
(2014) 05 CAL CK 0046
In the Calcutta High Court
Case No : W.P. No. 4085(W) of 2014

Bengal Shrachi Housing Development Limited and Another	APPELLANT
Vs	
Union of India and Others	RESPONDENT

Date of Decision : 15-05-2014

Acts Referred:

Citation : AIR 2014 Cal 145 : (2014) 2 CALLT 573 : (2014) 5 CHN 187

Hon'ble Judges : D. Datta, J

Bench : Single Bench

Advocate : Ratnanka Banerji, Mr. Debnath Ghosh and Mr. Shounak Mitra,
Advocate for the Appellant; Dilip Kumar Chatterjee and Mr. Indrajeet Dasgupta,
Advocate for the Respondent

Judgement

Dipankar Datta, J.—The first petitioner, a company incorporated under the provisions of the Companies Act, 1956, is the owner of the premises situated at No. CBD-1, JL 23, AAI, Newtown, Rajarhat (hereafter the said premises). Space on the 6th floor of the said premises, measuring more or less 45,605 sq. ft. of super built up area, together with total 45 car parks were offered on rent to the respondents following several meetings. The terms and conditions for letting out the said space to the respondents by the first petitioner ultimately crystalised @ Rs. 42 per sq. ft. of the total super built up area of 45,605 sq. ft. After finalisation of the terms and conditions of the proposed lease, a deed of lease dated September 1, 2012 (hereafter the said deed) was executed by and between the petitioner and the respondents. One of the terms and conditions of the said deed provided as follows:

6. The lessor/lessors shall pay all rates, taxes, assessment, charges and other outgoings whatsoever of every description which under the statutes are primarily leviable upon the lessor and shall keep the premises free from all encumbrances and interference in this behalf. Rates and taxes primarily leviable upon the occupier shall be paid by the Government.

2. Simultaneously with the execution of the said deed, the respondents were put

into possession of the leasehold space. From time to time bills were raised by the first petitioner on the respondents towards lease rent inclusive of the component of service tax. While the respondents paid the lease rent in respect of the leasehold space, the service tax was not paid. Requests and reminders followed at the end of the first petitioner to which the respondents replied that "the issue of payment of service tax is under consideration of competent Authority of Government of India, and necessary action will be taken after receipt of their decision in this matter". Like a broken record, the Defence Estate Officer, Kolkata Circle, the fourth respondent, went on playing the same tune by saying so in his letters dated January 15, 2013, February 11, 2013, March 12, 2013, April 1, 2013, June 11, 2013, July 24, 2013, August 22, 2013, September 24, 2013, October 24, 2013, November 25, 2013 and December 11, 2013, following the first letter dated December 11, 2012. The Government of India neither took any decision regarding payment of service tax nor did the respondents make any effort to obtain its decision and make payment in terms thereof.

3. Feeling aggrieved by the failure and/or remissness of the respondents in paying the service tax, this writ petition dated February 7, 2014 has been presented before this Court praying for, inter alia, the following relief:

In the circumstances, your petitioners most humbly pray Your Lordships for the following orders:-

a) A writ or writs in the nature of Mandamus do issue commanding the respondents to forthwith make payment of the service tax component of the monthly rentals in respect of the 6th floor of Premises No. CBD-1, JL 23, AAI, Newtown, Rajarhat, measuring more or less about 45605 sq. ft. super built-up area together with total 45 car parks, 20 open slots and 25 covered slots;

b) A writ or writs in the nature of Mandamus do issue commanding the respondents to forthwith make payment of the service tax component of the monthly rentals already deposited by the petitioners on behalf of the respondents aggregating to Rs. 36,37,475/- together with interest at the rate of 18% per annum; ** ** *

4. Mr. Banerjee, learned advocate representing the petitioners, contended that the liability to pay service tax is that of the person to whom service is being provided and, therefore, the respondents cannot escape the liability to pay service tax. Apart from clause 6 of the said deed extracted supra, he invited my attention to a letter dated April 30, 2012, issued by a Deputy Inspector General attached to the Indian Coast Guard. While conveying to the first petitioner that the Ministry of Defence, Government of India had sanctioned hiring of office accommodation at the said premises, the terms and conditions of hiring sanctioned by the Government of India were communicated reading as follows:

3. The terms and condition of hiring as sanctioned by the GOI are as follows:

(a) The monthly hiring charges @ Rs. 42/- per sq. ft. will be Rs. 16,34,967.00

(Rupees Sixteen Lakh Thirty Four Thousand Nine Hundred Sixty Seven only).

(b) There will be no annual escalation during the lease period.

(c) The registration charges, stamp duty, service tax etc (if applicable) is the liability of the lessee.

(d) The maintenance of the building and associated fittings will be the liability of to M/s. Bengal Shrachi Housing Development Ltd.

(e) The local taxes etc. if any will be paid by the M/s. Bengal Shrachi Housing Development Ltd

(f). The electricity charges as per consumption will be paid by the Coast Guard to M/s. Bengal Shrachi Housing Development Ltd.

(g) Other terms and conditions as per letter of offer.

According to him, the respondents having agreed to bear service charge and the same being their liability in terms of the extant law (the Finance Act 1994), there could be no escape from the conclusion that they are to bear the same.

5. Unreported decisions of the Delhi High Court dated October 20, 2010 and the Allahabad High Court dated January 16, 2013 in the case of Pearey Lal Bhawan Association v. M/s. Satya Developers Pvt. Ltd. and M/s. Bhagwati Security Services (Regd.) v. Union of India & ors. respectively were relied on by Mr. Banerjee in support of his aforesaid submissions.

6. Mr. Chatterjee, learned advocate representing the respondents, objected to maintainability of the writ petition. It was his contention that even if it is assumed that it is the liability of the respondents to bear the service tax and such liability has not been discharged by not paying the service tax to the first petitioner, such action amounts to breach of contract and the remedy of the first petitioner, in terms of the said deed, is to refer the dispute(s) and difference(s) by and between the parties for resolution by arbitration. He next contended that in terms of clause 6 extracted supra, it is the lessor (the first petitioner) who is liable to pay all rates, taxes, assessment charges and other outgoings whatsoever of every description, which under the relevant statutes are primarily leviable upon the lessor and since the service tax is primarily leviable upon the service provider, being the first petitioner, the respondents as lessees are not liable to pay service tax. Referring to the letter dated April 30, 2012 on which Mr. Banerjee placed reliance, it was contended by Mr. Chatterjee that the same cannot be construed as confirmation in regard to payment of service tax. Before concluding, he also urged that the lease rent was fixed @ Rs. 42 per sq. ft. with the understanding that the same would cover future taxes including service tax and that the first petitioner cannot be allowed to escape its obligations in terms of the said deed and foist the liability on the respondents.

7. I have heard the learned advocates for the parties and perused the materials on record.

8. In view of the decisions of the Supreme Court in the case of ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others, and in the case of Harbanslal Sahnia and Another Vs. Indian Oil Corpn. Ltd. and Others, , the point as to whether a writ petition impeaching contractual obligations despite availability of a forum for resolution of disputes and differences by arbitration would be maintainable, is no longer res integra. The facts surfacing from the writ petition do not require investigation into any disputed question of fact; rather the point involved is simple,-who between the first petitioner and the respondents, in terms of the agreement between the parties, is liable to bear the service tax.

9. In Pearey Lal Bhawan Association (supra), one of the issues that fell for consideration of the Delhi High Court was, "on whom does the incidence of taxation fall, in this case, having regard to the materials and documents on the record;". Relevant passages from the decision are quoted below:

12. The controversy requiring decision by the Court is narrow and limited. It is whether the burden of service tax, levied on the service or facility of leasing (of the suit premises) should be borne by the lessor (i.e. the service provider) or the lessee (i.e. the defendant, user). There is no dispute that the parties did not visualize that this kind of a levy would be made in respect of lease, or rental of commercial properties; it is also undisputed that the levy was made effective in 2007, after the parties had entered into the agreement. The defendant denies liability to pay, submitting that the conditions in the contract clearly stipulate that all taxes, etc. are to be borne by the plaintiff landlord. It relies on principles of interpretation of contract, to submit that when parties visualize situations and provision for them, it is not open to either of them to roam outside the express terms, and try to discover obligations when none exist.

13. ** ** ** **

14. It is true, that the contracts entered into between the parties in this case, spoke of the plaintiff lessor's liability to pay municipal, local and other taxes, in at least two places. The Court, however, is not unmindful of the circumstance that service tax is a species of levy which the parties clearly did not envision, while entering into their arrangement. It is not denied that leasing, and renting premises was included as "service" and made exigible to service tax, by an amendment; the rate of tax to be collected, is not denied. If the overall objective of the levy-as explained by the Supreme Court, were to be taken into consideration, it is the service which is taxed, and the levy is an indirect one, which necessarily means that the user has to bear it. The rationale why this logic has to be accepted is that the ultimate consumer has contact with the user; it is from them that the levy would eventually be realized, by including the amount of tax in the cost of the service (or goods).

15. ** ** ** ** Although there is no explicit provision to that effect, enabling lessor's such as the plaintiff, to the service tax component, this Court is of the

view that there is sufficient internal indication in the Act, through Section 83 read with Section 12-A and Section 12-B suggesting that the levy is an indirect tax, which can be collected from the user (in this case, the lessee). This issue, is therefore, answered in the plaintiff's favour, and against the defendant.

10. Insofar as the decision in *M/s. Bhagwati Security Services (Regd.) (supra)* is concerned, it appears that a writ petition was presented before the Allahabad High Court by the petitioner against Union of India and the BSNL authorities. Under the agreement, security services were to be provided to the respondent no. 2. Service tax was demanded but was denied on the ground that the same was not contemplated in the agreement. The Division Bench of the Allahabad High Court proceeded to hold as follows:

5. Having gone through the agreement and the provisions of the relevant statute, we find that service tax is statutory liability. It is a tax which is required to be collected by the service provider from the person to whom service is provided, and thereafter to be deposited with government treasury within the prescribed time.

6. Thus essentially the statute is being imposing the tax upon the person to whom service is being provided, and the service provider is merely a collecting agency.

7. In that view of the matter, the writ petition is allowed. The respondent no. 2 is directed to make reimbursement of service tax to the petitioner without further delay.

11. I share the views of the Delhi High Court and the Allahabad High Court extracted supra.

12. Turning to the facts of the present case, it appears that clause 6 extracted supra delineated the respective obligations of the lessor and the lessees. The parties agreed that the rates and taxes primarily leviable upon the occupier would be paid by the Government. That the respondents were not oblivious of their obligation to bear service charge is reflected from the letter dated April 30, 2012. Although the said deed does not specifically refer to service tax, the letter dated April 30, 2012 expressly provides that Government of India had sanctioned the terms and conditions of hiring including, inter alia, the liability of the "lessee in respect of registration charges, stamp duty, service tax etc., (if applicable)". The words "if applicable" in brackets follows "etc." and not "service tax". Therefore, it is not a case that if obligation to make payment of service tax arises, the respondents would have discretion to foist the responsibility on the lessor (the first petitioner). Liability to bear service tax being that of the person receiving service, there can be no escape from the conclusion that the respondents are liable to bear service tax.

13. The contention of Mr. Chatterjee that the lease rent was fixed @ Rs. 42/- per sq. ft. to cover all taxes and charges has not impressed me. I am inclined to be

of the view that such contention has been raised as an after thought. The terms of the said deed would have been differently worded, if indeed the parties had agreed to the lease rent being fixed @ Rs. 34/- per sq. ft.

14. In the result the writ petition succeeds. The first petitioner is entitled to writs/ orders in terms of prayers "a" and "b" extracted supra, with the only modification in regard to the rate of interest i.e. interest @ 10% instead of 18%. It is ordered accordingly.

15. On and from June 1, 2014, the lease rent shall be paid by the respondents together with service tax as is chargeable in law, to the first petitioner. Insofar as the arrears are concerned, the respondents shall have time till September 30, 2014 to pay the same with interest @ 10% p.a.

Urgent certified copy of this judgment and order, if applied for, may be furnished to the applicant at an early date.