(2008) 11 KL CK 0002

In the High Court Of Kerala

Case No : Writ Petition (C) No''s. 26625 and 27899 of 2008

Kishore K.S. APPELLANT

Vs

Cherthala Municipality RESPONDENT

Date of Decision : 27-11-2008

Acts Referred:
Central Excises and Salt Act, 1944 — Section 12B
Constitution of India, 1950 — Article 12, 154, 155, 243(P), 243(Q)

Citation : (2011) 24 STR 538 : (2012) 34 STT 379

Hon'ble Judges : K.M. Joseph, J

Bench : Single Bench

Advocate : M. Balagovindan, T.K. Ananda Padmanabhan and R.T. Pradeep, for the Appellant; J. Omprakash, Gopinath Menon and V.M. Kurian, Counsels, for the Respondent

Final Decision : Dismissed

Judgement

K.M. Joseph, J.—Common issues are raised in these writ petitions and hence they are disposed of by a common judgment. Petitioners have taken rooms on rent from the respondent Municipality. They have been called upon to pay service tax. It is their case that the demand for service tax is illegal.

2. I heard learned counsel for the petitioner Sri. T.K. Ananda Padmanabhan in WPC No. 26625/08, Sri R.T. Pradeep in WPC No. 27899/08, learned counsel for the Central Government Sri Gopinath Menon in both cases and learned counsel for the Municipality Sri J. Omprakash in WPC. No. 26625/08 and Sri V.M. Kurian in WPC No. 27899/08. According to the petitioners, they have entered into agreements with the Municipality and they are in possession of the tenanted premises. Under the agreement, there is no provision for payment of service tax. Therefore, the demand for payment of service tax is illegal. Secondly, they would contend that Service tax is a tax which is payable by the Municipality. It is their contention that there is no authority with the Municipality to pass it on to the petitioners. He would further contend that the demand should not be sustained

as it violates Article 268A. Sri R.T. Pradeep further contends that they are small tenants and the Municipality must be treated as units of the State within the meaning of Article 289. The intention behind Article 289 is that the property and income of the State should not be visited with tax. He also referred to Chapter IXA of the Constitution to contend that the Municipality is a unit of the State and, therefore, levy of service tax on the property or on the income of the Municipality is unsustainable. He would further contend that under Article 268A the law provides for sharing of the income between the unions and the States and the distribution must be based on a law made by Parliament and there is no such law.

3. Per contra, Sri Gopinath Menon would contend that service tax is an indirect tax. Though primarily the person liable to pay the tax is Municipality, there is nothing in the law which prevents passing of the liability to the tenants. He would rely on the decision of the Apex Court in All India Federation of Tax Practitioners v. Union of India (2007 (7) S.T.R. 625 SC). Therein, the Apex Court had occasion to consider the question in the context of a challenge by Chartered Accountants to the validity of the levy. It is, inter alia, stated as follows.

4. Service tax is an indirect tax levied on certain services provided by certain categories of persons including companies, association, firms, body of individuals etc.

7. In the light of what is stated above, it is clear that Service Tax is a VAT which in turn is destination based consumption tax in the sense that it is on commercial activities and is not a charge on the business but on the consumer and it would, logically, be leviable only on services provided within the country. Service tax is a value added tax.

37. In the case of Tamil Nadu Kalyana Mandapmam am Assn. Vs. Union of India (UOI) and Others, the Division Bench of this Court held that service tax is an indirect tax and is to be paid on all the services notified by the Government of India. It has been further held that the said tax is on "service" and not on the service-provider. In paragraph 58 it has been observed that under Article 246(1) of the Constitution, Parliament has exclusive powers to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule to the Constitution. As per Article 246(3), the State Government has exclusive powers to make laws with respect to matters enumerated in List 11 (State List). In the said Judgment, it has been held that service tax is made by Parliament under Entry 97 of List I. In our view, therefore, the point in issue in the present case is squarely covered by the judgment of this Court in the case of Tamil Nadu Kalyana Mandapam (supra). Of course, in the present case, we are not concerned with the services rendered by a Mandap-keeper, who performs what is called as property based services. In this case, we are concerned with performance based services. However, both the categories fall within the ambit of the word "services.

4. Sri Gopinath Menon and Sri. Omprakash would rely on the Division Bench

decision of this court reported in All Kerala Chartered Accountants Association v. Union of India (2002 (2) KLT 512). Therein, the Division Bench of this court referred to Section 12B of the Central Excise Act and held as follows :

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 provided by him, be deemed to have passed on the full incidence of such duty to the buyer of such goods.

The direct legal consequence of application of S. 12B of the Central Excise Act, 1944 to service tax is that there is a presumption that the service has been passed on to the customer who is the beneficiary of the service, and that is the reason why the service tax is levied on the service provider him-self. It is open to the service provider to pass on the tax to the beneficiary of the service and reimburse himself. In other words, by reason of the statutory presumption, the service provider does not pay the tax and the tax falls on the service receiver.

Therefore, they would contend that the matter is not res Integra and it is open to pass on tax to the beneficiary in this case, the petitioners, who are the tenants.

5. As regards the contention that in the contract in question there is no mention about the liability, it is pointed out that this is a right which the service provider/ Municipality have by virtue of the provisions under law to pass on to the tenants. It is another matter that they may decide not to pass it on fully or partly. It is not open to the petitioners to challenge the validity of the demand for service tax, in view of the fact that service tax is an indirect tax and the law provides that it can be passed on to the beneficiary.

6. As far as Article 289 of the Constitution is concerned, Sri Gopinath Menon would contend that it is not attracted in this case as what is prohibited is the levy of tax on the property or income of the State. The Municipality cannot be treated as State within the meaning of Article 289. As far as the contention based on Article 268A is concerned, Sri Gopinath Menon points out that it is not specifically pleaded in the writ petition and at any rate he would contend that there is a law.

7. As far as the first question is concerned, namely whether the tax is to be borne by the service provider, the Municipality in this case, I am of the view that it can be passed on by the service provider. The tax as held by the Apex Court is clearly an indirect tax. It is open to the legislature even if it is an indirect tax to provide that it shall not be passed on to the consumer. Example of such law is Section 5A of the KCST Act which provides for levy of purchase tax. It prohibits the passing on of the tax to the consumer. The same is the position in respect of the turnover tax u/s 5(2)(c) of the KCST Act. Therefore, examples are not wanting when the legislature intended that be it an indirect tax, it should be borne by the assessee and it cannot be passed on. There is no such prohibition in the matter of service tax. That apart, the bench decision of this court as already noted, specifically declares that service tax can be passed on by the service provider. Therefore, there is no merit in the contention that service tax cannot be

passed on by the Municipality to the tenants.

8. The second question is whether in the absence of the contract it is open to the Municipality to pass it on. The tax is primarily on the service provider. As already noted, it does prevent passing on of the tax to the tenants. A statutory right exists in favour of the Municipality to pass it on as already noted. It is open to the Municipality to decide not to pass on the burden. But, when the Municipality elects to demand the payment of tax, I would think that it may not be open to the petitioners particularly in a writ jurisdiction to set up the contract as pointed out that it is in violation of the contract to demand payment of service tax. I see no merit in this contention and it is rejected.

9. The further question which has been raised by Sri R.T. Pradeep relates to violation of Article 289 of the Constitution. Article 289 reads as follows :

289. Exemption of property and income of a State from Union taxation.-

(1) The property and income of a State shall be exempt from Union taxation.

(2) Nothing in clause (1) shall prevent the Union from imposing, or authorising the imposition of, any tax to such extent, if any, as Parliament may by law provide in respect of a trade or business of any kind carried on by, or on behalf of, the Government of a State, or any operations connecting therewith, or any property used or occupied for the purpose of such trade or business, or any income accruing or arising in connection therewith.

(3) Nothing in clause (2) shall apply to any trade or business, or to any class of trade or business, which Parliament may by law declare to be incidental to the ordinary functions of Government.

Undoubtedly, Article 289 constitutes a fetter on the power of the Union to levy tax on the properly of the State or on its income. The State is an expression which is not defined in Article 366 as such. In Article 12, no doubt, State is defined as including authorities. But it is at once relevant to note that the said definition is limited to the provision of Part III of the Constitution dealing with fundamental rights. Article 154 of the Constitution which comes under Part VI Chapter 1 dealing with the State provides that in this Part, unless the context otherwise requires, the expression "State" does not include the State of Jammu and Kashmir. Article 155 provides that there shall be Governors in each State. There are various other provisions which pertain to States. On the other hand, in Part IXA of the Constitution, Municipality is defined in Article 243P(c) as follows.

''Municipality'' means an institution of sell-government constituted under Article 243Q.

The Constitution of Municipalities, duration of Municipalities, reservation of seats and various other matters are dealt with in Part IXA. In other words, by no stretch of imagination, the word "State" in Article 289 embraces within its scope the Municipalities which are specifically dealt with in Part IXA of the Constitution.

Therefore, I reject the said argument that when service tax is levied on the Municipality there is violation of Article 289. In fact, the Municipality has not approached this court with such a plea. There is no contention raised by the Municipality that it is in violation of Article 289.

10. The last contention is on the basis of Article 268A. It is not a contention which specifically raised. Of course, it is contended by Sri Gopinath Menon that there is a law also. In such circumstances, there is no merit in the said contention. In view of this, no further contention has been raised before me. Writ petitions fail and they are dismissed.

