

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 24.04.2017

CORAM

THE HONOURABLE MR.JUSTICE RAJIV SHAKDHER

And

THE HONOURABLE MR.JUSTICE R.SURESH KUMAR

W.A.No.128 of 2017

1. The Commissioner of Central Excise,
Chennai Audit II Commissionerate,
No.690, Anna Salai,
Nandanam,
Chennai.
2. The Commissioner of Central Excise,
No.1, Goubert Avenue (Beach Road),
Puducherry. ... Appellants/Respondents 1 & 2

Vs.

1. M/s.Ayyakkannu & Co.
Rep. by its Managing Partner: Ayyakkannu
...1st Respondents/Petitioner
2. The General Manager (Finance/ Tax),
Neyveli Lignite Corporation Ltd (NLC),
Corporate Office,
Neyveli. ...2nd Respondents/3rd Respondents

Prayer:

Appeal filed under Clause 15 of Letters Patent praying to set aside the judgment dated 28.07.2016 in Writ Petition No.22977 of 2016.

Writ Petition No.22977 of 2016:- Writ Petition filed Under Article 226 of the Constitution of India, Seeking for issuance of a Writ of Certiorari to call for the records relating to the impugned Show cause Notice No.15/2016-ST dated 21.04.2016 issued by the 1st respondent answerable to the 2nd respondent and quash the same as arbitrary without authority of law not sustainable in law.

For Appellants	: Mr.A.P.Srinivas
For Respondents	: Mr.K.Jayachandran for R1 Ms.Swetha Giridhar for R2 for M/s.Lakshmi Kumaran

J U D G M E N T

(Judgment of the Court was delivered by RAJIV SHAKDHER,J.)

1.The record shows that notice in the appeal was issued on 10.02.2017, whereupon, Mr.Jayachandran, Advocate, has entered appearance on behalf of Respondent No.1. Ms.Swetha Giridhar, Advocate, has entered appearance on behalf of Respondent No.2.

1.1.With the consent of the learned counsels for the parties, the writ appeal is taken up for hearing and final disposal, at this stage itself.

2.This is an appeal, which has been preferred against the order dated 28.07.2015 passed by the learned Single Judge.

2.1.The Revenue, which has preferred the appeal, is aggrieved essentially, by the following operative directions contained in paragraph nos.6 and 7 of the impugned judgment. For the sake of convenience, the same are extracted hereinafter:

"6.Be that as it may, the first respondent cannot without reference to the previous correspondence between them and the NLC dated 28.07.2015, 19.10.2015, could have issued impugned show cause notice, that apart to determine as to whether the nature of activity done by the petitioner would amount to 'service' amenable to the Finance Act, 1994, as amended, it cannot be adjudicated by the authority in the absence of NLC. Therefore, the appropriate things to be done is issue notice to the NLC also and after affording an opportunity to the petitioner and NLC to submit their objections, the first respondent should adjudicate to show cause notice.

7.Accordingly, for the present, further proceedings pursuant to the impugned show cause notice shall be kept in abeyance and the first respondent shall issue separate notices or a combined notice to the petitioner as well as to the third respondent - NLC, and after giving sufficient opportunity to the parties to submit their objections, proceed to adjudicate the matter in accordance with law, after affording an opportunity of personal hearing."

3. Brief facts which are required to be noticed for adjudication of the instant appeal are as follows:

3.1. Respondent No.1 is a Contractor, who is engaged in works contract on behalf of Respondent No.2., i.e., Neyveli Lignite Corporation Limited (in short, NLC).

3.2. Respondent no.1, it appears, obtained registration under the Finance Act, 1994 and the Rules framed thereunder, to provide taxable services, such as, maintenance, repair and/or, construction services in respect of commercial or industrial buildings and to act as civil contractors and/or works contractors.

4. Respondent No.1/original writ petitioner, it appears, entered into a contract with NLC for extending works contract services, which entailed transportation of ash slag clinkers from boiler area to Units 1 to 7, located in NLC's Thermal Power Station - II.

4.1. Respondent No.1 claims that it has been providing the said services to NLC from 2006. It appears, that in connection with these services, two contracts dated 23.10.2010 and 24.09.2013 were executed between itself and NLC/Respondent No.2. As indicated above, these contracts required the petitioner to transport ash slag clinkers from the boiler area of the aforementioned Units, located in the Thermal Power Station - II of NLC/Respondent No.2.

5. Respondent No.1's case that while it rendered transportation services to NLC/Respondent No.2, it was not engaged in any cleaning activity. Given these circumstances, Respondent No.1 avers that as and when invoices were raised qua transportation services upon NLC/Respondent No.2, it was advised by NLC/Respondent No.2 not to include service tax, as ash slag clinkers were transported via road and accordingly, were not amenable to service tax. In fact, it appears, that Respondent No.1 was advised by NLC/Respondent No.2 that service tax qua the said services rendered by it, was neither payable prior to 01.07.2007 nor post 01.07.2012 under the category 'goods transport agency service'.

5.1. Respondent No.1 also takes the stand that between 2010 and 2015, returns were filed, based on its understanding that no service tax was payable on transportation services of the kind indicated above, to Respondent No.2.

6. It appears, that an audit was conducted by the Appellants, in respect of the records of Respondent No.1,

whereupon, a communication was addressed by the Appellants for the first time to NLC/Respondent No.2 on 09.03.2015.

6.1.By virtue of the said communication, the Appellants appeared to have called upon NLC/Respondent no.2, to furnish details of the nature of work carried out by Respondent No.1 for it. In response thereto, NLC/Respondent No.2 appears to have sent a letter dated 13.03.2015 to the Superintendent of Central Excise. In sum, NLC/Respondent No.2 took the stand that the services rendered by Respondent No.1 were not amenable to tax.

6.2.The record also shows that thereafter, the NLC/Respondent No.2, once again, wrote to the Superintendent of Central Excise vide, letter dated 27.07.2015, wherein, it reiterated its stand, which was taken in the earlier letter to which we have referred to above.

7.The Appellants, it appears were not satisfied and therefore, vide letter dated 28.07.2015, raised certain issues, which were communicated to NLC/Respondent No.2.

7.1.To be noted, a copy of this letter was marked to Respondent No.1.

7.2.As is evident from the record, NLC/Respondent No.2 vide letter dated 19.10.2015, responded to the communication dated 28.07.2015, addressed to it, by the Appellants. NLC/Respondent No.2 continued to maintain its stand that transportation of ash slag by the Respondent No.1, was not a service, which was amenable to tax.

8.The Appellants, however, were not satisfied and accordingly, issued a show cause notice dated 21.04.2016. It is at that stage that Respondent No.1 preferred a writ petition under Article 226 of the Constitution. Via the said writ petition, a challenge was laid to the show cause notice dated 21.04.2016. A prayer was made that the said show cause notice be quashed.

8.1.The learned Single Judge after issuing notice, passed the impugned judgment, in the matter qua which, the Appellants, as indicated above, have filed the instant appeal.

9.Mr.Srinivas, who appears for the appellants says that the directions contained in the impugned judgment, in particular, paragraph nos.6 and 7, to which, we have made a reference above, are not sustainable, in view of the fact that the provisions of the Finance Act, 1994, do not require issuance of either a notice or participation of NLC/Respondent No.2 in the adjudication proceedings.

9.1.For this purpose, he seeks to place reliance on Section 73 of the Finance Act, 1994.

9.2.Furthermore, the learned counsel says that the liability to pay service tax could only fall on respondent no.1 and not on NLC/Respondent No.2.

10.Mr.Jayachandran, who appears on behalf of Respondent No.1, largely relied upon the impugned judgment, in rebuttal to the submissions advanced by Mr.Srinivas.

10.1.The learned counsel says that the directions of the learned Single Judge are innocuous and hence, need not be interfered with.

11.Ms.Swetha Giridhar, learned counsel appearing for NLC/Respondent No.2, supports the submissions made by Mr.Jayachandran.

11.1.The learned counsel says that given the directions which have been issued, which would only assist in the adjudicatory process, this Court, ought not to interfere with the impugned judgment.

12.We have heard the learned counsel for the parties and perused the record.

13.The facts, as recorded above, by us, are not in dispute.

13.1.It appears that the learned Single Judge has issued the impugned directions only to ensure that the adjudicatory process is fair. In our opinion, fairness in adjudication can be achieved without stepping outside the ambit of the Finance Act, 1994, as would be evident from what is stated hereafter.

14.The grievance of the Appellants, as it appears, is with regard to enlargement of the scope of the adjudication proceedings.

14.1.Mr.Srinivas, as indicated above, has argued that NLC/Respondent No.2 cannot be made party to the adjudicatory process and hence, the direction issued, to issue a separate notice or in the alternative, a composite notice, in which NLC/Respondent No.2 should also be adverted to, is not sustainable.

14.2. We are of the view that to this limited extent Mr.Srinivas is right as under Section 73 Finance Act, 1994, the person on whom the liability can fall could only be Respondent No.1. Therefore, having regard to the directions issued in the

impugned judgment and the provisions of Section 73 of the Finance Act, 1994, we are inclined to modify the directions to the following extent:

(i) The show cause notice as issued dated 21.04.2016, shall continue to be adjudicated as it is.

(ii) Respondent no.1 shall file its reply, within a period of four weeks, either from the date of receipt of a copy of this order, or from the date when all documents, which are sought to be relied upon by the Appellants, which would include, the entire correspondence exchanged between them and NLC/Respondent No.2, whichever is later.

(iii) No separate notice need to be issued to NLC/Respondent No.2.

(iv) NLC/Respondent No.2 will not participate in the adjudication of the show cause notice.

15. With the aforesaid directions in place, the writ appeal is disposed of. The impugned directions contained in paragraph nos.6 and 7 are modified to the aforesaid extent. However, there shall be no order as to costs.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

1. The Commissioner of Central Excise
Chennai Audit II Commissionerate,
690, Annasalai, Nandam, Chennai.

2. The Commissioner of Central Excise,
No.1, Goubert Avenue (Beach Road),
Puducherry.

+1cc to Mr.A.P.Srinivas, Advocate Sr. 24721

+1cc to Mr.K.Jayachandran, Advocate Sr. 24775

+1cc to Mr. Lakshmi Kumaran, Advocate Sr. 24672

W.A.No.128 of 2017

VGII(CO)

VR(22/06/2017)