

(2009) 09 DEL CK 0360

In the Delhi High Court

Case No : Writ Petition No. 11435 of 2009

Brahmaputra Infrastructure Ltd.

APPELLANT

Vs

Delhi Development Authority

RESPONDENT

Date of Decision : 04-09-2009

Acts Referred:

Constitution of India, 1950 — Article 14, 226
Evidence Act, 1872 — Section 91

Citation : (2010) 251 ELT 488 : (2010) 17 STR 452 : (2010) 29 VST 511

Hon'ble Judges : Anil Kumar, J

Bench : Single Bench

Advocate : Biswajit Bhattacharya and Amit Punj, for the Appellant; Ajay Verma, for the Respondent

Final Decision : Dismissed

Judgement

Anil Kumar, J.—The petitioner seeks a direction under Article 226 of the Constitution of India to the respondent/DDA to reimburse the service tax deposited by the petitioner and not to discriminate the petitioner.

2. The request of the petitioner is to reimburse him the amount of Rs. 60,19,872/- on account of service tax along with interest at 12% from the date of first payment of the service tax which has been declined on behalf of DDA by office of the Executive Engineer, South Eastern Division No. 7 contending that as per terms and conditions of the agreement with M/s. Brahmaputra Infrastructure Ltd./petitioner service tax is not payable by the DDA.

3. The learned Counsel for the petitioner has relied on the letter dated 17th September, 2007 stipulating that the letter dated 25th July, 2007, 28th July, 2007 and 3rd September, 2007 shall form part of the agreement. Admittedly the written agreement between the parties does not stipulate that service tax shall be payable to the petitioner by the respondent.

4. On the basis of the letter dated 17th September, 2007 it is contended that

since the letter dated 28th July, 2007 forms part of the agreement and the said letter stipulates about applicability of the service tax, therefore, there are no disputed question of facts and the liability of the service tax of the respondent to the petitioner can be adjudicated in a writ petition under Article 226 of the Constitution of India.

5. The learned Counsel for the petitioner has relied on Gujarat State Financial Corporation Vs. Lotus Hotels Pvt. Ltd., to contend that the statutory authorities cannot commit breach of a solemn undertaking on which other side has acted and then contend that the party suffering by the breach of contract may sue for damages but cannot compel specific performance of the contract. Perusal of the precedent relied on by the petitioner reveals that it is distinguishable in as much as in the Gujarat State Financial Corporation (Supra) the said corporation had entered into an agreement in the performance of its statutory duty to advance loan to a company and acting on the undertaking, that company had proceeded to undertake and execute project of setting up four star hotel and incurred huge expenses and suffered liabilities to set up the hotel. The Gujarat State Financial Corporation had declined to advance loan to the company and the plea was taken that the agreement to advance the loan cannot be specifically enforced and the company may be entitled to recover damages which contention was rejected by the Supreme Court. The case of the petitioner is apparently distinguishable as petitioner is claiming service tax from the respondent, where the respondent/DDA is denying any liability to pay the service tax as the liability of the payment of service tax is not stipulated in the agreement between the parties and even the correspondence between the parties which had been made part of the agreement by letter dated 17th September, 2007 do not impose the liability of the service tax on the respondent. By letter dated 28th July, 2007 on which the petitioner relies to claim service tax, did not admit the liability of DDA to pay the service tax as by said letter the petitioner had demanded the respondent to clarify and confirm that the quoted rates given by the petitioner will be exclusive of service tax and the liability thereon shall be applicable to the DDA and will be reimbursed by DDA as per actual to the petitioner. This was one of the conditions which was claimed by the petitioner but which was not accepted by the respondent. The learned Counsel for the petitioner is unable to show any letter or demand after 28th July, 2007 whereby the respondent DDA had admitted their liability to pay the service tax. In the circumstances on the basis of the documents relied on by the petitioner it cannot be held that the respondent had admitted its liability of the service tax or the respondent is liable for the claim of the petitioner for an amount of Rs. 60,19,872/- for service tax. Therefore, it cannot be held that the petitioner is entitled for the said amount from the respondent. If the said amount is not admitted by the respondent to be payable by the DDA, the alleged liability of the respondent to pay 12% simple interest is also not admitted. If on the basis of written agreement and documents, the petitioner is not entitled for any amount on account of service tax, the petitioner shall not be entitled for the service tax from the respondent on account of any

oral evidence which may be adduced by the petitioner, as such an evidence prima facie, shall be not acceptable u/s 91 of the Evidence Act.

6. This cannot be disputed that as to when a discretionary jurisdiction is to be exercised or refused to be exercised by the High Court, it is to be determined having regard to the facts and circumstances of the case. The High Court can entertain a writ petition if it is shown that there is something more which goes to the root of the jurisdiction or something which would show that it would be a case of palpable injustice to the writ petitioner to force him to adopt the remedies provided under the civil law. Admittedly in the present case the petitioner has not contended that any provision of law is ultra vires and has not sought quashing of the same nor it can be inferred that the denial of the alleged payment to petitioner of service tax and the interest thereon is in violation of any written agreement or is in violation of any principles of natural justice. In ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others, it was held that the High Court having regard to the facts of the case, has a discretion to entertain or not to entertain the writ petition and it is the Court that has imposed upon itself certain restrictions in the exercise of this power. The Supreme Court had held at page 572 in Para 28 as under:

28. However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power. (See Whirlpool Corporation v. Registrar of Trade Marks.) And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the Court thinks it necessary to exercise the said jurisdiction.

7. In the present facts and circumstances the agreement between the parties does not stipulate that the respondent is liable for the service tax, the correspondence on which the petitioner rely do not reflect any admission on the part of the respondent to pay the service tax nor there is any admission to pay the interest. The petitioner relies on the liability of the service tax by the respondent on the basis of service tax paid in case of some other contractor.

8. Considering the entirety of facts and circumstances the disputes between the parties, disputes involve substantial disputed questions of facts which may not be determined without recording the detailed evidence of the parties and their cross examination.

9. In the circumstances, the petitioner is not entitled to invoke the remedy of

invoking writ jurisdiction under Article 226 of the Constitution of India for recovery of alleged amount of Rs. 60,19,872/-on account of service tax with interest at 12% from the date of first payment of the service tax in the facts and circumstances of this case. The writ petition is, therefore, dismissed. The petitioner shall, however, be entitled to take his other civil remedies, if available, to him in accordance with law. Parties are left to bear their own costs in the facts and circumstances of the case.