(2014) 02 AP CK 0090

In the Andhra Pradesh High Court

Case No : Writ Petition Nos. 4889 and 4910 of 2014

Sri Devi Restaurant and Bar	APPELLANT
Vs	
Union of India	RESPONDENT

Date of Decision : 20-02-2014

Acts Referred:

Central Excises and Salt Act, 1944 — Section 14
Constitution of India, 1950 — Article 265
Penal Code, 1860 (IPC) — Section 174, 175

Citation : (2014) 35 STR 713

Hon'ble Judges : Kalyan Jyoti Sengupta, C.J;Sanjay Kumar, J

Bench : Division Bench

Judgement

Kalyan Jyoti Sengupta, C.J.—Since the issue involved in both the writ petitions being the same, they are disposed of by this common order. In Writ Petition No. 4889 of 2014, the petitioner has prayed for the following relief:

"To issue an appropriate writ, order or direction particularly in the nature of Writ of Mandamus declaring the action and acts on the part of Respondents 3 to 5, namely, the Chief Commissioner of Central Excise, Customs & Service Tax and others through the impugned communication dated 27-5-2013 and the summons dated 10-1-2013 in C. No. IV/16/65/2012, SIV II, in seeking to levy and recover the Service Tax on the transactions of supply by way of sale or as part of service of food and drinks whether or not intoxicating by a restaurant already being subjected to Sales Tax in terms of Entry 54 of the State List in the Seventh Schedule to the Constitution as illegal, arbitrary, unfair, improper, without authority of law and without jurisdiction and also violative of the mandate enshrined in Article 265 of the Constitution of India and consequently forbear the respondents 3 to 5 as also their Officers, men, etc., from taking any coercive action in any manner of whatsoever nature including interference in conduct of business of the Petitioner and grant such other relief or reliefs as are deemed to be fit and proper in the circumstances of the case."

2. In order to obtain the above relief, the only material which has been placed before us to demonstrate that action is being taken to impose service tax are summons dated 10-1-2013 issued u/s 14 of the Central Excise Act, 1944 (for short ''the Act'').

3. Learned counsel for the petitioner drawing our attention to the entire text of the notice submits that this notice has been issued intending to impose Service Tax upon his client. He further submits that in view of the judgment of the Kerala High Court in Kerala Classified Hotels and Resorts Association Vs. Union of India, , the appropriate provision which had hitherto enabled the respondents to impose Service Tax has been struck down. A copy of the said judgment is annexed to the writ petition.

4. On a careful reading of the said summons dated 10-1-2013, it does not appear to us in clear terms that the intention of the authorities is to impose service tax upon the petitioner. We, therefore, set out the entire text of that notice, which reads thus:

"C. No. IV/16/65/2012 SIV II

Date: 10-1-2013

SUMMONS

To Sri N.V.V.S.S.S. Varma, M/s. Sri Devi Restaurant & Bar, 3-1-67, Cinema Road, Amalapuram.

WHEREAS a case M/s. Sri Devi Restaurant & Bar, 3-1-67, Cinema Road, Amalapuram, for non-payment/evasion of Service Tax in respect of service provided by him under the Finance Act, 1994 and Rules made thereunder is being inquired by me.

AND WHEREAS I have reasons to believe that you are in possession of facts or/ and documents and things which are relevant to the above inquiry. You are hereby summoned u/s 14 of Central Excise Act, 1944 to appear before the Superintendent (SIV), Kakinada II Division, Kakinada in person/by an authorized agent on 28-1-2013 at 10.30 Hrs. at II Floor, Office of the Assistant Commissioner of Central Excise & Customs, Central Excise Building, Dr. No. 27-4-10 & 11, Krishna Geetha Complex, Upstairs Syndicate Bank, Temple Street, Kakinada to give evidence or to make statement truthfully on such matters concerning the inquiry as you may be asked and to produce the relevant documents pertaining to M/s. Sri Devi Restaurant & Bar, 3-1-67, Cinema Road, Amalapuram for examination.

SCHEDULE

*Month-wise sales of alcoholic liquor and food made.

*Copies of Bills raised to customers from 1-5-2011.

*Month-wise procurement of alcoholic liquor from AP Beverages Corporation Ltd.

*Copies of Sales Tax/VAT Returns submitted to the competent authority.

*Copies of Balance sheet for 2011-12/Profit & Loss statement for 2011-12/ Income Tax Return for assessment year 2012-13/Trial Balance for 2012-13.

*Copy of Bank account statement of the licencee/firm from 1-5-2011.

*Self attested copy of ID proof and address proof.

All data may be furnished for the period from 1-5-2011 to 31-12-2012.

If you fail to obey this summons and intentionally omit to attend to give evidence, to make statements and/or to produce the documents, you will be liable to be punished u/s 174 & 175 of the Indian Penal Code, 1860."

5. It is merely a summons issued to the petitioner alleging a case about evasion of service tax/contravention of provisions of the Finance Act, 1994. It does not specifically say that who is evader and against whom the proceedings have to be initiated.

6. The learned counsel for the petitioner assumes that since copy of the summons have been issued to his client for production of documents and therefore, it must be presumed that proceedings are intended to be initiated against the petitioner for imposition of tax.

7. We are unable to accept this presumption and assumption. We have to go by what is there on record. Further Section 14 of the Act very clearly says that "summons can be issued to any person either prospective assessee or a third party". If we read the language employed in Section 14 of the Act, then we can have a presumption without any doubt that the authorities have only issued summons intending to enquire into alleged evasion. Therefore, the petitioner will appear before the authority concerned to know what is the real intention of the issuing authority (sic) vis-a-vis its nexus and if the real intention of the issuing authority is to proceed against the petitioner as a proposed assessee or payee of evaded tax, obviously at that stage, the aforesaid judgment of the Kerala High Court would be absolutely relevant. Therefore, we think that at this stage, the petitioner shall go to the Officer concerned, who has issued the summons. The aforesaid judgment of the Kerala High Court shall also be placed by the petitioner before the Officer concerned, who must see the said judgment and take note of it and follow the same without any demur. This exercise shall be completed within a period of four weeks from the date of communication of the order. Till such date, no coercive measures shall be taken by the respondent-authorities.

8. Writ Petition No. 4889 of 2014 is accordingly disposed of.

9. Now, coming to the other writ petition, namely, Writ Petition No. 4910 of 2014 is concerned, in view of the judgment rendered by us in Writ Petition No. 4889 of 2014, we do not want to write a separate judgment in this writ petition and we follow the same judgment, as the issues on fact and law are identical. Writ Petition No. 4910 of 2014 is accordingly disposed of in terms of the judgment

rendered in Writ Petition No. 4889 of 2014. Consequently, the miscellaneous applications, if any pending, shall also stand disposed of.

