OD-2, 3 & 4

IN THE HIGH COURT OF JUDICATURE AT CALCUTTA
CIVIL APPELLATE JURISDICTION
ORIGINAL SIDE

HEARD ON : 11.07.2022
DELIVERED ON: 11.07.2022

CORAM:

THE HON'BLE MR. JUSTICE T.S. SIVAGNANAM
AND
THE HON'BLE MR. JUSTICE BIVAS PATTANAYAK

APOT/155/2017
IA NO:GA/1/2017 (OLD NO. GA/1908/2017)
GA/2/2017 (OLD NO. GA/2039/2017)

TENACITY SECURITY & ANR.
Vs.
KOLKATA MUNICIPAL CORPORATION & ORS.

APO/192/2019
WITH
WPO/92/2017
IA NO:GA/2/2017 (OLD NO.GA/2253/2017)

BENGAL PROTECTIVE GUARDS & ANR.
VS.
KOLKATA MUNICIPAL CORPORATION & ORS.

APO/35/2020
WITH
WPO/103/2017
IA NO: GA/1/2017 (OLD NO: GA/2254/2017)
GA/2/2017 (OLD NO.GA/2255/2017)
STAR SECURITY & DETECTIVE AGENCY & ANR.
VS.
KOLKATA MUNICIPAL CORPORATION & ORS.

Appearance:

Mr. Pranab Kumar Dutta, Sr. Adv.
Mr. Atish Dipankar Ghosh, Adv.
Mr. Saurabh Bagaria, Adv.
Mr. P. Sharma, Adv.
Mr. Indranil Banerjee, Adv.
Mr. Saumyajit Mishra, Adv.

...for the appellant (Item No.4)

Mr. Saurabh Bagaria, Adv.
Mr. Indranil Banerjee, Adv.

...for the appellant (Item No.3)

Mr. K.K. Maiti, Adv.
Mr. Tapan Bhanja, Adv.

...for respondent Nos. 5 & 6

Mr. Asoke Kumar Banerjee, Sr. Adv.
Mr. Biswajit Mukherjee, Adv.
Mr. Arijit Dey, Adv.

....for respondent.

Mr. S.K. Tiwari, Adv.

...for UOI.

(Judgment of the Court was delivered by T.S. Sivagnanam, J.)

GA/1908/2017

1. We have heard learned Counsel for the parties and we are satisfied with the reasons given in the affidavit filed in support of the condone delay application. Accordingly, the delay of 7 days in filing the appeal is condoned.

2. The application is allowed.

GA/2254/2017

3. We have heard learned Counsel for the parties and we are satisfied with the reasons given in the affidavit filed in support of the condone delay application. Accordingly, the delay of 14 days in filing the appeal is condoned.

4. The application is allowed.

APOT/155/2017, APO/192/2019 & APO/35/2020

5. Since the issue involved in these three appeals are identical, with the consent of the learned Advocates appearing on either side, the appeals are taken up for hearing together and are disposed of by this common judgment and order. It would suffice to take note of the facts in APO/155/2017.

6. The appellant, Tenacity Security, is a service provider to the Kolkata Municipal Corporation (KMC) pursuant to a contract entered by which they are to supply security guards in the municipal corporation. For easy reference, the appellant shall be known as 'service provider' and the KMC as 'service recipient'. All was well with the arrangement between the parties as KMC was reimbursing the service tax remitted by the provider to the department. However, on and after 4th January, 2014, KMC refused to reimburse the service tax component as raised in the invoice of the provider by placing reliance on the Municipal Commissioner's Circular No.83 of 2013-14. For better appreciation, the Circular is quoted hereinbelow :

> *" The Law Department of Kolkata Municipal Corporation opined that the service rendered by the Kolkata Municipal Corporation and service given to K.M.C in rendering Public Service are exempt from the payment of Service Tax in view of the provision contained in the notification bearing No. 25 of 2012 dated 20.06.2012 issued by the Government of India, Ministry of Finance, Department of Revenue published in the Gazette of India, extraordinary part-II section 3, sub-section (i), since the function and duties of Kolkata Municipal Corporation is concomitant to the public interest as per the enshrined provision of the Constitution of India. The Kolkata Municipal Corporation shall, therefore, not be liable to pay Service Tax in terms of the provision of the said notification until further order in view of the fact the K.M.C is discharging Constitutional obligation imposed upon the K.M.C by the Constitution of India. All COs and HODs of all Departments/Units/Cells are requested to take note of it and act accordingly."*

7. The appellant had filed the writ petition challenging the said Circular stating that it is an incorrect interpretation of the Mega Exemption Notification issued by the Central Government. In the meantime, since the appellant did not remit the service tax component to the department, show cause notices were issued to all the three appellants. The matter has culminated in an order of adjudication which has been challenged by the said service provider before the Customs, Excise and Service Tax Appellate Tribunal, Kolkata Bench (CESTAT). The learned single Bench, by the impugned order, though separate orders, they contain the same reasoning,

taking note of the fact that the service tax authorities had issued summons to the appellants and that the proceedings are yet to attain finality, opined that it would be appropriate to permit the service tax authorities to conclude the proceedings against the appellants in accordance with law. The learned single Bench further pointed out that so far as the Circular issued by the KMC dated 4th January, 2014 is concerned, the view of KMC that they need not pay service tax may not be accepted by the service tax authorities. Further, the authorities deciding the liability of the service tax under the Finance Act, 1994 is the appropriate authority to adjudicate the liability of the appellant to pay service tax in respect of the contract between it and the KMC in accordance with law. Though such was the observation in the penultimate paragraph of the order, the writ petition stood dismissed. Aggrieved by such order, the appellants are before us by way of these appeals.

8. The learned senior counsel appearing for the appellants referred to Section 66F of the Finance Act, which deals with the principles of interpretation of specified description of services or bundled services. It is submitted that in terms of sub-Section 1 of Section 66F unless otherwise specified, reference to a service (main service) shall not include reference to a service which is used for providing main service. It is submitted that bearing in mind the interpretative provision as contained in Section 66F of the Act, if the Mega Exemption Notification No.25/2012-ST is examined, the exemption

will apply only in cases where service is provided to a local authority by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation or alteration of clause (e) pipe line, conduit or plant for water supply, water treatment or sewerage treatment or disposal. Further, it is submitted that clause 25 of the notification has to be read which deals with services provided to local authorities by way of water supply, public health etc. Further, it is submitted that KMC seeks to place reliance on clause 39 of the Mega Exemption Notification which in the opinion of the appellants would be inapplicable because it deals with services by a local authority and not services provided to a local authority.

9. The KMC has taken a stand as is evident from the Circular No.83 of 2013-14 dated 4th January, 2014 that the services rendered by them and services given to them in rendering public services is exempted from payment of service tax in view of Mega Exemption Notification No.25/2012-ST dated 20th June, 2012 issued by the Government of India since the functioning and duties of the KMC is concomitant to the public interest as enshrined in the Constitution of India. Therefore, the KMC opined that they are not liable to pay service tax in terms of the provisions of the said notification until further orders in view of the fact that the KMC is discharging constitutional obligation imposed upon them by the Constitution of India. The correctness of the interpretation made by KMC in their Circular dated 4th January, 2014 has to be decided. In our considered view, the writ court is not an

appropriate forum to decide the issue at the first instance since the adjudicating authority is yet to decide upon the same. The Service Tax Department has not put KMC on notice in any of the three proceedings initiated against the appellants. The appellants' stand apart from other things is that the service tax component which is remitted by them as a service provider has to be reimbursed by the recipient, KMC. Thus, unless and until the adjudication is done in the presence of the KMC, it will not be a binding adjudication. The appeal which is now pending before the learned CESTAT assuming is allowed in favour of the appellants therein, yet the order will continue to remain a paper order because KMC may take a stand that such order of the learned CESTAT would not bind them. Therefore, to give a final solution to the matter, the KMC has to be made a party to the proceedings and is made as a co-noticee along with the appellants and, thereafter, an adjudication has to be commenced and after hearing the parties, a speaking order is required to be passed. We are conscious of the fact that in one of the cases adjudication has been completed and the appeals are pending before the learned CESTAT (Kol) in Appeal No. ST/75994/2018 and ST/76382/2018. However, those appeals may not be proceeded since we are inclined to issue a comprehensive direction in these appeals to the Service Tax Commissionerate to commence and complete a fresh adjudication after issuing notice not only to the appellant but to the KMC as well.

10. In the result, the three appeals are disposed of by this common judgement and order by directing the concerned Service Tax Commissionerate to issue fresh notices to the appellants as well as KMC which shall be treated as continuation of the earlier show cause notices. After hearing the parties, the concerned authority shall adjudicate the issue and pass a reasoned order on merits in accordance with law. In the meantime, we request the learned CESTAT to defer the hearing of the proceedings which are pending before it in Appeal No. ST/75994/2018 and ST/76382/2018 until the adjudication is completed in terms of the above direction. As soon as the adjudication is completed, the appellants as well as the department shall intimate the tribunal and the tribunal shall also consider impleading the KMC as a party to the proceedings in the said case so as to avoid multiplicity of proceedings. Considering the peculiar facts and circumstances of the case, we are of the view that no coercive action shall be initiated against the appellants till the adjudication is complete.

11. We make it clear that we have noted the submissions of the appellant as well as the stand taken by the KMC in this judgment and order for the purpose of moulding relief to be granted herein and we have not decided the legal issue which is left open to be decided by the concerned adjudicating authority. The concerned adjudicating authority shall issue show cause notices to the appellants as well as the KMC within a period of four weeks from the date of receipt of a server copy of this judgment and order. The

appellants and the KMC are granted four weeks' time from the date of receipt of the show cause notices to submit their replies. Thereafter, the adjudication proceedings shall be commenced and completed within a period of three months therefrom. The authorised representatives of the appellants and the KMC shall be afforded an opportunity of personal hearing. The parties are directed to co-operate with the concerned officer for the early conclusion of the adjudication proceedings.

12. Consequently, the connected applications for stay are also disposed of.

(T.S. SIVAGNANAM, J.)

I agree.

(BIVAS PATTANAYAK, J.)

SN/GH/S.Das/As.