

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment Reserved on: October 05, 2015

% *Judgment Delivered on: October 13, 2015*

+ **RFA (OS) 24-25/2011**

SATYA DEVELOPERS PVT LTD.

..... Appellant

Represented by: Mr.J.K.Mittal, Advocate with
Mr.Rajveer Singh, Ms.Krishna
Nandan Kumar, Advocates for
appellant.
Mr.Balbir Singh, Sr.Advocate/
Amicus Curiae.

versus

PEAREY LAL BHAWAN ASSOCIATION

..... Respondent

Represented by: Mr.Simran Mehta, Advocate
with Mr.Prabhat Kalia,
Advocate for respondent.

+ **RFA (OS) 105/2014**

M/S HDFC BANK LIMITED

..... Appellant

Represented by: Mr.Raman Kapur, Sr.Advocate
instructed by Mr.Rishab Raj
Jain, Ms.Pallavi Deepika,
Advocates for the appellant.
Mr.Balbir Singh, Sr.Advocate/
Amicus Curiae.

versus

M/S MEATTLES PRIVATE LIMITED

..... Respondent

Represented by: Mr.Deepak Bashta, Advocate
for respondent.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J.

1. Pearey Lal Bhawan Association (in short 'PLBA') filed two suits being CS(OS) Nos. 1016/2008 and 1018/2008 against Satya Developers Pvt. Ltd. (in short 'Satya') whereas M/s Meattles Private Limited (in short 'Meattles') filed CS(OS) No. 512/2012 against M/s HDFC Bank Ltd. (in short 'HDFC Bank') seeking declaration and injunction qua the service tax paid in respect of rented premises.
2. The plaintiffs in the suit sought a declaration holding the defendants to be liable to pay the service tax leviable on the rent and the maintenance charges payable under the lease deed executed *inter se* the parties, recovery of amount and mandatory injunction requiring the defendants to pay to the plaintiff service tax of the amount on the lease rentals payable in future. Thus the three appeals are being disposed off by a common judgment as they involve common question of law.
3. In CS (OS) Nos.1018/2008 and 1016/2008 Plaintiff PLBA claimed that it was a registered society and being the owner of the building Pearey Lal Bhawan located at 2, Bahadur Shah Zafar Marg, New Delhi-110002 had entered into a registered lease deed dated October 09, 2006 with the Defendant Satya Developers in respect of an area measuring 500 sq.feet on the third floor of the premises Pearey Lal Bhawan and in respect of an area measuring 2818 sq.feet on the ground floor of the premises Peary Lal Bhawan. On October 16, 2006 the parties entered into a further agreement for maintenance of common service and facilities. With effect from June

01, 2007 the Central Government by amending Chapter-V of the Finance Act, 1994 levied service tax on renting of immovable property for business purposes. It was claimed that the service tax being an indirect tax has to be deposited by the service provider who was entitled to collect the same from the user of the service as it was a tax on the service and not on the service provider.

4. In the written statements filed Satya referring to the following terms of the lease agreement claimed that the parties have contracted that PLBA will pay the tax levied by the government and thus it had no liability to pay the service tax:

“5. That the lessor shall continue to pay all or any taxes, levies or charges imposed by the MCD, DDA, L&DO and or Government, Local Authority etc”.

The defendant also relied on clause II (1) of the agreement for maintenance of common service and facilities, which reads as under:

“II (1) That the Lessor to pay all rates, taxes, ground rent, house-tax charges, fire-fighting tax, easements and outgoing charges imposed or payable to the MCD, L&DO, DDA or Government in respect of the demised premises payable by the Lessor and discharge all its obligations well in time”.

5. In CS (OS) No.512/2012 Meattles claimed to be the lessor of the demised premises bearing Nos.3909-3912, Hamilton Road, Mori Gate, Kashmere Gate, New Delhi measuring approximately 2700 sq.ft of built up area on the ground floor leased out to HDFC Bank vide the registered lease deed dated November 25, 2004. The issue again raised was in relation to the service tax net w.e.f June 01, 2007 vide notification No.23/2007-ST dated May 22, 2007 and Finance Act, 2007.

6. In the written statement filed HDFC Bank also claimed that in terms of Clause 4(v) of the lease agreement it was not liable to pay the service tax as agreed between the parties which is reproduced as under:

“The municipal taxes, rates, charges and other outgoings in respect of the demised premises that would be determined/fixed/varied from time to time by the Municipal Corporation/Municipality/Gram Panchayat or any other local authority shall be paid by the Lessor or the Lessee as specified/stipulated in the schedule annexed herewith and shall keep the other party indemnified at all times against the same.”

7. In CS (OS) Nos.1018/2008 and 1016/2008 the following common issues were settled except that in issue No.3 in CS (OS) No.1016/2008 the amount was ₹3,55,270/- whereas in CS (OS) No.1018/2008 the amount was ₹24,720/-:

- “1. Whether the plaintiff is entitled to a decree of declaration in favour and against the defendant, holding that the defendant is liable to pay the service tax, which is leviable on the rent and the maintenance charges payable under the lease deed dated 09.10.2006 and the Agreement of Maintenance for Common Services and Facilities dated 16.10.2006, respectively?*
- 2. Whether the plaintiff is entitled to a decree of permanent mandatory injunction against the defendant directing the defendant to pay to the plaintiff the amount of service tax leviable on the rent and maintenance charges payable under the lease deed dated 09.10.2006 and the Agreement of Maintenance for Common Service and Facilities dated 16.10.2006 respectively, during the currency of the said agreements?*

3. *Whether the plaintiff is entitled to recovery of a sum of Rs.24,720/- paid by the plaintiff, on behalf of the defendant, on account of service tax for the period 01.06.2007 to 31.03.2008?*
 4. *Whether the plaintiff is entitled to interest on the amount of service tax paid by it on behalf of the defendant during the pendency of the suit and if so, at what rate?*
 5. *Relief.”*
8. The issues settled in CS (OS) No.512/2012 were:
- “1. *Whether the defendant is liable to pay service tax on rent, as alleged in the paint? OPP*
 2. *To what amount, if any, the plaintiff is entitled from the defendant? OPP.*
 3. *Whether the suit is barred by limited? OPD.”*
9. In the three suits since beyond the documents no evidence was required to be led and the documents were admitted, the parties agreed for the suits to be finally heard without leading evidence.
10. The two learned Single Judges of this Court vide separate judgments dated December 20, 2010 in CS (OS) Nos.1016/2008 and 1018/2008 and October 19, 2012 in CS (OS) No.512/2012 decided the suits in favour of the plaintiffs holding them entitled to recover amount payable towards the service tax from the defendants.
11. Learned counsel for Satya contends that the learned Single Judge erroneously relied upon the provisions of Sales of Goods Act, 1930 which

have no application to service tax. Section 12B of the Central Excise Act relied upon by the learned Single Judge applies only to refund of duty and does not provide for the liability of the consumer to pay service tax. Section 68 of the Finance Act, 1994 and 1997 provided for collection of service tax which term has been changed by the Finance Act of 1998 and the liability has been fixed on the service provider to pay the service tax. By the lease agreement the parties had contracted that taxes would be borne by the lessor and PLBA cannot now wriggle out of the terms of the contract. Section 67 of the Finance Act provides for valuation of the service tax which would be included in the 'gross amount' charged by a service provider which provision has been ignored by the learned Single Judge. The case of Satya is covered by the decision of Supreme Court reported as 2011 (13) SCC 497 Ultra Tech Cement Ltd. (Earlier Ultratech Cemco Ltd.) vs. State of Maharashtra and Anr. Reliance is also placed on the decisions reported as 2012 (26) STR 289 SC Rashtriya Ispat Nigam Ltd. vs. Dewan Chand Ram Saran, 2011 (22) STR 387 Max New York Life Insurance Co. Ltd. vs. Insurance Ombudsman and Ors. and 2011 (22) STR 5 MP Ravishankar Jaiswal vs. Jabalpur Development Authority and Anr. Referring to the decision reported as AIR 1961 SC 1047 Commissioner of Sales Tax, Uttar Pradesh vs. The Modi Sugar Mills Ltd. it is contended that in interpreting the taxing statute, equitable considerations are entirely out of place nor can any taxing statute be interpreted on any presumptions or assumptions.

12. Learned counsel for HDFC Bank contends that Section 68 (2) of the Finance Act provides that notwithstanding anything contained in sub-section (1) the Central Government is empowered to notify in the official gazette the service tax on taxable services, as notified, to be paid by such person and in

such a manner as may be prescribed. However, there is no notification directing the lessee to make the payment of service tax and hence in the absence of a notification no tax liability can be fastened on HDFC. Referring to the decision reported as JT 2005 (1) SCC 449 Maruti Udyog Ltd. vs. Ram Lal and Ors. it is contended that in construing a legal fiction, the purpose for which it is created should be kept in mind and should not be extended beyond the scope thereof or beyond the language by which it is created. Further a deeming provision cannot be pushed too far so as to result in an anomalous or absurd position. Referring to the decision reported as 2012 (191) DLT 183 Raghubir Saran Charitable Trust vs. Puma Sports India Pvt. Ltd. it is contended that the service tax liability has to be determined in terms of the contract between the parties.

13. Learned counsel for PLBA on the other hand contends that it is well settled that service tax is a Value Added Tax (VAT) and being a consumption tax it is not a charge on the business but on the consumer and would be thus leviable to whom the services are provided. It is further contended that ordinarily the burden of service tax has to be borne in law by the service recipient. Since service tax is an indirect tax, the service provider can by an agreement assume the burden of such tax and relieve the service recipient/consumer of the same. It is contended that from the terms of the lease agreement and also the agreement for maintenance, the service provider has not assumed the burden of paying the service tax and the liability would be that of the service recipient. The fact that execution of the lease deed dated October 09, 2006 precedes the imposition of tax liability, there was no possibility of any conscious assumption of any liability by PLBA as no such liability existed. The words 'shall continue to pay all or

any tax' in the lease agreement indicates that the liability of the lessor was confined only to the existing levies which already stood imposed at the time of execution of lease deed. Reliance is placed on the decision reported in (2007) 7 SCC 527 All India Federation of Tax Practitioners & Ors. vs. Union of India & Ors., 2011 (2) SCC 352 Association of Leasing and Financial Service Companies vs. Union of India & Ors., 182 (2011) DLT 548 (FB), Home Solutions Retails (India) Ltd Union of India & Ors.

14. Shri Balbir Singh, Senior Advocate who had been requested to assist this Court in this matter points out that the three essentials of a taxing statute are chargeability, receivability and assessment component. Service tax being an indirect tax, though leviable on the consumer of the services however, there is no mechanism by which the government can recover the same from the consumer. Thus the liability of payment of the service tax has been fixed on the service provider, that is, the lessor to be recoverable from the recipient, that is, the lessee. Referring to Section 64A of Sales of Goods Act, 1930 it is stated that unless it is contracted to the contrary, the consumer of the goods and thus the consumer of the services has to bear the liability of the tax. Referring to the decision of the Supreme Court reported in 1997 (5) SCC 536 Mafat Lal Industries vs. Union of India & Ors. it is contended that in case of indirect tax the Court would presume until a contrary is established that a duty of excise or a custom duty has been passed on to the consumer. It is undoubtedly a rebuttable presumption but the burden of rebutting it lies on the person who claims the refund. It is stated that Section 64A of the Sales of Goods Act is based on rule of equity. Service tax being an indirect tax it is possible that it may be passed on. Further the statutory provision can be of no relevance to determine the rights

and liabilities between the parties to the contract and there is nothing in law to prevent the parties from entering into an agreement with the burden of any tax arising out of obligation of a party under the contract to be borne by such party. Mr. Balbir Singh, Senior Advocate points out that pursuant to the 8th report of the Law Commission goods under the Sales of Goods Act, 1930 were provided to include the electricity, gas and water and amendments were also brought by insertion of Section 64A by replacing Section 10 of the Tariff Act. Section 64A of the Sales of Goods Act is a rule of equity based on the basic principle that indirect taxes can be passed on. It is stated that it is akin to a situation where Limitation Act may not apply however, the principles of Limitation Act would apply and thus the principles of passing on the liability as under the Excise Act, Customs Act and Sales Tax Act would apply to the Service Tax as well. Indirectly provisions relating to goods in Central Excise Tax have been made applicable to the Service Tax.

15. The Supreme Court in the decision reported in All India Federation of Tax Practitioners (Supra) noted that service tax is an indirect tax levied on certain services provided by certain categories of persons including companies, associations, firms, body of individuals etc. Service sector contributes about 64% to the GDP. It noted that in contemporary world, development of service sector has become synonymous with the advancement of the economy and the Economists hold the view that there is no distinction between the consumption of goods and consumption of services as both satisfy the human needs. It was noted that 'Value Added Tax' (in short 'VAT') which is a general tax applies in principle to all commercial activities involving production of goods and provision of services. The Supreme Court held that VAT is a consumption tax as it is

borne by the consumer and 'Service Tax' is a VAT which in turn is destination based consumption tax. The Supreme Court noted that just as excise duty is a tax on value addition on goods, Service tax is on value addition by rendition of services. Broadly 'Services' fall into two categories, namely, property based services and performance based services. Property based services cover service providers such as architects, interior designers, real estate agents, construction services, mandapwalas etc. and the later being services provided by stock-brokers, practising chartered accountants, practising cost accountants, security agencies, tour operators, event managers, travel agents etc.

16. In the decision reported as AIR 2012 SC 2829 Rashtriya Ispat Nigam Ltd.vs. M/s Dewan Chand Ram Saran it was held:

"26. As far as the submission of shifting of tax liability is concerned, as observed in paragraph 9 of Laghu Udyog Bharati (Supra), service tax is an indirect tax, and it is possible that it may be passed on. Therefore, an Assessee can certainly enter into a contract to shift its liability of service tax. Though the Appellant became the Assessee due to amendment of 2000, his position is exactly the same as in respect of Sales Tax, where the seller is the Assessee, and is liable to pay Sales Tax to the tax authorities, but it is open to the seller, under his contract with the buyer, to recover the Sales Tax from the buyer, and to pass on the tax burden to him. Therefore, though there is no difficulty in accepting that after the amendment of 2000 the liability to pay the service tax is on the Appellant as the Assessee, the liability arose out of the services rendered by the Respondent to the Appellant, and that too prior to this amendment when the liability was on the service provider. The provisions concerning service tax are relevant only as between the Appellant as an Assessee under the statute and the tax authorities. This statutory provision can be of no relevance

to determine the rights and liabilities between the Appellant and the Respondent as agreed in the contract between two of them. There was nothing in law to prevent the Appellant from entering into an agreement with the Respondent handling contractor that the burden of any tax arising out of obligations of the Respondent under the contract would be borne by the Respondent.”

17. Sections 65 (105) states ‘Taxable Service’ means any service provided or to be provided:

“(zzzz)to any person, by any other person in relation to renting of immovable property for use in the course or furtherance of business or commerce.

Explanation 1.—For the purposes of this sub-clause, “immovable property” includes—

(i) building and part of a building, and the land appurtenant thereto;

(ii) land incidental to the use of such building or part of a building;

(iii) the common or shared areas and facilities relating thereto; and

(iv) in case of a building located in a complex or an industrial estate, all common areas and facilities relating thereto, within such complex or estate, but does not include—

(a) vacant land solely used for agriculture, aquaculture, farming, forestry, animal husbandry, mining purposes;

(b) vacant land, whether or not having facilities clearly incidental to the use of such vacant land;

(c) land used for educational, sports, circus, entertainment

and parking purposes; and

(d) building used solely for residential purposes and buildings used for the purposes of accommodation, including hotels, hostels, boarding houses, holiday accommodation, tents, camping facilities.

Explanation 2.—For the purposes of this sub-clause, an immovable property partly for use in the course or furtherance of business or commerce and partly for residential or any other purposes shall be deemed to be immovable property for use in the course or furtherance of business or commerce;...

18. Section 83 of the Finance Act, 2007 makes certain provisions of the Central Excise Act, 1944 as in force from time to time applicable in relation to Service Tax as they apply in relation to a duty of excise:

“83. Application of certain provisions of Act 1 of 1944:

The provisions of the following section of the Central Excise Act, 1944 (1 of 1944), as in force from time to time, shall apply, so far as may be, in relation to service tax as they apply in relation to a duty of excise: -

9C, 9D, 11B, 11BB, 11C, 12 12A, 12B. 12C, 12D, 12E, 14, [14AA], 15, 33A, 35F, 35-FF to 35-O (both inclusive), 35Q, 36, 36A, 36B, 37A, 37B, 37C, 37D, [38A]* and 40.”*

19. Section 12 (b) of the Central Excise Act reads as under:

“12B. PRESUMPTION THAT INCIDENCE OF DUTY HAS BEEN PASSED ON TO THE BUYER.

Every person who has paid the duty of excise on any goods under this Act shall, unless the contrary is proved by him, be deemed to have passed on the full incidence of such duty to the buyer of such goods.”

20. Thus Section 83 of the Finance Act is a legislation by incorporation applying *inter alia* Section 12B of the Central Excise Act to the Service Tax. Halsbury's Law of England (4th Edn., Vol.44 (1)), para 127 page 744 deals with incorporation of other enactments by reference as under:

“It is a common device of legislative drafters to incorporate earlier statutory provisions by reference, rather than setting out similar provisions in full. This saves space and also attracts the case law and other learning attached to the earlier provision. Its main advantage is a Parliamentary one, however, since it shortens Bills and cuts down the area for debate.”

21. In the decision reported as 2011 (3) SCC 1 Girnar Traders vs. State of Maharashtra and Ors. the Constitution Bench while dealing with legislation by incorporation held that with the development of law, the legislature has adopted the common practice of referring to the provisions of the existing statute while enacting new laws. It was held that reference to an earlier law in the later law could be a simple reference of provisions of earlier statute or a specific reference where the earlier law is made an integral part of the new law, that is, by incorporation. In contrast to such simple reference, legal incident of legislation by incorporation is that it becomes part of the existing law which implies bodily lifting provisions of one enactment and making them part of another and in such cases subsequent amendments in the incorporated Act could not be treated as part of the incorporating Act. The obvious advantage of a legislation by incorporation is that the judicial precedents and discussions on the earlier enactment apply to the later enactments.

22. Section 83 of the Finance Act 2007 though a legislation by incorporation also takes care of non-applicability of future amendments as it provides for applicability of the relevant sections of the Central Excise Act 1944 as in force from time to time i.e. the future amendments in the provisions of the Central Excise Act would also be applicable mutatis Mutandis to Service Tax. As noted above, Section 12B of the Central Excise Act which applies to the Service Tax raises a presumption that the incidence of duty has been passed to the buyer unless the contrary is proved. Thus in the absence of a contract for the liability of a service tax, it will be presumed that the same has been passed over to the service recipient.

23. Based on the rule of equity similar provision exists in the Sales of Goods Act, 1930, that is, Section 64A. The Supreme Court in the decision reported as 2007 (8) SCC 466 Numaligarh Refinery Ltd.vs.Daelim Industries Co.Ltd held that whether a party is entitled to be paid such tax or such increase has to be ascertained from the intention of the parties to the contract and unless a different intention appears from the terms of the contract in the case of imposition or increase in the tax after the making of a contract the party shall be entitled to be paid such taxes or such increase. It was held:

“18. In this connection, learned Counsel has invited our attention to Section 64A of the Sale of Goods Act, 1930 which reads as under:

“64-A. 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.

(2) The provisions of Sub-section (1) apply to the following taxes, namely;-

(a) any duty of customs or excise on goods;

(b) any tax on the sale or purchase of goods.

This section also clearly says that unless a different intention appears from the terms of the contract, in case of the imposition or increase in the tax after the making of a contract, the party shall be entitled to be paid such tax or such increase. In this connection, the intention of the parties is to be ascertained, as per the clauses mentioned above.

24. In the decision reported as 1997 (5) SCC 536 Mafatlal Industries Ltd. & Ors. vs. Union of India & Ors. a nine judges Bench of the Supreme Court of India while dealing with the claim of refund held that the same was maintainable by virtue of declaration contained in Article 265 of the

Constitution of India as also under Section 72 of the Contract Act subject to one exception. Noting that the duties under the Central Excise and Customs are indirect taxes and supposed to be and are permitted to be passed on to the buyers it was held:

“80. For the purpose of this discussion, we take the situation arising from the declaration of invalidity of a provision of the Act under which duty has been paid or collected, as the bases, inasmuch as that is the only situation surviving in view of our holding on (I) and (II). In such cases the claim for refund is maintainable by virtue of the declaration contained in Article 265 as also under Section 72 of the Contract Act as explained hereinbefore subject, to one exception : where a person approaches the High Court or Supreme Court challenging the constitutional validity of a provision but fails, he cannot take advantage of the declaration of unconstitutionality obtained by another person on another ground; this is for the reason that so far as he is concerned, the decision has become final and cannot be re-opened on the basis of the decision on another person's case; this is the ratio of the opinion of Hidayatullah, CJ. In Tilokchand Motichand and we respectfully agree with it. In such cases, the plaintiff may also invoke Section 17(1)(c) of the Limitation Act for the purpose of determining the period of limitation for filing a suit. It may also be permissible to adopt a similar rule of limitation in the case of writ petitions seeking refund in such cases. But whether the right to refund or restitution, as it is called, is treated as a constitutional right flowing from Article 265 or a statutory right arising from Section 72 of the Contract Act, it is neither automatic nor unconditional. The position arising under Article 265 is dealt with later in Paras 75 to 77. Here we shall deal with the position under Section 72. Section 72 is a rule of equity. This is not disputed by Sri F.S. Nariman or any of the other counsel appearing for the appellants-petitioners. Once it is a rule of equity, it is un-understandable how can it be said that

equitable considerations have no place where a claim is made under the said provision. What those equitable considerations should be is not a matter of law. That depends upon the facts of each case. But to say that equitable considerations have no place where a claim is founded upon Section 72 is, in our respectful opinion, a contradiction in terms. Indeed, in Kanhaiyalal, the Court accepts that the right to recover the taxes - or the obligation of the State to refund such taxes - under Section 72 of the Contract Act is subject to "questions of estoppel, waiver, limitation or the like", but at the same time, the decision holds that equitable considerations cannot be imported because of the clear and unambiguous language of Section 72. With great respect, we think that a certain amount of inconsistency is involved in the aforesaid two propositions. "Estoppel, waiver...or the like", though rules of evidence, are yet based upon rules of equity and good conscience. So is Section 72. We are, therefore, of the opinion that equitable considerations cannot be held to be irrelevant where a claim for refund is made under Section 72. Now, one of the equitable considerations may be the fact that the person claiming the refund has passed on the burden of duty to another. In other words, the person claiming the refund has not really suffered any prejudice or loss. If so, there is no question of reimbursing him. He cannot be re compensated for what he has not lost. The loser, if any, is the person who has really borne the burden of duty; the manufacturer who is the claimant has certainly not borne the duty notwithstanding the fact that it is he who has paid the duty. Where such a claim is made, it would be wholly permissible for the court to call upon the petitioner/plaintiff to establish that he has not passed on the burden of duty to a third party and to deny the relief of refund if he is not able to establish the same, as has been done by this Court in I.T.C. In this connection, it is necessary to remember that whether the burden of the duty has been passed on to a third party is a matter within the exclusive knowledge of the manufacturer. He has the

relevant evidence - best evidence - in his possession. Nobody else can be reasonably called upon to prove that fact. Since the manufacturer is claiming the refund and also because the fact of passing on the burden of duty is within his special and exclusive knowledge, it is for him to allege and establish that he has not passed on the duty to a third party. This is the requirement which flows from the fact that Section 72 is an equitable provision and that it incorporates a rule of equity. This requirement flows not only because Section 72 incorporates a rules of equity but also because both the Central Excises duties and the Customs duties are indirect taxes which are supposed to be and are permitted to be passed on to the buyer. That these duties are indirect taxes, meant to be passed on, is statutorily recognised by Section 64A of the Sale of Goods Act, 1930.

25. Noting sub-section 2 of Section 64A of the Sales of Goods Act expressly made sub-Section 1 of Section 64A applicable to duty of customs or excise on goods and referring to the decisions of the Federal Court in AIR 1942 FC 33 The Province of Madras vs. Boddu Paidanna & Sons and the Supreme Court reported as AIR 1962 SC 1281 R.C. Jall v. Union of India it was held in Mafat Lal (supra) that in such a situation, it would be legitimate for the Court to presume, until the contrary is established, that a duty of excise or a customs duty has been passed on. It is a presumption of fact which a Court is entitled to draw under Section 114 of the Indian Evidence Act the same being undoubtedly a rebuttable presumption but the burden of rebutting it lies upon the person who claims the refund and it is for him to allege and establish that as a fact he has not passed on the duty and, therefore, equity demands that his claim for refund be allowed.

26. Thus as a legislation by reference sub-Section (2) of Section 64A of the Sales of Goods Act making applicable sub-Section (1) of Section 64A to

any duty of Customs or Excise on goods and as a legislation by incorporation Section 83 of the Finance Act making applicable Section 12B of the Central Excise Act to Service Act, Section 64A(1) is applicable to Service Tax. From the provisions as noted and the decisions of the larger benches it is evident that a service tax is a VAT which in turn is a destination based consumption tax and is to be borne by the consumer of goods. Further unless contracted to the contrary, the consumer of service is liable to refund the said tax to the service provider who in turn is liable to pay to the government.

27. From the legal position as noted it is evident whether the service tax liability has been agreed not to be passed on to the recipient of the service would depend on the interpretation of clauses entered into between the parties. Before adverting to the relevant clauses *inter se* the parties in the present case it would be appropriate to note a few decisions on the interpretation of a contract.

28. The House of Lords in [1998] 1 WLR 896 Investors Compensation Scheme Ltd. vs. West Bromwich Building Society summarized the principle of interpretation of contractual documents as under:

“(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The background was famously referred to by Lord Wilberforce as the “matrix of fact,” but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to

the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

*(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see *Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd.* [1997] A.C. 749.*

(5) The “rule” that words should be given their “natural and ordinary meaning” reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he

said in Antaios Compania Naviera S.A. v. Salen Rederierna A.B. [1985] A.C. 191, 201:

“if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.”

29. In [2009] 2 All ER, 26 Durham vs. BAI (Run Off) Ltd.(in scheme of arrangement) & other cases the Queen’s Bench Division while dealing with the construction of commercial contracts noted:

*“(203) A summary of helpful principles, drawn largely from the words of Longmore LJ in Absalom (on behalf Lloyd's Syndicate 957) v. TCRU Ltd (2005) EWCA Civ 1586 at (7), (2006) 1 All ER (Comm) 375 at (7), (2006) 2 Lloyd's Rep 129, and based upon submissions to me by counsel, which I had approved, in the recent case of Reilly v. National Insurance *Guarantee Corporation Ltd (2008) EWHC 722 (Comm) at (13), (2008) 2 All ER (Comm) 612 at (13), was again the subject matter of agreement, and I repeat and incorporate it:*

‘(a) Ordinary Meaning. There is a presumption that the words to be construed should be construed in their ordinary and popular sense, since the parties to the contract must be taken to have intended, as reasonable men, to use words and phrases in their commonly understood and accepted sense. (See also para (7)(i)-(iii) in the judgment of Longmore LJ and in particular: “The object of the inquiry is not necessarily to probe the ‘real’ intention of the parties, but to ascertain what the language they used in the document would signify to a properly informed observer.”)

(b) Businesslike Interpretation. It is an accepted canon of construction that a commercial document, such as an insurance policy, should be construed in accordance with sound commercial principles and good business sense, so that its provisions receive a fair and sensible application. (See also the words of Lord Diplock in Antaios Cia Navieras SA v. Salen Rederierna AB, The Antaios (1984) 3 All ER 229 at 233, (1985) AC 191 at 201 cited at (7)(iv) by Longmore LJ: If a “detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense”.)

(c) Commercial Object. The commercial object or function of the clause in question and its relationship to the contract as a whole will be relevant in resolving any ambiguity in the wording.

(d) Construction to avoid unreasonable results. If the wording of a clause is ambiguous, and one reading produces a fairer result than the alternative, the reasonable interpretation should be adopted. It is to be presumed that the parties, as reasonable men, would have intended to include reasonable stipulation in their contract.”

30. In 2009 (5) SCC 713 Vimal Chand Ghevarchand Jain & Ors. vs. Ramakant Eknath Jajoo the Supreme Court reiterated the principle of construction of a commercial contract by looking at the document as a whole and construing it in its entirety.

31. Thus a contract has to be construed by looking at the document as a whole and the meaning of the document has to be what the parties intended to give to the document keeping the background in mind and conclusion that

flouts business commonsense must yield unless expressly stated. In the present case it will also have to borne in mind whether the parties intend to include taxes which were not contemplated at the time of the agreement as indubitably the agreements between the parties in the three suits were entered into prior to the Finance Act, 2007 coming into force w.e.f. June 01, 2007.

32. In the agreement between HDFC Bank and Meattles Clause 4(v) imposes liability of municipal taxes, rates, charges and other outgoings in respect of the demised premises that would be determined/fixed/varied from time to time by the Municipal Corporation/Municipality/Gram Panchayat or any other local authority only. It is well settled that the Municipal Corporation, Municipality, Gram Panchayat or local authority is distinct from the government and thus the clause *inter se* the parties cannot be said to cover the exemption of HDFC Bank to pay to Meattles service tax paid by it to the government pursuant to the Finance Act, 2007.

33. As regards the lease deed and the agreement of maintenance of common services and facilities between Satya and PLBA Clause 5 of the lease deed as noted above provides that the lessor shall continue to pay all or any taxes, levies or charges imposed by the MCD, DDA, L&DO and or Government, Local Authority etc. By use of the words “Lessor shall continue to pay” it is evident that the parties contemplated the existing taxes, levies or charges and not future. Even as per the agreement of maintenance of common service facilities though the same has no application to the service tax however, still the said clause II(1) cannot be said to exclude HDFC Bank from paying future service tax.

34. In view of the discussion aforesaid the judgments and the decrees

passed by the learned Single Judge in the three suits are upheld. Appeals are dismissed. Parties will bear their own costs.

35. We place on record our appreciation for the valuable assistance rendered by Mr. Balbir Singh, Senior Advocate/learned Amicus Curiae.

(MUKTA GUPTA)
JUDGE

(PRADEEP NANDRAJOG)
JUDGE

OCTOBER 13, 2015
‘vn’