(2014) 03 MP CK 0072

In the Madhya Pradesh High Court

Case No : Writ Petition Nos. 12503-12505 and 12506 of 2010

Sunderdas Gianchand APPELLANT

Vs

Jabalpur Development Authority RESPONDENT

Date of Decision : 24-03-2014

Acts Referred:

Citation : (2014) 35 STR 523

Hon'ble Judges : Rajendra Menon, J;Anil Kumar Sharma, J

Bench : Division Bench

Advocate : Amalpushp Shroti, Advocate for the Appellant; Jitendra Shrivastava and S. Dharmadhikari, Advocate for the Respondent

Judgement

1. Calling in question tenability of a resolution dated 6-3-2010 passed by the Jabalpur Development Authority in the matter of payment of service tax by the petitioners; these writ petitions have been filed. As the common questions of law and fact are involved in all the four petitions, they are being decided by this common order. For the sake of convenience, the pleadings and documents available in W.P. No. 12506/2010 are being referred to in this order. Petitioners in all the cases are Contractors and they were awarded certain contract by the Jabalpur Development Authority with regard to certain construction work. Agreement was entered into and when the petitioners started discharging their duties in accordance to the agreement, it seems that a question arose with regard to payment of service tax. When, notices were issued by the Revenue in the matter of recovery of service tax, it seems that the matter was taken up between the petitioners and Jabalpur Development Authority, and the Jabalpur Development Authority passed a resolution on 23-10-2009 vide Annexure-P/3 being Resolution No. 12. Based on certain opinion given by the senior counsel for the authority, the Jabalpur Development Authority decided that in the matter of payment of service tax as there is no provision in the agreement, it was decided that the component of service tax shall be added in the cost of construction to be done and thereafter, it shall be transferred to the ultimate beneficiary who will

get the benefit of the work done by the Contractor as per the agreement entered into with the contractor. Accordingly, it is the case of the petitioners, and Shri Amalpushp Shroti emphasizes that the petitioners were absolved of the liability for making payment of service tax and it was decided by the Jabalpur Development Authority that the same shall be recovered from the ultimate persons who are beneficiaries of the construction and to whom the constructed building is finally transferred. It was stated that the amount of service tax shall be added to the cost of construction and recovered from the persons who reached the benefit of the construction done. It is submitted that inspire of the aforesaid agreement when the service tax was being recovered by the revenue, the matter came to this Court at the instance of the petitioners and a Division Bench of this Court decided the matter by a common order passed on 29-1-2010 in W.P. No. 13410/2009(O) and various other cases, also reported in Ravishankar Jaiswal Vs. Jabalpur Development Authority and Another,

2. In the order passed by the Division Bench, it was held that the petitioners as contractor were under the law are obliged and duty bound to make payment of the service tax and as far as inter se dispute between the petitioners and Jabalpur Development Authority was concerned, certain liberties were granted to the petitioners and with regard to the same, the learned Division Bench on 29-1-2010 in W.P. No. 13410/2009(O), gave the following observations and directions:-

"The only question for consideration is that the petitioner is entitled to recover the amount of service tax from the respondent No. 1 either under the common law or under the resolution No. 12 relating to the service tax. Once we hold that under the law the liability would be of the petitioner then whether under the contract entered into between the parties the petitioner is entitled to reimbursement will have to be decided by a Court of competent jurisdiction which can receive evidence, hear the parties and decide the matter in accordance with the terms of the agreement. At this stage, we are of the opinion that this Court is not required to enter into the contractual dispute.

Insofar as implementation of subject No. 12/resolution No. 12 is concerned, assuming the respondent has taken such a resolution then too it would not be possible for a Court of law to direct the respondent No. 1 to put into force such resolution which is likely to be reviewed. We refuse to interfere in the matter."

(Emphasis supplied)

3. As things were so standing it seems that the process for recovery of service tax was initiated against the petitioners by the Revenue and it is now reported that the question with regard to recovery of service tax from the petitioners, the dispute between the petitioners and the Revenue is pending before the competent Appellate Authority, where the assessment made is challenging by the petitioners. In the meanwhile, the grievance of the petitioners in these petitions are that resolution as contained in Annexure-P/3, dated 23-10-2009 has been

withdrawn and by a subsequent resolution made is available as Annexure-P/12, dated 6-3-2010, the earlier resolution passed on 23-10-2009 has been withdrawn and it is in-fact a review of the earlier resolution. Inter alia contending that the Jabalpur Development Authority is a creation of Statute and once a decision was taken as is evident from Annexure-P/3, dated 23-10-2009 it''s review or reconsideration and modification subsequently, vide Annexure-P/12 is not permissible. Inter alia contending that this is without hearing the petitioners, without affording an opportunity of hearing to them and it is beyond the powers available to the Jabalpur Development Authority, this writ petition has been filed for quashing the resolution Annexure-P/12, dated 6-3-2010.

4. It is argued by Shri Amalpushp Shroti that the earlier resolution passed being Resolution No. 12, dated 23-10-2009 as contained in Annexure-P/3 could not be withdrawn in the manner as it has been done vide Annexure-P/12; therefore, challenging the same, this writ petition has been filed.

5. Respondent No. 1, even though, represented by a counsel, has not filed any reply. Respondent No. 2 represented by Shri S. Dharmadhikari has filed reply and as far as the liability of the Excise Department to recover the amount of service tax is concerned, they say that in the light of the order passed by a Division Bench of this Court in W.P. No. 13410/2009(O), on 29-1-2010, the petitioners are liable to make payment of the service tax and thereafter, if there is any inter se dispute between the petitioners and the Jabalpur Development Authority, the Excise Department is concerned with the same and it is to be resolved between the petitioners and the Jabalpur Development Authority. As far as the Jabalpur Development Authority is concerned, they have not filed any reply. However, after hearing learned counsel for the parties, we are of the considered view that the moot question warranting consideration for us for the present in these writ petitions are as to whether the petition is maintainable for the purpose of a dispute between the petitioners and the Jabalpur Development Authority in the matter of refund of service tax. Even though, initially vide Annexure-P/3, on 23-10-2009 i.e. by Resolution No. 12, certain decisions were taken by the Jabalpur Development Authority for getting the tax recovered from the ultimate beneficiary of the entire agreement and the construction to be undertaken in accordance with the agreement. The fact remains that this resolution has been withdrawn vide Annexure-P/12 and the question now is as to whether the withdrawal of the resolution is proper or not. While, the matter was considered in the earlier round of litigation between the parties in W.P. No. 13410/2009(O) and other cases, Resolution No. 12 was taken note of and with regard to its implementation, it was held that right is available to the petitioners for getting the service tax refunded after its payment either from the Jabalpur Development Authority or the ultimate beneficiary of the agreement. In the order passed by the Division Bench, as reproduced hereinabove, the Division Bench has clearly held that the question with regard to entitlement of the petitioners to recover the amount of service tax from the Jabalpur Development Authority either under the common law or under the Resolution No. 12 is a matter which is disputed

between the contractor and the Jabalpur Development Authority and it was held that for the said dispute, the matter will have to be decided by a court of competent jurisdiction which can receive evidence, hear the parties and decide the matter in accordance with the terms of the agreement. Once, this court has held that the question of refund of the amount and the tenability of the same based on Resolution No. 12 is to be decided by a court of law after recording of evidence, i.e. after conducting an inquiry, we are of the considered view that this petition is not maintainable. Even if, the resolution Annexure-P/3 bearing No. 12, dated 23-10-2009 is said to have been withdrawn by the Jabalpur Development Authority vide Annexure-P/12, the question of its withdrawal also is a question co-related with the right available to the petitioners for recovery of the amount of service tax from the Respondent No. 1 and as already held by this Court this question has to be resolved through intervention of a competent court of jurisdiction where inquiry can be conducted and evidence can be recorded and the question of breach of agreement or the terms and conditions of the agreement decided. That being so, we are of the considered view that now, the dispute between the petitioners and respondent Jabalpur Development Authority in the matter of refund of service tax is within the realm of arbitration, if any arbitration agreement exists between the parties or the common law remedy available to the petitioners. That being so, we are not inclined to interfere into the matter but deem it appropriate to grant liberty to the petitioners to take recourse to the remedy available either under the common law or for Arbitration, if provided in the agreement. However, having heard learned counsel for the parties, we may point out that the petitioners while raising the dispute in accordance with the aforesaid direction will be at liberty to seek quashment of Annexure-P/12 and seek enforcement of earlier resolution Annexure-P/3 bearing No. 12, dated 23-10-2009 and the Authority/Arbitrator or the Court which adjudicate the dispute shall go into the merits of the matter and shall decide the claim in accordance with law without being influenced by any observation or comments made by this court either by this order or the order dated 29-1-2010 passed in W.P. No. 13410/2009(O) and other cases. The dispute shall be independently dealt with in accordance with law applicable and while interpreting the agreement or adjudicating dispute between the parties, the Court or Arbitrator or Authority shall be free to decide the matter in accordance with law without being influenced by order of this Court in W.P. No. 13410/2009(O). With the aforesaid, for the present, no indulgence into the matter is called for.

6. All these writ petitions stands disposed of with the aforesaid. CC as per rules.

