

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

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DATED THIS THE 7TH DAY OF MARCH, 2025

PRESENT

THE HON'BLE MR JUSTICE KRISHNA S DIXIT

AND

THE HON'BLE MR JUSTICE RAMACHANDRA D HUDDAR

WRIT APPEAL NO.3253 OF 2018 (T-RES)

BETWEEN:

M/S. JYOTHY FABRICARE SERVICE LTD.,
NO.903, 9TH FLOOR, NORTH BLOCK, (REAR WING)
MANIPAL CENTRE, DICKENSON ROAD,
BANGALORE-560 042.

(REPRESENTED BY MS.CHAITRA KARANTH H N,
LEGAL OFFICER
AGED ABOUT 30 YEARS,
D/O MR.NAGESH KARANTH H K)

...APPELLANT

(BY SRI.V RAGHURAMAN., SENIOR COUNSEL A/W
SRI. BHANUMURTHY J S., ADVOCATE)

AND:

THE SENIOR DIVISIONAL COMMERCIAL MANAGER
BANGALORE DIVISION,
SOUTH WESTERN RAILWAY,
DIVISIONAL OFFICE, BANGALORE-560 023.

...RESPONDENT

(BY SRI.ABHINAY Y T.,ADVOCATE)

THIS WRIT APPEAL IS FILED UNDER SECTION 4 OF THE
KARNATAKA HIGH COURT ACT PRAYING TO I) ALLOW THE
WRIT APPEAL AND SET ASIDE THE JUDGMENT OF THE
LEARNED SINGLE JUDGE IN WP 24097/2015 AND 30354/2015
DATED 22/10/2018 AND II) GRANT RELIEFS AS PRAYED FOR
IN WP 24097/2015 AND 30354/2015.

THIS WRIT APPEAL HAVING BEEN RESERVED FOR ORDER, COMING ON FOR PRONOUNCEMENT THIS DAY, **KRISHNA S. DIXIT.J.**, PRONOUNCED THE FOLLOWING:

CORAM: HON'BLE MR JUSTICE KRISHNA S DIXIT
AND
HON'BLE MR JUSTICE RAMACHANDRA D HUDDAR

CAV JUDGEMENT

(PER: HON'BLE MR JUSTICE KRISHNA S DIXIT)

This intra-court appeal seeks to call in question a learned Single Judge's order dated 22.10.2018 whereby, appellant's W.P.No.24097/2015 & W.P.No.30354/2015 have been negatived. In the said petitions, essentially, he had sought for a Writ of Mandamus to the respondent-Railway to reimburse service tax component in terms of tender documents followed by contract in the light of subsequent amendment of law relating to Service Tax Regime w.e.f. 1.7.2012. The said amount has been quantified at Rs.31,37,692/-.

2. Appellant, a company incorporated under the provisions of erstwhile Companies Act, 1956, is engaged in the business of providing wet washing services, wash bedrolls that are ordinarily used by the Railway passengers. During the period between 20.12.2009 &

11.06.2012, the appellant-Company has won thirteen agreements with the respondent-Railway in a public tender process for providing the services of collection of soiled linens, washing, loading of washed linens in coaches and supplying washed bedrolls to Railway passengers. All these contracts were entered into prior to 1.7.2012 i.e., the crucial date with effect from which the Service Tax Regime underwent a paradigm shift in the sense that what was selectively taxable became the exception, all services having become taxable. In other words, negative list taxation regime came into operation. During the contract period, only the service of dry cleaning was taxable and wet cleaning was not.

3. The respondent-Railway despite half a dozen letters sent by the appellant during the period between 9.10.2012 to 26.7.2013 for claiming reimbursement of service tax component, maintained stony silence. Eventually, that led to appellant sending a legal notice dated 29.10.2014 in that connection calling upon the Railways to make good the service tax component specifically mentioning the

amendment to Finance Act, 1994 read with Central Excise Act, 1944. The Railways vide reply dated 12.11.2014 repelled the claim on the ground that the terms of the contract did not impose any such obligation on their part and that the passengers were charged by the Railways as per their schedule with no separate collection from them for bedrolls. A legal reply notice dated 23.12.2014 followed to the same effect.

4. Appellant had filed the subject writ petition grieving against the stand of the Railways. After service of notice, Railways entered appearance through its counsel and filed their Statement of Objections resisting the petition both on merits and on the ground of availability of arbitration facility. Learned Single Judge broadly agreed with the version of the Railways and dismissed the petition relegating the appellant to arbitration. Aggrieved thereby, this appeal is presented at our hands.

5. Having heard the learned Senior Advocate appearing for the appellant-Company and the learned Senior Panel Counsel representing the respondent-Railways, we are

inclined to grant indulgence in the matter for the following reasons:

5.1 AS TO ARBITRATION CLAUSE BARRING INVOCATION OF WRIT JURISDICTION:

(a) The contracts for rendering of cleaning services were entered into prior to 1.7.2012 and at that time there was no service tax levy on wet cleaning services. True it is that there is an arbitration clause in the agreements in question which reads as under:

"If any dispute, difference or question shall arise between the Railway Administration and the contractor as to the respective rights, duties and obligations of the parties here to or as to the constructions or interpretations of any of the terms and conditions of the agreement as to its applications (except the decision whereof if herein expressly provided for) then the same shall be referred to the Chief Commercial Manager of South Western Railway, whose decision shall be final."

(b) The first contention of learned Panel Counsel appearing for the Railways that the arbitration clause would be an alternate & efficacious remedy and therefore consistent with learned Single Judge's order the appellant should explore the same, is bit difficult to countenance. Reasons for this are not far to seek:

(i) Firstly, the arbitration clause is hit by the Apex Court decision in *CENTRAL ORGANISATION FOR RAILWAY*

*ELECTRIFICATION vs. ECI SPIC SMO MCML (JV)*¹. Therefore, the subject arbitration clause is liable to be ignored for all practice purposes.

(ii) Secondly, the question is not as to the liability to pay the service tax in respect of services in question; it is essentially as to who should pay this in the light of change of legal regime of taxation post conclusion of contracts. In fact, in Railways Reply Legal Notice dated 23.12.2014, at para 3, it is specifically admitted '*It is true that the service tax is indirect tax and has to be necessarily collected from the receiver of services. My client has already discharged the service tax portion to your client since cost as per tenders as quoted by your client includes the service tax portion also. Therefore, my client need not reimburse the service tax twice...*' Thus, there being no repudiation of liability for discharging the service tax, it cannot be argued that there is an arbitrable dispute merely because a question as to who should pay, eventually arises. This view gains support from the Coordinate Bench decision in W.A.No.1427/2021 (T-RES) between *HUBBALLI DHARWAD SMART CITY LIMITED vs. MAS CONSTRUCTIONS* disposed off on 31.01.2025.

(iii) Thirdly, an arbitration clause of the kind even otherwise does not constitute a China Wall against exercising writ jurisdiction. In appropriate cases, Writ

¹ 2024 SCC Online SC 3219

Court can grant relief when the answering respondent happens to be Article 12-Entity in the light of *R.D.SHETTY vs. INTERNATIONAL AIRPORT AUTHORITY OF INDIA*². It is not that the Writ Courts should invariably deny relief merely because the other side disputes the fact matrix, provided that the disputed facts can be ascertained from the pleadings & record. **Justice Oliver Wendell Holmes**, a century ago has said in **DAVIS vs. MILLS**³:

"Constitutions are intended to preserve practical and substantial rights, not to maintain theories...".

5.2 AS TO STAND OF THE RAILWAYS EMANATING FROM ITS LEGAL REPLY NOTICE:

(a) The vehement contention of learned Panel Counsel appearing for the Railways that his client is not at all liable to reimburse the service tax component under the terms of contract, is contrary to its stand taken up in the legal reply notice dated 23.12.2014 wherein at page 2 it is stated as under:

"My client admits that generally the liability to pay service tax has been placed on the 'service provider' except in certain case. The contractor to whom bed rolls contract is awarded is the Service Provider and is liable for service tax for his activities of providing bed rolls. Thus, my client is committed to observe

² AIR 1979 SC 1628

³ 194 U.S. 451 (1904)

all statutory obligations of the Service Tax laws.

It is stated in your legal notice that in view of applicability of section 12B so as to read it with section 12A of the Central Excise Act corresponding to section 83 of the Finance Act, 1994, an deemed presumption regarding passing of service tax on the recipient of service would be created automatically. Thus as per foregoing provisions the provider of service who is an assessee under Section 65 of the Finance Act has to collect service tax from the users of service."

(b) There are certain paragraphs in the subject Legal Reply Notice which purport to repudiate claim of the appellant for reimbursement of tax component, is true. However, on the principle of reimbursement as such, there is no dispute at all. The dispute is the extent of reimbursement in the sense that what is payable by way of service tax because of paradigm shift in the Legal Regime, with effect from 1.7.2012 i.e. post-contract period.

5.3 AS TO SPECIFIC CLAUSES IN THE TENDER/CONTRACT DOCUMENTS:

(a) The next contention of learned Panel Counsel is that the Price Bid for comprehensive work of supply, washing and distribution of Bed Rolls to the passengers of AC includes rate inclusive of all applicable taxes and levies etc. This argument is structured on the basis of clause

(xvi) of Agreement No.04/MECH/SBC/2012 dated 11.06.2012 which reads as under:

"(xvi) Successful tenderer has to pay necessary Service Tax wherever levied or becomes leviable or as and when advised by the Service Tax Department. Failure to do so shall lead to termination of contract and forfeiture of Security Deposit (SD) and Performance Guarantee (PG). Railway Administration may also recover the same from any pending bills of the successful tenderer."

(b) Learned Sr. Advocate appearing for the appellant is right in telling us that this clause cannot be construed as absolving obligation of the Railways to reimburse the service tax component. This submission impresses us in the light of admission of the Railways in its Legal Reply Notice, relevant part of which is reproduced above. This clause is in the nature of a warning to the contractor that he should discharge the initial liability by paying the service tax so that no coercive proceedings may be taken against the officials of the Railways, owing to the lapse of contractor, and nothing beyond. This accords with the stand taken by the Railways in the Reply Notice. Added, the said clause is applicable only in respect of TDS like taxes and not service tax since there is no such provision in the Finance Act, 1994.

(c) Learned Panel Counsel next brought to our notice Note-1 of Price Bid vide Tender Notice

No.08/SBC/MECH/2011 dated 22.12.2011 which is a part of the tender document. The same reads as under:

"Tenderer(s) should quote the rate inclusive of all applicable taxes and levies, etc."

He submits that the rates quoted by the appellant thus necessarily include the applicable taxes & levies and therefore that obligation does not rest on the shoulders of Railways. This is bit difficult to agree with and reasons are not far to seek:

- (i) Firstly, if that is the kind of interpretation, why is that the Railways has reimbursed the service tax component all through, remains unanswered. In fact, it is the case of the Railways that it has already reimbursed the service tax component, of course, at the agreed rate.
- (ii) Secondly, in their legal reply notice the Railways have specifically admitted that they are the service recipients, appellant being the service provider, and further that it is the obligation of the service recipient to discharge tax component.
- (iii) Section 83 of Finance Act, 1994 read with Sections 12A & 12B of Central Excise Act, 1944 raises a presumption that the incidence of duty can be passed on to the buyer unless contrary is proved and therefore, being an indirect tax,

has to be borne by the service recipient vide **Satya Developers Pvt. Ltd. vs. Pearey Lal Bhawan Association**⁴, and; **Meattles Pvt. Ltd. Vs. HDFC Bank Ltd.**⁵

- (iv) When the contracts in question were entered into in the year 2011, both the parties had not contemplated change of legal regime with effect from 1.7.2012 from Positive List to Negative List eventually giving rise to new tax liability. It is not just change of rates of tax, but, very taxability. Therefore, the Railways have to bear the brunt vide **Govt. of NCT vs. MBL Infrastructure**⁶

5.4 AS TO DRAWING ANALOGY FROM SEC.64A OF THE SALE OF GOODS ACT, 1930:

- (i) The contention of the Railways that what has not been contemplated when the parties negotiated the contract, cannot be loaded to the shoulders of his client, merely because there is change of law, does not merit acceptance. There is a statute namely, the Sale of Goods Act, 1930 which regulates the contract of/for sale or purchase of goods. However, there is no corresponding statute of the kind in respect of service and labour. Section 64A of the Act that applies to sale of goods gives

⁴. 2017 (3) GSTL 325 (Del.).

⁵. 2016 (42) STR 655 (Del.).

⁶ 2012 SCC Online Del 1465.

an indication as to who should bear the brunt of new taxes. The same reads as under:

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

(ii) Sec.64A of our 1930 Act is modeled from Sec.10 of English Finance Act, 1910 which permits the seller to add tax component to the agreed price for the sale of

goods, if such tax levy is because of a statute enacted post conclusion of contract. There are some differences between our law and their law, is true; however that difference is not relevant to our discussion. Firstly, Sec.64A regulates the rights & liabilities between the seller and the buyer. It deals with two distinct things: Imposition of tax and increase of tax, occurring in clause (a). Where tax is chargeable at the time of making of the contract, any increase subsequently will be covered by clause (a). The intent of the Parliament is as clear as Gangetic waters: No party to a contract should be made to unjustly gain or suffer on account of the State action in increasing or decreasing duty. If the duty is increased the liability is on the buyer and if it is decreased the liability to refund such part is on the seller. The clauses of tender/contract document which the Panel Counsel heavily banked upon as above have to be understood in the light of this provision.

(iii) True it is, that section 64A as such cannot be invoked because the case does not relate to tax on goods; however that does not mean that the wisdom of its underlying principle cannot be made use of by analogy. We are aware of the difference between goods and services. There is terminological difference also when it comes to usage: ordinarily it is said 'goods are sold or bought' whereas 'service is rendered'. Goods are tangible whereas services need not be so. Consideration for sale

of goods is price; such terminology is not employed when it comes to rendering of service. In a sense salary, wages, charges, etc. are employed in lieu of price. Of course, the words consideration is genus and price, salary, wages, charges, etc. are species. All this being said, there is one common thing between these two: Both are taxed, although under different statutes. The basic principle on which levy is enacted, thus largely remains the same, variance in modalities notwithstanding. All this we are saying to point out that there is nothing that bars drawing of wisdom of a provision of a statute, which may not be applicable to transactions of the kind, the case involves.

(iv) We are asking ourselves a question: Had the levy of service tax on services of the kind is abolished by an Ordinance with retrospective effect, whether Railways would have allowed the appellant to retain the quoted rates which admittedly include the tax component ? The answer would be perfectly in the negative. As a corollary of this the recipient of services like the buyer of goods has to bear the new levy of service tax occasioned by State action namely the amendment to Finance Act, 1994 w.e.f. 01.07.2012, which obviously is post conclusion of contracts in question. Any other answer or view would strike at reason, at law and at logic.

In the above circumstances, this appeal succeeds and impugned order of the learned Single Judge is set aside; appellant's WP No.24097/2015 & WP No.30354/2015 are allowed. A Writ of Mandamus issues directing the respondent-South Western Railway to reimburse to the appellant all that amount which it has paid by way of service tax, with 9% interest p.a. from the date the amount became payable, within eight weeks. Delay if brooked would carry additional interest at the rate of 1% per mensem and the same may be recovered from the erring officials.

**Sd/-
(KRISHNA S DIXIT)
JUDGE**

**Sd/-
(RAMACHANDRA D. HUDDAR)
JUDGE**

Snb/cbc/SK