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**(2014) 11 KAR CK 0333**  
**In the Karnataka High Court**  
**Case No : Writ Petition No. 2033 of 2014**

Ballal Auto Agency

APPELLANT

Vs

Union of India and Others

RESPONDENT

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**Date of Decision :** 03-11-2014

**Acts Referred:**

Constitution of India, 1950 — Article 246, 246(1), 248, 265, 268A — Finance Act, 1994 - Section 65, 65(105)(zzzzv)

**Citation :** (2015) 3 AKR 230 : (2015) ILR 2083 : (2015) 3 KCCR 2377 : (2015) 40 STR 51 : (2015) 86 VST 365

**Hon'ble Judges :** B.V. Nagarathna, J.

**Bench :** Single Bench

**Advocate :** K. Chandranath Ariga, for the Appellant; C. Shashikanth, Central Govt. Counsel, for the Respondent

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## Judgement

B.V. Nagarathna, J.?Petitioners have assailed sub-clauses (zzzzv) and (zzzzw) of Clause 105 of Section 65 of Finance Act, 1994, under which service tax was introduced. These sub-clauses were inserted by the Finance Act of 2011. The common ground on which challenge to the aforesaid clauses is made is that the levy of service tax in terms of those clauses is beyond the legislative competence of the Parliament. The substance of the grievance of the petitioners is-that by the impugned amendments made to the Finance Act, 1994, service tax is being levied illegally on transactions made by the petitioners. In W.P. No. 2033/2014 and W.P. No. 1966/2014, the petitioners are running a hotel in the name and style of "Hotel Ballal Tourist" in a town called Moodabidri and "Ballal Residency" at Nazarath Road in Bangalore. W.P. No. 52327/2013 is filed by Bruhat Bengaluru Hotels Association, which is a registered Association, through its Secretary.

2. According the petitioners they are engaged in the business of running hotels and restaurants. During the course of their business they supply food and articles of human consumption and drink in a restaurant or by way of outdoor catering. In respect of sale of aforesaid articles (goods) prepared by them or purchased from elsewhere, petitioners have been registered as dealers under the provisions

of the Karnataka Sales Tax Act, now substituted by the Karnataka Value Added Tax Act, 2003, and that they are not amenable to pay any Service Tax in respect of the very same transactions made by them in their respective hotels and restaurants. More specifically, it is contended that their transactions being in the nature of sale of goods in terms of Article 366(29A)(f), they are not liable to pay service tax. It is in this context, that petitioners have raised their principal contention that the levy of service tax on their business and more particularly on their sale transactions is beyond the legislative competence of the Parliament. Hence, they have sought a declaration that the said amendments are ultra vires the Constitution.

3. I have heard learned counsel for the petitioners and the learned Central Government counsel for respondents and perused the material on record.

4. At the outset, learned counsel for respondents submitted that the matter should not take too long, as the Division Bench of the Bombay High Court as well as the Division, Bench of this Court have opined that even in the case of a composite transaction such as in the instant case, service tax is leviable along with sales tax or value added tax in respect. Of the same transaction. Therefore, learned Counsel submitted that this Court may follow the decisions of the Bombay High Court in the case of Indian Hotels and Restaurant Association and Vishwavihar Bar and Restaurant Vs. Union of India and Others, and Sky Gourmet Catering Private Limited Vs. The Assistant Commissioner of Commercial Taxes, The Commissioner of Commercial Taxes, The State of Karnataka and The Commissioner of Service Tax--> and hold that the Parliament has the legislative competence to levy service tax on the petitioners and other similarly situated persons. Learned counsel has therefore contended that there is no merit in these writ petitions and the same may be dismissed.

5. Countering this submission, learned counsel for petitioners would submit that those decisions are not applicable to the case at hand and that the decision of the Hon''ble Supreme Court in the case of M/s. K. Damodarasamy Naidu and Bros. Etc. Etc. Vs. The State of Tamil Nadu and Another Etc. Etc., and the decision of the learned single Judge of the Kerala High Court in the case of Kerala Classified Hotels and Resorts Association Vs. Union of India, are applicable and therefore, the impugned amendments made in the year 2011 by insertion of (zzzzv) and (zzzzw) to Clause 105 of Section 65 of the Finance Act, 1994, would have to be declared as unconstitutional.

6. In the context of the aforesaid decisions, learned counsel for the petitioners contended that by virtue of the 46th amendment made to the Constitution, sub-clause (f) of Clause (29A) was inserted to Article 366, to include tax on the supply, by way of or as part of any service or any other manner whatsoever, goods, being food or any other article for human consumption and that when such an amendment has been made to make it a deemed sale of goods, taxation would have to be only on the basis that there is a sale of goods which is as part of any service and therefore, there cannot be an independent levy of service tax

on such transactions.

7. Elaborating on the said contention, it was submitted that under Article 366(29A)(f), tax can be levied 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, that such a tax is a part of sales tax or value added tax, which is levied by the State Government and therefore, on that aspect of the matter, Parliament is not competent to levy service tax. More specifically, it was contended, having regard to the nature of transaction of selling food and drink in a hotel, there is a composite transaction of sale-cum-service and that the two aspects cannot be bifurcated or made divisible and therefore, on the very same transaction, both sales tax or value added tax and service tax could not be levied. It was therefore, contended that Parliament had no legislative competence to amend the Finance Act, 1994 to incorporate the impugned amendments made in the year 2011 and thereby, levy service tax on a transaction involving the sale of food and drink, as part of service. Learned counsel for the petitioners therefore contended that the amendments would have to be struck down as being ultra vires the Constitution.

8. In response, learned Central Government Counsel drew my attention to Entry 97 of List I of the VII Schedule and also to Article 248-A of the Constitution, which empowers the Parliament to levy service tax and that there is no entrenchment upon Entry 54 of List II of VII Schedule, under which the State Legislatures can levy sales tax or value added tax.

9. Learned counsel on either side have relied upon certain decisions of the Hon'ble Supreme Court as well as this Court, Bombay High Court and the Kerala High Court, in support of their respective submissions.

10. Having heard learned counsel for parties, the following point would arise for my consideration: Whether amendments made to Finance Act, 1994 in 2011 by insertion of sub-clauses (zzzzv) and (zzzzw) are ultra vires the Constitution?

11. Service tax was introduced in India by the Finance Act of 1994. That law was legislated by the Parliament on the strength of the residuary entry that is Entry-97 List-I of the VD Schedule r/w. Articles 248 and 246(1) of the Constitution. Under the said Act, a number of services were sought to be taxed. There have been a number of amendments made to the said law by the Parliament from time to time. Amendment made to the Finance Act of 2011 by insertion of sub-clause (zzzzv) and (zzzzw) to Clause 105 of Section 65 are impugned in these writ petitions.

12. Sections 65(105)(zzzzv) and (zzzzw) of chapter V of Finance Act, 1994 read as under:--

"65. Definitions -- In this chapter unless the context otherwise requires--

x x x x x

(105) "taxable service" means any service provided or to be provided.

x x x x x

(zzzzv) to any person, by a restaurant, by whatever name called, having the facility of air-conditioning in any part the establishment, at any time during the financial year, which has licence to serve alcoholic beverages, in relation to serving of food or beverage, including alcoholic beverages or both, in its premises;

(zzzzw) to any person, by a hotel, inn, guest house, club or campsite, by whatever name called, for providing of accommodation for a continuous period of less than three months;"

13. The aforesaid amendments have been made pursuant to Article 246 of the Constitution, which relates to the subject matter of laws, which could be made by the Parliament and by the Legislatures of State. The said article refers to the distribution of legislative powers between the Parliament and the Legislatures of the State, which are in the form of three lists i.e., List I or the Union List empowering the Parliament to make laws on subjects enumerated in that list, List II or the State list which empowers the Legislature of any State to make Laws on any matter enumerated in List I and List III or the concurrent list which empowers both the Parliament as well as Legislatures of every State to make laws in matters enumerated in that list. In the instant case, the point of controversy relates to specific entries in List I and II of VII Schedule. Therefore, it is not necessary to go into the niceties of the concurrent list.

Article 248 reads thus:

"248. Residuary powers of legislation:--(1) Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List.

(2) Such power shall include the power of making any law imposing a tax not mentioned in either of those Lists."

Article 265 reads as under:--

"Taxes not to be imposed save by authority of law:-- No tax shall be levied or collected except by authority of law."

Article 268-A reads as under:--

"268-A-Service tax levied by Union and collected and appropriated by the Union and the States:-(1) Taxes on services shall be levied by the Government of India and such tax shall be collected and appropriated by the Government of India and the States in the manner provided in clause (2).

(2) The proceeds in any financial year of any such tax levied in accordance with

the provisions of clause (1) shall be--

(a) collected by the Government of India and the States;

(b) appropriated by the Government of India and the States, in accordance with such principles of collection and appropriation as may be formulated by Parliament by law."

Entry 92C of List I reads as under:--

"Taxes on Services"

Entry 97 of List I reads as under:--

"Any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists."

Article 268A and entry 92C are not yet in force as they have not been notified yet.

Entry 54 of List II reads as under:--

"Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of entry 92A of List I."

14. At this stage, it could be noted that Entry 97 of List I is a residuary Entry under which Parliament is empowered to make laws in respect of any matter not enumerated in List II or List in, including any tax not mentioned in either of those laws. But Entry 54 of List II specifically deals with taxes on the sale or purchase of goods other than newspapers, subject to the provisions of Entry 92A of List I, is a subject on which the State Legislature can enact laws.

15. The submission of respondents' counsel is that Entry 97 of List I derives its powers from Article 248 of the Constitution which gives power to the Parliament to make a law imposing a tax, not mentioned in either of two other lists namely Lists II and III and therefore Service Tax is leviable by the part.

16. In the context of those entries, the contention of the learned counsel for the petitioners is that in view of insertion of Clause 29A to Article 366 of the Constitution, it is only the State Government which is empowered to levy tax on a transaction as stipulated in Clause (f) thereof and therefore, on such a transaction, the Parliament does not have legislative competence to levy service tax.

Therefore, the bone of contention between the parties is with regard to the legislative competence of the parliament to levy service tax as is defined in clause (zzzzv) and (zzzzw) of clause 105 of Section 65 of the Act.

17. In order to consider and answer the aforesaid contentions, it is necessary to give a historical background of levy of sales tax pursuant to insertion of sub-clause (29/A) to Article 366 of the Constitution as well as service tax in India.

18. As learned counsel for the petitioners has relied upon Clause (f) of Article 366(29A), to contend that the transaction entered into by the petitioners are being governed by the Sales Tax Law and now the Value Added Tax, which is being levied by the State Government and it is the levy of service tax on the very same transaction, which is without legislative competence, it would be necessary at this stage to give a brief background to Article 366(29A) of the Constitution. By the 46th Amendment of the Constitution, Article 366(29A) of the Constitution was amended to enlarge the scope of expression "sale or purchase of goods", by means of a legal fiction. The constitutional validity of the said amendment by which the legislatures of the State were empowered to levy Sales Tax on certain transactions enumerated in sub-clauses (a) to (f) of Article 366(29A) of the Constitution was called in question in Builders Association of India and Others Vs. Union of India (UOI) and Others, . In the said case, a narration of the relevant constitutional provisions, with reference to judicial precedents were set out in order to appreciate the contention of the parties particularly, in the context of Articles 286, 301, 304 and Entry 54 of List II of the Constitution and Entry 92A of List I of VII Schedule and Article 269 and the 61st report of Law Commission with regard to levy of Sales Tax on certain transactions though strictly not sale leading to 46th Amendment, incorporating a new definition of sale. The Apex Court upheld the amendment as well as the definition of sale. Therefore, transactions in goods referable to sub-clauses (a) to (f) of clause (29A) of Article 366 of the Constitution were amenable to sales tax or value added tax by the State legislatures, which was subject to Article 286 and Article 265 of the Constitution.

19. Before discussing the point for consideration, it would be relevant to quote Hon"ble Supreme Court's observations in Federation of Hotel and Restaurant Association of India, etc., Vs. Union of India (UOI) and Others, . It states that "law with respect to a subject might incidentally affect a another subject in some way, but that is not the same thing as the law being on the latter subject. There may be overlapping but the overlapping must be in law. The transaction may involve two or more taxable events in its different aspects. But the fact that there is an overlapping does not detract from the distinctiveness of the aspects. The consequences and facts of the legislation are not the same thing as the legislative subject matter."

20. In Bharat Sanchar Nigam Ltd. and Another Vs. Union of India (UOI) and Others, , the controversy that came up for decision before the Hon"ble Supreme Court was with regard to the nature of transaction, by which a phone connection was taken, as to whether it was a sale or service or both. In that decision, after reiterating the legal history of Article 366(29A) of the Constitution, the Hon"ble Court held as under:--

"41. Sub-clause (a) covers a situation where the consensual element is lacking. This normally takes place in an involuntary sale. Sub-clause (b) covers cases relating to works contracts. This was the particular fact situation which the Court

was faced with in Gannon Dunkerley and which the Court had held was not a sale. The effect in law of a transfer of property in goods involved in the execution of the works contract was by this amendment deemed to be a sale. To that extent the decision in Gannon Dunkerley was directly overcome. Sub-clause (c) deals with hire purchase where the title to the goods is not transferred. Yet by fiction of law, it is treated as a sale. Similarly the title to the goods under sub-clause (d) remains with the transferor who only transfers the right to use the goods to the purchaser. In other words, contrary to A.V. Meiyappan's decision a lease of a negative print of a picture would be a sale. Sub-clause (e) covers cases which in law may not have amounted to sale because the member of an incorporated association would have in a sense begun as both the supplier and the recipient of the supply of goods. Now such transactions are deemed sales. Sub-clause (f) pertains to contracts which had been held not to amount to sale in *The State of Punjab Vs. Associated Hotels of India Ltd.*, . That decision has by this clause been effectively legislatively invalidated."

The latest decision in line of cases dealing with Article 366(29A) of the Constitution is the judgment of the Hon"ble Supreme Court in case of *Larsen and Toubro Limited and Another Vs. State of Karnataka and Another*, which shall be adverted to later.

21. Adverting to the point of controversy, namely, with regard to the levy of service tax as per impugned clauses (zzzzv) and (zzzzw), in *The State of Punjab Vs. Associated Hotels of India Ltd.*, , respondents therein were hoteliers and a question arose with regard to the nature of services rendered by the respondents therein as well as, levy of Sales Tax under the provisions of-PGS. Tax Act, 1948. In that decision, Hon"ble Supreme Court at Paragraphs 15 and 17 observed as under:--

"15. Even in the case of restaurants and other such places where customers go to be served with food and drink for immediate consumption at the premises, two conflicting views appear to prevail in the American courts. According to one view, an implied warranty of wholesomeness and fitness for human consumption arises in the case of food served by a public eating place. The transaction, in this view, constitutes a sale within the rules giving rise to such a warranty. The nature of the contract in the sale of food by a restaurant to customers implies a reliance, it is said, on the skill and judgment of the restaurant-keeper to furnish food fit for human consumption. The other view is that such an implied warranty does not arise in such transactions. This view is based on the theory that the transaction does not constitute a sale inasmuch as the proprietor of an eating place does not sell but "utters" provisions, and that it is the service that is predominant, the passing of title being merely incidental (*Corpus Juris Secundum*, Vol. 7/, 1215, 1216). The two conflicting views present a choice between liability arising from a contract of implied warranty and for negligence in tort, a choice indicative of a conflict, in the words of Dean Pound, between social interest in the safety of an individual and the individual interest of the supplier of

food. The principle accepted in cases where warranty has been spelt out was that even though the transaction is not a sale, the basis for an implied warranty is the justifiable reliance on the judgment or skill of the warrant or and that a sale is not the only transaction in which such a warranty can be implied. The relationship between the dispenser of food and one who consumes it on the premises is one of contractual relationship, a relationship of such a nature that an implied warranty of wholesomeness reflects the reality of the transaction involved and an express obligation understood by the parties in the sense that the customer does, in fact, rely upon such-dispenser of food for more than the use of due care, [see *Cushing v. Rodman*]. A representative case propounding the opposite view is the Case of *F.W. Woolworth Co. v. Wilson*, citing *Niskv v. Childa Co.*, wherein the principle accepted was that such cases involved no sales but only service and that the dispenser of food, such as a restaurant or a drug store keeper serving food for consumption at the premises did not sell and warrant food but uttered and served it and was liable in negligence, the rule in such cases being *caveat emptor*.

x x x x x

17. The transaction between a hotelier and a visitor to his hotel is thus one essentially of service in the performance of which and as part of the amenities incidental to that service, the hotelier serves meals at stated hours. The Revenue, therefore, was not entitled to split up the transaction into two parts, one of service and the other of sale of food stuffs and to split up also the bill charged by the hotelier as consisting of charges for lodging and charges for food stuffs served to him with a view to bring the latter under the Act."

22. In this context in *BSNL* at paragraphs 44 and 45, Hon"ble Supreme Court has observed as under:--

"44. Of all the different kinds of composite transactions the drafters of the Forty-sixth Amendment chose three specific situations, a works contract, a hire purchase contract and a catering contract to bring them within the fiction of a deemed sale. Of these three, the first and third involve a kind of service and sale at the same time. Apart from these two cases where splitting of the service and supply has been constitutionally permitted in sub-clauses (b) and (f) of clause (29-A) of Article 366, there is no other service which has been permitted to be so split. For example, the sub-clauses of Article 366(29A) do not cover hospital services. Therefore, if during the treatment of a patient in a hospital, he or she is given a pill, can the Sales Tax Authorities tax the transaction as a sale? Doctors, lawyers and other professionals render service in the course of which can it be said that there is a sale of goods when a doctor writes out and hands over a prescription or a lawyer drafts a document and delivers it to his/her client? Strictly speaking with the payment of fees, consideration does pass from the patient or client to the doctor or lawyer for the documents in both cases.

45. The reason why these services do not involve a sale for the purposes of Entry

54 of List II is, as we see it, for reasons ultimately attributable to the principles enunciated in Gannon Dunkerley's case, namely, if there is an instrument of contract which may be composite in form in any case other than the exceptions in Article 366(29-A), unless the transaction in truth represents two distinct and separate contracts and is discernible as such, then the State would not have the power to separate the agreement to sell from the agreement to render service, and impose tax on the sale. The test therefore for composite contracts other than those mentioned in Article 366(29-A) continues to be: Did the parties have in mind or intend separate rights arising out of the sale of goods? If there was no such intention there is no sale even if the contract could be disintegrated. The test for deciding whether a contract falls into one category or the other is to as what is "the substance of the contract." We will, for the want of a better phrase, call this the dominant nature test."

23. While referring to various clauses of Article 366(29-A) of the Constitution, Hon'ble Supreme Court held that it is only in sub-clauses (b) and (f) of that Article, there is a splitting of the services and supply, which is constitutionally permitted. In other words, what the Supreme Court implied was that in the course of rendering of service, there would also be a sale of goods such as in the case of works contract or in the case of restaurant service.

At para 116 it has been held as under:--

"116. It is not possible to interpret the contract between the service provider and the subscriber that the consensus was to mutilate the integrity of contract as a transfer of right to use goods and rendering service. Such a mutilation is not possible except in the case of deemed sale falling under sub-clause (b). Nor can the service element be disregarded and the entirety of the transaction be treated as a sale of goods (even when it is assumed that there are any goods at all involved) except when it falls under sub-clause (f). This will also result in an anomaly of the entire payment by the subscriber to the service provider being for alleged transfer of a right to use goods and no payment at all for service. The licence granted by the Central Government fixes the tariff rates and all are for services."

24. In fact, in BSNL, Hon'ble Supreme Court has referred to what is called as the aspect theory in order, to justify overlapping of taxes on the same transaction. This has been elaborated in other judgments of the Hon'ble Supreme Court, some of which are referred to as under:--

a) In The State of West Bengal Vs. Kesoram Industries Ltd. and Others, , Hon'ble Supreme Court while elucidating on the aspect theory has held that there can be no question of conflict solely on account of two aspects of the same transaction being utilized by two legislatures for two levies, both of which may be taxes or fees or one which may be a tax and other a fee falling within two fields of legislation respectively, available to them. So long as the essential character of levy is not departed from within the four corners of the particular entry, the

measure of tax or on the manner of tax levied, will not have any vitiating effect.

Hon"ble Supreme Court also referred to what is known as the power of taxation and measure of taxation, by stating that there may be more than one taxable events in a single transaction. When these taxable events involves different kinds of taxes and different aspects of taxation, there could not be any confusion regarding powers of taxation. Also, tax may be levied on an object or on an event of taxation.

b) In *Imagic Creative Pvt. Ltd. Vs. The Commissioner of Commercial Taxes and Others*, , the Hon"ble Supreme Court has pointed out that the payment of service tax and VAT are mutually exclusive. A transaction or activity may consist of different elements providing for or attracting different nature of levy.

c) In *Escotal Mobile Communications Ltd. Vs. Union of India (UOI) and Others*, , it has been held that:

"while the State Legislature is competent to impose tax on "sale" by a legislation relatable to entry 54 of List II of Seventh Schedule, the tax on the aspect of "services" rendered not being relatable to any entry in the State List, would be within the legislative competence of Parliament under Article 248 read with Entry 97 of List I of the Seventh Schedule to the Constitution".

d) In this context, Hon"ble Supreme Court in *Federation of Hotel and Restaurant Association of India, etc., Vs. Union of India (UOI) and Others*, , held as under:--

"Wherever legislative powers are distributed between the Union and the States, situations may arise where the two legislative fields might apparently overlap. It is the duty of the courts, however difficult it may be, to ascertain to what degree and to what extent, the authority to deal with matters falling within these classes of subjects exists in each Legislature and to define, in the particular case before them, the limits of the respective powers. It could not have been the intention that a conflict should exist; and, in order to prevent such a result the two provisions must be read together, and the language of one interpreted, and, where necessary modified by that of the other".

Thus, Aspect theory implies that different aspects of a single transaction can be taxed under different statutes. The Aspect doctrine legitimises the levy of more than one tax on a subject matter, if incidence of each of the taxes is different and where each of the taxes is imposed under different statutes and for different reasons. Thus, aspect theory can be applied only when a tax is levied on different taxable events of the same transaction. In other words, aspect theory though does not allow the State Legislature to entrench upon the Union List and tax services, by including the cost of such service in the value of goods but at the same time does not disentitle the State to tax the sale of goods element involved in the execution of works contract or in a composite contract.

Thus, different aspects of the same transaction can involve more than one taxable event. There is nothing to prevent taxation of different aspects of the

same transaction as separate taxable events. "It is a well-established judicial principle that so long as the legislation is in substance on the matter assigned to the Legislature enacting the statute, it must be held valid in its entirety even though it may incidentally trench upon matters beyond its competence." vide Tamil Nadu Kalyana Mandapmam am Assn. Vs. Union of India (UOI) and Others, .

25. In the aforesaid decision on the point under consideration, the Hon'ble Supreme Court has opined as follows:--

"42. On article 366(29A)(f), we are of the view that "it only permits the State to impose a tax on the supply of food and drink by whatever mode it may be made. It does not conceptually or otherwise include the supply of services within the definition of sale and purchase of goods. This is particularly apparent from the following phrase contained in the said sub-article "such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods". In other words, the operative words of the said sub-article are supply of goods and it is only supply of food and drinks and other articles for human consumption that is deemed to be a sale or purchase of goods."

"43. The concept of catering admittedly includes the concept of rendering service. The fact that tax on the sale of the goods involved in the said service can be levied does not mean that a service tax cannot be levied on the service aspect of catering. Mr. Mohan Parasaran, learned Senior Counsel for the appellant, submitted that the High Court before applying the aspect theory laid down by this Court in the case of Federation of Hotel & Restaurant Association of India v. Union of India ought to have appreciated that in that matter article 366(29A)(f) of the Constitution was not considered which is of vital importance to the present matter and that the High Court ought to have differentiated the two matters. In reply, our attention was invited to paragraphs 31 and 32 of the judgment of the High Court in which the service aspect was distinguished from the supply aspect. In our view, reliance placed by the High Court on Federation of Hotel & Restaurant Association of India and, in particular, on the aspect theory is, therefore, apposite and should be upheld by this Court."

26. The Bombay High Court in Indian Hotels and Restaurant Association and Vishwavihar Bar and Restaurant Vs. Union of India and Others, while distinguishing between tax on sale or purchase of goods and tax on service, has borne in mind Article 366(29A)(f) of the Constitution and has observed as under:--

"45. It is therefore, clear that a sales tax is on sale of goods. While selling, supply thereof is contemplated and covered by Article 366(29A)(f) of the Constitution of India. It does not mean that the service during the course of or while supplying the goods is taxed, but the tax is and remains on sale of goods. That is why the State Legislatures were held to be empowered to impose, levy, assess and recover a tax on sale of articles of food and drink which have been termed as "goods". Once the observations of the Honourable Supreme Court and

the Constitutional definition is understood in this context, then, we do not feel that any assistance can be derived by the petitioners from the judgment in K. Damodaraswamy Naidu (supra). This judgment of the Honourable Supreme Court in no way decided the controversy before us far from holding that the parliament is incompetent to impose and levy a tax on services provided in an air-conditioned Restaurant".

27. In M/s. K. Damodarasamy Naidu and Bros. Etc. Etc. Vs. The State of Tamil Nadu and Another Etc. Etc., , on which reliance is placed by petitioners" counsel, wherein it has opined as follows:

"The provisions of sub-clause (f) of Clause (29A) of Article 366 need to be analysed. Sub-clause (f) permits the States to impose a tax on the supply of food and drink. The supply can be by way of a service or as part of a service or it can be in any other manner whatsoever. The supply or service can be for cash or deferred payment or other valuable consideration. The words of sub-clause (i) have found place in the Sales Tax Acts of most States and, as we have seen, they have been used in the said Tamil Nadu Act. The tax, therefore, is on the supply of food or drink and it is not of relevance that the supply is by way of a service or as part of a service. In our view, therefore, the price that the customer pays for the supply of food in a restaurant cannot be split up as suggested by learned Counsel. The supply of food by the restaurant owner to the customer, though it may be a part of the service that he renders by providing good furniture, furnishing and fixtures, linen, crockery and cutlery, music, a dance floor and a floor show, is what is the subject of the levy. The patron of a fancy restaurant who orders a plate of cheese sandwiches whose price is shown to be Rs. 50 on the bill of fare knows very well that the innate cost of the bread, butter, mustard and cheese in the plate is very much less, but he orders it all the same. He pays Rs. 50 for its supply and it is on Rs. 50 that the restaurant owner must be taxed".

(Underlining by me)

Thus, even in the case of K. Damodaraswamy Naidu, the Hon''ble Supreme Court has recognized the service aspect of the transaction involved in supply of food and drink in a restaurant by way of the aforesaid illustration. The Hon''ble Supreme Court has not opined that the tax on the aforementioned transaction could only be in the nature of sales tax and that no service tax was leviable.

28. Reference could also be made to judgment of the Division Bench of this Court in Sky Gourmet Catering Private Limited Vs. The Assistant Commissioner of Commercial Taxes, The Commissioner of Commercial Taxes, The State of Karnataka and The Commissioner of Service Tax--> which is a case arising under sub-clause (zzt) of Clause 105 of Section 65 of the Act. In that case the assessee therein was engaged in the business of catering services, which included preparation and supply of food, beverages and other eatables. By sub-clause (zzt) outdoor catering services was brought within the net of service tax. The

assessee therein contended that service tax was being paid on the transaction in question. Therefore, the State could not levy sales tax or value added tax on the very same transaction. The Division Bench of this Court considered as to whether in a catering contract," particularly out door catering, it was open for the State to levy sales tax when service tax had been paid on the service rendered. In that case also, reference was also made to K. Damodaraswamy Naidu and it was held that contract for out-door catering is a composite contract which falls within sub-clause (f) of clause (29A) of Article 366 of the Constitution and service tax is payable on the service aspect and sales tax was payable on deemed sale aspect and it is not an indivisible contract. If in a contract, apart from sale, an element of service is also contained, then the purport and object for which the Constitution had to be amended and clause (29A) had been inserted in Article 366, must be kept in mind. Payments of service tax as also the VAT are mutually exclusive. Therefore, they should be held to be applicable having regard to the respective parameters of service tax and sales tax as envisaged in a composite contract as contradistinguished from an indivisible contract. It was also stated that different elements of a transaction provide for attracting different nature of levy and that it was difficult to hold that sales tax would be payable on the value of the entire contract; irrespective of the element of service provided. Thus, in the said decision, it was held that the entire consideration paid under the agreement cannot be the subject matter of service tax nor could it be the subject matter of sales tax. Otherwise, it would amount to double taxation. Since catering contract involves supply of goods and services, the consideration received under such contract has to be apportioned between that part of the contract involving supply of goods and the part involving supply of service and appropriate tax be levied separately.

29. The latest in the list of cases arising under the works contract is Larsen and Toubro Limited and Another Vs. State of Karnataka and Another, , which has relevance to the case at hand. In that decision, the Hon"ble Supreme Court has opined at para 60 as under:--

"Whether the 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."

Thus the dominant intention test noticed in BSNL has not been reiterated rather it has been held to be immaterial while considering the case under Article 366(29A) of the Constitution.

The aforesaid observations of the Hon"ble Supreme Court are clearly in contrast to the observations made by the High Court of Kerala in the case of Kerala Classified Hotels and Resorts Association Vs. Union of India, . In that decision,

the Kerala High Court has observed thus:--

"The very purpose of incorporating the definition of tax on sale or purchase of goods in Article 366 was to empower the State Governments to impose tax on the supply, whether it is by way of or as a part of any service of goods either being food or any other article for human consumption or any drink either intoxicating or not intoxicating whether such supply or service is for cash, deferred payment or other valuable consideration. The words "and such transfer, delivery or supply of goods" is deemed to be a sale of those goods by the person making the transfer. Therefore, the incidence of tax is on the supply of any goods by way of or as part of any service. When food is supplied or alcoholic beverages are supplied as part of any service, such transfer is deemed to be a sale. Apparently, the transfer is during the course of a service and when the deeming provision permits the State Government to impose a tax on such transfer, there cannot be a different component of service which could be imposed with any service tax in exercise of the residuary power of the Central Government under Entry 97 of List I of the Constitution of India."

The aforesaid observations are clearly against the aspect theory which envisages that in respect of a single transaction, there can be taxation levied on different aspects of it. In fact, the Bombay High Court in *Indian Hotels and Restaurant Association and Vishwavihar Bar and Restaurant Vs. Union of India and Others*, while referring to the decision of the Kerala High Court has held that the Kerala decision neither observes nor holds that the tax in question is covered by the State List (Entry 54). A categorical finding in that regard was necessary. The Bombay High Court has relied upon *Federation of Hotel and Restaurant Association of India, etc., Vs. Union of India (UOI) and Others*, and has rejected the contention of the petitioner therein that Kalyana Mandapams cannot be equated with Restaurants. It has further opined that tax on sale of goods involved in the said service levied, does not mean that the service tax cannot be levied on the service aspect of catering. That means that when a restaurant renders to any person a service, tax on sale of goods involved in the said service can be levied separately. That does not mean that service tax cannot be levied on the aspect of serving food at a restaurant. That is precisely the tax imposed by the Parliament by virtue of impugned amendments. There could be a sale during the course of rendering of service at a restaurant and therefore, a sales tax could be imposed by the State Legislature on the sale/supply of food. So long as there is no prohibition against imposition of service tax on the services rendered, it must be held that the Parliament is competent to impose a service tax also on the service aspect of the very same transaction. In other words, if a transaction is relatable purely to Entry 54 of State List of the Constitution, then in that case, the Parliament cannot levy service tax on that transaction. But if it is a composite transaction, then exclusive tax on the sale aspect as well as service aspect are leviable by the State legislature and by Parliament respectively.

30. Thus, a tax on the sale or purchase of goods and tax on service are two

distinct aspects. Tax on sale or purchase of goods is envisaged under Entry 54 of List II (Sales Tax) and the taxable event therein is transfer of property in goods or any of the nature of transactions stipulated in Article 366(29A)(a) to (f). Sales Tax can be levied by the State Government and the State Legislature is competent to enact law with regard to levy of Sales Tax. When State Government imposes tax on sale of goods, it does not do so on the service aspect of the sale. Thus, service tax is not levied on the transaction when sale of goods occurs. Service tax can however be levied on the said transaction by the Parliament, which is competent to enact a law imposing service tax. Hence, in the instant case, by the insertions of clauses (zzzzv) and to sub-section (105) of Section 65 of the Finance Act, 1994, the Parliament intends to levy service tax on those transactions relatable to service aspect and not on the aspect of sale of goods, which the Parliament is competent to do so. Therefore, there is no merit in the submission of the petitioners with regard to the competency of the Parliament to levy service tax on the transactions referred to in the above sub-clauses.

31. In fact, a learned single Judge of this court in the case of Confederation of Real Estate Developers' Association of India (Karnataka) and another v. Union of India, through Joint Secretary, Ministry of Law and Justice Bhavan and others, reported in BLR 2013 Karnataka 569: (2013 (3) AIR Kar R 380), while considering Clauses (zzq) & (zzzh) and Clause (zzzzu) of sub-section (105) of section 65 of the Finance Act, 1994, has held that Parliament had the legislative competence to impose service tax on those transactions which are relatable to service rendered during the course of sale of land and buildings which is distinct from the tax that is levied on the construction of flats and buildings which is a works contract. The reasoning given by the learned single Judge, by analogy, is applicable to the present case. The aforesaid case deals with Article 366(29A)(b) of the Constitution which, according to the Hon'ble Supreme Court in BSNL is on par with Clause (f) of that Article, with which this instant case is concerned with.

32. In view of the aforesaid detailed discussion, I am inclined to follow the view of the Bombay High Court which has rightly held that the Parliament had the legislative competence to levy service tax on sub-clauses (zzzzv) and (zzzzw) of clause (105) of section 65 of the Act. With respect, I hold that the reasoning of the Kerala High Court is not correct.

33. In the result, the writ petitions are dismissed. Parties to bear their respective costs.