economic activity intended to be eligible to State tax.

53.3. There are clear distinguishing features between ordinary sales and deemed sales.

53.4. Article 366(29-A)(d) of the Constitution implies tax not on the delivery of the goods for use, but implies tax on the transfer of the right to use goods. The transfer of the right to use the goods contemplated in sub-clause (d) of clause (29-A) cannot be equated with that category of bailment where goods are left with the bailee to be used by him for hire.

53.5. In the case of Article 366(29-A)(d) the goods are not required to be left with the transferee. All that is required is that there is a transfer of the right to use goods. In such a case taxable event occurs regardless of when or whether the goods are delivered for use. What is required is that the goods should be in existence so that they may be used.

53.6. The levy of tax under Article 366(29-A)(d) is not on the use of goods. It is on the transfer of the right to use goods which accrues only on account of the transfer of the right. In other words, the right to use goods arises only on the transfer of such right to use goods.

53.7. The transfer of right is the sine qua non for the right to use any goods, and such transfer takes place when the contract is executed under which the right is vested in the lessee.

53.8. The agreement or the contract between the parties would determine the nature of the contract.

Such agreement has to be read as a whole to determine the nature of the transaction. If the consensus ad idem as to the identity of the good is shown the transaction is exigible to tax.

53.9. *The locus of the deemed sale, by transfer of the right to use goods, is the place where the relevant right to use the goods is transferred. The place where the goods are situated or where the goods are delivered or used is not relevant.”*

22. In the case of **M/s K. P. Mozika** (supra) which is the latest judgment on the point of transfer of the right to use goods, it was observed at paragraph No.33 that the contract between the parties will have to be tested on the touch stone of the five tests laid down in the concurring opinion rendered in the case of **Bharat Sanchar Nigam Ltd.** (supra). It was observed that contract will be covered by Sub-Clause (d) of Clause 29A of Article 366 of the Constitution provided all the five conditions laid down are fulfilled. Further to that, the Supreme Court observed that there is distinction between transferring the right to use the goods and merely a license to use goods in as much as in every case where the owner of the goods permits another person to use the goods, the transaction need be of the transfer of the right to use goods. It can be simply a license to use the goods which may not amount to transfer of the right to use the goods.

23. It may be very appropriate at this stage to take into consideration that the question before the Supreme Court in the case of **M/s K. P. Mozika** (supra), pertained to agreements for hiring of various cranes, trucks, buses, transportation of petroleum products by vehicles, hiring trailers, hiring water tankers and for hiring of scrapping winch chassis. The Supreme Court after taking into account the various clauses of the contracts in those cases came to an opinion that the contracts do not reflect the intention on the part of the contractor to transfer the right to use the goods. It was observed that the contracts in relation to hiring of tankers for transportation of goods stipulated that once the tankers provided by the contractors are loaded with goods, the entire responsibility of their safe transit, including avoiding contamination, delivery and unloading at the destination is of the contractor. It was therefore observed that the test was not satisfied, and therefore, it

was impossible to conclude that there is a transfer of right to use tankers in favour of the Indian Oil Corporation Limited. In paragraph No.42 of the said judgment, the Supreme Court categorically observed that the transfer of the right to use will involve not only possession, which may be granted at some stage (after execution of the contract) but also the control of the goods by the user. It was observed that when the substantial control remains with the contractor and not handed over to the user, there is no transfer of the right to use the goods, vehicles, cranes, tankers etc. Whenever there is no such control on the goods vested on the person to whom the supply is made, the transaction would be of rendering service coming within the meaning of Section 65 (105) (zzzzj) of the Finance Act, 1994 after the said provision came into force. Paragraph No.42 of the said judgment is quoted herein under:-

“42. Essentially, the transfer of the right to use will involve not only possession, which may be granted at some stage (after execution of the contract), but also the control of the goods by the user. When the substantial control remains with the contractor and is not handed over to the user, there is no transfer of the right to use the vehicles, cranes, tankers, etc. Whenever there is no such control on the goods vested in the person to whom the supply is made, the transaction will be of rendering service within the meaning of Section 65(105) (zzzzj) of the Finance Act after the said provision came into force.”

24. In the backdrop of the above law, let this Court therefore take note of the respective clauses of the two contracts agreements dated 08.06.2009 and 04.07.2012 which are similar in content. The contracts relate to hiring of two numbers of launch vessels in connection with the construction of the Bogibeel Bridge across river Brahmaputra near Dibrugarh. The Schedule of Rates and their approximate quantities mentioned about the description of the items, i.e. hire charge per launch fitted with 10 KVA DG set for essential services which shall include the cost of operators/machines etc. deployed for running and operation of the launch as per the IWAI regulations complete in all respect. The second description of the items shows “running charge of launch vessel including cost of all consumable including the cost of the operators etc.

complete in all respect. The third description of the items is in respect for 10 KVA DG set including cost of all consumable/hire charges etc. complete for essential services in launch vessel.

25. The said agreement contains a Chapter stipulating the Special Specifications. In terms with Clause-A which is the “Objective and the Area of Work”, it would transpire that the launch vessels shall be operated from Bogibeel Ghat to Kareng Chapor Ghat on North Bank in connection with construction of Bogibeel Bridge across river Brahmaputra near Dibrugarh and any other project related locations as directed by the Engineer. It was stipulated that the launch cannot be used by the contractor for any other purposes during the contract period without the specific permission of the Railway Authorities. The said stipulation therefore also implies that the launch vessels can be used for any other purpose but with the specific permission of the Railway Authorities.

26. Clause B of the Special Specifications stipulates the technical and special specifications of the launch vessels. A perusal of these technical and the special specifications shows that the petitioners were required to provide launch vessels satisfying those technical and special specifications. Therefore, there was no specific identity to a particular launch vessel. What was required was placing the service of two launch vessels satisfying those technical and special specifications.

27. This Court further finds it apropos to take into consideration some of the other terms which are relevant for the purpose of adjudications of the instant proceedings. Clauses 2, 3, 4, 13, 14, 15, 17, 18, 36, 37, 38, 39, 48 & 49 are reproduced herein under:-

“2. Each launch shall be provided with a properly qualified master/sarang and an Engine Driver having marine Certificate, in addition to four numbers of Khalasi and one cook (who knows cooking well) for survey/inspection party and touring officers in the launch | shall be provided.

3. The launches shall be provided with adequate number of qualified crew having relevant

statutory certificates, which shall be produced for verification as and when demanded by Engineer-in-charge (EIC). In addition, adequate and suitable helping hands for proper operation of the various activities connected with dredging shall be provided.

4. The tenderer shall clearly indicate about number of launches/tugs owned by him or under valid lease agreement with other owner and shall furnish supporting documents for the same.

13. Routine repairs and maintenance works shall be adjusted with mutual discussion with Engineer in charge such that the overall works schedule is not affected. In total maximum 48 hours may be allowed per month for maintenance of engines and other machineries, and payments for this period is allowable.

14. The contractor shall bear the cost for running of engine for charging battery of the launch/tug to keep the launch/tug in tip-top condition with full voltage electricity. Engine RPM meter shall be provided in the launch preferably in the wheelhouse.

15. Non-availability of launches for service due to non-compliance of instruction of Engineer's representative shall be considered as disqualification of the contractor to claim hiring charges for the launch for the period.

17. In case of mechanical defects or any other defects or safety reasons the launch/tug is not fit for further sailing, similar vessel with same facilities shall have to be provided in replacement under same terms and conditions within seven days temporarily.

18. The Engine body and other machineries of the launch/tug shall be in good and tip-top condition.

36. The contractor shall maintain log-book with a running serially paged register for each launch/tug for recording all movements of the launch/tug. The log-book so maintained must be got countersigned every day by the Engineer-in-Charge or his authorized representative. One copy of the logbook shall be enclosed with the running bill.

37. The running charges including cost of POL shall be paid to the contractor strictly on the basis of actual movement of the launches, which is entered and countersigned in the logbook.

38. The contractor shall at all times undertake reasonable precautions for safety of Railway

officials & Staff in the performance of their duties and other crew of launches and shall comply with all applicable provisions of the safety laws drawn up by the State/Central District Authorities, Municipalities and other Government Authorities/Departments of Government of India etc. The contractor shall comply with all provisions of safety handbook approved by the Ministry of Irrigation and Power (Govt. of India) and “Safety Manual”.

39. In case of loss or damage to Railway equipment or materials due to carelessness/negligence of any crew of the launch/tug, the contractor shall be liable to pay the amount to recover such loss or to rectify the damage so caused. The amount to be paid by the contractor for such eventuality shall be decided by the Engineer-in-Charge and shall be binding on the contractor.

48. An attendance register to be maintained for the vessel crew. The same is to be fot counter signed by the Engineer's representatives everyday.

49. Adequate number of substitute hands shall be provided as required on the launch/tug for continuing their operation, if any member of crew is absent or proceeds on leave.”

28. From the above terms of the contract, it would be seen that the petitioners have an option of replacing the launch vessel in case one of the launch vessels was not working properly (clause 17). The petitioners are liable to take care of legal consequence of using the launch vessels (clauses 38 & 39). The petitioners must maintain the vessels and it is for the petitioners to pay for consumable like fuel, oil etc. (clauses 13, 14 & 18). Even the launch vessels must be moved and operated by the crew members appointed by the Petitioners (clauses 2 & 3). Moreover, in case of mishap or an accident in connection with the launch vessels or in connection with the use of the launch vessels or as a consequence thereof, the entire liability would be on the petitioners and not on the Railway (clauses 38 & 39). Thus, in short, the contracts in question are for providing the service of the launch vessels to the Railways. The reason is that the Railways are not required to face legal consequences for using the launch vessels supplied by the Petitioners . Therefore, the test laid down in Clause (c) & (d) of paragraph No.97 of the concurring opinion in **Bharat Sanchar Nigam Ltd.** (supra) are not fulfilled to constitute the

transaction of right to transfer the use of the vessels.

29. It is also pertinent to observe that on a conjoint reading of the above quoted clauses, it would on the other hand appear that the use of launch vessels provided by the Petitioners to the Railways were by way of only permissive use. Though the launch vessels are used for carrying out the works as suggested by the Railways, the entire control over the launch vessels are retained by the Petitioners. At the cost of repetition, it is again reiterated that the Petitioners provides the crew members for operating the crane; it is the Petitioners who have to pay for the fuel, oil etc., for maintenance, for loss or damage of the launch vessels, for staff of the Petitioners, for any loss to any third party, staff as well as the properties of the Railways.

30. This Court, at this stage finds it relevant to take note of the submission made by the learned counsel for the respondent-Finance and Taxation Department to the effect that the issue involved herein is squarely covered by the judgment of the Supreme Court in the case of *Great Eastern Shipping Co. Ltd.* (supra). In the opinion of this Court, the said submission is fallacious. The reason being that the law laid down in the case of *Bharat Sanchar Nigam Ltd.* (supra) till *M/s K. P. Mozika* (supra) continues to be the same. In fact, in the judgment of the Supreme Court in the case of *M/s K. P. Mozika* (supra), it was duly observed at paragraph No.32 that in the case of *Great Eastern Shipping Co. Ltd.* (supra), the three Judges Bench had also approved the test as laid down by Dr. A. R. Lakshmanan, J. (as His Lordship then was) in the case of *Bharat Sanchar Nigam Ltd.* (supra). It is however relevant to take note of that the facts in the case of *Great Eastern Shipping Co. Ltd.* (supra) was different from the facts involved in the instant proceedings in as much as a perusal of the judgment in the case of *Great Eastern Shipping Co. Ltd.* (supra) would show that as per the Agreement entered into between the parties in the case of *Great Eastern Shipping Co. Ltd.* (supra), all the attributes of paragraph no.97 of the judgment in *Bharat Sanchar Nigam Ltd.* (supra) were satisfied. Paragraph nos.36 & 37 of the judgment in *Great Eastern Shipping Co. Ltd.* (supra) are quoted herein below:-

36. In a concurring opinion, Dr Ar. Lakshmanan, J. in BSNL observed:

“97. To constitute a transaction for the transfer of the right to use the goods, the transaction must have the following attributes:

- (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 therefore 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.”

37. The charter party agreement qualifies the test laid down by this Court. Applying the substance of the contract and the nominal nature test, the vessel was available when the agreement for the right to use the goods has taken place. The vessel was available at the time of transfer, deliverable, and delivered and was at the exclusive disposal for six months round the clock with the charterer port trust. The use of licence and permission was at the disposal of the charterer and to the exclusion of the contractor/transferor. It was not open to the contractor to permit the use of the vessel by any other person for any other purpose.”

31. However, in the instant case, the terms of the contracts were similar to the terms in the case of *M/s K. P. Mozika* (supra). The same would be seen from a perusal of paragraph No.35 of the said judgment for which the same is reproduced herein bellow:-

“35. On a conjoint reading of the aforesaid terms of the contract, it is apparent that the contractor has an option of replacing the cranes in case one of the cranes was not working properly. Only the contractor is liable to take care of the legal consequences of using the

cranes. The contractor must maintain the cranes, and it is for the contractor to pay for consumables like fuel, oil, etc. Even the cranes must be moved and operated by the crew members appointed by the contractor. Moreover, in case of any mishap or accident in connection with the cranes or connection with the use of the cranes or as a consequence thereof, the entire liability will be of the contractor and not of the ONGC. Thus, in short, the contract is for providing the service of cranes to ONGC. The reason is that the transferee (ONGC) is not required to face legal consequences for using the cranes supplied by the contractor. Therefore, the tests laid down in clauses (c) and (d) of paragraph 97 of the decision of Dr AR Laxmanan, J are not fulfilled in this case. Moreover, on a conjoint reading of the aforesaid clauses, it appears that the use of the cranes provided by the contractor to ONGC will be by way of only a permissive use. Though the cranes are used for carrying out the work as suggested by ONGC, the entire control over the cranes is retained by the contractor, inasmuch as it is the contractor who provides crew members for operating the cranes, it is the contractor who has to pay for fuel, oil, etc. and for maintenance of any loss or damage to the equipment of the contractor, staff of the contractor, any third party and staff and property of ONGC. Therefore, we find that as regards the contract to provide cranes, the finding of the High Court that there was a transfer of the right to use cranes was not correct as the transactions do not satisfy all the five tests referred to above."

32. Under such circumstances, this Court is of the unhesitant opinion that the contracts in question to provide the launch vessels would not come within the ambit of transfer of right to use the launch vessels. They are purely service contracts. Paragraph No.42 of the judgment in the case of **M/s K. P. Mozika (supra)** as quoted above, applies to the facts of the instant case.

33. In view of the above analysis and observations made to the effect that there is no transfer of right of use of the launch vessels in favour of the Railways, the contracts in question would come within the ambit of service contracts as stipulated in Section 65 (105)(zzzzj) of the Finance Act, 1994. The consequential effect of the said observation and declaration is that the impugned order dated 03.04.2017 stands set aside and quashed and the clarifications so given by the respondent No.2 on 28.08.2015 and

06.06.2015 stands restored. The respondents therefore are further directed to act on the basis of the clarification orders dated 28.08.2015 and 06.06.2015 and take appropriate steps for processing the application for refund of the petitioners as sought for at the earliest.

34. In view of the above discussion and observations, the instant writ petition stands allowed. However, there shall be no costs.

JUDGE

Comparing Assistant