(2008) 02 BOM CK 0061

In the Bombay High Court

Case No : Appeal No. 188 of 2006 in Arbitration Petition No. 364 of 2004

Rastriya Ispat Nigam Ltd. APPELLANT

Vs

Dewan Chand Ram Saran RESPONDENT

Date of Decision : 25-02-2008

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34
Finance Act, 1994 — Section 65, 65(6)
Finance Act, 1997 — Section 88
Finance Act, 2000 — Section 116
Motor Vehicles Act, 1988 — Section 2, 66(3)

Citation : (2008) 11 STR 453 : (2008) 14 STT 328

Hon'ble Judges : S. Radhakrishnan, J;Anoop V. Mohta, J

Bench : Division Bench

Advocate : Rajeevkumar and S.A. Bhalwal, instructed by Vyas and Bhalwal, for the Appellant; K.K. Rai and Neel G. Helekar, for the Respondent

Final Decision : Dismissed

Judgement

Anoop V. Mohta, J.—This is an Appeal filed by the Original Respondents against the impugned Judgment dated 4th July, 2005 passed by the learned Single Judge in Arbitration Petition No. 364 of 2004 u/s 34 of the Arbitration and Conciliation Act-1996 (for short, "The Act") whereby, the award dated 25th May, 2004 passed by the sole Arbitrator in Arbitration between the parties has been quashed and set aside.

2. The Appellants'' case is as under:

3. The Respondent is a transport Contractor/ travelling agent/ service provider, governed by the provisions of Motor Transport Workers Act, 1961.

4. On 17/06/1993, the Respondent entered into a written contract with the Appellant as "Handling Contractor" for handling its iron and steel materials at their Kalamboli Stockyards, Navi Mumbai.

5. During the pendency of the said contract, Section 65 of the Finance Act, 1994 was substituted by Section 88 of the Finance Act, 1997 whereby 5% service tax was introduced on various services including on clearing and forwarding agent.

6. On 05/11/1997 vide notification No. 41 of 1997 the said tax was brought into force with effect from 16/11/1997.

7. The Appellants thereafter deducted 5% service tax from the Respondent''s bills on the assumption that the Respondent is clearing and forwarding agent from 31/10/1997 inspite of Respondents objections amounting to approximately Rs. 24 lakhs.

8. As dispute was raised, the same was referred to the sole arbitrator. On 25/05/2004, the Arbitrator dismissed the claim.

9. Hence the Arbitration Petition No. 364 of 2004 was filed by the Respondent.

10. By an order dated 4th July, 2005, the learned Single Judge has allowed the petition and set aside the award. The Appellants appealed.

11. The relevant Provisions and Clauses of the Act are as under:

"CHAPTER -V"

SERVICE TAX

116. Amendment of Act 32 of 1994 - During the period commencing and from me 16th day of July, 1997 provisions of Chapter V of the Finance Act, 1994 shall be deemed to have had effect subject to the following modifications, namely; a) in Section 65

f) for Clause (6), the following clause had been subsisted, namely;

(6) "assessee" means a person liable for collecting the service tax and includes:

i) his agent; or

ii) in relation to services provided by a clearing and forwarding agent, every person who engages a clearing and forwarding agent and by whom remuneration or commission (by whatever name called) is paid for such services to the said agent; or

iii) in relation to services provided by a goods transport operator; every person who pays or is liable to pay the freight either himself or through his agent for the transportation of goods by road in a goods carriage;

iv) after Clause (18) the following clause had been substituted namely:

(18A) "goods carriage" has the meaning assigned to it in Clause (14) of Section 2 of the Motor Vehicles Act 1988 (59 of 1988).

(18B) "goods transport operator" means any commercial concern engaged in the transportation of goods by does not include a courier agency;

(iii) in Clause (48), after Sub-clause (m), the following sub-clause had been inserted, namely;

(ma) to a customer, by a goods transport operator in relation to carriage of goods by road in a goods carriage;

(b) in Section 66, for Sub-section (3), the following sub-section had been substituted, namely;

12. The main reliance has been placed upon Clause 9.3 of the Agreement dated 17th June, 1993 which is reproduced as under:

9.3. The Contractor shall bear and pay all taxes, duties and other liabilities in connection with discharge of his obligations under this order. Any income tax or any other taxes or duties which the company may be required by law to deduct shall be deducted at source and the same shall be paid to the Tax Authorities for the account of the Contractor and the Company shall provide the Contractor with required Tax Deduction Certificate.

13. The constitutional validity with regard to the extension of Service tax in view of the amendment to the Finance Act-2000, Section 116(a) and Section 65(6) of the Finance Act-1994 to treat the recipients of the services as assessees in case of services rendered by goods transport, operators and clearing and forwarding agents is upheld (Gujarat Ambuja Cements Ltd. and Another Vs. Union of India (UOI) and Another,).

14. By the impugned Judgment the learned Single Judge has set aside the award passed by the Arbitrator by which the Arbitrator held that the Petitioners/ Appellants was entitled to deduct the service tax amount from the amount payable to the Petitioners though it was payable by the Respondents. Admittedly, the Petitioners/ Appellants recipients of the service of the Respondents as per the agreement in question. The Appellants, pursuant to the Provisions of Service Tax registered and recognized as an "Assessee" and also filed returns as contemplated, accordingly. The Appellants being assessee, therefore, liable to pay the Service tax being the recipients of the services from the Respondents. Admittedly, there was no specific agreement with regard to the payment of service tax in question by the Respondents to the extent that the Appellants would entitle to deduct the amount so paid or payable under the Service Tax though the Respondents are not assessee and or not liable to pay the service tax under the law. The agreement between the parties, therefore, is the basic document to consider the rival submissions made by the parties with regard to such right of deduction from the amount payable to the Respondents.

15. We have perused the basic agreement between the parties. The Arbitrator has relied on Clauses 6 and 9.3 of the agreement to support the reasoning in favour of the Appellants.

16. We found that Clause 6, in no way covers the submission with regard to the liability of the Appellants to pay the Service Tax. With regard to the Clause 9.3,

the learned Counsel appearing for the Appellants submitted that it covers the Service tax liability of the contractor to the Respondents as he agreed to bear and pay all taxes, duties and other liabilities in connection with the discharge of his obligations under this order. As noted, the Respondents are not "Assessee" under the Service Tax Act. The Appellants are, being recipients, resisted and have filed the return. It is, therefore, the Appellants'' obligation to pay the Service tax and not that of the Respondents. There is no specific clause that such service tax, liability would be deductible from the amount payable by the Appellants to the Respondents pursuant to the contract in question. The deduction as claimed and as directed by the award in absence of any agreement or clause, therefore, is not correct.

17. There was no such intention even reflected from the Clauses of agreement and specially Clause Nos. 6 and 9.3 as referred above under the commercial contract like this, in absence of specific clause there is no question of deducting such amount as the Respondents contractor is even otherwise and in no way liable to pay such service tax. The Appellants by claiming such deduction, after paying the said tax to the department, recovering the said amount by this method from the Respondents which is impermissible. The department, on application filed by the Applicant, already rejected the specific claim of refund of this amount.

18. With regard to the second part of the Clause 9.3, we have noted that there is no force in the contention that this amount is deductible as the amount apparently made/paid by the Appellants was in no way on account of or on behalf of the contractor. The Contractor was not at all liable to make the payment, being service provider and forwarding agent, under the service tax law.

19. There is nothing to show even from the plain reading of the agreement and the Clauses referred above that payment of service tax though payable by the "Assessee" and "the recipients", binds the Respondents, the service provider, to re-pay the same to the Appellants and therefore, the Appellants entitled to deduct the Service Tax from the bills of the Respondents in terms of the aforesaid clauses of the agreement. See also Kerala State Electricity Board v. Commissioner of Central Excise, Thiruvananthapuram (2008) 1 S.C.C. 780.

20. The learned single Judge, therefore, right in reversing the award passed by the Arbitrator. The unchanged Clause 9.3 nowhere entitled the Appellants to deduct and or recover such Service tax from the Respondents.

21. We are also of the view that the award suffers from non-application of mind and therefore, it was rightly set aside. The learned Single judge right in holding that the Arbitrator mislead the provisions of law as well as unchanged Clause 9.3.

22. The learned Counsel appearing for the Appellants strongly relied on Oil and Natural Gas Corporation Ltd. Vs. Dai Ichi Karkaria Ltd., and contended that the conclusion drawn on the facts of the case by the Arbitrator could not be scrutinized by the Court for re-appreciating the documents and material on

record and further that the possible view as expressed by the Arbitrator ought not to have been interfered by the learned Single Judge. As noted above, we see, there is no force in this contention. The view as expressed by the Arbitrator was wrong. In absence of specific clauses, the interpretation given by the Arbitrator was incorrect and in fact contrary to the scheme of the Service Tax Act itself. One can not overlook the scheme of such service tax which is that it is a tax on service and not on the service provider, All India Federation of Tax Practitioners and Others Vs. Union of India (UOI) and Others, .

23. The Hon''ble Supreme Court in Chiranjilal Shrilal Goenka (Dead) By Lrs. v. Jasjit Singh and Ors. (2001) 1 S.C.C.486 reiterated that the Court can interfere with the above, where Arbitrator mis-interpretes a basic document. In the present case, in view of the above reasoning and as rightly held by the learned Single Judge, the Award is, on the face of it, illegal and erroneous.

24. In totality, therefore, Appeal is dismissed.

No costs.

