

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 20.08.2019

Delivered on : 27.08.2019

CORAM

THE HONOURABLE MR. JUSTICE N. SATHISH KUMAR

O.P. No.1065 of 2018
and
A. No.9293 of 2018

M/s.C.R.Caterers India (P) Ltd.,
Plot No.15/16/17, 2nd Floor,
Vision Towers, Yogam Garden,
Brindavan Nagar, Valasaravakkam,
Chennai – 600 087.

... Petitioner

Vs.

M/s.Chennai Petroleum Corporation Ltd.,
Manali,
Chennai – 600 068.

... Respondent

Prayer : Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the impugned award of the sole Arbitrator dated 12.07.2018 passed in SCOPE-SFCA/ARB/CRCAT Vs. CPCL Chennai/2016-17/1028.

For Petitioner : Mr.S.Murugappan

For Respondent : Mr.S.Arjun Suresh

ORDER

An arbitral award dated 12.07.2018 (hereinafter referred to as 'impugned award'), passed by an Arbitral Tribunal, constituted of a sole Arbitrator, is assailed in the instant Original Petition.

2.For the sake of convenience, the petitioner and the respondent in the present Original Petition will be referred to by their rank in the Arbitration proceedings, i.e. as 'claimant' and 'respondent' respectively.

3.The entire case turns around Entry 19-A in 'Mega Notification No.25/2012-S.T. dated 20.06.2012, inserted by another Notification No.14/2013-S.T. dated 22.10.2013', both under tax statute (hereinafter referred to as 'the notification' for brevity).

4.It will be useful to give a thumbnail sketch of facts for appreciating the case of the claimant, hence, I do so hereunder :

The claimant was awarded a contract to render canteen services to the respondent refinery at Manali, for a total estimated value of Rs.94148265/-, excluding taxes and duties, for a period of 12 months from 01.02.2014. Service Tax at 12.36% on 60% of the invoice value raised by the claimant was paid on reimbursement basis by the respondent till June 2014. Subsequently, on coming to know of Entry 19-A of the notification, the

respondent informed the claimant that the respondent is not liable to reimburse/pay the service tax and stopped reimbursement of service tax component in the invoice of the claimant, from July 2014. However, the claimant continued to pay service tax to the Department. The respondent not only stopped reimbursement, but also started recovery of the amount already reimbursed, from the subsequent bills submitted by the claimant.

5.It is the case of the claimant that, service tax is payable and therefore, reimbursable as per the contract. However, it is the case of the respondent that, Entry 19-A was inserted vide notification dated 22.10.2013, and the contract was awarded to the claimant, much later than the date of the above notification, hence, the claimant is exempted from payment of service tax as per the above notification and consequently, the respondent is not liable to reimburse the same.

6.The dispute was referred for Arbitration before a sole Arbitrator.

The learned Arbitrator framed the following issues :

"1.Whether the respondent is right in taking the stand that Service Tax is inapplicable to all canteen services rendered in the respondent factory?"

2.Whether Service Tax is reimbursable by respondent on 'Canteen Service' rendered in the respondent factory by the claimant for the period from February 2014 to January 2015, pursuant to the contract entered between the parties?"

3. Whether an amount of Rs.5482495 or any part thereof was remitted by the claimant to the authorities towards Service Tax with regard to the 'Canteen Service' rendered by the claimant to the respondent?

4. Whether the claimant is entitled to interest of Rs.2135775 or any part thereof?

5. Whether the respondent is entitled to the sum of Rs.2565677?

6. Whether the respondent is bound by the terms of contract?

7. Whether the claimant is right in stating that the respondent has unilaterally refused to be bound by the terms of the contract in the absence of any amendment to the contract?

8. Whether the parties are entitled to costs?

Thereafter, the learned Arbitrator proceeded with arbitration. Ultimately, on interpretation of Entry 19-A of the notification, the learned Arbitrator held that, Service Tax is not payable by the claimant/caterer and therefore, they are not entitled for reimbursement from the respondent, and accordingly, passed the impugned award on 12.07.2018.

7. Learned counsel for the claimant mainly contended on the ground of jurisdiction. Though, the claimant had not questioned the jurisdiction of the learned Arbitrator to decide the notification pertaining to Service Tax statute, the learned counsel has raised such ground in this petition under Section 34 of the 'Arbitration and Conciliation Act, 1996' ('the Act' for brevity).

It is the contention of the learned counsel that, the learned Arbitrator has no jurisdiction to go into the merits of the notification to decide an issue with regard to exemption under tax statute. The learned counsel further contended that, by a clarification letter dated 05.08.2014, the office of the Commissioner of Service Tax, has clarified that, inasmuch as the claimant is providing catering service to the factories from its centralised kitchen and in some cases, it is cooking food in the factory premises itself, it is only an outdoor caterer and therefore, the exemption granted vide Entry 19-A of the notification is not applicable to them. Despite such clarification issued by the office of the Commissioner of Service Tax, the learned Arbitrator has held that, Service Tax is not payable by the claimant as per the notification.

8.The learned counsel for the claimant relied upon judgment of a Division Bench of Allahabad High Court in *Indian Coffee Workers' Co.op. Society Ltd. v. C.C.E. & S.T. Allahabad* [**2014 (34) S.T.R. 546 (All.)**], wherein, it is clearly held that, when an assessee is a person, who supplies food, edibles and beverages for a purpose and the assessee being an outdoor caterer within the meaning of Section 65(105)(zzt) r/w. Clause (24) and (76a) of the Finance Act, 1994, such assessee is subject to levy of Service Tax. The above judgment has been taken on appeal before the Hon'ble Supreme Court in Special Leave Petition (Civil) No.18745 of 2014. Therefore, it is the contention of the learned counsel that, when the interpretation of the

notification is a subject matter before the Hon'ble Supreme Court, such issue is not arbitrable before an Arbitral Tribunal. The learned Arbitrator cannot give a finding, which will have an impact over the entire country. Therefore, the learned counsel submitted that the dispute is not capable of adjudication or settlement by Arbitrator(s). Interpretation of a notification, issued under tax statute, is a right in rem and such exercise impacts the entire tax field at large. Therefore, it is his contention that the learned Arbitrator ought not to have entertained in interpreting the notification, issued under tax statute.

9. Per contra, learned counsel for the respondent would contend that, such plea of jurisdiction has not been made by the claimant before the learned Arbitrator. The learned Arbitrator has considered the notification and has adjudicated the dispute before him with regard to reimbursement of Service Tax as per the terms of the contract. The learned Arbitrator has taken note of entire facts of the case and has clearly found that, as per the notification, no service tax is payable by the claimant, since they being a caterer. No ground set out under Section 34 of the Act has been raised to interfere with the award and hence, the award has to be confirmed. In support of his contentions, the learned counsel mainly relied upon the judgments of the Hon'ble Apex Court in *Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India (NHAI)* [2019 SCC Online SC 677] and *S.N.Malhotra and Sons v. Airport Authority of India*

and Ors. **[MANU/DE/0527/2008]**.

10. Heard the learned counsel on either side and perused the award and other materials available on record.

11. The short question arising in this Original Petition is as to whether or not the dispute referred before the learned Arbitrator is arbitrable. The dispute referred to the learned Arbitrator is with regard to the liability of the claimant to pay and claim reimbursement of Service Tax. The learned Arbitrator, while deciding the issue, has interpreted Entry 19-A of the notification. The above notification originally grants exemption from payment of Service Tax to the services provided in relation to serving of food or beverages by a canteen maintained in a factory covered under the Factories Act, 1948. The above notification makes it very clear that the exemption is extended only to the services relating to serving of food or beverages. It is pertinent to note that, a clarification letter dated 05.08.2014 had been issued by the office of the Commissioner of Service Tax, wherein, it is held that the above Entry 19-A of the notification does not apply to the caterers, who are providing catering services from a centralised kitchen; therefore, the catering services rendered by the claimant, being an outdoor caterer is not exempted from Service Tax under the notification. Despite such clarification issued by the same Department, the learned Arbitrator has relied upon the Entry

No.19-A of the notification and has held that no service tax is payable by the claimant. Though, the question of jurisdiction of the learned Arbitrator to decide the above issue had not been raised earlier, there is no bar to plea of jurisdiction being raised by way of objection for the first time in a petition under Section 34 of the Act, even if no such objection was raised under Section 16 of the Act, as held by the Hon'ble Apex Court in *Lion Engineering Consultants v. State of M.P. And Ors.* **[MANU/SC/0313/2018]**.

12.The primary dispute referred to the Arbitrator is as to whether or not Service Tax is payable by the claimant and whether the claimant is entitled for reimbursement of Service Tax, as per the terms of the contract in specific, for deciding which, the learned Arbitrator had gone into interpreting the notification under tax statute, particularly in relation to revenue to the Government, which exercise is not a right in personam and it will have an effect all over the country. It is well settled that, all disputes relating to the right(s) in rem, being unsuited for private arbitration, are required to be adjudicated only by Courts or by public Tribunals, as held by the Hon'ble Apex Court in *Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd. And Ors.* **[AIR 2011 SC 2507]**. The relevant portion of the judgment is extracted hereunder :

"23. It may be noticed that the cases referred to above relate to actions in rem. A right in rem is a right exercisable against the world at large, as contrasted from a right in

personam which is an interest protected solely against specific individuals. Actions in personam refer to actions determining the rights and interests of the parties themselves in the subject matter of the case, whereas actions in rem refer to actions determining the title to property and the rights of the parties, not merely among themselves but also against all persons at any time claiming an interest in that property. Correspondingly, judgment in personam refers to a judgment against a person as distinguished from a judgment against a thing, right or status and Judgment in rem refers to a judgment that determines the status or condition of property which operates directly on the property itself. (Vide : Black's Law Dictionary). Generally and traditionally all disputes relating to rights in personam are considered to be amenable to arbitration; and all disputes relating to rights in rem are required to be adjudicated by courts and public tribunals, being unsuited for private arbitration. This is not however a rigid or inflexible rule. Disputes relating to sub-ordinate rights in personam arising from rights in rem have always been considered to be arbitrable."

13.It would be useful to extract relevant paragraphs of the judgment of the Division Bench of Allahabad High Court in *Indian Coffee Workers' Co.op. Society Ltd. v. C.C.E. & S.T. Allahabad* **[2014 (34) S.T.R. 546 (All.)]**.

"7.Under Section 65 (105) (zzt) of the Finance Act 1994, the expression 'taxable service' is defined to mean any service provided or to be provided to any person by an

outdoor caterer. The expression "caterer" is defined in clause (24) of Section 65 as follows:

" "caterer" means any person who supplies, either directly or indirectly, any food, edible preparations, alcoholic or non-alcoholic beverages or crockery and similar articles or accoutrements for any purpose or occasion."

The expression "outdoor caterer" is defined in clause (76a) of Section 65 thus:

" "outdoor caterer" means a caterer engaged in providing services in connection with catering at a place other than his own but including a place provided by way of tenancy or otherwise by the person receiving such services."

8. Analyzing the provisions of clause (24) of Section 65 of the Finance Act, 1994, in order to be a caterer, a person should be one who supplies food, edible preparations, beverages (alcoholic or non-alcoholic) or crockery and similar articles or accoutrements for any purpose or occasion. The supply may be made directly or indirectly. Consequently, there has to be, firstly, a supply of food, edibles, beverages or crockery and similar articles or accoutrements. Secondly, this supply may be for any purpose or occasion. A purpose is an effectuation of a particular object. An occasion is an event defined with reference to time which may take place either as an isolated occurrence or be sporadic or periodical. Thirdly, the supply may be directly by the person himself or indirectly through another. In order to be an outdoor caterer within the meaning of clause (76a), a person must, at the outset, be a caterer. Clause (76a) provides a statutory definition of who is regarded as an outdoor caterer. A caterer is an outdoor

caterer because services in connection with catering are provided at a place other than his own. The use of the expression 'in connection with catering' broadens the ambit of the definition by bringing within its purview not merely a service of catering but a service which has a connection with catering. The place where the service is to be provided must be a place other than that of the caterer himself. The inclusive part of the definition includes a place which may be provided to the caterer by the person receiving the service either by an agreement of tenancy or otherwise.

9. In the present case, the assessee is a caterer. The assessee is a person who supplies food, edibles and beverages for a purpose. The purpose is to cater to persons who use the facility of a canteen which is provided by NTPC or, as the case may be, by LANCO within their own establishments. NTPC and LANCO have engaged the services of the assessee as a caterer. The assessee is an outdoor caterer because the services which he provides as a caterer are at a place other than his own. The place is provided by NTPC and LANCO. The inclusive part of clause (76a) expands the definition to a place provided by way of tenancy or otherwise by the person receiving such services. NTPC and LANCO have engaged the services of the assessee as an outdoor caterer and the assessee is an outdoor caterer because services in connection with catering are provided by it at a place other than a place of the assessee.

10. Consequently, on a plain and literal construction of the provisions of Section 65 (105) (zzt) read with the definitions of the expressions "caterer" and "outdoor caterer" as contained in clauses (24) and (76a), it is evident that the assessee is subject to the levy of service tax. The assessee provides to any person, to wit, NTPC or LANCO, the service of an outdoor caterer. In our view, there is a fundamental fallacy in the submission of the assessee that it should be held not to fall within the definition of the expression "outdoor caterer" on the ground that the food, edibles or beverages are provided not to NTPC or LANCO but to their employees, customers and guests. That, in our view, begs the question. The taxable catering service cannot, in our view, be confused with who has actually consumed the food, edibles and beverages which are supplied by the assessee. Taxability or the charge of tax does not depend on whether and to what extent the person engaging the service consumes the edibles and beverages supplied, wholly or in part. What is material is whether the service of an outdoor caterer is provided to another person and once it is, as in the present case, the charge of tax is attracted.

...

14. The Circular of the Board of Customs and Central Excise dated 23 August 2007, which is sought to be relied upon by the assessee, in fact, also contains a clarification that the deeming supply of a food in a restaurant as a sale does not, in any way, bar the levy of service tax on the service provided by outdoor caterers, which is primarily a tax on service rendered by the outdoor caterer."

14.As far as the payment of Service Tax by an assessee being an outdoor caterer is concerned, at present, the Division Bench of the Allahabad High Court holds it affirmatively. But, it is brought to the notice of this Court that, as against the above judgment, a Special Leave Petition (Civil) is pending before the Hon'ble Apex Court in SLP (Civil) No.18745 of 2014.

15.It is also relevant to extract clause No.4.54.3 of the contract :

"4.54.3 Service Tax :

Bidders' quoted price shall be EXCLUSIVE OF SERVICE TAX. Applicable service tax shall be reimbursed by CPCL. Service tax rules amended with effect from 01.07.2012 shall be applicable for this tender.

Service tax liability depends on the type of the service provider and hence the bidder shall mention their type, percentage of service tax and service tax liability in the format as per Annexure 3.8 to ITB and shall submit the same along with the techno commercial offer in accordance with the amended rules.

CPCL is eligible for 88.2% service tax credit and the same shall be reimbursable.

As per the amended rules, type of bidders and tax liabilities are as follows:

- Type A - Company, Body Corporate, Trust, Association of Persons, Body of Individual
- Type B - Individual, HUF, Proprietary Firm, Partnership Firm

Bidders shall note that the service tax liability of a bidder is based on the type of the bidder. Depending on the status of the bidder, the applicable Service Tax will become the liability of the Bidder or the liability of both the bidder and CPCL. As per the amended rules, tax liabilities based on the type of bidders are as follows:

- i. In case the bidder is liable for 100% of the applicable Service Tax, then the bidder shall include the portion of the service tax for which service tax credit is not available to CPCL, in their quoted price. CPCL will reimburse the contractor to the extent of its service tax credit eligibility.*
- ii. In case the bidder is liable for 50% of the applicable service tax and CPCL is liable to pay the balance 50% service tax, then the bidders shall include in their quoted price, the portion of the service tax in the bidders 50% liability, for which service tax credit is not available to CPCL. The portion of the service tax in CPCL's 50% liability for which CPCL cannot claim service tax credit will be loaded on the bidder's price to arrive at the evaluation price of the bidder.*

No such loading is applicable for the bidder who is liable to pay all the applicable service tax.

The type of bidder furnished in the un priced offer will only be considered for evaluation of the final price of the bidder and to select the lowest bidder.”

16. On a perusal of judgment of Delhi High Court in a similar issue, i.e. reimbursement of Sales Tax on manufacturing items in the case of *Fixopan Engineers (P) Ltd. v. National Projects Construction Corporation Ltd. & Anr. [2006 SCC Online Del 832]*, it is seen that, the learned Arbitrator therein has refunded to the claimant therein the sales tax and excise duty, recovered by statutory authorities in respect of the items utilized for executing the works. Since, there was evidence to show that the amounts awarded were proved to have been paid by the claimant to statutory authorities, the award therein has been sustained by the Delhi High Court. But, in this case, the fact remains that the learned Arbitrator has gone to the extent of interpreting the statute and holding that service tax is not payable by caterer(s), notwithstanding the fact that such an exercise will have an impact over the entire service tax regime. Though, the scope of Section 34 of the Act is very limited, since, a dispute which involves interpretation of a notification issued under tax statute will have an effect in the entire tax regime, this Court is forced to come to a conclusion that, such a dispute is not capable of being resolved by Arbitration.

17.Be that as it may, Entry 19-A of the notification makes it clear that the services provided in relation to serving of food or beverages by a canteen, maintained in factory covered under the Factories Act, 1948, having the facility of air-conditioning or central air-heating at any time during the year, alone are exempted from Service Tax. The learned Arbitrator has passed the impugned award relying upon the above notification. However, even in order to apply the above notification in this case, the learned Arbitrator has to go into the question as to whether the claimant's canteen is covered under Factories Act, 1948, and is having facility of air-conditioning or central air-heating at any time during the year. However, the learned Arbitrator has not done such exercise while interpreting the said notification.

18.The Division Bench of Allahabad High Court has held that the assessee, who is outdoor caterer, is liable to pay service Tax and the same has also been held by the CESTAT of Mumbai and Delhi High Court. But, still the said issue is pending decision before the Hon'ble Supreme Court. When such being the position, interpretation of the notification under tax statute by an Arbitrator is not sustainable, since, it involves right in rem and it will have an impact over the tax statute. Such disputes are to be adjudicated only by Courts or by Tribunals and not by Arbitrator(s). By holding so, the impugned award passed by the Arbitrator as a result of such interpretation also becomes assailable.

19.In the light of the aforesaid narrative, this Original Petition is allowed and the impugned award dated 12.07.2018 is set aside. No costs. Consequently, connected application is closed.

The claimant is given liberty to approach the competent Court within a month after receipt of a copy of this order to agitate their right to reimbursement of service tax and work out their remedy in accordance with law.

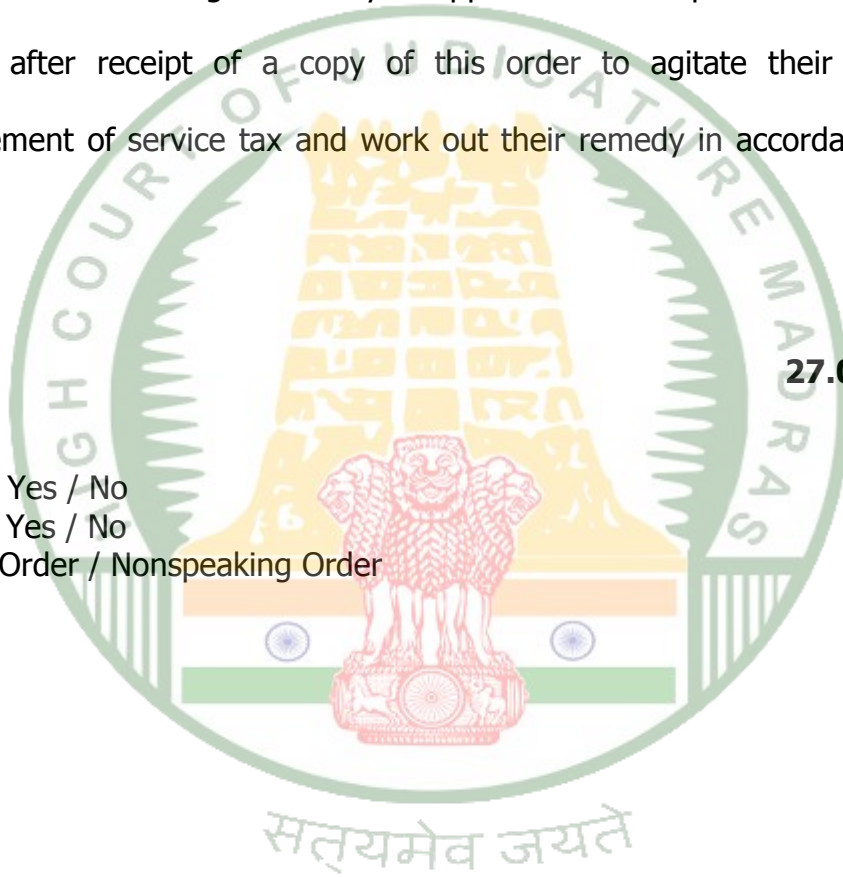
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