RESERVED ON : 15.03.2016

DELIVERED ON: 18.03.2016

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18.03. 2016

CORAM

THE Hon'ble Mr.JUSTICE M. DURAISWAMY

W.P.No.15718 of 2012
and
M.P.No.1 of 2012

Sri Sudha Constructions,
(formerly known as Sri Sudha Telecom Consultants),
Flat No.9, Meenakshi Sundaram,
Second Floor, No.33 (11),
Sivaji Street,
T.Nagar,
Chennai - 600 017,
represented by its Managing Partner,
Mr.P.V.Rao .... Petitioner

vs

1. I.T.I Limited,
Represented by its
Chief Regional Manager,
Regional Office,
3rd floor, 17(6), Rajaji Salai,
Chennai - 600 001

2. The Commissioner of Central Excise,
Chennai-I Commissionerate
26/1, Mahatma Gandhi Road,
Nungambakkam,
Chennai - 600 034

3. The Assistant Commissioner (Service Tax),
Office of the Commissioner of Service Tax,
Chennai Commissionorate,
692, Anna Salai,
Nandanam,
Chennai - 600 035

..... Respondents

Writ Petition filed under Article 226 of the Constitution of India praying this Court to issue a Writ of Certiorarified Mandamus to call for the records comprised in Ref:- SR/Proj/CHE/Cable-Cont/ dated 29.11.2011 on the file of the first respondent, quash the same and consequently direct the first respondent to release all the payments due to the petitioner for executing the works in favour of the first respondent to the tune of Rs.67 lakhs, along with suitable interest .

For petitioner	:	Mr.R. Bharanidharan
For 1st respondent	:	Ms.Rita Chandrasekar for M/s Aiyar & Dolia
For R.2 & R.3	:	Mr.V. Sundareswaran CGSC

ORDER

The petitioner has filed the above writ petition to issue a Writ of Certiorarified Mandamus to call for the records comprised in Ref:-SR/Proj/CHE/Cable-Cont/ dated 29.11.2011 on the file of the first respondent, quash the same and consequently direct the first respondent to release all the payments due to the petitioner for executing the works in favour of the first respondent to the tune of Rs.67 lakhs, along with suitable interest .

2. According to the petitioner, they are carrying on cable laying works to various parties, including the first respondent. By letter of Indent dated 17.11.2005, the first respondent was awarded a letter of Indent for upgradation/rehabilitation of external plant net work of Chennai Telephones. The value of the work was estimated at Rs.1.92 crores with a plus or minus variation of 25% and the stipulated contract period was one year. The scope of work was in the nature of cable laying and rehabilitation of external plant in St. Thomas Mount and Chrompet of South Area of BSNL, Chennai Telephones. In otherwords, the first respondent had received orders from BSNL and in turn, has sub contracted the same to the petitioner on a back to back basis. By letter dated 06.02.2006, the petitioner brought to the notice of the first respondent about the amendment carried out in the Finance Act, 2005 with effect from 16.6.2005 by stating that the services carried out by the petitioner for the first respondent pursuant to the letter of Indent dated 17.11.2005 is liable to service tax. While presenting the rates, the petitioner had not anticipated service tax imposition and now that, the first respondent has to bear the service tax burden, being the indirect tax levy, which can be passed on to the first respondent.

3. The petitioner has been remitting service tax to the third respondent on all its activities, including the scope of services rendered to the first respondent, by virtue of letter of Indent dated 17.11.2005. The entire Service Tax was paid by the petitioner and are yet to be reimbursed or recovered from the first respondent.

4. The first respondent was served with a show cause notice on 01.04.2009, demanding Service Tax on the service rendered towards trenching and laying of telephone cables to BSNL and other public sector undertakings, directly as well as through sub contractors. The show cause proceedings culminated in order dated 25.3.2011 passed by the second respondent, wherein, the second respondent had confirmed that the activity performed by the first respondent to BSNL and other public sector undertakings would tantamount to taxable service and liable to service tax. According to the petitioner, though Service Tax has been paid by the petitioner, the same is yet to be reimbursed by the first respondent.

5. On 29.11.2011, the first respondent had informed the petitioner that the Service Tax Department Commissioner had passed an order to pay a sum of Rs.83.23 lakhs along with equal penalty for the various projects related to the BSNL external plant net work during the period 2004 to 2008 and that they have appealed to CESTAT, Chennai against the said claim and also informed that they are constrained to hold the amount applicable to the petitioner firm from the payments received from BSNL and other customers till the issues are resolved with the service tax department.

6. The first respondent contended that the first respondent Company has been declared as a Sick Industrial Company, based on the audited balance sheet in terms of Sec.3(1)(o) of the Sick Industrial Companies (Special Provisions) Act 1985 (SICA) by the Board for Industrial and Financial Reconstruction (BIFR) and State Bank of India has been appointed as the Operating Agency under Sec.17(3) of the Act to prepare a revival Scheme. Further, the BIFR gave a direction that no coercive recovery action can be taken against the first respondent Company by any authority or party, without taking prior approval of the Bench. Further, even as per the provisions of the SICA, no legal proceeding can be initiated against the first respondent without the prior permission of BIFR in terms of Sec.22(1) and (3) of SICA.

7. According to the first respondent, they received orders from BSNL and in turn, sub contracted the same to the petitioner on back to back basis, keeping a margin of only 4% of the order value. Further, the first respondent contended that the

petitioner cannot agitate the issues by invoking the writ jurisdiction and the writ petition is not maintainable.

8. According to the respondents 2 and 3, they are not necessary parties to this writ petition.

9. Mr.R. Bharanidharan, learned counsel for the petitioner, in support of his contention, relied upon a judgment reported in 2011 (2) SCC 439 (Godavari Sugar Mills Limited vs State of Maharashtra and Others), wherein the Hon'ble Supreme Court held as follows:

> " 8. The observationis in Suganmal related to a claim for refund of tax and have to be understood with reference to the nature of the claim made therein. The decision in Suganmal has been explained and distinguished in several subsequent cases, including in U.P. Pollutaion Control Board vs Kanoria Industrial Ltd and ABL International Ltd vs Export Credit Guarantee Corpn of India Ltd. The legal position becomes clear when the decision in Suganmal is read with the other decisions of this Court on the issue, referred to below:
>
> (i) Normally, a petition under Article 226 of the Constitution of India will not be entertained to enforce a civil liability arising out of a breach of a contract or a tort to pay an amount of money due to the claimants. The aggrieved party will have to agitate the question in a civil suit. But an order for payment of money may be made in a writ proceeding, in enforcement of statutory functions of the state or its officers.(vide Burmah Construction Co vs State of Orissa)
>
> (ii) If a right has been infringed - whether a fundamental right or a statutory right and the aggrieved party comes to the Court for enforcement of the right, it will not be giving complete relief if the Court merely declares the existence of such right or the fact that existing right has been infringed. The High Court, while

enforcing fundamental or statutory rights, has the power to give consequential relief by ordering payment of money realised by the Government without the authority of law (Vide State of M.P vs Bhailal Bhai)

(iii) A petition for issue of writ of mandamus will not normally be entertained for the purpose of merely ordering a refund of money, to the return of which the petitioner claims a right. The aggrieved party seeking refund has to approach the civil court for claiming the amount, though the High Courts have the power to pass appropriate orders in the exercise of the power conferred under Article 226 for payment of money (Vide Suganmal vs State of M.P.)

(iv) There is a distrinction between cases where a claimant approaches the High Court seeking the relief of obtaining only refund and those where refund is sought as a consequential relief after striking down the order of assessment, etc., While a petition praying for mere issue of a writ of mandamus to the State to refund the money alleged to have been illegally collected is not ordinarily maintainable, if the allegation is that the assessment was without a jurisdiction and the taxes collected was without authority of law and therefore the respondents had no authority to retain the money collected without any authority of law, the High Court has the power to direct refund in a writ petition. (Vide Salonah Tea Co Ltd vs Supdt of Taxes)

(v) It is one thing to say that the High Court has no power under Article 226 of the Constitution to issue a writ of mandamus for making refund of the money illegally collected. It is yet another thing to say that such power can be exercised sparingly depending on facts and circumstances of each case. For instance, where the facts are not in dispute, where the collection of money was without the authority of law and there was no case of undue enrichment, there is no good reason to deny a relief of refund to the citizens. But even in cases where collection of css, levy or tax is held to be unconstitutional or invalid, refund is not an automatic consequence but may be refused on several grounds depending on facts and circumstances of a given case (Vide U.P Pollution Control Board vs Kanoria Industrial Ltd)

(vi) Where the lis has a public law character, on involves a question arising out of public law functions on the part of the State or its authorities, access to justice by way of a public law remedy under Article 226 of the Constitution will not be denied (Vide Sanjana M. Wig v Hindustan Petroleum Corpn Ltd.)

10. It was contended by the first respondent that the first respondent was declared as a Sick Industrial Company and that the matter is pending before BIFR. Further, in their counter, they have stated that any proceedings can be initiated against the first respondent only with the leave of BIFR. The petitioner has not stated anything in their affidavit whether they have got leave from BIFR for filing the present writ petition, claiming a sum of Rs.67,00,000/-.

11. In the absence of any averment stated in the affidavit, filed in support of the writ petition that the petitioner got the leave from BIFR for filing the writ petition for claiming a sum of Rs.67,00,000/-, I am of the view that the writ petition cannot be maintained at this stage. That apart, when the contract is between the first respondent and the petitioner, who is a sub contractor of the first respondent, the claim made by the petitioner to the tune of Rs.67,00,000/- cannot be made in the writ petition.

12. Admittedly, the contract was only between the first respondent and the BSNL and the petitioner is not a party to the said contract. Further, there is no clause in the contract between the first respondent and the petitioner with regard to the payment of Service Tax by the petitioner. In such

circumstances, in the absence of any contract between the petitioner and the first respondent with regard to the payment of service tax and the reimbursement of the same, the said issue cannot be gone into in the writ petition. Therefore, the claim made by the petitioner can be decided only by a competent civil Court and not under Article 226 of the Constitution of India.

13. In these circumstances, the judgment relied upon by the learned counsel for the petitioner is not applicable to the present case. Therefore, the writ petition is devoid of merits and the same is dismissed. However, it is open to the petitioner to file a civil suit as against the first respondent for claiming the amount from the first respondent in accordance with law. No costs. Consequently, connected MP is closed.

Sd/-
Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

sr
To

1. The Commissioner of Central Excise,
Chennai-I Commissionerate
26/1, Mahatma Gandhi Road,
Nungambakkam,
Chennai - 600 034

2. The Assistant Commissioner (Service Tax),
Office of the Commissioner of Service Tax,
Chennai Commissionorate,
692, Anna Salai,
Nandanam,
Chennai - 600 035

+1cc to Mr.V. Sundareswaran, Advocate, S.R.No.17596
+1cc to M/s. Aiyar & Dolia, Advocate, S.R.No.17522
+1cc to Mr.R. Bharanidharan, Advocate Sr.17291

RSY(CO)
EU(04/04/2016)

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