Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE SIDE JURISDICTION

WRIT PETITION NO.8148 OF 2018

WITH

WRIT PETITION NO. 8151 OF 2018

Vikas Madangopal Tulsian and others] Petitioners
Vs.
M/s. Joy Forzen Foods Pvt. Ltd] Respondent

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Mr. A.R. Pai i/b Neuty Nilesh Thakkar, for Petitioners in both the Petitions.
Mr. Vaibhav V. Ugle, for Respondents in both the Petitions.

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CORAM : R.G. KETKAR, J.

DATE : 9TH AUGUST, 2018.

P.C:

Not on board. At the request of Mr. Pai, taken up for admission.

2. Heard Mr. Pai, learned Counsel for the petitioners and Mr. Ugle, learned Counsel for the respondent in both the Petitions.

3. By these Petitions under Article 227 of the Constitution of India, the petitioners, appellants in the appeal/original defendants in the suit have challenged the judgments and orders dated 5th June, 2018 passed by the Appellate Bench of the Court of Small Causes at Mumbai below Exhibit 52 in (P) Appeal No. 7 of 2013 and (P) Appeal No.6 of 2013 preferred by them challenging the judgment and decrees dated 28th January, 2013. During pendency of these appeals, the respondent/plaintiff has filed applications Exhibit 52, inter alia, praying for direction to the defendants to pay amount of Rs. 5,37,675/- towards service tax @ 15% on the amount of compensation in

Writ Petition No. 8148 of 2018 and Rs. 10,59,300/- towards service tax @ 15% on the amount of compensation paid by the petitioner in Writ Petition No. 8151 of 2018.

4. Rule. Mr. Ugle waives service. Having regard to the narrow controversy raised in these Petitions as also at the request and by consent of the learned Counsel for the parties, Rule is made returnable forthwith and Petitions are taken up for final hearing.

5. In support of these Petitions, Mr. Pai invited my attention to clause (2) of the agreement of lease dated 18th November, 1999 which lays down that all the municipal taxes, water charges, collected taxes and other taxes etc are to be paid by the lessor alone, meaning thereby, by the plaintiff herein. He invited my attention to Chapter V of the Finance Act, 1994 dealing with service tax and in particular section 68 (1) which lays down that every person providing taxable service to any person shall pay service tax at the rate specified in section 66 in such manner and within such period as may be prescribed.

6. Mr. Pai also invited my attention to Section 2(1) (d) (ii) to contend that in a case other than sub-clause (i), a person is liable to pay service tax who is the provider of service. He submitted that the service tax is payable by the service provider and not by the service recipient. In addition, he submitted that the plaintiff has not paid service tax. In any case, in view of Section 41 of the Presidency Small Causes Courts Act, 1882, at the highest the plaintiff can claim licence fee or charges or rent which will not include service tax. He submitted that the Appellate Court has not considered the provisions of Finance Act, 1994 and has directed the defendant to pay service tax.

7. On the other hand, Mr. Ugle relied on the decision of Calcutta High Court in the case of **Bengal Shachi Housing Development Limited and another vs. Union of India and others, AIR 2014 Calcutta 145** in support of his submission that the defendant is liable to pay service tax as he is occupier of the suit premises. During the course of arguments, upon taking instructions from Mr. Hemant N. Gandhi, one of the Directors and Shareholders of the respondent/plaintiff Company. Mr. Ugle submitted that impugned orders may be set aside by consent of the parties and applications at Exhibit 52 may be restored to the file of the Appellate Court for deciding afresh after considering the provisions of the Finance Act, 1994.

8. In view thereof, by consent of the parties, impugned orders dated 5th June, 2018 passed below Exhibit 52 in (P) Appeal No. 7 of 2013 and (P) Appeal No.6 of 2013 are set side. Applications at Exhibit 52 in (P) Appeal No. 7 of 2013 and (P) Appeal No.6 of 2013 are restored to the file of the Appellate Court for deciding it afresh. The Appellate Court will decide the applications un-influenced by the observations made in this order. All contentions of the parties on merits are expressly kept open. Rule is made absolute with no order as to costs.

[R.G. KETKAR, J.]