
(2013) 05 DEL CK 0084

In the Delhi High Court

Case No : FAO (OS) No"s. 440 of 2012 and 52 of 2013

Raghubir Saran Charitable Trust

APPELLANT

Vs

Puma Sports India Pvt. Ltd.

RESPONDENT

Date of Decision : 15-05-2013

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 10, 11, 30, 34, 37
Constitution of India, 1950 — Article 12
Finance Act, 1994 — Section 65(105), 65(105)(zm)
Sales of Goods Act, 1930 — Section 64A

Citation : (2013) 05 DEL CK 0084

Hon'ble Judges : Sanjeev Sachdeva, J; Sanjay Kishan Kaul, J

Bench : Division Bench

Advocate : Simran Mehta, for the Appellant; Chinmoy Pradip Sharma and Mr. Sayan Ray, for the Respondent

Judgement

Sanjay Kishan Kaul, J.—The appellant, Raghubir Saran Charitable Trust, is the owner of premises bearing no. E-10, Block-E, Inner Circle, Connaught Place, New Delhi, which was leased out to the respondent in pursuance to a Lease Deed dated 25.04.2007 for a period of 60 months, renewable at the sole option of the respondent for a further period of 48 months on the same terms and conditions other than the rent which was specified with increases for different periods of time. The lease stood terminated by consent of both the parties on 30.09.2011 and the possession of the premises was handed over to the appellant. The dispute which arose inter se the parties was a sequitur to the Finance Act, 2007 which introduced an amendment in the Finance Act, 1994 incorporating in Section 65 (105), a sub-Clause (zzzz). The effect of this clause was the imposition and attraction of service tax qua rent received from renting of immovable properties for commercial purposes.

2. The appellant as a consequence of the aforesaid, included service tax element of 12.36% on all rental bills and cess thereon from June, 2007 onwards.

3. The respondent, however, refused to pay the service tax component on the basis that under Clause 7.1 of the Lease Deed, such liability had to be borne by the appellant. A demand notice was issued by the appellant on 27.12.2007 calling upon the respondent to pay the service tax liability till December, 2007 but the respondent refused to oblige and the appellant paid the service tax to avoid prosecution and penalty.

4. In view of the Arbitration Clause 16.2 of the Lease Deed, the appellant served a notice dated 12.01.2008 to the respondent invoking the arbitration clause qua the aforesaid dispute. There was no concurrence over the appointment of an Arbitrator which resulted in the appellant filing an application u/s 11 of the Arbitration & Conciliation Act, 1996 ("the said Act" for short) before this Court which was registered as Arbitration Application No. 92/2008 and in terms of the order dated 21.11.2008, the Court appointed Mr. Bharat Bhushan, retired Judge from Higher Judicial Service as the Sole Arbitrator, who made and published an Award dated 14.12.2011 rejecting the claim petition (claiming service tax for the period from 01.06.2007 to 31.03.2009 amounting to Rs. 37,42,954 along with interest @18% p.a.) of the appellant on a reading of the clauses of the Lease Deed. The appellant herein filed a petition being OMP No. 955/2011 u/s 34 of the said Act which was dismissed by the learned single Judge on 04.07.2012.

5. In FAO (OS) No. 52 of 2013, this Court in an application u/s 11 of the said Act, had appointed Hon'ble Mr. Justice Mukul Mudgal, former Chief Justice, Punjab & Haryana High Court as the Sole Arbitrator, who had made and published an Award dated 07.07.2012 rejecting the claim petition of the appellant (claiming service tax for the period from 01.04.2009 to 30.09.2011 amounting to Rs. 48,27,777 along with interest @18% p.a.) on a reading of the clauses of the Lease Deed. A petition u/s 34 of the said Act was filed, challenging this Award, which was dismissed by the learned Single Judge on 06.11.2012 on the basis of the decision dated 04.07.2012 in the connected matter i.e. OMP No. 955/2011 which is also sought to be assailed before us.

6. It may be noticed that in view of a Division Bench judgment of this court which struck down, as unconstitutional, the amendment to the Finance Act, 1994, the appellant stopped including the service tax component but on reintroduction with the retrospective effect of sub-Clause (zzzz) of Section 65 (105), by virtue of the Finance Act, 2010, the amount was so deposited. Suffice to say that this issue stands resolved with the legal position being that such tax was liable to be deposited and thus the only question for examination is as to whether the liability to pay service tax is of the appellant or the respondent. In order to appreciate the controversy, we consider it appropriate to re-produce the relevant clauses.

7. MAINTENANCE, ELECTRICITY; WATER

7.1. It is agreed by and between the Parties that the Lessor shall be liable to pay property taxes and other outgoings in respect of the Premises, whatsoever

payable and as levied from time to time promptly and timely, including any revisions thereto, directly to the authorities concerned and no claim for contribution towards such taxes, cesses, levies and increases shall be made by the Lessor or be entertained by the Lessee.

.... 9. COVENANTS OF THE LESSEE

The lessee, for itself, its successors and permitted assigns and to the intent that its obligations may continue through the term hereby created, but not exceeding the Initial Term, covenants with the Lessor as follows:

... ..

(d) To pay all taxes necessary for carrying on its business within the Premises, other than municipal taxes and other related property taxes.

7. Learned counsel for the appellant, conscious of the limitation on the contours of the controversy and the jurisdiction of this Court under S. 37 of the 1996 Act while dealing with an arbitral award, sought to plead that though the complete dispute revolved only around clauses of the Lease Deed referred to aforesaid, the interpretation sought to be put forth by the Arbitrator could not be countenanced as it was not a plausible view. The submission, thus, was that even though in matters of interpretation of such clauses due deference should be given to the opinion of an Arbitrator, the same does not preclude a Court from interfering with an award if the interpretation is contrary to the plain reading of the clause.

8. A reading of the Award shows that various judicial pronouncements were referred to qua the controversy in question including in two suits CS (OS) 1016/2008 and CS (OS) 1018/2008 decided on 20.10.2010 where it was held that the liability to pay and refund the service tax was of the tenant. However, this judgment has been distinguished on account of specific Clause 7.1 in the Lease Deed and the fact that the judgment cited was in the context of facts where no such clause existed. The learned Arbitrator found that on a plain reading of Clause 7.1, it is the lessor who is liable to pay property taxes and other outgoings in respect of the premises. This clause was held to be of wide importation.

9. Insofar as the impugned judgment of the learned Single Judge is concerned, there is in fact a more elaborate discussion qua the interpretation of this clause. The learned Single Judge took note of the prohibition contained in the latter part of the clause to conclude that any revision in the rates was also to be borne by the lessor since the expression "outgoings" was of wide import where the word "such" referred to the property taxes and "other outgoings" was in respect of the premises. The plea that the expression "outgoings" should be read as ejusdem generis with the words "property tax", was repelled. This wide expression was thus held to include all taxes in respect of the premises and service tax being such an outgoing, it was held to be the liability of the lessor. This conclusion was sought to be supported by the observations in Brett v. Rogers; (1897) 1 QBD 525

where the expression "duties imposed in respect of the premises" was held to be wide enough to include the expenses incurred by the landlord for replacing a new drain. The learned single Judge has opined that the Judgment in Pearey Lal Bhawan Association Vs. Satya Developers Pvt. Ltd., would not apply on account of the wording of the clause being different as the expression "outgoing charges imposed or payable" was qualified by reference to MCD, L & DO, DDA and Government in respect of the premises. Merely because the levy was not statutorily operative at the time of entering of the Lease Deed was held not to imply that the liability did not attach to the appellant. Clause 7.1 was held to reflect the intentions of the parties that the appellant would bear the incidence of all taxes and the view of the Arbitrator was held to be a plausible one.

10. Learned counsel for the appellant sought to contend before us that service tax by its very nature is an indirect tax on the service rendered. Thus, though the service provider may be the Assessee for purposes of identification and collection of the tax, but the ultimate burden thereof has to be borne by the service recipient.

11. Learned counsel referred to the judgment in All India Federation of Tax Practitioners and Others Vs. Union of India (UOI) and Others, to advance the plea that the service tax is akin to a Value Added Tax (VAT) which in turn is a 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. The relevant paras are as under:

6. At this stage, we may refer to the concept of "Value Added Tax" (VAT), which is a general tax that applies, in principle, to all commercial activities involving production of goods and provision of services. VAT is a consumption tax as it is borne by the consumer.

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.

12. The aforesaid principle is stated to have been uniformly followed including in a recent judgment in the Association of Leasing and Financial Service Companies Vs. Union of India (UOI) and Others, where in para 38 it is observed as under:

38. In All India Federation of Tax Practitioners and Others Vs. Union of India (UOI) and Others, this Court explained the concept of service tax and held that service tax is a value added tax ("VAT", for short) which in turn is a destination based consumption tax in the sense that it is levied on commercial activities and it is not a charge on the business but on the consumer. That, service tax is an economic concept based on the principle of equivalence in a sense that consumption of goods and consumption of services are similar as they both satisfy human needs. Today with the technological advancement there is a very

thin line which divides a "sale" from "service". That, applying the principle of equivalence, there is no difference between production or manufacture of saleable goods and production of marketable/saleable services in the form of an activity undertaken by the service provider for consideration, which correspondingly stands consumed by the service receiver. It is this principle of equivalence which is inbuilt into the concept of service tax under the Finance Act, 1994. That service tax is, therefore, a tax on an activity. That, service tax is a value added tax. The value addition is on account of the activity which provides value addition, for example, an activity undertaken by a chartered accountant or a broker is an activity undertaken by him based on his performance and skill. This is from the point of view of the professional. However, from the point of view of his client, the chartered accountant/broker is his service provider. The value addition comes in on account of the activity undertaken by the professional like tax planning, advising, consultation, etc. It gives value addition to the goods manufactured or produced or sold. Thus, service tax is imposed every time service is rendered to the customer/client. This is clear from the provisions of Section 65(105)(zm) of the Finance Act, 1994 (as amended). Thus, the taxable event is each exercise/activity undertaken by the service provider and each time service tax gets attracted.

13. Learned counsel for the Appellant also sought to point out the infirmity in the Award to the extent that the Division Bench judgment in Home Solutions Retail India Ltd. v. Union of India & Ors. 158 (2009) DLT 722 (DB) was held to cover the matter in issue even though, the only controversy dealt with by the Division Bench was qua the vires of the levy and not the inter se rights and liabilities of the service provider and the service recipient. Moreover, a Full Bench judgment in Home Solutions Retails (India) Ltd. Vs. Union of India (UOI) and Others, had overruled the judgment of the Division Bench given on 23.09.2011 well before the passing of the award. Similarly, the interim order relied upon in the award passed by the Division Bench on 18.05.2010 was set aside by the Supreme Court vide orders dated 10.01.2011 and 04.02.2011 in SLP (Civil) Nos. 16960/2010 and 982/2011 respectively. However, it was fairly conceded during the course of the arguments that these aspects would really not be germane as the controversy is, as we have set out hereinbefore, i.e. who bears the burden of service tax-the lessor or the lessee. Learned counsel for the appellant also submitted that the controversy in question was squarely covered by the judgment in Pearey Lal Bhawan's case (supra) which had been wrongly distinguished allegedly on the basis of difference in the wordings of the clause. The facts of that case are that the Lease Deed was prior to the amendment of the Finance Act, 1994. No doubt, the relevant clause 5.0 reads as under:

5.0 That the lessor shall continue to pay all or any taxes, levies or charges, imposed by the MCD, DDA, L & DO and/or Government, local authority, etc.

14. Clause 5.0 reproduced in para 8 of this judgment reads slightly differently than the clause before us. However, the findings pertaining to the said clause 5.0

are contained in para 14 of the judgment, which read as under:

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 a "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. Thus, the ratio is that the service tax was a species of levy which the parties clearly did not envisage while entering into their arrangement and it is the service which is taxed and the levy is an indirect one which necessarily means that the user has to bear it. This logic is based on the fact that the ultimate consumer has a contract with the user; it is from them that the levy would eventually be realized by including the amount of tax in the cost of service.

16. The judgments relied upon by the learned single Judge were sought to be distinguished on the principle that in those cases levy was in existence at the time of the execution of the contract and was thus in specific contemplation of the parties and so provided for. In *Rashtriya Ispat Nigam Ltd. Vs. Dewan Chand Ram Saran*, , it was contended that the levy was in existence at the time of execution of the contract. In *Numaligarh Refinery Ltd. Vs. Daelim Industrial Company Ltd.*, the countervailing duty imposed vide Customs Tariff (Amendment) Act, 1994 and the agreement inter se the parties specifically provided that the contractor would pay all taxes and duties including customs duties. Thus, there was specific provision made qua custom duties apart from the fact that the duty though non-existent at the time of submission of the bid, had come into force prior to the finalization of the contract.

17. The submission of the learned counsel for the appellant thus was that service tax is not akin to a property tax and could not be categorized as an outgoing in respect of the premises, being a taxation on the commercial activities which resulted in value addition. That is the reason why the same transaction if made for residential purposes would not have invited service tax.

18. Learned counsel for the appellant also emphasized that Clause 7.1 forms a part of the main clause 7.0 which deals with Maintenance, Electricity and Water. It is in that context, a reference to property tax alone has been made with other outgoings which would have to be akin to the nature of the levies mentioned in the heading of clause 7.0 and the reference is to "such" taxes, cesses and levies

or increases. The other clause referred to is clause 9 which deals with Covenants of the Lessee and as per clause (d) it is the lessee who has to pay all taxes necessary for carrying on its business within the premises other than municipal taxes and other related property taxes. The submission thus is that if Clause 7.1 is read with clause 9 (d), it is obvious that actually the incidence of taxes has to fall on the lessee (the tenant), the exception being only municipal taxes and other related property taxes which are taken care of in Clause 7.1. Service tax is an incidence of the business activity in the premises.

19. On the other hand, learned counsel for the respondent sought to support the impugned decisions by canvassing that though service tax is in the nature of an indirect tax, it does not necessarily have to be borne by the service recipient as there can be an agreement inter se the parties to the contrary. It was, thus, his submission that Clause 7.1 of the Lease Deed was, in fact, such an agreement where reference was made to "other outgoings" and clarified by the words "whatsoever payable". The liability as specified in the clause is towards taxes, cesses and levies. Insofar as the expression "outgoings" is concerned, learned counsel relied upon the Halsbury's Laws of England 4th Edition Volume 42 where in para 125 it has been observed as under:

The term "outgoings" is of very wide import, and includes not merely business rates, rent, service charges, repairs and the ordinary expenses, of cultivating or managing the property but also expenses, even if of a capital nature, of works executed by local authorities under their public health, highway and other powers which are recoverable from the owner, and which are also, in general, charged on the property. (see *Stock v. Meakin*; (1900) 1 Ch 683, CA, followed in *Surtees v. Wood house* (1903) 1 KB 396, CA)

20. The other aspect emphasized by learned counsel for the respondent was that the expression "outgoings" is not in consonance or ejusdem generis with the words property tax. Such a course of action it was pleaded was permissible only if general words are preceded by a clause or wordings which together form a genus but can have no application in a case where there is mention of single species such as property tax in the present case. In this behalf, reference was made to *United Towns Electric Co. Ltd. v. Attorney General for Newfoundland*; All England Law Reports Annotated (1939) 1 All ER 423. The appellant/company there was incorporated for purposes of supplying electricity in certain towns in Newfoundland and was made liable for water rates on all lands and buildings owned by it in these towns, but was otherwise, exempted from taxation. Subsequently, income tax came to be levied in Newfoundland and the Company was sought to be assessed for the taxes. The company claimed exemption from income tax by virtue of the exemptions from taxation granted to it on the premise that the term "taxation" necessarily refers to a local taxation only and could not include income tax. It is in this context that it was observed as under:

In their opinion, there is no room for the application of the principle of ejusdem generis in the absence of any mention of a genus, since the mention of a single

species—for example, water rates—does not constitute a genus, and, as regards the Act of 1929, sect. 10, if the appellant company's construction of it is accepted, would modify sect. 30 of the Act of 1902 by limiting the period of immunity in the case of the undertaking authorized by the Act of 1929.

21. The above judgment has been relied upon in *Rajasthan State Electricity Board, Jaipur Vs. Mohan Lal and Others*, where in the following paragraph it was observed as under:

4. In our opinion, the High Courts fell into an error in applying the principle of *ejusdem generis* when interpreting the expression "other authorities" in Article 12 of the Constitution, as they overlooked the basic principle of interpretation that, to invoke the application of *ejusdem generis* rule, there must be a distinct genus or category running through the bodies already named. *Craies on Statute Law* summarises the principle as follows:

The *ejusdem generis* rule is one to be applied with caution and not pushed too far.... To invoke the application of the *ejusdem generis* rule there must be a distinct genus or category. The specific words must apply not to different objects of a widely differing character but to something which can be called a class or kind of objects. Where this is lacking, the rule cannot apply, but the mention of a single species does not constitute a genus [*Craies on Statute Law*, 6th Edn., p.181]

Maxwell in his book on "Interpretation of Statutes" explained the principle by saying: "But the general word which follows particular and specific words of the same nature as itself takes its meaning from them, and is presumed to be restricted to the same genus as those words.... Unless there is a genus or category, there is no room for the application of the *ejusdem generis* doctrine [*Maawell on Interpretation of Statutes*, 11th Edn. pp 326, 327]." In *United Towns Electric Co., Ltd. v. Attorney-General for Newfoundland* [(1939) 1 AER 423], the Privy Council held that, in their opinion, there is no room for the application of the principle of *ejusdem generis* in the absence of any mention of a genus, since the mention of a single species—for example, water rates—does not constitute a genus. In Article 12 of the Constitution, the bodies specifically named are the Executive Governments of the Union and the States, the Legislatures of the Union and the States, and local authorities. We are unable to find any common genus running through these named bodies, nor can these bodies be placed in one single category on any rational basis. The doctrine of *ejusdem generis* could not, therefore, be, applied to the interpretation of the expression "other authorities" in this article.

22. Learned counsel also referred to Section 64A of the Sale of Goods Act, 1930 for the scenario where a new levy is introduced which is not in contemplation or is expressly provided in a contract and in such an eventuality, it has to be inferred as per the terms of the contract governing the parties. The said provision reads as under:

64-A. In contracts of sale, amount of increased or decreased taxes to be added or deducted.--(1) Unless different intention appears from the terms of the contract in the event of any tax of the nature described in subsection (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.

23. In the aforesaid context, it has been contended that the party which has agreed to bear the taxes under the agreement has to pay the new levy too (Ref: Numaligarh Refinery Ltd's case (supra).

24. In the end, learned counsel for the respondent laid emphasis on the scope of the jurisdiction u/s 34 of the said Act to contend that interpretation of clauses of an agreement is solely within the domain of an Arbitrator and even if there are two plausible interpretations, the view taken by the Arbitrator has to be upheld. Construction of terms of a contract does not amount to an error of jurisdiction and courts cannot interfere with the findings which are based on sound and reasonable interpretation of clauses of contract.

25. We have examined the rival contentions of the parties. We may note at the threshold that there is no real dispute about the proposition that the scope of the Court while examining the objections u/s 34 of the said Act is limited-and that too-when the only controversy pertains to interpretations of the clauses of the contract. The opinion of the arbitral Tribunal/Arbitrator normally should be final even if it is a plausible view and not the only possible view. However, if a plain reading of the clauses conveys a completely different meaning, then it is not for the arbitral Tribunal/Arbitrator to interpret the same as per its whims and fancies, since the arbitral Tribunal/Arbitrator is a creature of the contract itself.

The complete controversy in our view hinges on two aspects

? What is the nature of service tax?

? How would one read Clause 7.1 qua clause 9 (d)?

26. As far as the nature of the service tax is concerned, the issue is no more *res integra* and if one may say, the parties are *ad diem* that it is an indirect tax. The observations in *All India Federation of Tax Petitioners'* case (*supra*) makes it clear that service tax is a VAT which in turn is a destination based consumption tax being on the commercial activity. Thus, it is not a charge on the business but on the consumer and thus has to be levied only on the service provider. This is the reason why there is a distinguishing feature inasmuch as a property let out for residential purposes does not attract service tax, but the tax is levied only on the commercial letting as per the relevant clause.

27. Learned counsel for the respondent in fact fairly conceded that aforesaid being the position, if the contract was silent, the incidence would have to fall on the respondent being an indirect tax of this nature. His contention basically was that this, however, does not preclude the parties to agree as to on whom this indirect tax would fall. Thus, the terms of the contract become material. This position is also conceded by learned counsel for the appellant. The only controversy, therefore, really is as to whether, on a reading of the clauses of the contract i.e. the Lease Deed, it specifically puts the liability of all taxes, of whatever nature, on the appellant as observed by the learned Arbitrator.

28. Now turning to the relevant clauses of the Lease Deed, it is important to note that Clause 7.1 falls under the heading of "Maintenance, Electricity and Water". Thus, the clauses under this heading ought to have been dealing with aspects of this nature. However, learned counsel for the respondent is partially right in contending that not much assistance can be taken from this heading as none of the clauses really deal with that aspect as Clause 7.1 deals with taxes, Clause 7.2 deals with legal proceedings instituted by or against the lessor and Clause 7.3 deals with regular water supply and requisite electricity load. Thus, only Clause 7.3 strictly deals with the heading.

29. We have deliberately used the expression "partially right" because Clause 7.2 alone is completely *de hors* the heading. Clause 7.3 directly deals with the heading. These are aspects of municipal services for which arrangements have to be made by the lessor in respect of the premises. Clause 7.1 undisputedly deals with property tax which again is an incident of the ownership of the property. The only question thus is whether the expression "outgoings" in respect of the premises and the expression "such" taxes, cesses, levies or increases is wide enough to encompass any nature of indirect tax. The judicial pronouncements referred to by learned counsel for the respondent, more specifically, *United Towns Electric Co. Ltd's* case (*supra*) which has received approval in *Numaligarh Refinery Ltd's* case (*supra*) that a single species followed by general expression cannot give rise to *ejusdem generis* principles. Similarly, the observations in

Halsbury's Laws of England that the expression "outgoings" has to be given a wide connotation cannot be disputed. However, in our view, Clause 7.1 does not envisage that any nature of indirect taxation has to be borne by the lessor. The aforesaid view has been formulated by us as the reference is to a specific property tax. Apart from this, the expression used "other outgoings" has to be read in the context of "in respect of the premises". This is followed by an expression of wider connotation when it says that it may be of "whatsoever nature" and as may be payable and levied "from time to time" including revisions thereof and putting a prohibition on the lessor from claiming contribution towards "such" taxes, cesses, levies or increases. Thus, Clause 7.1 is clearly confined to property taxes or other outgoings in respect of the "premises". It has to be a tax on the premises or the property. Such a tax may be of any nature whatsoever and thus even a new tax on the premises would be covered by this clause and absolves the lessee of the liability in this behalf, this clause nowhere envisaging an indirect tax of the nature of a service tax. The aforesaid view is further reinforced by Clause 9 (d) which in fact puts the responsibility on the lessee to pay all taxes necessary for carrying on its business within the premises other than the municipal taxes and related property taxes. Thus, any tax on the business activity is on the lessee and the only exclusion made is of municipal tax and related property taxes for which there is a specific Clause 7.1. It is not as if there is a singular clause relating to taxes in the agreement being the Lease Deed which puts the burden on the lessor alone. The nature of taxes is bifurcated into two categories; one borne by the lessor and the other to be borne by the lessee. The aforesaid becomes important in the context of the nature of service tax which is a tax on the commercial activity and to that extent would, thus, fall within the parameters of Clause 9 (d) and not Clause 7.1.

30. We thus have not the slightest of doubt that these are not clauses which can brook of any two interpretations, but there can be only one interpretation on a plain reading of the clauses. The language of a clause cannot be twisted to come to a conclusion as is sought to be done by the learned Arbitrator. It appears that Clause 9 (d) seems to have been completely lost by the learned Arbitrator. The judgments thus relied upon by the arbitral tribunal and by impugned order would be of no assistance to the respondent. In fact, it has been rightly pointed out by learned counsel for the appellant that *Rashtriya Ispat Nigam Limited's* case (supra) dealt with a levy which was in existence at the time of execution of the contract and was thus in contemplation while *Numaligarh Refinery Ltd's* case (supra) dealt with countervailing duty imposed by the Customs Tariff (Amendment) Act, 1994 when the contract inter se the parties required all taxes and duties including custom duties to be paid by the party apart from the fact that the actual contract came into being only post the levy. The judgment in *Pearey Lal Bhawan's* case (supra) thus, cannot be distinguished, as rightly submitted by learned counsel for the appellant.

31. The most crucial aspect which is material for decision of the present case, as noticed by us, is that service tax is neither a "property tax" nor an "outgoing" in

respect of the premises; it is on the commercial activity carried on. The two expressions "property tax" and "outgoings" in respect of the premises are in fact of a common species. Clause 7.1 thus only deals with taxes which are relatable to the property and not the activity carried out in the premises, which is on what service tax is levied.

32. We may also note that a Division Bench of this Court in RFA (OS) No. 64/2012 M/s. Vasari India Pvt. Ltd. v. Ghanshyam Dass Soni & Anr. decided on 20.07.2012 in the context of a plea of the tenant that he was not liable to pay service tax and the same was the liability of the landlord, observed as under:

6. Having admitted not having paid the rent as claimed in the plaint, it is apparent that the first defence taken in the preliminary objection No. 1 that the tenant was not liable to pay service tax is a defence prohibited by law inasmuch as service tax on commercial rented properties is an indirect tax and the jurisprudence on indirect tax tells us that the primary liability of the landlord to pay the tax to the Income Tax Authorities can be passed on to the tenant, for the reason as per the law it is the commercial use by the tenant which enhances the utility to the tenant with respect to the property which attracts service tax on commercial properties. It is apparent that the defence taken in preliminary objection No. 1 with respect to service tax is prohibited by law.

33. We are, thus, of the view that the impugned Awards dated 14.12.2011 and 07.07.2012 as well as the impugned judgments of the learned single Judge dated 04.07.2012 and 06.11.2012 are liable to be set aside. It is, in fact, the respondent who has to bear the incidence of the service tax and not the appellant.

34. We have, however, examined the matter threadbare not only qua the reasoning in respect of interpretation of clauses inter se the parties, but also the liability arising therefrom.

35. We may note that there is no dispute about the quantum of the amount of service tax which already stands paid by the appellant which is Rs. 37,42,954/- and Rs. 48,27,777/- in the two appeals respectively which will now thus have to be paid by the respondent to the appellant. Since the premises were vacated on 30.09.2011, we consider it appropriate to grant interest from 01.10.2011 till date of payment at the rate of 9% per annum simple interest. The appeals are accordingly allowed and the parties are left to bear their own costs.