



**IN THE HIGH COURT OF MADHYA PRADESH  
AT INDORE**

**BEFORE**

**HON'BLE SHRI JUSTICE VIVEK RUSIA**

**&**

**HON'BLE SHRI JUSTICE BINOD KUMAR DWIVEDI**

**WRIT PETITION No. 2883 of 2008**

***ASHOKA INFROWAYS P.LTD.***

*Versus*

***STATE OF M.P. & ORS. AND OTHERS***

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**Appearance:**

Shri P.M. Choudhary, learned Senior Advocate along with Shri Anand Prabhawalkar, learned counsel for the petitioner.

Shri Sudeep Bhargava learned Dy. Advocate General for the respondent No.1 / State.

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**WITH**

**WRIT PETITION No. 3029 of 2007**

***ASHOKA INFRAWAYS P.LTD.***

*Versus*

***STATE OF M.P. AND OTHERS***

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**Appearance:**

Shri P.M. Choudhary, learned Senior Advocate along with Shri Anand Prabhawalkar, learned counsel for the petitioner.

Shri Sudeep Bhargava learned Dy. Advocate General for the respondent No.1 / State.

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**WRIT PETITION No. 1414 of 2009**

***ASHOKA INFRAWAYAS P.LTD.***

*Versus****STATE OF M.P. & ORS. AND OTHERS*****Appearance:**

Shri P.M. Choudhary learned Senior Advocate along with Shri Anand Prabhawalkar, learned counsel for the petitioner.

Shri Sudeep Bhargava learned Dy. Advocate General for the respondent No.1 / State.

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<b><i>Reserved on</i></b>	<b>:</b>	<b><i>26.09.2024</i></b>
<b><i>Pronounced on</i></b>	<b>:</b>	<b><i>04.10.2024</i></b>

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**ORDER*****Per: Justice Vivek Rusia*****In Writ Petition No.2883 of 2008**

Petitioner has filed the present petition challenging the common order dated 23.10.2007 passed by the Additional Commissioner, Commercial Tax / Revisional Authority under the M.P. Vanijyik Kar Adhiniyam, 1994 (hereinafter referred to as “Commercial Tax Act”) and the M.P. Sthaniya Kshetra Me Mal Ke Pravesh Par Kar Adhiniyam, 1976 (hereinafter referred as “Entry Tax Act”) for the assessment year 01.04.2003 to 31.03.2004. The petitioner is also aggrieved by an order of assessment dated 29.12.2006 passed by the Assistant Commissioner of the Commercial Tax.

**In Writ Petition No.3029 of 2007**

**02.** Petitioner has filed this petition challenging the order dated 14.11.2006 passed by the Additional Commissioner, Commercial Tax under the Commercial Tax Act and Entry Tax Act and order dated 30.01.2006 passed by the Assistant Commissioner of the Commercial Tax for the assessment year 01.04.2002 to 31.03.2003.

**In Writ Petition No.1414 of 2009**

**03.** Petitioner has filed this petition challenging the order dated 14.11.2008 passed by the Additional Commissioner, Commercial Tax under the Commercial Tax Act and Entry Tax Act and the order dated 26.12.2007 passed by the Assistant Commissioner of the Commercial Tax for the assessment year 01.04.2004 to 31.03.2005.

**04.** Since the controversy involved in these cases is identical in nature, therefore, all these writ petitions filed by the petitioner are finally heard and decided by this common order. For the sake of convenience, facts of **Writ petition No.2883 of 2008** are being taken for disposal of all the aforesaid writ petitions.

**Facts of the case**

**05.** The petitioner is a private limited company that entered into the contract of construction, development, strengthening, maintenance and operation of toll roads under the scheme of Build, Operate and Transfer (hereinafter referred to as “BOT”) floated by the State and the Central Government. The petitioner comes under the definition of “**registered dealer**” as defined under Section 2(gg) of the M.P. Entry Tax Act, 1976 and holding the certificate No.TIN 23030903601 which continues under the M.P. VAT Act, 2002.

**The details of the contract in question**

**06.** The Executive Engineer of the Public Works Department, of the State of M.P., Division Dewas issued a tender notice dated 12.07.2000 inviting bids for construction of **the Dewas By-pass** road under the scheme of BOT. The total length of the road in the contract is 19.8 km including one medium bridge, 27 numbers of culverts, junctions and rotaries, protection works, toll tax barriers and booth, plantation, fencing truck parking lay-by and longitudinal drains, etc. It was made clear in



the tender condition that the successful tenderer was required to maintain and operate the by-pass for the period of 10 years i.e. concessional period, for use of the general public. The tenderer was also authorised to collect the toll from the vehicles passing through the toll plaza constructed on a by-pass. This means the tenderer was permitted to recover the cost of construction and its maintenance during the concessional period by way of toll from the vehicles passing through the Dewas by-pass.

**07.** In response to the aforesaid NIT, M/s Ashoka Buildcon Ltd. submitted its bid which was accepted by the Public Works Department of the State of M.P. vide memo No.2472 dated 17.04.2001. A letter of acceptance of the bid was issued to the successful tenderer followed by execution of an agreement dated 31.08.2021. As per clause 24.1 of the agreement, M/s Ashoka Buildcon Ltd. was required to make arrangements for the fund to be utilized in the construction and maintenance of the Dewas by-pass from its resources either by way of borrowing from the market or a bank or other financial institutions. M/s Ashoka Buildcon Ltd. vide letter dated 08.05.2021 requested the Executive Engineer to permit it to promoter a separate Special Purpose Vehicle (SPV) Company to implement the project which was duly accepted vide letter dated 16.11.2001.

**08.** After the aforesaid approval, M/s Ashoka Infraways Pvt. Ltd., Nasik i.e. the petitioner was promoted to implement the whole project including the collection of toll. An agreement dated 03.01.2002 was executed between M/s Ashoka Buildcon Ltd. and M/s Ashoka Infraways Pvt. Ltd. (hereinafter referred to as “the petitioner”). The petitioner constructed the Dewas by-pass and toll tax barriers and started recovering the toll from the vehicles passing through on the said road.



**Assessment proceedings and impugned orders**

**09.** For the period from 01.04.2003 to 31.03.2004, the Assistant Commissioner of Commercial Tax assessed the petitioner under the Commercial Tax Act. The petitioner appeared before the authority by contending that the nature of work executed by it was not in the nature of the works contract since there was no monetary consideration for the work executed by the petitioner was paid by the Government of M.P. nor there was any transfer of property by the Government of M.P. It was also submitted that the petitioner was not only given the work to construct the by-pass road but also directed to perform other obligations like, maintenance of by-pass, operation of the Toll Naka, plantation and other activities. The petitioner was liable to bear the amount of compensation of Rs.636.72 Lacs to the private landowners whose lands were required for the construction of the Dewas by-pass. The petitioner was authorized to collect the toll money to reimburse the expenditure incurred in the construction of the by-pass i.e. BOT road. According to the petitioner, since all the elements of the sale do not exist, therefore, the petitioner is not liable to get taxed under the Commercial Tax Act as well as the Entry Tax Act. The aforesaid contention was not accepted by the learned authority because *firstly* the petitioner is a dealer under Section 2(h) of the Commercial Tax Act *Secondly*, the petitioner under the BOT system was given the right to recover the toll from the vehicles to recover the sale amount of the items purchased for construction of the road *thirdly* the petitioner was given 3922 days i.e. almost 10 years to recover the toll from those vehicle owners who utilize the by-pass, therefore, the work allotted to the petitioner under BOT system comes under the category of works contract. Accordingly, the learned authority determined the toll turnover at Rs.9,93,52,465/- and liable to be levied



the tax of Rs.28,88,378/- besides the above Value Added Tax under Section 9-B of the Commercial Tax Act amounting to Rs.2,33,775/- was also levied. The learned authority also directed the petitioner to pay interest of Rs.15,97,913/- under Section 26(4)(a) of the Commercial Tax Act apart from the penalties, therefore, in total demand of Rs.46,87,141/- was raised against the petitioner. Simultaneously, respondent No.2 also assessed the petitioner under the Entry Tax Act by order of assessment dated 29.12.2006 by determining the entry tax Rs.3,50,460/- with interest of Rs.1,62,964/- under Section 13 of the Entry Tax Act apart from the penalties, in total, Rs.5,14,424/-.

**Impugned orders passed by the Revisional Authority**

**10.** Being aggrieved by the aforesaid demands separately under the Commercial Tax Act and Entry Tax Act, revisions were filed before the Revisional Authority *inter alia* on the ground that the BOT contract is such that it does not satisfy all the elements of sale because there is no transfer of property in the goods and there is no payment of sale consideration by the State of M.P. Respondent No.3 did not agree with the aforesaid submission of the petitioner and upheld the order of Assessment Officer by holding that the BOT contract awarded to the petitioner is in the nature of works contract hence, the present petition before this Court.

**Submissions of the petitioner**

**11.** Shri P.M. Choudhary, learned senior counsel appearing for the petitioner argued that the learned authorities have wrongly held that the BOT contract is a works contract, whereas there is a vast difference between both the contracts. In a normal works contract, the Government pays the contract money to the contractor for the construction of any building for civil work and after construction, the same is liable to be



transferred to the State Government, therefore, in a normal works contract, the contractor being a dealer is liable to pay the commercial tax as well as entry tax on the goods consumed in the construction work. But the awarding of construction work by the Government of M.P. under the BOT scheme is altogether a new concept under which the Government do not pay the construction cost of the building, road or bridge (as the case may be), the contractor himself arranges the finances and construct and maintain the same for the concessional period and thereafter transfer to the State Government. Since there is no element of the sale in the BOT, therefore, the petitioner is not liable to pay the taxes on the material under the Entry Tax Act as well as under the Commercial Tax Act.

**12.** In order to support the aforesaid contention, Shri Choudhary, learned senior counsel has placed reliance on a judgment passed by the Apex Court in the case of *Hotel Balaji and others V/s State of Andhra Pradesh and others, (1993) 88 STC 98 (SC)*, where the question under consideration was whether the levy of tax was on the purchase of goods or the consignment of the manufactured goods. The Apex Court has held that the levy materializes only when the purchased goods (raw material) are consumed in the manufacture of different goods and those goods are disposed of within the State otherwise than by way of sale or are consigned to the depots or the manufacturing dealer or of his agent outside the State of Haryana. It refers to the connection with the event of purchase and sale and not the point of time at which such purchase or sale takes place.

**13.** Learned senior counsel for the petitioner has further placed reliance on another judgment passed by the Hon'ble Apex Court in the case of *Commissioner of Wealth Tax V/s Ellis Bridge Gymkhana and*



*others, (1998) 229 ITR 1 (SC)*, in which it is held that if a person has not been brought within the ambit of the charging taxes, in clear words he cannot be taxed at all, a charging section has to be construed strictly. In the case of *Commissioner of Central Excise, Pondicherry V/s Acer India Ltd., (2004) 137 STC 596 (SC)* it has been held by the Hon'ble Apex Court that rule of construction of a charging section that before taxing a person it must be shown that he falls within the ambit thereof by clear words used, as no one can be taxed by implication. In the case of *Mangalore Ref. Petrochemicals Ltd. V/s Commissioner of Customs, (2015) 34 GSTR 519 (SC)*, it has been held that levy of customs duty under Section 12 of the Act is only on goods imported into India and the case and the goods said to be imported into India when they are brought to India from a place outside India.

14. To conclude, Shri Choudhary, learned senior counsel has placed reliance on a judgment passed by the Apex Court in the case of *Kiran Spinning Mills V/s Collector of Customs, (1999) 113 ELT 753 (SC)*, in which it has been held that taxable event occurs when the customs barrier is crossed. The import would be completed only when the goods are to cross the customs barrier and that is the time when the import duty is to be paid and that is what has been termed in the Act.

#### **Submissions of the State**

15. The respondent / State has filed the reply in support of the impugned orders. In terms of the agreement executed with the petitioner, the Government of M.P. handed over the land on a license basis for a concessional period. This will not amount to a transfer of ownership or the lease of the land to the entrepreneur. The toll collection period was fixed for 10 years after considering all costs and expenses to be incurred in the construction of the Dewas by-pass road and collection of charges.





The agreement clearly shows that the entrepreneur has constructed the Dewas Bypass road on a BOT basis for the State Government in its land by executing the works contract. The valuable consideration of the construction of the by-pass road is included in the toll tax amount which has been retained by the Entrepreneur for 10 years and after recovering the entire cost from the toll amount, the entrepreneur shall not have any right to collect the toll and the road shall be transferred to the State Government.

**16.** It is further submitted by learned Dy. Advocate General that the petitioner had executed the works contract on the land belonging to the State Government which was acquired by the State Government through the Collector of Dewas under the provisions of the Land Acquisition Act. The Commercial Tax Department has rightly levied the Commercial Tax and Entry Tax Act on the value of levied tax used/consumed/transferred in the execution of the construction of the Dewas By-pass road. The petitioner was given a right to collect the toll tax from the vehicle passing through the by-pass road in order to recover the cost incurred on construction and maintenance. Section 2(t) of the Commercial Tax Act, 1994 defines the sale and it means the transfer of property and goods for cash or deferred payment or other valuable consideration. Hence, valuable consideration doesn't need to be paid by handing over the cash immediately, it could be deferred, like in the present case, where the payment was deferred by way of the collection of toll tax by way of authorization to the petitioner, therefore, this petition has no merit and is liable to be dismissed.

**17.** Shri Sudeep Bhargava, learned Dy. Advocate General for the respondent / State relied on the Full Bench of this Court in the case of *Viva Highways V/s M.P. Road Development Authority, (2017) 2 MPLJ*



**681** held that the work done under the concessional agreement is a works contract under the provisions of the M.P. Madhyastham Adhikaran Adhiniyam, 1983 irrespective of its nomenclature. The petitioner has been given the right to collect the toll because the petitioner had invested money in the construction of the Dewas By-pass otherwise, no one has a right to collect the toll or tax from any person passing through the road, therefore, the petitioner who has given the right to collect tax only to recover the amount of money invested by him in construction of the road, hence, it is a works contract rightly held by the learned authorities. Hence, this petition is devoid of merits and is liable to be dismissed.

**Appreciation and conclusion by us**

**18.** At the very outset, Shri P.M. Choudhary, learned senior counsel for the petitioner admitted that if the BOT contract awarded to the petitioner is in the nature of the works contract, then certainly the petitioner was liable to pay the commercial tax under the Commercial Tax Act as well as the Entry Tax Act. Therefore, the only issue which requires consideration is ***whether the BOT contract is a works contract or not the commercial tax under the Commercial Tax Act as well as the Entry Tax Act.***

**19.** Admittedly, the petitioner is a registered dealer under the Commercial Tax Act by holding a certificate No.TIN 23030903601. After the repeal of the Adhiniyam, 1994 by MP VAT Act, 2002 w.e.f. 01.04.2006, the petitioner continued to be a dealer under this new Act. The petitioner has been assessed for the period of 01.04.2003 to 31.03.2004, as a dealer who executed the works contract of Dewas By-pass road on a BOT basis. The petitioners contend that no sale of goods



was effected in constructing a Dewas By-pass road of the BOT scheme of this State Government, therefore, there is no liability of payment of tax on the goods transferred and consumed in the execution of works contract under the Entry Tax Act and Commercial Tax Act.

**20.** The definition of a **dealer** is given under clause (h) of Section 2 of M.P. Vanijyik Kar Adhiniyam, 1994 which is extracted as under for ready reference:

"(h) "dealer" means any person who carries on the business of buying, selling, supplying or distributing goods, directly or otherwise, whether for cash or for deferred payment or commission, remuneration or other valuable consideration and includes -

(i) a local authority, a company, an undivided Hindu family or any society (including a co-operative society), club, firm or association which carries on such business;

(ii) a society (including a co-operative society), club, firm or association which buys goods from, or sells, supplies or distributes goods to, its members;

(iii) a commission agent, broker, a del-credere agent, an auctioneer or any other mercantile agent, by whatever name called, who carries on the business of buying, selling, supplying or distributing goods on behalf of the principal;

(iv) any person who transfers the right to use any goods for any purpose, (whether or not for a specified period) in the course of business to any other person;

**Explanation** - (I) Every person who acts as an agent of a non-resident dealer, that is as an agent on behalf of a dealer residing outside the State and buys, sells, supplies or distributes goods in the State or acts on behalf of such dealer as -

(i) a mercantile agent as defined in the Indian Sale of Goods Act, 1930 (III of 1930); or

(ii) an agent for handling goods or documents of title relating to goods; or

(iii) an agent for the collection or the payment of the sale price of goods or as a guarantor for such collection or payment, and every local branch of a firm or company situated outside the State, shall be deemed to be a dealer for the purpose of this Act.

(II) The Central or a State Government or any of their departments or offices which, whether or not in the course of business, buy, sell, supply or distribute goods, directly or otherwise, for cash or for deferred payment, or for commission, remuneration or for other valuable consideration, shall be deemed to be a dealer for the purpose of this Act."

**21.** The definition of "sale" is given under clause (t) of section 2 of



M.P. Vanijyik Kar Adhiniyam, 1994 which is extracted as under for ready reference:

"(t) **"sale"** with all its grammatical variations and cognate expressions means any transfer of property in goods for cash or deferred payment or for 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 supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;

(v) 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, 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 purchase of these goods by the person to whom such transfer, delivery or supply is made, \*[but does not include a mortgage, hypothecation, charge or pledge];

(vi) 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;

**Explanation - (a)** Notwithstanding anything contained in the Sale of Goods Act, 1930 (III of 1930), where a sale or purchase of goods takes place in pursuance of a contract of sale, such sale or purchase shall be deemed, for the purposes of this Act to have taken place in the State wherever the contract of sale or purchase might have been made, if the goods are within the State-

(i) in the case of specific or ascertained goods, at the time the contract of sale or purchase is made; and

(ii) in the case of unascertained or future goods, at the time of their appropriation to the contract of sale or purchase by the seller or by the purchaser, whether the assent of the other party is prior or subsequent to such appropriation; and

**(b)** Where there is a single contract of sale or purchase of goods situated at more places than one, the provisions of clause (a) shall apply as if there were separate contracts in respect of the goods at each of such places."

**(c)** Section 7 of M.P. Vanijyik Kar Adhiniyam, 1994 extracted as under:

**"7. Joint and several liability of a contractor or a sub-contractor -**

(1) Where a dealer who carries on the business of supplying goods



in the course of execution of works contract entered into by him (hereinafter referred to as a contractor) through another such dealer (hereinafter referred to as a sub-contractor) directly or otherwise, and the sub-contractor executes such works contract and each or either of them is liable to pay tax under this Act, then notwithstanding anything contained in this Act, the contractor and the sub-contractor shall be jointly and severally liable to pay tax in respect of \*[transfer of property in goods whether as goods or in some other form involved in the execution of such works contract].

(2) If the contractor proves in the prescribed manner that the tax has been paid by the sub-contractor on the turnover of goods supplied in the course of execution of the works contract, the contractor shall not be liable to pay tax again on the turnover of such goods.

(3) If the sub-contractor proves in the prescribed manner that the tax has actually been paid by the contractor on the turnover of goods supplied in the course of execution of the works contract, the sub-contractor shall not be liable to pay tax again on the turnover of such goods.

(4) Deduction in respect of the turnover of goods supplied in the course of execution of works contract referred to in sub-section (2) or sub-section (3) shall be allowed to the contractor or to the sub-contractor on the production of proof required to be furnished under the said sub-section."

## 22. Definitions under the M.P. Sthaniya Kshetra Me Mal Ke Pravesh Par Kar Adhiniyam, 1976:

"(1) "Value of goods" in relation to a dealer or any person who has effected entry of goods into a local area shall mean the purchase price of such goods as defined in [clause (q) of Section 2 of the Vanijyik Kar Adhiniyam] [and shall include excise duty and/or additional excise duty and/or customs duty, if levied under the Central Excise and Salt Act, 1944 (No.1 of 1944), the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (No.58 of 1957) or the Customs Act, 1962 (No.52 of 1962), as the case may be] or the market value of such goods if they have been acquired or obtained otherwise than by way of purchase;"

(f) "2. All those expressions, other than expression "goods" and "sale" which are used but are not defined in this Act and are defined in the [Vanijyik Kar Adhiniyam] shall have the meanings assigned to them in that Act."

(g) Section 3 of M.P. Entry Tax Act, 1976:

### "3. Incidence of taxation

(1) There shall be levied an entry tax.-

(a) on the entry in the course of business of a dealer of goods specified in Schedule II, into each local area for consumption, use or sale therein, and

(b) on the entry in the course of business of a dealer of goods specified in Schedule III into each local area for consumption or use of such goods but not for sale therein;



and such tax shall be paid by every dealer liable to tax under the Vanijyik Kar Adhiniyam who has effected entry of such goods:"

**23.** In view of the aforesaid definitions, if the petitioner is a dealer then certainly liable to pay taxes by filing a return on the goods purchased and brought with the State in execution of the works contract. The words 'project' and 'project cost' are defined in clauses W3, and W4 of the agreement. According to the project, it shall mean survey, investigation, studies, design, construction, reconstruction, improvement, strengthening and repair. All the work related to the maintenance of the road, renewal of surface, bridge, tunnel, culvert, etc. and the cost offered to invest by the entrepreneur for completion of the aforesaid project shall be a project cost. As per clause 4.1, the land for construction of the by-pass road will be handed over on a license basis to the contractor for the concession period and this will not amount to transfer of the ownership or lease of the land. Clause 6 made it clear that the entrepreneur will have to make his own arrangement for procuring the material required for work.

**24.** The Governor's right was absolutely reserved to take over the facility at any time after completion of the work even during the concession period and in such circumstances, the entrepreneur shall be eligible for compensation for the unrecovered amount along with the interest. No permanent structure except the toll collection booth, site office, etc. shall be permitted to be constructed by the entrepreneur. As discussed above, the period of collection of the toll upon the construction of the Dewas By-pass road was fixed for 10 years by taking into consideration all the costs and expenses incurred in the construction work. By way of agreement, the petitioner was handed over the land by the State Government for construction of the by-pass road. The



petitioner was required to make all arrangements for the money for the construction of the by-pass road, the petitioner was given the right to collect the toll after completion of the construction of the road for which 10 years was fixed. The period of 10 years was calculated after considering the total cost of construction of the project and its recovery by way of collection of toll. After the expiry of the said period, the petitioner shall not have any claim on the road as well as on a toll.

**25.** It is a settled law that no person has a right to collect a toll or any tax from private persons for using the road. The State Government gave a right to collect the toll to the petitioner from the vehicle passing through the road for a definite period to recover the only cost of construction i.e. the sale amount or the contract value, therefore, the Dy. Advocate General for the State has rightly contended that in this case, the contract amount or sale price is liable to be made to the contractor as a deferred payment by authorizing him to recover the toll tax and except this, there is no difference in the work done under the BOT scheme and in the normal works contract. This issue has been considered in detail by the Full Bench of this Court in the matter of *Viva Highways (supra)* before the Apex Court in which it has been held that the works contract means an agreement must be in writing, it must be executed of any work related to the construction, repair or maintenance of any building, superstructure or other amenities mentioned in the definition. Any agreement by whatever name is called, if it falls within the meaning of a definition of works contract as per the definition of 1983 it must be treated as the works contract. Para 42 to 55 of *Viva Highways (supra)* are reproduced below:

**42.** Since these questions are interrelated, it is apt to deal with these questions simultaneously. In the case of Kamini Malhotra (supra), the learned single Judge considered the definition of 'works contract.



In addition, the meaning of word "building" was also considered. It was held that the definition of works contract is in wide spectrum. Its a definition of wide amplitude and application. The relevant portion of this judgment reads as under:

“14. Learned counsel for appellant has submitted that the use of word 'means' in clause (i) of section 2 of Adhinyam, clearly indicates that the definition is a hard and fast definition and therefore except for the works specified in the said clause, no other work could be treated as 'Works Contract'. In other words the said definition excludes all other works, which are not specified in the said definition.

15. Learned counsel for appellant in the above context referred to *P. Kasilingam v. P.S.G. College of Technology, 1995 Supp (2) SCC 348: AIR 1995 SC 1395* wherein, it has been observed that the use of word 'means' indicates that the definition is a hard and fast definition and no other meaning can be assigned to the expression than is put down in definition. In *Punjab Land Development and Reclamation Corporation Ltd. Chandigarh v. Presiding Officer, Labour Court Chandigarh, (1990) 3 SCC 682* it has been observed by the Apex Court that a definition is an explicit statement of full connotation of a term. It has further been observed that when a statute says that a word or phrase shall 'mean' certain things or acts, the definition is a hard and fast definition and no other meaning can be assigned to the expression than is put down in definition.

16. Since, as per section 2(1)(i) of the Adhinyam 'Works Contract' means an agreement in writing for the execution of any work specified therein; it is clear that a work to constitute and to be construed as 'Works Contract' must be strictly covered by the works specified in the said definition and that no other work should be treated as "Works Contracts'.

17. Learned counsel for the respondents in the above context submitted that, Water Treatment Plant, essentially consists of building and water tanks. It was therefore submitted that the name "Water Treatment Plant" used in the contract between the parties, by itself would not exclude the said work executed by the appellant, from the category or definition of 'Works Contract. It has been submitted that the Water Treatment Plant was construction of such buildings and tanks, the details of which are given in (Annexure R-3). It was submitted in the above context that all the components of Water Treatment Plant basically consisted of building or storage tanks. In the above context photographs (Annexure R-4) to (Annexure R-9) are also filed, to indicate the nature of work and construction relating to the Water Treatment Plant executed by the appellant.

18. It has further been submitted by the learned counsel for respondents that section 2(1)(i) of the Adhinyam provides that a 'Works Contract' means an agreement in writing for the execution of any work relating to construction, repair or maintenance of any building or superstructure, dam, weir, canal,





reservoir, tank, etc. Learned counsel for respondents emphasised that thus the definition of 'Works Contract' covers 'any' work relating to construction, repair or maintenance of 'any' building or superstructure, which clearly indicates that all buildings, or superstructures or constructions are to be covered by the said definition of 'Works Contract', 't was therefore submitted that, since the Water Treatment Plant basically includes construction or building and water, storage plant, it was fully covered by the definition of 'Works Contract'.

19. In the above context learned counsel for respondents submitted that, the word "any" has been explained in Black's Law Dictionary and it has been stated therein that the word 'any' has a diversity of meaning and may be employed to indicate 'all' or 'every' as well as 'some' or 'one' and its meaning in a given statute depends upon the context and subject-matter of statute. It is often synonymous with 'either', 'every' or 'all'. The Supreme Court in *Lucknow Development Authority v. M.K. Gupta, (1994) 1 SCC 243: AIR 1994 SC 787* had considered the meaning and purport of word 'any' in the context of Consumer Protection Act, 1986 and has quoted the above definition of the said word in Black's Law Dictionary and has observed that its meaning in a given statute depends upon the context and subject-matter of the statute.

20. In the instant case, it is clear that the word 'any' in section 2(1)(1) of the Adhinyam appears to have a very wide spectrum, because it relates to the execution of any work relating to construction, repairs or maintenance of 'any' buildine or superstructure, tank, canal, reservoir, etc. the repetition of word 'any' in the said definition prior to the word 'Work' as well as before the nature of construction, e.s. buildins, superstructure, etc., clearly indicates the intention of legislature to provide for its wide amplitude and application. Therefore, it appears that the definition of 'Works Contracts' as siven in section 2(1)(i) of the Act, applies to all works of construction, repairs or maintenance of all types of buildinss, superstructures, reservoirs, tanks etc.

21. Therefore, all types of buildinss tanks whatever be its technical nomenclature would be covered under the sald definition of 'Works Contract'. In *Ghanshim Das v. Debi Prasad, AIR 1966 SC 1998* the Supreme Court with reference to U.P. Zamindari Abolition and Land Reforms Act, observed:

"The word building has not been defined in the Act and is, therefore, to be construed in its ordinary grammatical sense unless there is something in the context or object of the statute to show that it is used in a special sense different from its ordinary grammatical sense. So construed according to the dictionary meaning, the existence of a roof is not always necessary for a structure to be regarded as a building. Residential buildings ordinarily have roofs but there can be a non-residential building for which a roof is not necessary. A large stadium or an open air swimming pool constructed at a



considerable expense would be a building as it is a permanent structure and designed for useful purpose."

22. As noticed earlier, the use of word 'any' building etc. used in section 2(1)(i) of the Adhinyam avvears to be a very wide connotation and 'any' work relating to building appears to have been intended to be included in the definition of 'Works Contract'. As noticed earlier, in the instant case basic work constituting Water Treatment Plant, included construction of building as well as of storage tanks and reservoirs. Necessary ancillary, gadgets and implements for purification and cleansing of water would also have to be constructed. But such ancillaries would not change the basic nature of work to be executed by the appellant, which essentially was the construction of buildings and storage tanks. Therefore, the work undertaken to be executed by the appellant was covered within the meaning and definition of 'Works Contract'.

(Emphasis Supplied)

As per the view taken in the case of Kamini Malhotra (supra), the nomenclature of agreement is immaterial.

43. In the case of **D.D. Sharma** (supra), another Single Judge considered the definition of 'works contract' and opined that it is elaborate exhaustive and inclusive. While deciding the case of **D.D. Sharma** (supra), the learned Single Judge considered earlier judgment delivered in M.C.C. No. 850/2005, Technogem Consultant Pvt. Ltd. v. G.M.M.P.R.R.D.A. In D.D. Sharma (supra), it was held that even if the State has formed a society for execution of a work, that would not make such society, a distinct legal entity from the State thereby loosing all the attributes of the State. It was further held that the words "all other matters relating to execution of any of the said werk" mentioned under section 2(1)(1) of the Adhinyam are wide enough and brings within its ambit even the consultancy services. The relevant portion of this order in the case of D.D. Sharma (supra) reads as under:

9. Now the crucial question which has been raised by the applicant in this petition is that the agreement and work assigned to the applicant does not fall within the definition of 'Works Contract', may be examined.

To assess the nature of contract entered into between the parties it would be necessary to refer certain clauses of the agreement which provides the works to be done under the supervision consultancy for the work of construction/upgradation of rural roads in Madhya Pradesh under the Pradhan Mantri Gram Sadak Yojna scheme. Clauses 4.2, 4.3, 4.5, 4.6 and 7.1 are relevant, which provides construction, supervision to check quality of materials and works, measurement of works, scrutinize the claim raised by the contractor and held the management to clear the payment. The petitioner was to monitor progress of the work with certain services as enumerated in clause 4.6 and to submit various reports as enumerated in Clause 7.1 of the scheme. The aforesaid all the works are related to the works contract. Clause 2 of the terms of reference provides objectives for



*providing consultancy services*, which reads thus:

2. Objectives-The objectives of the proposed Consultancy Services are:

- i. Proper management of civil works contract as 'Engineer' in terms of civil works contract including field measurements and quality assurance work.
- ii. Comprehensive supervision of project implementation activities carried out by the ii Contractors to ensure complete compliance with the drawings, technical specifications and various stipulations contained in the Contract Documents.
- iii. Efficient construction supervision by personnel who are experienced in the modern methods of construction supervision and contract management.
- iv. Ensure high standards of quality assurance in the supervision/execution of work.
- v. Completion of the work within the stipulated period of completion. Consultants will specially be responsible for quality and early completion.

10. The definition of Works Contract under section 2(1)(1) of the Adhiniyam is elaborate and includes an agreement for supply of goods or material and all other matters relating to the execution of any of the said works. Meaning thereby that all other matters relating to the execution of works contract are included in the definition of works contract. The aforesaid definition is exhaustive and inclusive in nature. The work assigned to the applicant as per the contract were supervision of construction and the applicant had to carry out checking and verification of all the works as per the working drawings and regular inspection of contractors equipment, plant and machinery. Applicant was also entitled to direct the contractor to carry out all such works or to do all things as may be necessary to avoid or reduce the risk affecting the safety of life of workers, or adjoining property etc. the applicant was under an obligation to inspect the works on completion before taking over by the respondents. The applicant was also to report in respect of quality of material and work. The applicant was to inform the progress as per the working plan and was to prepare all reports and documents. In nutshell the applicant was to supervise construction, to report in respect of quality and progress of work and was to measure the work after completion of works. Meaning thereby the applicant was deeply concerned with the work and works contract and in absence of works contract or that of contractor the applicants existence cannot be presumed. The entire work of applicant was related to the works contract and the contract of applicant falls within the purview of matters relating to the 'execution of works contract'. *Technogem Consultants Pvt. Ltd. (supra)* the learned Judge considering this aspect held thus:

18. Mere perusal of afore quoted definition of "works contract" in section 2(1)(1) and in particular the words underlined would go to show that if the State Government or its official enters into a contract with any person for construction, repairs and maintenance of road



then it becomes a works contract, as defined in section 2(1)(i). Similarly, definition of "works contract", also includes an agreement in relation to all other matters relating to execution of any of the said work i.e., road. In other words, if in execution of main work as in this case road, any other agreement is entered into by State Government with any person for accomplishing execution of road work then the said agreement would also be regarded as "works contract within the meaning of section 2(1)(1) ibid.

19. In my considered view, therefore, the agreement in question (Annexure P-1) being in the nature of providing all kind of consultancy services by the petitioner to State Government which are necessary for construction and development of road and hence, it becomes a "works contract" as defined under section 2(1) ibid. In other words, It is a contract which falls in second category of "works contract" in its inclusive definition namely "all other matter relating to execution of any of the said work" i.e., road."

It is apparent that in this case the learned Single Judge considered the effect of existence of other agreements also which are entered into for accomplishment of work which is related with activities related to a 'works contract'.

**44.** In the case of *Jabalpur Corridor (supra)*, the judgment of *Kamini Malhotra (supra)* was not considered. However, the judgment passed in the case of *Technogem Consultant Pvt. Ltd. (supra)* and *D.D. Sharma (supra)* were relied upon by the State. The learned Single Judge did not discuss the aforesaid judgments in the case of *Jabalpur Corridor (supra)*. It needs no emphasis that an order passed by a previous bench of same strength is binding on the subsequent bench unless the earlier judgments are distinguishable or there exists any other judgment on the same point which is rendered by more number of Judges of the High Court or there exists a judgment of Supreme Court on that point.

**45.** True it is that in *Kamini Malhotra (supra)*, this Court was considering a works contract in relation to construction of a water tank. Concession agreement was not subject -matter of adjudication in the case of *Kamini Malhotra (supra)*. However, in *Kamini Malhotra (supra)*, this Court opined that the definition of works contract is of wide spectrum/amplitude. Almost similar view was taken in the case of *Technogem (supra)* and *D.D. Sharma (supra)*. Thus, in our view, to the extent interpretation of definition of 'works contract' is concerned, in *Kamini Malhotra*, *Technogem* and *D.D. Sharma (supra)*, it was laid down that the definition is very wide.

**46.** In *Jabalpur Corridor (supra)*, the learned Single Judge held that the expression "works contract as defined in the 1983 Adhinyam has a "restrictive meaning and has special and limited connotation". It is further held that definition aforesaid does not include detail and design. In our considered view, this finding in *Jabalpur Corridor (supra)* interpretation given by previous Benches in *Kamini Malhotra*, *Technogem* and *D.D. Sharma (supra)*. Detail and design etc. are essential part of activity of 'construction'.



**47.** In *Jabalpur Corridor (supra)*, the reasons for holding that concession agreement is not a works contract are-the concession agreement does not include detailed design, financing and operation of the contract, the works contract is a lump sum contract wherein the contractor has to quote the amount for execution of the work based on details furnished by the employer, there is no necessity for creation of any escrow account in works contract, in works contract the payment is made against the running account bills prepared by the contractor and submitted to the employer periodically whereas in concession agreement, the Concessionaire has to utilize and arrange the funds, the concessionaire under the agreement after completion of construction recovers the amount invested by him for completion of the project by way of toll, no State support agreement is executed in case of a works contract whereas it takes place in a case of concession agreement. The Concessionaire is not liable to pay value added tax, sales tax and other taxes under the concession agreement which are otherwise payable under the works contract. The Bench considered that 17 concession agreements were entered into between the parties in case of *Jabalpur Corridor (supra)*. A EPC contract was also entered into. On the basis of these "salient features" the Bench came to hold that concession agreement cannot be treated as a works contract. In addition, it was held that parties have clearly understood the agreement to be a concession agreement and decided to resolve their dispute as per the Act of 1996.

**48.** In the case of *Ashoka Infraways Ltd. v. State of M.P., 2016 (2) M.P.L.J. 685*, the Division Bench relied upon and followed the judgment rendered in the case of *Jabalpur Corridor (supra)*. The view of the Division Bench is mainly based on the dicta of *Jabalpur Corridor (supra)*. In addition, it was held that the Bench is reinforced in its decision due to the use of the term "concession" used at several places in the agreement itself. The Bench noticed that the words "concession area", "concession period", "concession agreement", etc. are repeatedly used in various paragraphs of the concession agreement. Hence, it was held that the concession agreement is not 'a works contract'.

**49.** Reverting back to the unamended definition of 'works contract', it is noteworthy that works contract means an agreement which must be in writing for the execution of any work relating to construction, repair or maintenance of any building or super structure or other entities mentioned in the said definition. In the definition, it was made clear that other matters relating to execution of any of the said work are also included. In our considered view, whether a concession agreement or any agreement by whatever name called is a works contract or not will depend whether essential ingredients of works contract are available in the said agreement.

The essential ingredients in the definition of "works contract" are that the agreement must be in writing, it must be for execution of "any work" relating to construction, repair or maintenance of any building, super structure or other entities mentioned in the definition.



The words "any work relating to construction, repair or maintenance" are very wide. If activity of construction, repair or maintenance is involved, nature of construction, repair or maintenance is immaterial. If aforesaid essential ingredients of works contract are available in the agreement and in addition thereto certain other elements are added in the agreement which are not included in the definition of "works contract", it will not take out the agreement outside the purview of works contract. If present agreement is tested on the anvil of aforesaid principle, it will be clear like noon day that the agreement fulfills the said requirement i.e. there exists an agreement in writing for execution of work relating to construction, repair and maintenance of building and other entities. In addition, the Concessionaires can operate the contract. Apart from this, it is noteworthy that the definition of 'works contract' is totally silent about the mode and method of payment. It is also silent as to how the work relating to construction, repair or maintenance should be carried out. The definition of 'works contract' contains the word "construction", "repair" and "maintenance". These words can be further divided and bifurcated. The definition of word "construction" in the concession agreement mentioned above is an example of the same. It is a matter of common knowledge that there cannot be any construction activity without undertaking the exercise of investigation, engineering, design, procurement, etc. The aforesaid ancillary activities are essential part of a construction activity. Likewise, the word repair or maintenance can be subdivided in various sub heads. However, such division or elaboration will not change the basic nature of the activity. Thus, we are not able to agree with the view taken in [Jabalpur Corridor](#)(Supra) that definition of works contract has a restrictive meaning and has a limited connotation. The design and finance etc. are also essential parts of construction activity.

**50.** In *Jabalpur Corridor*(Supra), it was held that there are certain elements which are special to the concession agreement and such "salient features" are absent in works contract. In our view, the requirement of maintaining account of a particular nature (whether it is Escrow Account or any other account), the method of payment, requirement to pay taxes under various Statutes are not relevant for determining whether concession agreement is a 'works contract' or not. If agreement satisfies the requirement of a 'works contract', on the basis of parameters laid down in the definition of 'works contract' it can be safely concluded that said agreement is a 'works contract'. As per the definition of 'works contract', the 'salient features' aforesaid are not decisive. In this regard reference may be made to the judgment of Supreme Court reported in 2014 (1) SCC 708, *Larsen and Toubro Ltd. vs. State of Karnataka*. The Apex Court considered the term "works contract" used in Art. 366 (29A)b of the Constitution. It is laid down that even if in a contract besides the obligations of supply of goods and material and performance of labour and services, some additional obligations are imposed, such contract does not cease to be a 'works contract'. The additional



obligations in the contract would not alter the nature of contract so long as the contract provides for a contract of work and satisfied the primary description of works contract. It is apt to mention that this view is subsequently affirmed by the Constitution Bench in 2014 (7) SCC 1 [*Kone Elevator India Pvt. Ltd. vs. State of Tamil Nadu*].

**51.** As analyzed, the present agreements satisfy the primary descriptions, of the works contract. If in addition to these primary description, applicant are engaged in other activity like operation of project or maintaining a particular type of account etc. or signed other contracts also, this will not take away the agreements outside the scope of 'works contract'. The requirement of payment of tax is a different facet and as per Section 2(i) of the Adhinyam it will not determine the nature of agreement. Similarly, mode of payment and method of arranging and utilizing money will not determine the nature of agreement. The definition of 'works contract' alone will determine whether a particular agreement falls within its ambit or not. For this reason, the argument of Shri Naman Nagrath based on relevant provisions of IT Act and railway contract must fail.

**52.** Similarly, in the case of R.V. Infrastructure Engineers Pvt. Ltd. (*supra*), this court had no occasion to test the agreement on the anvil of definition of works contract. In the said case, the question was whether the particular agreement is a lease or licence within the meaning of Transfer of Property Act and Easement Act. The question was relating to payment of stamp duty and registration under the Indian Stamp Act and Registration Act. The aforesaid judgment is of no assistance to the applicants.

**53.** In the case of *Kunhayammed (supra)*, it was held that while hearing a SLP, the Supreme Court is not exercising its It is merely exercising discretionary jurisdiction to grand its appellate jurisdiction appeal. The petitioner is still outside the gate of entry though aspiring to enter the appellate arena of Supreme Courts Whether he enters or not would depend on the fate of his petition for special leave. It is further held that neither the principle of res judicata nor the principle of public policy that leave was not granted and SLP was dismissed before its conversion into a civil appeal. analogous thereto, would bar the trial of Identical issues in a separate proceedings before the High Court merely on the basis of an uncertain assumption that the issues must have been decided by the Supreme Court at least by implication. In no uncertain terms, it was made clear that it is not correct or safe to extend the principle of res judicata or constructive res judicata to such an extent so as to found it on mere guess work. In view of this judgment, it cannot be held that the order of this Court in *Jabalpur Corridor (supra)* has got a seal of approval from the Supreme Court. The order of Supreme Court shows that leave was granted and SLP was dismissed before its conversion into a civil appeal.

**54.** On the basis of foregoing analysis, it is clear that any agreement by whatever name called, if it falls within the meaning and definition of "works contract" as per Adhinyam of 1983, it must be treated as a



works contract. In that case, the appropriate forum is the Tribunal constituted under section 3 of Adhinyam of 1983 if differences between the parties are covered under section 2(1)(d) of the Adhinyam of 1983.

**55.** The aforesaid discussion further shows that nomenclature of agreement is immaterial for determining whether it falls within the ambit of 'works contract'. By applying an artistic linguistic engineering, an agreement can be worded in a unique or a different manner. It may have a different nomenclature but these factors will not determine its real nature. In *Ashoka Infraways (supra)*, the Division Bench paid much "concession". The Division Bench further relied on the judgment of *Jabalpur Corridor (supra)*. We are unable to agree within the reasoning given in *Ashoka Infraways (supra)* for the reasons stated above. In addition, it is well settled that question of jurisdiction goes to very root of the matter and this legal question needs to be examined on the basis of interpretation of enabling provisions. The jurisdiction cannot be assumed by consent of parties. See *AIR 1954 SC 340, Kiran Singh v. Chaman Paswan*. For the aforementioned reasons, in *Jabalpur Corridor (supra)* and in *Ashoka Infraways (supra)*, the Benches have committed an error in holding that the "concession agreement" is not a "works contract". Hence, these orders to the said extent are overruled.

The aforesaid judgment was assailed by the *Viva Highways (supra)* before the Apex Court and the SLP has been dismissed.

**26.** Therefore, in view of the above, the petitioner is misconstruing the terms of the agreement and the construction of Dewas by-pass road on a BOT basis that it does not amount to execution of works contract, the petitioner executed the works contract on the land belonging to the State Government and recovered the construction and maintenance cost by way of toll with the due permission from the State Government, it is nothing but a deferred payment by a mode of recovery of toll. Hence, we do not find any substance in the writ petition.

**27.** Accordingly, Writ Petition No.2883 of 2008 as well as Writ Petition Nos.1414 of 2009 and 3029 of 2007 being devoid of merit and substance are hereby **dismissed**. The amount of taxes under the Commercial Tax Act as well as the Entry Tax Act, if not recovered because of the pendency of these writ petitions be recovered from the





petitioner with interest.

**28.** Let a photocopy of this order be kept in Writ Petition Nos.1414 of 2009 and 3029 of 2007.

**(VIVEK RUSIA)**  
**JUDGE**

**(BINOD KUMAR DWIVEDI)**  
**JUDGE**

Divyansh