

**(2019) 06 BOM CK 0046**

**In the Bombay High Court**

**Case No :** Appeal No. 284, 286, 287, 288, 290 Of 2019, Arbitration Petition No. 210, 211, 214, 218, 364 Of 2014

Central Warehousing Corporation

APPELLANT

Vs

Aqdas Maritime Agency Pvt. Ltd

RESPONDENT

**Date of Decision :** 14-06-2019

**Acts Referred:**

Arbitration And Conciliation Act, 1996 — Section 34  
Finance Act, 2007 — Section 83  
Central Excise Act, 1944 — Section 12(b)  
Sale Of Goods Act, 1930 — Section 64A, 64A(1), 64A(2)  
Indian Contract Act, 1872 — Section 72  
Limitation Act, 1963 — Section 17(1)(c)  
Evidence Act, 1872 — Section 114  
Constitution Of India, 1950 — Article 265

**Citation :** (2019) 06 BOM CK 0046

**Hon'ble Judges :** Pradeep Nandrajog, CJ;N.M. Jamdar, J

**Bench :** Division Bench

**Advocate :** Rajesh Mirchandani

**Final Decision :** Dismissed

## Judgement

Pradeep Nandrajog, CJ

1. Having heard learned Counsel for the Appellant in the five captioned Appeals which lay a challenge to a singular Judgment dated 18.02.2019 dismissing five Arbitration Petitions filed under Section 34 of the Arbitration and Conciliation Act, 1996 challenging five Awards of even date, we find no case made out to issue notice to the Respondent and thus dismiss the Appeals in limine.

2. The matter of the dispute before the Arbitrator was five contracts of different dates having identical terms whereunder the Respondent was functioning as the handling and transport contractor of the Appellant. Reimbursing the contractor service tax deposited by the contractor with the Income Tax Department, the Appellant took a stand that under bonafide mistake it had reimbursed the service

tax. Claim before the Arbitrator was praying that Award be passed in favour of the Appellant for the amount of service tax paid by the Appellant to the Respondent who had deposited the service tax with the Income Tax Department. Reliance was placed on Clause XII, Para (i), which was identical in all the contracts. The Clause reads:

"(i) All the taxes/levies/fees/charges payable to any Government body/Local body shall be paid by the contractor and no claim what so ever shall be against the Corporation on this account."

3. Overruling technical objection raised by the contractor, the learned Arbitrator has held that the Appellant, as the service recipient, was liable to pay the service tax and that as per the clause in question, the Respondent had not taken over the liability to bear the service tax.

4. In the impugned decision, the learned Single Judge has held that the construction of the clause of the contract by the learned Arbitrator fell within the domain of the Arbitrator and thus the decision could not be challenged.

5. In the decision reported as (2007) 7 SCC 527 All India Federation of Tax Practitioners & Ors. Vs. UOI & Ors., the Supreme Court noted that service tax is an indirect tax levied on certain services provided by certain categories of persons including companies, associations, firms, body of individuals etc. The service sector contributes about 64% to the GDP. It noted that in the contemporary world, development of service sector has become synonymous with the advancement of the economy and the Economists hold the view that there is no distinction between the consumption of goods and consumption of services as both satisfy the human needs. It was noted that Value Added Tax (in short VAT) which is a general tax applies in principle to all commercial activities involving the production of goods and provision of services. The Supreme Court held that VAT is a consumption tax as it is borne by the consumer and Service Tax is a VAT which in turn is destination based consumption tax. The Supreme Court noted that just as excise duty is a tax on value addition on goods, Service tax is on value addition by the rendition of services. Broadly "Services" fall into two categories, namely, property-based services and performance based services. Property-based services cover service providers such as architects, interior designers, real estate agents, construction services, mandapwalas etc. and the later being services provided by stock-brokers, practising chartered accountants, practising cost accountants, security agencies, tour operators, event managers, travel agents etc.

6. In the decision reported as AIR 2012 SC 2829 Rashtriya Ispat Nigam Ltd.vs. M/s Dewan Chand Ram Saran it was held:

"26. As far as the submission of shifting of tax liability is concerned, as observed in paragraph 9 of Laghu Udyog Bharati (Supra), service tax is an indirect tax, and it is possible that it may be passed on. Therefore, an Assessee can certainly enter into a contract to shift its liability of service tax. Though the Appellant

became the Assessee due to amendment of 2000, his position is exactly the same as in respect of Sales Tax, where the seller is the Assessee, and is liable to pay Sales Tax to the tax authorities, but it is open to the seller, under his contract with the buyer, to recover the Sales Tax from the buyer, and to pass on the tax burden to him. Therefore, though there is no difficulty in accepting that after the amendment of 2000 the liability to pay the service tax is on the Appellant as the Assessee, the liability arose out of the services rendered by the Respondent to the Appellant, and that too prior to this amendment when the liability was on the service provider. The provisions concerning service tax are relevant only as between the Appellant as an Assessee under the statute and the tax authorities. This statutory provision can be of no relevance to determine the rights and liabilities between the Appellant and the Respondent as agreed in the contract between two of them. There was nothing in law to prevent the Appellant from entering into an agreement with the Respondent handling contractor that the burden of any tax arising out of obligations of the Respondent under the contract would be borne by the Respondent."

7. Section 83 of the Finance Act, 2007 made certain provisions of the Central Excise Act, 1944 as in force from time to time applicable in relation to Service Tax as they apply in relation to a duty of excise. The Section reads as under:

"83. Application of certain provisions of Act 1 of 1944:

The provisions of the following section of the Central Excise Act, 1944 ( 1 of 1944), as in force from time to time, shall apply, so far as may be, in relation to service tax as they apply in relation to a duty of excise: -

9C, 9D, 1 B, 1 BB, 1 C, 12 12A, 12B. 12C, 12D, 12E, 14, [14AA]\*, 15, 33A, 35F, 35-FF to 35-O (both inclusive), 35Q, 36, 36A, 36B, 37A, 37B, 37C, 37D, [38A]\* and 40."

8. Section 12 (b) of the Central Excise Act reads as under:

"12B. PRESUMPTION THAT INCIDENCE OF DUTY HAS BEEN PASSED ON TO THE BUYER.

Every person who has paid the duty of excise on any goods under this Act shall, unless the contrary is proved by him, be deemed to have passed on the full incidence of such duty to the buyer of such goods."

9. Thus Section 83 of the Finance Act is a legislation by incorporation applying inter alia Section 12B of the Central Excise Act to the Service Tax.

10. Halsbury's Law of England (4th Edn., Vol.44 (1)), para 127 page 744 deals with the incorporation of other enactments by reference as under:

"It is a common device of legislative drafters to incorporate earlier statutory provisions by reference, rather than setting out similar provisions in full. This saves space and also attracts the case law and other learning attached to the earlier provision. Its main advantage is a Parliamentary one, however, since it

shortens Bills and cuts down the area for debate."

1 . In the decision reported as 2011 (3) SCC 1 *Girnar Traders vs. State of Maharashtra & Ors.*, the Constitution Bench while dealing with legislation by incorporation held that with the development of law, the legislature has adopted the common practice of referring to the provisions of the existing statute while enacting new laws. It was held that reference to an earlier law in the later law could be a simple reference of provisions of the earlier statute or a specific reference where the earlier law is made an integral part of the new law, that is, by incorporation. In contrast to such simple reference, legal incident of legislation by incorporation is that it becomes part of the existing law which implies bodily lifting provisions of one enactment and making them part of another and in such cases, subsequent amendments in the incorporated Act could not be treated as part of the incorporating Act. The obvious advantage of legislation by incorporation is that the judicial precedents and discussions on the earlier enactment apply to the later enactments.

12. Section 83 of the Finance Act 2007, though a legislation by incorporation, also takes care of non-applicability of the future amendments, as it provides for applicability of the relevant Sections of the Central Excise Act 1944 as in force from time to time. Thus the future amendments in the provisions of the Central Excise Act would also be applicable *mutatis mutandis* to Service Tax. As noted above, Section 12B of the Central Excise Act, which applies to the Service Tax raises a presumption that the incidence of duty has been passed to the buyer unless the contrary is proved. Thus in the absence of a contract for the liability of a service tax, it will be presumed that the same has been passed over to the service recipient.

13. Based on the Rule of Equity, similar provision exists in the Sales of Goods Act, 1930, that is, Section 64A. The Supreme Court in the decision reported as 2007 (8) SCC 466 *Numaligarh Refinery Ltd. Vs. Daelim Industries Co. Ltd.*, held that whether a party is entitled to be paid such a tax or increase has to be ascertained from the intention of the parties to the contract and unless a different intention appears from the terms of the contract, in the case of imposition or increase in the tax after the making of a contract, the party shall be entitled to be paid such taxes or such increase. It was held:

"18. In this connection, learned Counsel has invited our attention to Section 64A of the Sale of Goods Act, 1930 which reads as under:

"64-A. In contracts of sale, amount of increased or decreased taxes to be added or deducted.- (1) Unless a different intention appears from the terms of the contract, in the event of any tax of the nature described in Sub-section (2) being imposed, increased, decreased or remitted in respect of any goods after the making of any contract for the sale or purchase of such goods without stipulation as to the payment of tax where tax was not chargeable at the time of the making of the contract, or for the sale or purchase of such goods tax-paid where tax was

chargeable at that time-

(a) if such imposition or increase so takes effect that the tax or increased tax, as the case may be, or any part of such tax is paid or is payable, the seller may add so much to the contract price as will be equivalent to the amount paid or payable in respect of such tax or increase of tax, and he shall be entitled to be paid and to sue for and recover such addition; and

(b) if such decrease or remission so takes effect that the decreased tax only, or no tax, as the case may be, is paid or is payable, the buyer may deduct so much from the contract price as will be equivalent to the decrease of tax or remitted tax, and he shall not be liable to pay, or be sued for, or in respect of, such deduction.

(2) The provisions of Sub-section (1) apply to the following taxes, namely;-

(a) any duty of customs or excise on goods;

(b) any tax on the sale or purchase of goods. This section also clearly says that unless a different intention appears from the terms of the contract, in case of the imposition or increase in the tax after the making of a contract, the party shall be entitled to be paid such tax or such increase. In this connection, the intention of the parties is to be ascertained, as per the clauses mentioned above.

14. In the decision reported as 1997 (5) SCC 536 Mafatlal Industries Ltd. & Ors. Vs. Union of India & Ors. a nine judges Bench of the Supreme Court of India while dealing with the claim of refund held that the same was maintainable by virtue of declaration contained in Article 265 of the Constitution of India as also under Section 72 of the Contract Act subject to one exception. Noting that the duties under the Central Excise and Customs are indirect taxes and supposed to be and are permitted to be passed on to the buyers, it was held:

"80. For the purpose of this discussion, we take the situation arising from the declaration of invalidity of a provision of the Act under which duty has been paid or collected, as the bases, inasmuch as that is the only situation surviving in view of our holding on (I) and (II). In such cases the claim for refund is maintainable by virtue of the declaration contained in Article 265 as also under Section 72 of the Contract Act as explained hereinbefore subject, to one exception : where a person approaches the High Court or Supreme Court challenging the constitutional validity of a provision but fails, he cannot take advantage of the declaration of unconstitutionality obtained by another person on another ground; this is for the reason that so far as he is concerned, the decision has become final and cannot be re-opened on the basis of the decision on another person's case; this is the ratio of the opinion of Hidayatullah, CJ. In *Tilokchand Motichand* and we respectfully agree with it. In such cases, the plaintiff may also invoke Section 17(1)(c) of the Limitation Act for the purpose of determining the period of limitation for filing a suit. It may also be permissible to adopt a similar rule of limitation in the case of writ petitions seeking refund in

such cases. But whether the right to refund or restitution, as it is called, is treated as a constitutional right flowing from Article 265 or a statutory right arising from Section 72 of the Contract Act, it is neither automatic nor unconditional. The position arising under Article 265 is dealt with later in Paras 75 to 77. Here we shall deal with the position under Section 72. Section 72 is a rule of equity. This is not disputed by Sri F.S. Nariman or any of the other counsel appearing for the appellants-petitioners. Once it is a rule of equity, it is understandable how can it be said that equitable considerations have no place where a claim is made under the said provision. What those equitable considerations should be is not a matter of law. That depends upon the facts of each case. But to say that equitable considerations have no place where a claim is founded upon Section 72 is, in our respectful opinion, a contradiction in terms. Indeed, in *Kanhaiyalal*, the Court accepts that the right to recover the taxes - or the obligation of the State to refund such taxes - under Section 72 of the Contract Act is subject to "questions of estoppel, waiver, limitation or the like", but at the same time, the decision holds that equitable considerations cannot be imported because of the clear and unambiguous language of Section 72. With great respect, we think that a certain amount of inconsistency is involved in the aforesaid two propositions. "Estoppel, waiver...or the like", though rules of evidence, are yet based upon rules of equity and good conscience. So is Section 72. We are, therefore, of the opinion that equitable considerations cannot be held to be irrelevant where a claim for refund is made under Section 72. Now, one of the equitable considerations may be the fact that the person claiming the refund has passed on the burden of duty to another. In other words, the person claiming the refund has not really suffered any prejudice or loss. If so, there is no question of reimbursing him. He cannot be re compensated for what he has not lost. The loser, if any, is the person who has really borne the burden of duty; the manufacturer who is the claimant has certainly not borne the duty notwithstanding the fact that it is he who has paid the duty. Where such a claim is made, it would be wholly permissible for the court to call upon the petitioner/plaintiff to establish that he has not passed on the burden of duty to a third party and to deny the relief of refund if he is not able to establish the same, as has been done by this Court in *I.T.C.* In this connection, it is necessary to remember that whether the burden of the duty has been passed on to a third party is a matter within the exclusive knowledge of the manufacturer. He has the relevant evidence - best evidence - in his possession. Nobody else can be reasonably called upon to prove that fact. Since the manufacturer is claiming the refund and also because the fact of passing on the burden of duty is within his special and exclusive knowledge, it is for him to allege and establish that he has not passed on the duty to a third party. This is the requirement which flows from the fact that Section 72 is an equitable provision and that it incorporates a rule of equity. This requirement flows not only because Section 72 incorporates a rules of equity but also because both the Central Excises duties and the Customs duties are indirect taxes which are supposed to be and are permitted to be passed on to the buyer. That these duties are indirect taxes, meant to be passed on, is statutorily

recognised by Section 64A of the Sale of Goods Act, 1930."

15. Noting sub-section 2 of Section 64A of the Sales of Goods Act expressly made sub-Section 1 of Section 64A applicable to the duty of customs or excise on goods and referring to the decisions of the Federal Court in AIR 1942 FC 33 *The Province of Madras Vs. Boddu Paidanna & Sons* and the Supreme Court reported as AIR 1962 SC 1281 *R. C. Jall v. Union of India*, it was held in *Mafatlal* (supra) that in such a situation, it would be legitimate for the Court to presume, until the contrary is established, that a duty of excise or a customs duty has been passed on. It is a presumption of fact which a Court is entitled to draw under Section 14 of the Indian Evidence Act the same being undoubtedly a rebuttable presumption but the burden of rebutting it lies upon the person who claims the refund and it is for him to allege and establish that as a fact he has not passed on the duty and, therefore, equity demands that his claim for refund be allowed.

16. Thus as a legislation by reference sub-Section (2) of Section 64A of the Sales of Goods Act making applicable sub-Section (1) of Section 64A to any duty of Customs or Excise on goods and as a legislation by incorporation Section 83 of the Finance Act making applicable Section 12B of the Central Excise Act to Service Tax, Section 64A(1) is applicable to Service Tax. From the provisions as noted and the decisions of the larger benches it is evident that a service tax is a VAT which in turn is a destination based consumption tax and is to be borne by the consumer of goods. Further, unless contracted to the contrary, the consumer of service is liable to refund the said tax to the service provider who in turn is liable to pay to the government.

17. From the legal position as noted it is evident whether the service tax liability has been agreed not to be passed on to the recipient of the service would depend on the interpretation of clauses entered into between the parties. Before advertng to the relevant clauses inter se the parties in the present case it would be appropriate to note a few decisions on the interpretation of a contract.

18. The House of Lords in the decision reported as [1998] 1 WLR 896 *Investors Compensation Scheme Ltd. vs. West Bromwich Building Society* summarized the principle of interpretation of contractual documents as under:

"(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see *Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd.* [1997] A.C. 749.

(5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Compania Naviera S.A. v. Salen Rederierna A.B.* [1985] A.C. 191, 201:

"if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense."

19. In the decision reported as [2009] 2 All ER, 26 *Durham vs. BAI (Run Off) Ltd.* (in scheme of arrangement) & Ors. the Queen's Bench Division while dealing with the construction of commercial contracts noted:

"(203) A summary of helpful principles, drawn largely from the words of Longmore LJ in *Absalom (on behalf Lloyd's Syndicate 957) v. TCRU Ltd* (2005) EWCA Civ 1586 at (7), (2006) 1 All ER (Comm) 375 at (7), (2006) 2 Lloyd's Rep 129, and based upon submissions to me by counsel, which I had approved, in the recent case of *Reilly v. National Insurance \*Guarantee Corporation Ltd* (2008) EWHC 722 (Comm) at (13), (2008) 2 All ER (Comm) 612 at (13), was again the subject matter of agreement, and I repeat and incorporate it:

"(a) Ordinary Meaning. There is a presumption that the words to be construed should be construed in their ordinary and popular sense, since the parties to the contract must be taken to have intended, as reasonable men, to use words and phrases in their commonly understood and accepted sense. (See also para (7)(i)-



(iii) in the judgment of Longmore LJ and in particular: "The object of the inquiry is not necessarily to probe the "real? intention of the intention of the parties, but to ascertain what the language they used in the document would signify to a properly informed observer.")

(b) Businesslike Interpretation. It is an accepted canon of construction that a commercial document, such as an insurance policy, should be construed in accordance with sound commercial principles and good business sense, so that its provisions receive a fair and sensible application. (See also the words of Lord Diplock in *Antaios Cia Navieras SA v. Salen Rederierna AB*, *The Antaios* (1984) 3 All ER 229 at 233, (1985) AC 191 at 201 cited at (7)(iv) by Longmore LJ: If a "detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense".)

(c) Commercial Object. The commercial object or function of the clause in question and its relationship to the contract as a whole will be relevant in resolving any ambiguity in the wording.

(d) Construction to avoid unreasonable results. If the wording of a clause is ambiguous, and one reading produces a fairer result than the alternative, the reasonable interpretation should be adopted. It is to be presumed that the parties, as reasonable men, would have intended to include reasonable stipulation in their contract."

20. In the instant case, the clause in question does not fix liability on the contractor to pay service tax that apart from, the clause required interpretation and in view of the aforementioned Judgments regarding the interpretation of the contract, view taken by the learned Arbitrator cannot be faulted.

21. The Five Appeals are, accordingly, dismissed.