IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 313 OF 2021

Konkan LNG Limited Earlier Known as)
Konkan LNG Private Limited, a company)
incorporated under the Companies Act,)
2013 and having its registered office at)
16, Bhikaji Cama Place, R. K. Puram,)
New Delhi 110 066.) ...Petitioner

Versus

1. The Commissioner of State Tax)
8th floor, GST Bhavan, Mazgaon, Mumbai-10)

2. The Commissioner of CGST)
Vasant Plaza Commercial Complex,)
4th & 5th floor, C. S. No.1079/2 K. H.)
Rajaram Road, Bagal Chowk,)
Kolhapur – 416 001)

3. The Union of India)
through the Secretary, Ministry of Finance,)
Department of Revenue, 128-A/North Block)
New Delhi 110 001)

4. The State of Maharashtra)
through the Secretary to Finance & Tax)
Department, Government of Maharashtra,)
5th floor, Mantralaya, Hutatma Rajguru)
Chowk, Madam Kama Road, Mumbai-32)

5. The Maharashtra Authority for)
Advance Ruling,)
GST Bhavan, 8th floor, H-Wing, Mazgaon,)
Mumbai 400 010)

6. The Maharashtra Appellate Authority)
for Advance Ruling,)
15th floor, Air India Building,)
Nariman point, Mumbai 400 021) ..Respondents

Mr. Sirram Sridharan a/w Mr. Shanmuga Dev for Petitioner.
Ms Jyoti Chavan, Addl GP for Respondent Nos.1, 4, 5 & 6.
Mr. Dhananjay Deshmukh i/b Mr. Jitendra Mishra for Respondent Nos.2 & 3

CORAM : K. R. SHRIRAM &
JITENDRA JAIN, JJ.
DATED : 28th JUNE 2024

ORAL JUDGMENT (PER K. R. SHRIRAM J.) :

1 Ratnagiri Gas and Power Pvt Ltd., a joint venture of NTPC, GAIL and Maharashtra State Government, was incorporated in July-2005 to take over the Dabhol Power Company by Enron Corporation, USA and others. Through a scheme of demerger, duly approved by the National Company Law Appellate Tribunal, Ratnagiri Gas and Power Pvt Ltd. retained the power plant whereas the LNG (Liquid Natural Gas) Terminal was transferred to petitioner. Post demerger, petitioner is engaged in regassification of LNG at its regassification plant situated in Dabhol. Petitioner is a subsidiary company of GAIL (India) Ltd. a Government of India undertaking.

2 Under the GST regime, according to petitioner, the activity of regassification of LNG amounts to supply of taxable services and hence petitioner has been discharging appropriate CGST and MGST liability on such supply. Petitioner has also been filing the stipulated returns as required under the CGST Act.

3 Petitioner receives LNG, being the input for the regassification plant,

by sea from various countries through LNG carriers which contain large cryogenic tanks onboard. The LNG imported is received at petitioner's captive jetty which is 300 meters long and situated at 1.8 km into the sea. Tugs are used to tow the LNG carriers towards jetty and after alignment, anchoring and mooring the LNG carrier is berthed at the jetty. Once the vessels are moved alongside, the LNG is transferred to cryogenic storage tanks located in the regassification plant with the help of insulated plant pipeline. After discharging cargo, the LNG carriers sail away.

4 Adjacent to the jetty, their exists a breakwater which was partially constructed by Dabhol Power Company. The primary function and purpose of breakwater is to absorb or throw back as completely as possible the energy of the maximum sea waves assailing the coast. It is to ensure that the swell and wave height is kept at minimum within desired limit thereby preventing damage to the jetty and other structures on shore.

5 Petitioner was not allowed to berth and unload LNG during monsoon and during rough weather conditions. Therefore, petitioner decided to reconstruct the existing incomplete breakwater to ensure safety of the jetty and the LNG carriers so that LNG carriers could berth and unload LNG even during monsoon season. Petitioner issued a notice inviting tender. Larsen and Toubro Ltd. bid and was awarded the contract. Petitioner spent approximately Rs.600 crores of which, approximately Rs.360 crores was towards supply of material and Rs. 240 crores was towards supply of

services.

6 Petitioner filed an application for advance ruling before the Maharashtra Authority for Advance Ruling (Respondent No.5) under Section 97 of the Central Excise Goods and Services Tax Act, 2017 (CGST Act) and the Maharashtra Goods and Services Tax Act, 2017 (MGST Act). Petitioner sought advance ruling in respect of the following questions:

> *"1. Whether on the facts and circumstances of the case and as per the law, the applicant is not eligible to avail/utilize the input tax credit of the taxes paid in terms of section 16 read with section 17 of the MGST ACT/CGST ACT (CGST/SGST/IGST) to the supplier of goods/ services on the construction of the break water wall, which is an important and integral part of the existing jetty and very much required for the purpose of safety and longevity of the jetty and is imperative for making the existing jetty as fully workable as an all-weather jetty and hence improves the operational efficiency of the applicant.*
>
> *2. Whether on the facts and circumstances of the case, as per the law and scope of work, the works contract services which the KLPL intends to procure is not predominantly earth work (that is, constituting more than 75 percent of the value of the works contract) and the services of the works contract by the contractor is covered under item (vii) of serial No.3 of Table of the Notification No. 11/2017-Central Tax (Rate) dated 28th June, 2017 as amended by Notification No. 31/2017 - Central Tax (Rate) dated 13th October, 2017."*

7 Respondent no.5 answered question no.1 in affirmative and as regards question no.2 did not answer in view of the discussions made in the order. Respondent no.5 in its discussion came to a conclusion that the breakwater would not qualify for inclusion in the term "plant and machinery" under Section 17(5)(d) of the CGST Act and, therefore, petitioner will not be entitled to any Input Tax Credit (ITC) on the construction / reconstruction of the breakwater.

8 As against the above order, petitioner preferred an appeal before respondent no.6 being the Maharashtra Appellate Authority for Advance Ruling for Goods and Services Tax under Section 101 of the CGST Act and MGST Act. Respondent No.6, by an order dated 6th November 2019, confirmed the order passed by respondent no.5. It is this order of respondent no.6 that is impugned in this petition.

9 We have gone through the facts of the case, documents on record and considered the submissions made by Mr. Sridharan, Ms Chavan and Mr. Deshmukh.

10 The issue is whether petitioner will be able to claim the ITC on the construction / reconstruction of the breakwater? Respondent no.5 held that as per Section 17(5)(d) of the CGST Act, petitioner will not be allowed to take the credit. According to respondent no.5: a) construction of breakwater was only facilitating the receipt of raw material that is LNG and it is not going to be used for rendering outward supply, b) the breakwater, being an immovable structure cannot be considered as "plant and machinery". Petitioner is already functioning without the complete breakwater and hence could not establish that it is impossible for them to function without breakwater.

11 Mr. Sridharan submitted as under:

(a) That the breakwater was a "plant and machinery" and, therefore, petitioner should be entitled to claim ITC.

(b) That breakwater is an “immovable property” and it can be considered as plant and machinery as all immovable structures are not disqualified from being covered in terms of “plant and machinery”.

(c) That Section 17(5)(d) of the CGST Act carves out an exception for plant and machinery and, therefore, if goods or services or both are received from taxable person for construction of plant and machinery, then ITC shall be available.

(d) That in the explanation to Section 17 of Chapter V of the CGST Act, “plant and machinery” is defined to mean apparatus, equipment and machinery fixed to the earth by foundation and structural support that are used for making outward supply of goods or services or both. “Apparatus” has been defined in various dictionaries as an integrated group of materials or devices used for a particular purpose or a collection or set of materials, implements or utensils for a given work etc. The analysis of the definition given in various dictionaries would show that “apparatus” is a combination of materials and other things having a particular function or intended for a specific use.

(e) That the complete breakwater shall comprise of accropodes to be installed on core structure of rocks and 1.5 to 3 MT secondary armour layer of boulders. The uneven surface of accropodes leads to improvement of inter-locking capacity and, therefore, the breakwater consisting of accropodes, rocks and boulders is clearly covered by the term “apparatus”

since it is a collection of materials with specific function of absorbing or throwing back the energy of the maximum sea waves assailing the coast. Once the breakwater is considered to be “apparatus”, then it is wholly irrelevant and immaterial whether the breakwater is an immovable property.

12 Ms Chavan and Mr. Deshmukh both submitted that the findings given by respondent no.5 and affirmed by respondent no.6 does not call for any interference. It was submitted that “plant” would mean where industrial activity takes place or a factory where certain material is produced or machinery are used to carry out certain process or for production. It was submitted that the breakwater wall constructed on the sea to protect the ship from high waves can hardly be called machinery or apparatus or equipment. It was also submitted that the breakwater not only comprises of piling of accropode on top of each other but involves extensive civil work and foundation laying in order to build the breakwater wall and the accropode is only part of it. It is therefore a “civil structure” and not “plant and machinery” by any stretch of imagination. The extensive earthwork as well as civil work which has gone into the making of the breakwater wall and, therefore, even for a moment one calls it as “plant and machinery”, it has to be excluded by virtue of it being a “civil structure”.

13 In our view, the conclusion arrived at by respondent no.5 and respondent no.6 do not require any interference. Section 17(5)(d) of the

CGST Act reads as under:

> *"17. Apportionment of credit and blocked credits.-*
>
> *************************
>
> *5) Notwithstanding anything contained in sub-section (1) of section 16 and sub-section (1) of section 18, input tax credit shall not be available in respect of the following, namely:-*
>
> *************************
>
> *(d) goods or services or both received by a taxable person for construction of an immovable property (other than plant or machinery) on his own account including when such goods or services or both are used in the course or furtherance of business.*
>
> ***************************
>
> *Explanation.-For the purposes of this Chapter and Chapter VI, the expression "plant and machinery" means apparatus, equipment, and machinery fixed to earth by foundation or structural support that are used for making outward supply of goods or services or both and includes such foundation and structural supports but excludes-*
>
> *(i) land, building or any other civil structures;*
>
> *(ii) telecommunication towers; and*
>
> *(iii) pipelines laid outside the factory premises."*

The reading of Sub-Section 5(d) shows that "plant and machinery" though immovable are eligible for ITC. What is "plant and machinery" is defined in the explanation and it says the input must be used: (a) for making the "plant and machinery" which should be apparatus, equipment and machinery; b) it is used for making outward supply of goods or services and c) it should be neither: i) land, building or any other civil structures; ii) telecommunication towers and ; iii) pipelines laid outside the factory premises.

14 As seen from the facts presented before us, petitioner provides the services of regassification of LNG to Ratnagiri Gas and Power Company for

which LNG is supplied to them by LNG carrier which are berthed at the captive jetty. LNG is then transferred to petitioner's unit for regassification. The breakwater has been constructed to ensure safety of the ship that are berthed at the jetty and also to allow the ship to reach the jetty and remain safe at any point of time irrespective of the severity in the weather conditions.

15 In such a situation, can this court uphold petitioner's contentions that the said breakwater constructed can be considered to be "plant and machinery"? Mr. Sridharan submitted that even though breakwater is an immovable property, it is covered under the term "plant and machinery" since accropode which are used to construct the breakwater are interlocking device fixed to the earth by foundation and those are "apparatus".

16 The dictionary meaning used by respondents for the term "plant" indicates that it would mean and include a place where the industrial activity takes place and/or factory where certain material is produced or machinery are used to carry out certain process or production. Mr. Sridharan in fairness stated that the breakwater or accropode cannot be called as "machinery". Even if we take both plant and machinery together, it should be interpreted to mean a place where certain manufacturing activities of production are carried out with the help of inputs. In the present case, the breakwater wall or accropode that are essential, certainly

do not qualify as plant and machinery. The breakwater wall can hardly be called “plant or machinery”. Accropode loses its identity when breakwater wall is constructed using accropode.

17 Explanation to Section 17 also provides that “plant and machinery” should be used for making outward supply of goods or services. In the instant case, breakwater wall is used for protecting the vessel from tides while unloading the LNG received and not for making outward supply of goods or services. Therefore, even on this count, petitioner does not satisfy the condition provided in the Explanation to Section 17 to be eligible for ITC.

18 On a perusal of paragraphs 22 to 28 of the impugned order dated 6th November 2019 passed by respondent no.6 and paragraph 6 of order dated 24th May 2019, we do not see any infirmity in the impugned order but we are in complete agreement with the said orders impugned in the present petition.

19 In the circumstances, in our view, there is no merit in the petition. Petition dismissed.

(JITENDRA JAIN, J.) (K. R. SHRIRAM, J.)

Meera Jadhav