



GAHC010176012015

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

Case No. : WP(C)/2286/2015

M/S ANAMIKA MOTORS
GAR ALI ROAD, RAJABARI, JORHAT- 785014, REP. BY ITS MANAGING
PARTNER SRI RAJENDRA KUMAR GOYAL, R/O- DOCTORS LANE,
BHAGAWATI SADAN, JORHAT- 785001.

VERSUS

THE STATE OF ASSAM AND 8 ORS
REP. BY THE COMMISSIONER AND SECY. TO THE GOVT. OF ASSAM,
FINANCE TAXATION DEPTT., DISPUR, GUWAHATI.

2:THE COMMISSIONER OF TAXES
ASSAM
KAR BHAWAN
DISPUR
GHY- 6.

3:THE ADDL. COMMISSIONER OF TAXES
ASSAM
KAR BHAWAN
DISPUR
GHY- 6.

4:THE DY. COMMISSIONER OF TAXES
JORHAT ZONE
JORHAT.

5:THE SUPERINTENDENT OF TAXES
JORHAT
JORHAT.

6:THE UNION OF INDIA



REP. BY THE SECY. TO THE GOVT. OF INDIA
MINISTRY OF FINANCE
GOVT. OF INDIA
NEW DELHI.

7:THE COMMISSIONER OF CENTRAL EXCISE AND SERVICE TAX
DIBRUGARH
OFFICE OF THE COMMISSIONER OF CENTRAL EXCISE AND SERVICE TAX
DR. LILA GOGOI PATH
DIBRUGARH- 786003.

8:THE DY. COMMISSIONER OF CENTRAL EXCISE
JORHAT
OFFICE OF THE ASSTT. COMMISSIONER OF CENTRAL EXCISE
JORHAT DIVISION
2ND FLOOR
AKSHAY APARTMENT
STATION GODOWN ROAD
JORHAT.

9:THE SUPERINTENDENT OF CENTRAL EXCISE AND SERVICE TAX
SERVICE TAX CELL
OFFICE OF THE ASSTT. COMMISSIONER OF CENTRAL EXCISE
JORHAT DIVISION
2ND FLOOR
AKSHAY APARTMENT
STATION GODOWN ROAD
JORHAT

BEFORE

HON'BLE MR. JUSTICE KALYAN RAI SURANA

For the petitioner	: Dr. Ankit Todi, Advocate
For respondent Nos.1 to 5	: Mr. D. Saikia, Advocate General
	: Mr. A. Chaliha.
For respondent Nos.6 to 9	: Ms. G. Hazarika
Date of hearing	: 29.11.2021
Date of judgment	: 11.01.2022

JUDGMENT AND ORDER**(CAV)**

Heard Dr. Ankit Todi, learned counsel for the petitioner. Also heard Mr. D. Saikia, Advocate General for the State, assisted by Mr. A. Chaliha, learned standing counsel for the Finance Department, representing respondent nos. 1 to 5 as well as Ms. G. Hazarika, learned standing counsel for the Central Excise & Service Tax Department, appearing for respondent nos. 6 to 9.

2) By this writ petition filed under Article 226 of the Constitution of India, the petitioner has assailed (i) the assessment order dated 10.08.2010 (Annexure-5) passed by the Deputy Commissioner of Taxes, Jorhat (respondent no.4), and (ii) the revisional order dated 18.02.2015 (Annexure-7) passed by the Additional Commissioner of Taxes, Assam (respondent no.3). The respondent authorities had considered paint consumed during restoration and reconditioning of vehicles at Authorised Service Station as transfer of property of paints and nature of works was considered as works contract in spite of the fact that on the same work, the Central Government was collecting service tax. Thus, the only issue which is required to be determined is whether Assam Value Added Tax (VAT for short) can be levied on paints by the Taxation Department of the State by treating the nature of works as works contract resulting in transfer of property in paints during the restoration and reconditioning work.

3) Referring to the statements made in the writ petition, the learned counsel for the petitioner has submitted that when damaged vehicles come into the workshop of the petitioner, the condition of the vehicle is

inspected and if any denting and painting service is required to be provided for reconditioning and/or restoration of the damaged panels of vehicles, such repair work is carried out with the aid of expert labourers/painters. Accordingly, it is submitted that any painting and/or denting materials that are consumed in the process would fall within the realm of a contract of service. It is submitted that in ordinary sense as understood by a common man, no one would send a vehicle for denting and painting with a view to purchase paint and other denting and painting consumables and therefore, it is contended that such contract for service does not involve or result in a transfer of property in such goods. Thus, it is submitted that no tax can be levied under the Assam VAT Act.

4) By referring to the C.B.E.C. Circular No.699/15/2003-CX dated 05.03.2003 (Annexure-9), the learned counsel for the petitioner has submitted that on account of denting and painting services rendered by the petitioner, Service Tax is being paid since the year 2001 as per the Finance Act, 1994 on the gross receipt of the value for such work. Therefore, it is contended that if the petitioner is required to pay VAT on the same nature of work, it would amount to double incidence of tax by the State on the same component on which the Central Government is realizing Service Tax from the petitioner. It is submitted that several substantial questions of law as mentioned in para-32 of the writ petition arise for determination in this case. In support of his submissions, the learned counsel for the petitioner has placed reliance on the following cases, viz., *S.S. Photographic Lab Pvt. Ltd. v. State of Assam & Ors.*, (2011) 3 NEJ 638, and (ii) *Dainik Janambhumi v. State of Assam*, (2003) 1 NEJ 1. It is also submitted that the decision of the Division Bench of this Court in the case of *S.S. Photographic Lab Pvt. Ltd. (supra)*, was unsuccessfully assailed in

Supreme Court of India and that as no appeal was preferred against the decision in the case of *Dainik Janambhoomi (supra)*, the said judgment have attained finality and are binding on the respondent authorities.

5) Per contra, the learned Advocate General for the State respondent nos. 1 to 5 has referred to the definition of goods, sale, sale price and works contract as provided under Sections 2(20)(iii), 2(43)(i) and (ii), 2(44) and 2(57) of the Assam VAT Act and it has been submitted that paint is covered by the definition of goods and therefore, it cannot be interpreted to be a "consumable". It is submitted that paint is a goods which becomes imbedded to the vehicle and therefore, by referring to the power to impose tax on sale of goods as per the Article 366 (29A) of the Constitution of India, it is submitted that the State is not taxing service, but as the goods like paint can be divisible from the works contract, the sale of goods can be lawfully subjected to tax incidence. Accordingly, it is submitted that the writ petition is devoid of any merit and the same be dismissed. In support of his submissions, the learned Advocate General has placed reliance on the following cases, viz., (i) *Larsen & Toubro Limited & Anr. v. State of Karnataka & Anr.*, (2014) 1 SCC 708; (ii) *Md. Ekram Khan & Sons v. Commissioner of Trade Tax*, (2004) 6 SCC 183; (iii) *Costal Chemicals Ltd. v. Commercial Tax Officer, A.P. & Ors.*, (1999) 8 SCC 465.

6) The learned standing counsel for respondent nos. 6 to 9 has submitted that she was not contesting the stand of the petitioner as the petitioner was paying due service tax.

7) Considered the submissions advanced by the learned counsel

for the petitioner and the learned Advocate General for the State. Also perused the writ petition, and affidavit in opposition filed by the respondent nos. 4 to 9 and by respondent no. 2.

8) The question to be decided in this case is whether the denting and painting job on a vehicle is a sale or is it a service or is it both? If it is a sale then the States are legislatively competent to levy sales tax on the transaction under Entry 54 List II of the Seventh Schedule read with Article 366(29-A) of the Constitution of India. However, if it is a service then the Central Government alone can levy Service Tax under Entry 97 of List I (or Entry 92C of List I after 2003 and prior to its repeal in 2016). And if the nature of the transaction partakes of the character of both sale and service, then the moot question would be whether both legislative authorities could levy their separate taxes together or only one of them.

9) While the learned counsel for the petitioner projects that no person with ordinary prudence would go to a vehicle workshop with an intention to purchase paint and accordingly, it is submitted that painting is an incidental part of repair work. It was also submitted that the paint is nothing but a consumable but in the scope of the work of painting and denting, paint is not a "goods" within the meaning of Sec. 20 of the Assam VAT Act. However, per contra, the learned Advocate General submits that the paint is a movable property which gets embedded into the vehicle which in turn enhances the value of the vehicle from a scrap to a well finished vehicle. Therefore, in order to decide the issue, it would be relevant to visit the provisions of the Assam Value Added Tax Act, 2003 (hereinafter referred to as the "Assam VAT Act") and

few case laws relevant to the point to be decided.

10) It is not in dispute that the petitioner is a partnership firm and is a registered dealer under the Assam VAT Act and is also registered with the Superintendent of Central Excise and Service Tax, Jorhat under the Finance Act, 1994.

11) It would be appropriate to refer to the definition of (i) "goods" as defined in Section 2(20); (ii) "raw material" as defined in Section 2(38); (iii) "sale" as defined in Section 2(43); and (iv) "sale price" as defined in Section 2(44) of Assam VAT Act, which are extracted herein below:-

a. Section 2(20) "goods" means all materials, commodities and articles and all other kinds of movable property, whether tangible or intangible, and includes,-

(i) livestock.

(ii) computer software, subscriber identification module (SIM) cards and the like,

(iii) all materials (whether as goods or in some other form) involved in the execution of works contracts, transfer of 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;

(iv) growing crops, grass, trees, plants and things attached to or forming part of the land which are agreed to be severed before the sale or under the contract of sale, but does not include newspapers, electricity, money, actionable claims, stocks, shares and securities;

b. Section 2(38) "raw material" means goods used as an ingredient in the manufacture of any other goods or any article consumed in the process of manufacture which has a direct nexus with the finished product or to which the finished product can directly be attributed but it does not include stores, fuel and lubricants required in the process of manufacture;

c. Section 2(43) "sale" with all its grammatical variations and cognate expressions means every transfer of the property in goods (other than by way of mortgage,

hypothecation, charge or pledge) by one person to another for cash or for deferred payment or other valuable consideration and includes,-

- (i) a transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;*
- (ii) a transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;*
- (iii) a delivery of goods on hire purchase or any system of payment by installments,*
- (iv) a 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;*
- (v) a supply of goods by any unincorporated association or body of persons to a member thereof for cash; deferred payment or other valuable consideration;*
- (vi) a 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 or deferred payment or other valuable consideration;*
- (vii) a transfer of property in goods by the Central Government or the State Government or any local authority or autonomous or statutory body for cash or for deferred payment or for any other valuable consideration, whether or not in the course of business,*

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 and the words "sell" and "buy" shall be construed accordingly,

Explanation I.- Where there is a single contract of sale or purchase in respect of goods situated in the State as well as in place outside the State, the provisions of this explanation shall apply as if there were separate contracts of sale or purchase in respect of the goods situated at each of such places.

Explanation II.- Notwithstanding anything to the contrary contained in this Act, or any other law for the time being in force, two independent sales or purchases shall, for the purposes of this Act, be deemed to have taken place,-

- (a) when the goods are transferred from a principal to his selling agent and from the selling agent to the purchaser, or*
- (b) when the goods are transferred from the seller to a buying agent and from the buying agent to his principal,*

if the agent is found in either of the cases aforesaid,

- (i) to have sold the goods at one rate and passed on the sale proceeds to his principal at another rate, or*
- (ii) to have purchased the goods at one rate and passed them to his principal at another rate, or*
- (iii) not to have accounted to his principal for the entire collection or deduction made by him, in the sales or purchases effected by him on behalf of his principal, or*
- (v) to have acted for a fictitious or non-existent principal;*

d. Section 2(44) "sale price" means the amount of valuable consideration paid or payable to a dealer for any sale made including any sum charged for anything done by the dealer in respect of goods at the time of or before delivery of the goods other than the cost of freight or delivery or the cost of installation in cases where such cost is separately charged.

Explanation I- For the purpose of this clause 'sale price' includes,-

- (i) the amount of duties or fees levied or leviable on the goods under the Central Excise Act, 1944 or the Customs Act, 1962 or the Assam Excise Act, 1910 or under any other enactment whether such duties or fees are paid or payable by or on behalf of the seller or the purchaser or any other person;*
- (ii) in relation to the transfer of property in goods (Whether as goods or in some other form) involved in the execution of works contract, such amount received or receivable as consideration;*
- (iii) in relation to the delivery of goods on hire purchase or any system of payment by installments, the amount of valuable consideration payable to a person for such delivery;*
- (iv) in relation to transfer of the right to use any goods for any purpose (whether or not for a specified period) the valuable consideration received or receivable for such transfer, and*
- (v) the amount received by the seller by way of deposit whether refundable or not, which has been received whether by way of a separate agreement or not, in connection with or incidental or ancillary to, the said sale of goods.*

Explanation II- For the propose of this clause, 'sale price' does not include,-

- (i) tax charged or chargeable under this Act;*
- (ii) any amount allowed by seller of goods to the purchaser as cash discount or commission or trade discount at the time of sale of goods according to the*

practice normally prevailing in the trade;

12) The provisions of Clause 12 and Clause 29A of Article 366 of the Constitution of India are also quoted below:-

12) "Goods" includes all materials, commodities, and articles;

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;

13) In the case of *Costal Chemicals (supra)*, cited by the learned Advocate General, the appellant claimed concessional tax on natural gas which it was purchasing as fuel for the manufacture of paper and paper products and under the said context, it was held by the Supreme Court of India that natural

gas was not consumable. Therefore, in the light of the facts and law involved in the said cited case of *Costal Chemicals (supra)*, the Court is unable to perceive paint as a fuel and as such paint can only be treated as a consumable. Thus, the cited case does not help the State.

14) In the case of *Mohd. Ekram Khan (supra)*, cited by the learned Advocate General, the appellant assessee was an agent of the manufacturer of motor vehicles and replaced parts during the warranty period and in course of such transaction, the reimbursement by the manufacturer was held to be sales by repelling the contention that the replacement of defective parts involved no sale. This is not the fact situation in the present case in hand. Hence, the said decision does not help the State.

15) In the case of *Larsen & Toubro Ltd. (supra)*, cited by the learned Advocate General, in order to understand the said decision, it would be apposite mention that in the said case, a two-Judge Bench of the Supreme Court of India had referred the matter to a larger Bench by observing as follows:-

“10. ... We have *prima facie* some difficulty in accepting the proposition laid down in Para 20 quoted above. Firstly, in our view, *prima facie*, M/s Larsen & Toubro - petitioner herein, being a developer had undertaken the contract to develop the property of Dinesh Ranka. Secondly, the show-cause notice proceeds only on the basis that Tripartite Agreement is the works contract. Thirdly, in the Show Cause Notice there is no allegation made by the Department that there is monetary consideration involved in the first contract which is the Development Agreement.

11. Be that as it may, apart from the disputes in hand, the point which we have to examine is whether the ratio of the judgment of the Division Bench in the case of *Raheja Development Corporation (supra)* as enunciated in Para 20, is correct. If the Development Agreement is not a works contract could the Department rely upon the second contract, which is the Tripartite Agreement and

interpret it to be a works contract, as defined under the 1957 Act. The Department has relied upon only the judgment of this Court in Raheja Development Corporation (supra) case because para 20 does assist the Department. However, we are of the view that if the ratio of Raheja Development case is to be accepted then there would be no difference between works contract and a contract for sale of chattel as a chattel.

12. *Lastly, could it be said that petitioner Company was the contractor for prospective flat purchaser. Under the definition of the term "works contract" as quoted above the contractor must have undertaken the work of construction for and on behalf of the contractor for cash, deferred (sic. payment) or any other valuable consideration. According to the Department, Development Agreement is not works contract but the Tripartite Agreement is works contract which, prima facie, appears to be fallacious. There is no allegation that the Tripartite Agreement is sham or bogus.*

13. *For the aforesaid reasons, we direct the Office to place this matter before the Hon'ble Chief Justice for appropriate directions in this regard, as we are of the view that the judgment of Division Bench in the case of Raheja Development (supra) needs re-consideration by the larger Bench."*

16) The learned Advocate General has in extensio referred to the case of *Larsen & Toubro Ltd. (supra)*, giving much stress on paragraphs 55 to 60, 66, 72, 80 to 82, 87 to 92, 95, 96, 97, 107 to 113 and 116 thereof. Some of the paragraphs, which are relevant for the purpose of this order are extracted below:-

“55. *Clause 29-A was inserted in Article 366 by the Forty-sixth Amendment with effect from 02.02.1983. Entry 54 of List II (State List) enables the State to make laws relating to taxes on the sale or purchase of goods other than the newspapers, subject to the provisions of Entry 92-A of List I. Entry 63 of List II enables the States to provide rates of stamp duty in respect of documents other than those specified in provisions of List I with regard to the rates of stamp duty. Entry 92-A of List I deals with taxes on the sale or purchase of goods other than newspapers where such sale or purchase takes place in the course of inter-state trade or commerce. Entry 6 of List III deals with the subjects, "transfer of property other than the agricultural land; registration of deeds and documents".*

56. *It is important to ascertain the meaning of sub-clause (b) of clause 29-A*

of Article 366 of the Constitution. As the very title of Article 366 shows, it is the definition clause. It starts by saying that in the Constitution unless the context otherwise requires the expressions defined in that article shall have the meanings respectively assigned to them in the article. The definition of expression "tax on sale or purchase of the goods" is contained in clause (29-A). If the first part of clause 29-A is read with sub-clause (b) along with latter part of this clause, it reads like this: tax on the sale or purchase of the goods" includes 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 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. The definition of "goods" in clause 12 is inclusive. It includes all materials, commodities and articles. The expression, 'goods' has a broader meaning than merchandise. Chattels or movables are goods within the meaning of clause 12. Sub-clause (b) refers to transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract. The expression "in some other form" in the bracket is of utmost significance as by this expression the ordinary understanding of the term 'goods' has been enlarged by bringing within its fold goods in a form other than goods. Goods in some other form would thus mean goods which have ceased to be chattels or movables or merchandise and become attached or embedded to earth. In other words, goods which have by incorporation become part of immovable property are deemed as goods. The definition of 'tax on the sale or purchase of goods' includes a tax on the transfer or property in the goods as goods or which have lost its form as goods and have acquired some other form involved in the execution of a works contract.

57. Viewed thus, a transfer of property in goods under clause 29-A(b) of Article 366 is deemed to be a sale of the goods involved in the execution of a works contract by the person making the transfer and the purchase of those goods by the person to whom such transfer is made.

58. The States have now been conferred with the power to tax indivisible contracts of works. This has been done by enlarging the scope of "tax on sale or purchase of goods" wherever it occurs in the Constitution. Accordingly, the expression "tax on the sale or purchase of goods" in Entry 54 of List II of Seventh Schedule when read with the definition clause 29-A, includes a tax on the transfer of property in goods whether as goods or in the form other than goods involved in the execution of works contract. The taxable event is deemed sale.

59. *State of Madras v. Gannon Dunkerley and Co.*, AIR 1958 SC 560 and few other decisions following *Gannon Dunkerley (1)* wherein the expression "sale" was

given restricted meaning by adopting the definition of the word "sale" contained in the Sale of Goods Act has been undone by the Forty-sixth Constitutional Amendment so as to include works contract. The meaning of sub-clause (b) of clause 29-A of Article 366 of the Constitution also stands settled by the Constitution Bench of this Court in Builders' Association (1989) 2 SCC 645. As a result of clause 29-A of Article 366, tax on the sale or purchase of goods may include a tax on the transfer in goods as goods or in a form other than goods involved in the execution of the works contract. It is open to the States to divide the works contract into two separate contracts by legal fiction: (i) contract for sale of goods involved in the works contract and (ii) for supply of labour and service. By the Forty-sixth Amendment, States have been empowered to bifurcate the contract and to levy sales tax on the value of the material in the execution of the works contract.

60. *Whether contract involved a dominant intention to transfer the property in goods, in our view, is not at all material. It is not necessary to ascertain what is the dominant intention of the contract. Even if the dominant intention of the contract is not to transfer the property in goods and rather it is the rendering of service or the ultimate transaction is transfer of immovable property, then also it is open to the States to levy sales tax on the materials used in such contract if it otherwise has elements of works contract. The view taken by a two-Judge Bench of this Court in Rainbow Colour Lab v. State of M.P., (2000) 2 SCC 385 that the division of the contract after Forty-sixth Amendment can be made only if the works contract involved a dominant intention to transfer the property in goods and not in contracts where the transfer of property takes place as an incident of contract of service is no longer good law, Rainbow Colour Lab (supra) has been expressly overruled by a three-Judge Bench in Associated Cement Companies Ltd. v. Commissioner of Customs, (2001) 4 SCC 593.*

66. *The Forty-sixth Amendment leaves no manner of doubt that the States have power to bifurcate the contract and levy sales tax on the value of the material involved in the execution of the works contract. The States are now empowered to levy sales tax on the material used in such contract. In other words, clause 29-A of Article 366 empowers the States to levy tax on the deemed sale.*

72. *In our opinion, the term 'works contract' in Article 366(29-A)(b) is amply wide and cannot be confined to a particular understanding of the term or to a particular form. The term encompasses a wide range and many varieties of*

contract. The Parliament had such wide meaning of "works contract" in its view at the time of Forty-sixth Amendment. The object of insertion of clause 29-A in Article 366 was to enlarge the scope of the expression "tax of sale or purchase of goods" and overcome Gannon Dunkerley (1) (supra). Seen thus, even if in a contract, besides the obligations of supply of goods and materials and performance of labour and services, some additional obligations are imposed, such contract does not cease to be works contract. The additional obligations in the contract would not alter the nature of contract so long as the contract provides for a contract for works and satisfies the primary description of works contract. Once the characteristics or elements of works contract are satisfied in a contract then irrespective of additional obligations, such contract would be covered by the term 'works contract'. Nothing in Article 366(29-A)(b) limits the term "works contract" to contract for labour and service only. Learned Advocate General for Maharashtra was right in his submission that the term "works contract" cannot be confined to a contract to provide labour and services but is a contract for undertaking or bringing into existence some "works". We are also in agreement with the submission of Mr. K.N. Bhat that the term "works contract" in Article 366(29-A)(b) takes within its fold all genre of works contract and is not restricted to one specie of contract to provide for labour and services above. The Parliament had all genre of works contract in view when clause 29-A was inserted in Article 366.

97. In light of the above discussion, we may summarise the legal position, as follows:

- 97.1. For sustaining the levy of tax on the goods deemed to have been sold in execution of a works contract, three conditions must be fulfilled: (one) there must be a works contract, (two) the goods should have been involved in the execution of a works contract and (three) the property in those goods must be transferred to a third party either as goods or in some other form.
- 97.2. For the purposes of Article 366(29-A)(b), in a building contract or any contract to do construction, if the developer has received or is entitled to receive valuable consideration, the above three things are fully met. It is so because in the performance of a contract for construction of building, the goods (chattels) like cement, concrete, steel, bricks etc. are intended to be incorporated in the structure and even though they lost their identity as goods but this factor does not prevent them from being goods.
- 97.3. Where a contract comprises of both a works contract and a transfer of immovable property, such contract does not denude it of its character as works contract. The term "works contract" in Article 366 (29- A)(b) takes

within its fold all genre of works contract and is not restricted to one specie of contract to provide for labour and services alone. Nothing in Article 366(29-A)(b) limits the term "works contract".

- 97.4. *Building contracts are species of the works contract.*
- 97.5. *A contract may involve both a contract of work and labour and a contract for sale. In such composite contract, the distinction between contract for sale of goods and contract for work (or service) is virtually diminished.*
- 97.6. *The dominant nature test has no application and the traditional decisions which have held that the substance of the contract must be seen have lost their significance where transactions are of the nature contemplated in Article 366(29-A). Even if the dominant intention of the contract is not to transfer the property in goods and rather it is rendering of service or the ultimate transaction is transfer of immovable property, then also it is open to the States to levy sales tax on the materials used in such contract if such contract otherwise has elements of works contract. The enforceability test is also not determinative.*
- 97.7. *A transfer of property in goods under clause 29-A(b) of Article 366 is deemed to be a sale of the goods involved in the execution of a works contract by the person making the transfer and the purchase of those goods by the person to whom such transfer is made.*
- 97.8. *Even in a single and indivisible works contract, by virtue of the legal fiction introduced by Article 366(29-A)(b), there is a deemed sale of goods which are involved in the execution of the works contract. Such a deemed sale has all the incidents of the sale of goods involved in the execution of a works contract where the contract is divisible into one for the sale of goods and the other for supply of labour and services. In other words, the single and indivisible contract, now by Forty-sixth Amendment has been brought on par with a contract containing two separate agreements and States have now power to levy sales tax on the value of the material in the execution of works contract.*
- 97.9. *The expression "tax on the sale or purchase of goods" in Entry 54 in List II of Seventh Schedule when read with the definition clause 29-A of Article 366 includes a tax on the transfer of property in goods whether as goods or in the form other than goods involved in the execution of works contract.*
- 97.10. *Article 366(29-A)(b) serves to bring transactions where essential ingredients of 'sale' defined in the Sale of Goods Act, 1930 are absent within the ambit of sale or purchase for the purposes of levy of sales tax. In other words,*



transfer of movable property in a works contract is deemed to be sale even though it may not be sale within the meaning of the Sale of Goods Act.

97.11. *Taxing the sale of goods element in a works contract under Article 366(29-A)(b) read with Entry 54 List II is permissible even after incorporation of goods provided tax is directed to the value of goods and does not purport to tax the transfer of immovable property. The value of the goods which can constitute the measure for the levy of the tax has to be the value of the goods at the time of incorporation of the goods in works even though property passes as between the developer and the flat purchaser after incorporation of goods."*

17) It would now be appropriate to refer to the decision of the Division Bench of this Court rendered in the case of *S.S. Photographic Lab (supra)*. In this regard, the learned counsel for the petitioner had submitted that against the said decision, the State had filed a Special Leave Petition (SLP for short) before the Supreme Court of India, which was dismissed and therefore, the said judgment has attained finality. Paragraphs 9 to 13, 17 to 19 and 21 to 23 thereof are quoted below:-

“9. The first question that we are required to answer is whether exposed photographic film rolls and negatives are "goods" within the meaning of Section 2(15) of the Act. If they are not "goods" then they fall outside the purview of a works contract which includes any agreement for processing or otherwise treating or adapting any goods.

10. *In Rainbow Colour Lab & Anr. v. State of M.P. & Ors, (2000) 2 SCC 385 the Supreme Court accepted the test of marketability of goods for the purposes of deciding whether a contract is a works contract or not as laid down in Bavens v. Union of India, 1995 (97) STC 161. Although Rainbow Colour Lab was overruled on another issue, the marketability of goods remained intact as a proposition of law.*

11. *That the test of marketability of goods has not been overruled is clear from BSNL v. Union of India, (2006) 3 SCC 1. In that case, the Supreme Court referred with approval to Tata Consultancy Services Ltd v. State of A.P., (2005) 1 SCC 308 where it was held that goods may be tangible property or intangible property. Such property would become goods if it has the attributes thereof having*

regard to

- (a) *Its utility,*
- (b) *Its capability of being bought and sold and*
- (c) *Its capability of being transmitted, transferred, delivered, stored and possessed.*

There is, therefore, no doubt that to qualify as "goods" an item must have some utility and must be marketable. Applying this test, the Supreme Court held that electromagnetic waves are not "goods". They cannot be delivered or possessed and they are not marketable.

12. *The question that now arises is whether exposed photographic film rolls and negatives are goods? The answer must be a firm "No". Exposed photographic film rolls and negatives per se have absolutely no utility for anyone not even for the owner. Furthermore, no one goes to the market (or anywhere else for that matter) to buy an exposed photographic film roll or negatives. It is only when they are developed or processed, as the case may be, that they have some personal value for the owner of the photographs. Clearly, therefore, if exposed photographic film rolls and negatives are not "goods" they cannot be the subject matter of a works contract which concerns itself with the processing or otherwise treating or adapting any goods as defined in Section 2(38)(iv) of the Act.*

13. *Alternatively, if the transactions entered into between the appellants and their customers are not works contracts, would the utilization of chemicals in developing exposed photographic film rolls into negatives and then processing the negatives into positive photographs be a "sale" of such chemicals?*

17. *It is clear from the above that if there is an agreement both for transfer of property in goods and for processing or otherwise treating or adapting any goods, then the agreement is a works contract involving a sale, otherwise not. Therefore, three ingredients are necessary:*

- (i) *The existence of goods,*
- (ii) *The transfer of property in those goods,*
- (iii) *The processing or treating or adapting of those goods.*

18. *A combined reading of all the provisions suggests that goods for processing must be in existence. As we have already held that exposed photographic film rolls and negatives are not "goods" the provisions of Sections 7,*

8 and Schedule VI of the Act do not come into play at all. When a customer goes to the appellants to have his exposed photographic film rolls developed or negatives processed, there may be an agreement for the transfer of property in the chemicals used in the processing or otherwise treating or adapting the exposed photographic film rolls and negatives. But since they are not "goods" within the meaning of the Act, the question of taxing the "sale" of the chemicals does not at all arise.

19. The above discussion undoubtedly leads to only one conclusion which is that the conversion of exposed photographic film rolls into negatives and then into positive photographs or the conversion of negatives into positive photographs is nothing but a rendering of service specific to a customer and is a matter of skill and expertise of the developer it is not a works contract.

21. The issue in our case is whether the exposed photographic film rolls and negatives are "goods" or not. We have held that they have no utility and are not marketable. As such, they are not "goods". Consequently, a contract for processing exposed photographic film rolls and negatives is not a works contract as defined in Section 2(38) of the Act. Reference to Studio Sujata is not at all apposite.

22. Learned counsel for the appellants also relied upon Rainbow Colour Lab to contend that the dominant intention of the contract is required to be considered as also the marketability of the goods. The learned Additional Advocate General is partially right in submitting that Rainbow Colour Lab was overruled in BSNL. In paragraph 49 of the Report, the Supreme Court held:

"After the Forty-sixth Amendment, the sale element of those contracts which are covered by the six sub-clauses of clause (29-A) of Article 366 are separable and may be subjected to sales tax by the States under Entry 54 of List II and there is no question of the dominant nature test applying. Therefore when in 2005 C.K. Jidheesh v. Union of India, (2005) 13 SCC 37 held that the aforesaid observations in Associated Cement, (2001) 4 SCC 593 were merely obiter and that Rainbow Colour Lab was still good law, it was not correct. It is necessary to note that Associated Cement did not say that in all cases of composite transactions the Forty-sixth Amendment would apply."

The Supreme Court made it clear that there are two categories of composite contracts, one covered by Article 366 (29A) of the Constitution - to which the dominant nature test did not apply. To this extent Rainbow Colour Lab was overruled. The other category is those not covered by Article 366 (29A) of the Constitution. The applicability of the dominant nature test to the second category

of contracts was not decided. The marketability test (which was accepted in Rainbow Colour Lab after referring to Bavens) was approved in BSNL after referring to Tata Consultancy Services Ltd. Therefore, to contend that Rainbow Colour Lab was completely overruled is not correct. We are mentioning this only for the record, although in our opinion this controversy does not arise.

23. *The case of the appellants is fully covered in their favour by the law laid down by the Supreme Court in BSNL. The appeals are allowed and the judgment and order of the learned Single Judge is set aside.*

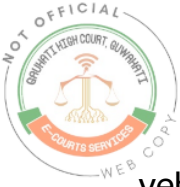
18) In light of above, specifically para-22 of the case of *S.S. Photographic Lab (supra)*, when the issue involved in this case is visited on the parameter as to whether the denting and painting work is marketable, the answer is in the negative. In this regard, the submission of the learned counsel for the petitioner appears to be correct that when a person goes to a workshop for getting a denting and painting job done on a vehicle, there is no contract for sale or purchase of any article, commodity or thing, but it is a contract for labour and service. The marketability test, thus, appears to be the first test to decide the issue, which is decided in favour of the petitioner as the painting work on a vehicle, of its own, is not marketable. Based on the finding recorded in paragraph- 56 of the case of *Larsen & Toubro Ltd. (supra)*, as quoted herein before, the second test appears to be whether the denting and painting job is something which becomes embedded on earth and to the said query, the answer would be in the negative and in favour of the petitioner.

19) Now if we consider a new vehicle, a vehicle is made of thousands of components, each having its unique character. Nonetheless, though a vehicle is a composition of numerous unique components, it is impermissible for the taxing authority to tax individual item of the vehicle.

Similarly, in the composite work of denting and painting contract, the combination would be a composite contract of labour and service and as in the present case, the petitioner is liable for and is paying service tax as imposed on the work of denting and painting, being a service provided by a "authorised service station" which is covered by the provisions of Section 65(9) of the Finance Tax Act, 1994 (as amended). Therefore, it would not be permissible for the State Taxing Authority to impose VAT on paint separately. There is no dispute that an item taxable by the State under Article 366(29-A) is exempted from being levied with Service Tax and vice-versa.

20) In this regard, the learned counsel for the petitioner, has referred to the provisions of Section 65(9) and Section 65(105)(zo) of the Finance Act, 1994, as amended, and it is submitted that service, repair, reconditioning or restoration of motor vehicle is treated as a taxable service under Finance Act, 1994 (as amended). The learned counsel for the petitioner has also referred to the Circular No. 699/15/2003-CX dated 05.03.2003 (Annexrure-9 of the writ petition), wherein it has been clarified that items such as paints used in painting body, etc., during the course of providing service form intrinsic part and parcel of service in so much as that these are not distinctly and separately identifiable from the services rendered and therefore value of such items, which form intrinsic part of service is included in the value of taxable service.

21) In light of the discussions above, the Court is of the considered opinion that the petitioner has been able to repel the opinion expressed in the impugned orders, thereby holding the use and/or application of paint in a



vehicle workshop as a "sale" of paint and thus, taxable under the Assam Value Added Tax Act, 2003. Accordingly, the impugned (i) assessment order dated 10.08.2010 (Annexure-5) passed by the Deputy Commissioner of Taxes, Jorhat (respondent no.4), and (ii) the revisional order dated 18.02.2015 (Annexure-7) passed by the Additional Commissioner of Taxes, Assam (respondent no.3) are not found sustainable and the same are hereby set aside and quashed.

22) There shall be no order as to cost.

JUDGE

Comparing Assistant