

(2019) 08 DEL CK 0246

In the Delhi High Court

Case No : Letters Patent Appeal No. 686, 688 Of 2017

Sushila

APPELLANT

Vs

Airport Authority Of India & Anr

RESPONDENT

Date of Decision : 22-08-2019

Acts Referred:

Constitution Of India, 1950 — Article 226

Finance Act, 1994 — Section 65(105), 65(105)(zzm) , 65A, 65A(2), 65A(2)(a), 73(1)

Citation : (2019) 8 AD(Delhi) 586

Hon'ble Judges : Hima Kohli, J;Asha Menon, J

Bench : Division Bench

Advocate : J.K. Mittal, Vandana Mittal, Abhishek Handa, Anil Kathuria, Atul Sharma, Abhinav Sharma

Final Decision : Dismissed

Judgement

Hima Kohli, J

1. The appellant/petitioner is aggrieved by a common order dated 15.9.2017, passed in W.P. (C) Nos. 10880/2019 and 10883/2016 whereby, her plea for issuing a writ of mandamus to the respondent No.1/Airports Authority of India (AAI) and the respondent No.2/Delhi International Airport Limited (DIAL) for return of Fixed Deposit Receipts (FDRs) retained by the said authorities against Service Tax liabilities that would have been attracted on the revenue generated from the contracts executed between the parties, has been disposed of with an observation that since there is an arbitration clause contained in the contract, the appellant has a remedy of invoking the said clause and raising her disputes before the Arbitral Tribunal.

2. Briefly stated, the relevant facts of the case are that on 20.07.2005, the appellant had entered into a License Agreement with the respondent No.1/AAI and later, on 19.06.2006, had entered into a License Agreement with the successor-in-interest of AAI, respondent No.2/DIAL on similar terms for removal or disposal of garbage from various designated points falling within the premises

of the IGI Airport at New Delhi. An issue arose as to whether Service Tax was leviable on garbage disposal charges payable by the respondents to the appellant/petitioner. Pending adjudication of the said issue before the Service Tax Department, the respondents withheld the security deposits in the form of FDRs offered by the appellant/petitioner to the tune of Rs.17,28,000/-, the subject matter of LPA 688/2017 and Rs.28,51,200/-, the subject matter of LPA 686/2017.

3. The office of the Commissioner of Service Tax, New Delhi served notices to show cause on the respondents regarding non-payment of Service Tax on the service of garbage removal rendered by the appellant. While the said proceedings were still pending, the appellant filed a writ petition in the High Court, registered as W.P. (C) 15096/2006, inter alia challenging the applicability of Service Tax in respect of the agreement entered into with the respondent/AAI. Besides the appellant/petitioner herein, several other persons who had entered into agreements with the respondent/AAI, also filed writ petitions challenging the application of Clause (zzm) inserted in Section 65 (105) of the Finance Act, 1994 w.e.f. 1.4.2004 that had extended the definition of 'taxable services' to be provided "to any person, by airports authority or by any other person, in any airport or a civil enclave:.....PROVIDED that the provisions of Section 65A shall not apply to any service when the same is rendered wholly within the airport or civil enclave."

4. As the Service Tax authorities were of the view that Clause (zzm) would be attracted to the agreements entered into by the appellant herein and other similarly placed parties with the respondent/AAI, notices were issued to the AAI to pay the Service Tax. By a detailed common judgment dated 12.4.2012 in a batch of petitions, the Division Bench observed that the Commissioner, Service Tax had completed the assessment in the case of AAI and declared that it was liable to pay Service Tax and the said decision had been challenged by AAI by preferring appeals. Further, noting that a dispute had been raised by the petitioners in the said batch of petitions as to who would ultimately be liable to pay Service Tax, the Court expressed a view that since both, the petitioners and the respondent/AAI were questioning the leviability of Service Tax on the subject transaction and appeals against the order passed by the Commissioner, Service Tax were pending adjudication before the appropriate fora, it was for the said fora to decide the said issue. However, taking into consideration the submission made by the petitioners therein that they were not parties to the appeal proceedings and having regard to the stand taken by the respondent/AAI that they did not have any objection if the petitioners would be permitted to intervene in the said appeals, to which suggestion, the Service Tax authorities, who had been impleaded in the petitions, were also agreeable, all the petitioners, including the appellant/petitioner herein were permitted to participate in the appeal proceedings and it was directed that they would be granted a hearing by the Appellate Authority.

5. Coming to the specific disputes raised by each of the petitioners against the

respondent/AAI in the aforesaid batch of petitions, the Division Bench held that in the event, the Appellate Authority holds that Service Tax is leviable, then it would be for the aggrieved parties to invoke the arbitration clause contained in the agreements governing them. Lastly, the Court separately dealt with each case where the respondent/AAI was holding a security deposit/bank guarantee or had recovered Service Tax from the petitioners therein and in the case of the appellant before us, the following direction were issued:-

"The respondent AAI had awarded the contract to the petitioners for collection and disposal of garbage from IGI Airport, Delhi. The said contracts have already come to an end. Vide interim order in these petitions the respondent AAI was restrained from taken any coercive steps against the petitioners for collection/recovery of service tax. However, the respondent AAI is withholding the security deposit in the form of FDRs of the petitioners. The interest of the respondent AAI is thus fully safeguarded. The petitioners are however directed to keep the FDRs renewed from time to time. In the event of the service tax being ultimately levied, the dispute as to who is to bear the same shall be resolved by arbitration. The parties shall be entitled to seek interim measures in the said arbitration proceedings. The petitioners to within one month also file affidavits undertaking to this court to pay the service tax amount if ultimately found due to the respondent AAI."

6. The contention of Mr. Mittal, learned counsel for the appellant/petitioner is that since no Service Tax was ultimately imposed by the Service Tax Department on the revenue generated by the respondent No.1/AAI and the respondent No.2/DIAL, the FDRs offered by the appellant as security, are liable to be returned/refunded forthwith.

7. On the other hand, Mr. Kathuria, learned counsel for the respondent No.1/AAI submitted that the dispute as to whether Service Tax is attracted on the services rendered by the appellant, has already been adjudicated upon and decided by the Central Excise and Service Tax Appellate Tribunal (CESTAT) in proceedings where the appellant had been permitted to be impleaded in terms of the judgment dated 12.4.2012 in W.P.(C) 15096/2006, referred to hereinabove and that AAI has already paid the Service Tax on garbage disposal charges, as demanded. He stated that despite an opportunity granted to the appellant to participate in the said appeal proceedings, she elected not to do so and instead, approached the High Court by filing yet another petition, which has rightly been dismissed by the impugned order. He clarifies that AAI had deposited the Service Tax collected from the appellant and other similarly placed parties, prior to filing the appeals in the year 2007. The said appeals were disposed of by the CESTAT vide order dated 02.01.2015. The relevant para of the said order reads as follows:-

"27. In view of the above findings, the following order is passed:

27.1 Service tax is chargeable on the Appellant's revenue from:-

- (a) Passenger service fee;
- (b) Left luggage facility, rest rooms/retiring rooms facility and supply of trolleys for courier service;
- (c) Renting/leasing of space inside Airports/Civil Enclaves to various Airlines and other persons for their business activity;
- (d) Renting of space inside the Airports/Civil Enclaves for various persons for putting up hoarding/advertisements; and
- (e) Lump sum amounts received as licence fee from licensees/concessionaries for operating/managing car parking facility, public admission and issue of season tickets/temporary passes.

Accordingly, the Commissioner's order regarding levy of service tax on (a) (b), (c) & (e) is upheld and the other in respect of (d) is set aside and levy of service tax in respect of

(d) above is confirmed. However for quantification of the service tax demand by the revenue from the above mentioned services, which would be recoverable only for the normal limitation period or for the period for which the assessments were provisional, the matter is remanded to the Commissioner. The extended period under proviso to Section 73 (1) is not invocable."

8. Learned counsel for the respondent No.1/AAI clarified that on the matter being remanded to the Commissioner, Service Tax on the aspect of quantification of service tax demanded by the Revenue Department, adjudication is still pending.

9. Mr. Atul Sharma, learned counsel for the respondent No.2/DIAL also supported the impugned order and sought to urge that the legal issue relating to leviability of Service Tax upon services rendered by the appellant/petitioner in the instant case, has yet to be adjudicated upon and the matter is still at the show cause stage. He submitted that since the Statute contemplates that the liability to pay the Service Tax, if leviable, rests with the party who renders the said services, which in the present case would be the appellant, the respondent No.2/DIAL has no option but to retain the security deposited by her in the form of FDRs pending adjudication. In addition to the above plea, it was submitted that there is an arbitration clause in the License Agreement executed between the parties and if the appellant is disputing the liability to pay Service Tax, then the same can only be adjudicated upon by the Arbitral Tribunal, on invocation of the said clause. In other words, a petition under Article 226 of the Constitution of India would not lie in such circumstances.

10. In his rejoinder arguments, learned counsel for the appellant not only reiterated the submissions made by him before the learned Single Judge, he also cited a decision in the case of Airport Retail Pvt. Ltd. Vs. Union of India reported as 2014 (35) S.T.R. 659 to contend that the issue relating to leviability of Service

Tax in respect of services rendered, stands settled as would be apparent on a bare reading of paras 39 to 41. For purposes of ready reference, the relevant paras of the said decision relied on by learned counsel are extracted herein below:-

"39. In our view, the license arrangement between DIAL and the petitioner could not be subject to service tax under Clause 65(105)(zzm) prior to 01.07.2010, as in no event could the same be considered as 'airport services' under Clause (zzm) of Section 65(105) of the Act. This is so, because letting of immovable property was specifically covered under Clause (zzzz) of Section 65(105) and Section 65A(2) mandates that the sub-clause which provides the most specific description would be preferred to sub-clauses providing a more general description. Indisputably, if the transaction between DIAL and the petitioner is considered merely as letting of immovable property, then by virtue of Section 65A(2)(a) the same would be considered as taxable service under Clause 65(105) (zzzz) and could not be classified as 'airport services' under clause (zzm) of Section 65(105) of the Act.

40. In addition to amending Clause (zzzz) of Section 65(105), the Finance Act, 2010 also brought about an amendment in Clause 65(105)(zzm). However, this amendment was not retrospective and came into effect from 01.07.2010. The said clause as amended by Finance Act, 2010 reads as under:-

"(105) "taxable service" means any service provided or to be provided-

xxxx xxxx xxxx xxxx

(zzm) to any person, by airports authority or by any other person, in any airport or a civil enclave:

Provided that the provisions of section 65A shall not apply to any service when the same is rendered wholly within the airport or civil enclave;"

41. With the introduction of the proviso to Clause (zzm) of Section 65(105) of the Act, recourse to Section 65A was no longer available to determine whether any service rendered within the airport or civil enclave was more appropriately covered by any specific clause of Section 65(105) of the Act. Thus, after 01.07.2010, if any service which was otherwise taxable under the Act was rendered within the airport or civil enclave the same could be chargeable to service tax as 'airport services'."

11. We have examined the decision in the case of Airport Retail (P) Ltd. (supra) and find that the issue that was raised therein, was entirely different. In the said case, the Division Bench was required to examine as to whether Section 65 (105) (zzm) of the Finance Act, 1994 as amended by the Finance Act, 2010 w.e.f. 01.07.2010, whereby, Service Tax was imposed on renting of immoveable property by DIAL to a third party like the petitioner therein, could be treated as a transaction that would fall within the scope of "rendering of service". Taking note of the fact situation of the said case, the Division Bench held that even if the

transaction between the petitioner therein and DIAL is considered as a simple case of letting out of an immoveable property, it would not fall within the category of taxable service of "airport services" under Clause (zzm) of Section 65 (105), prior to the date of the amendment, i.e. 1.7.2010, since the petitioner therein had closed its operations with effect from 30.6.2010.

12. It is relevant to mention here that aggrieved by the aforesaid judgment dated 30.7.2014, DIAL being the successor-in-interest of AAI, had preferred an appeal before the Supreme Court limited to the direction issued to it to bear the cost of the bank guarantee furnished by the private party, who was a licensee and was permitted to operate a duty-free shop within the airport premises. The said appeal was dismissed by the Supreme Court by confirming the view expressed by the High Court that DIAL must bear the cost of securing the bank guarantee. For purposes of ready reference, the opening para that pin points the scope of the appeal filed by DIAL and the operative para of the said judgment are extracted below:-

"1. Leave granted. This appeal seeks to challenge the Order dated 30-07-2014 passed by the High Court of Delhi in Writ Petition No.4274 of 2010 [2014(35) S.T.R. 659 (Del.) to the extent it directed the appellant to bear the cost for the bank guarantee furnished by the present Respondent No.5.

XXX XXX XXX

8. It is this direction that the appellant must pay to Respondent No.5 the cost of bank guarantee, which is under challenge in the present appeal. We have heard Shri S.K. Bagaria, learned Senior Advocate for the appellant and Mr. S. Ganesh, learned Senior Advocate for Respondent No.5. Having gone through the matter and considered the rival submissions we affirm the view taken by the High Court. The interest of the appellant was well secured by the Award dated 30-03-2011 which was a Consent Award. Respondent No.5 had an interim order in its favour passed by the High Court and it was only because of the insistence on the part of appellant that Respondent No.5 was directed to furnish the bank guarantee. It is, therefore, but logical and consequential that the appellant must bear the costs for securing such bank guarantee. Confirming the view taken by the High Court we dismiss the present appeal. However, there will be no order as to costs."

13. Thus, the contention of the learned counsel for the appellant that the judgment in the case of Airport Retail Pvt. Ltd. (supra) has for all effects and purposes, settled the issue of levability of Service Tax on services rendered by the appellant/petitioner to the respondents in both the appeals, in terms of the License Agreement, is not borne out. Nor is learned counsel correct in asserting that since the said decision has been affirmed by the Supreme Court, nothing further survives for adjudication by the Appellate Authority under the Act and consequently, the security offered by the appellant in the form of FDRs ought to be released by the respondents forthwith. We do not find any infirmity in the view expressed in the impugned order that once there is a dispute as to whether

the appellant is liable to pay Service Tax on the revenue generated from garbage collection, then her remedy lies before the Arbitral Tribunal, since there is an arbitration clause governing the parties. We are in complete agreement with the view expressed by the learned Single Judge that the dispute raised in the writ petitions cannot be a subject matter of judicial review under Article 226 of the Constitution of India. It is for the appellant to invoke the arbitration clause, if she so desires. Moreover, despite an opportunity afforded to the appellant/petitioner to participate in the appeal filed by the respondent No.1/AAI before the CESTAT against the order passed by the Commissioner, Service Tax in terms of the judgment dated 12.04.2012, for reasons best known to her, she has elected to stay away from the said proceedings that culminated in the order dated 02.01.2015, whereunder a particular aspect relating to quantification of Service Tax demanded by the Revenue Department has been remanded to the Commissioner, Service Tax for consideration.

14. We are therefore of the opinion that there is no error in the impugned order. Writ proceedings are not an appropriate forum to decide as to whether Service Tax would be leviable on garbage collection charges and if the answer is in the affirmative, who would be liable to pay Service Tax more so, when the appellant/petitioner has not even impleaded the Service Tax Authorities as a party in the writ petitions. As was observed by the Division Bench in clear terms while deciding the earlier round of litigation between the parties, in case of a dispute, the arbitration clause contained in the License Agreement can be invoked by the appellant.

15. The impugned order is accordingly upheld and the present appeals are dismissed as meritless while leaving the parties to bear their own expenses.