IN THE HIGH COURT AT CALCUTTA
(Ordinary Original Civil Jurisdiction)
COMMERCIAL DIVISON

Present:

The Hon'ble Justice Krishna Rao

CS 9 of 2019

Titagarh Rail Systems Limited
Versus
The Board of Major Port Authority For the Syama Prasad Mookherjee Port, Kolkata

Mr. Sabyasachi Choudhury
Mr. Sayantan Bose
Ms. Arpita Saha
Ms. Ankita Choudhury

... For the plaintiff.

Mr. Abhrajit Mitra, Sr. Adv.
Mr. Ashok Kumar Jena

... For the defendant.

Hearing Concluded On : 09.10.2023

Judgment on : 22.11.2023

Krishna Rao, J.:

1. The plaintiff has filed the instant suit claiming interest of Rs. 2,81,59,025/- along with pendente lite interest and interest on judgment at the rate of 18 % per annum.

2. Case of the plaintiff is as follows :

a. In between the years of 2005 and 2011, the defendant floated eight tenders inviting bids for manning, operation, maintenance and repair of several identified pilot vessels and/or launches. All the bids submitted by the plaintiff were accepted by the defendant and issued letters of intent followed by work orders. The plaintiff and the defendant have also entered into separate eight agreements contained similar terms and conditions.

b. Clause 3.12 of the agreements provides that: *"The rate quoted by the `bidders shall be inclusive of all taxes and duties. However, Service Tax and Educational Cess, if applicable, will be reimbursed by KOPT at actual on production of documentary evidence. Service Tax and Educational Cess will not be considered for the evaluation of the Tender".*

c. The plaintiff under the impression that the service tax was payable only in respect of daily maintenance charges of the vessels, the plaintiff started raising bills on the defendant together with the bills for reimbursement of service tax on daily maintenance charges and the same was duly received by the defendant and were duly paid.

d. When the control and management of the Corporated Shipyard Private Limited was merged with the plaintiff, a doubt was created with regard to the applicability of the service tax on the entire service rendered by the plaintiff to the defendant under the contracts. The plaintiff has sought for professional expert opinion and it was opined that service tax was payable on the entirety of the service rendered by the plaintiff. In order to regularize payment of service tax under the eight agreements and further in order to avail of a Service Tax Voluntary Compliance Encouragement Scheme (hereinafter referred to as "VCES") which was introduced from 10th May, 2013, the plaintiff decided to pay service tax and to avail the benefit of VCES.

e. The total service tax liability with respect of eight agreements was accessed at Rs.3,94,34,035/- and out of which the plaintiff has made payment of Rs. 2,40,00,000/- on 31st December, 2013. After payment of the said amount, the plaintiff has requested for reimbursement of the said amount but the defendant neglected to reimburse the same and finding no other alternative, the plaintiff has paid the balance amount of Rs.1,54,34,035/- on 31st December, 2014 along with interest of Rs. 13,97,767/-. Delay for payment of balance amount was occurred due to the negligence on the part of the defendant as the defendant had not reimbursed the service tax paid by the plaintiff on 31st December, 2013.

f. The plaintiff had applied for reimbursement of the service tax paid by the plaintiff along with debit notes. Instead of reimbursing of the service tax paid by the plaintiff, the defendant insisted the plaintiff for furnishing bank guarantee of the said amount and an indemnity bond cum undertaking for release of the said amount.

g. Being aggrieved with the action of the defendant, the plaintiff has filed a writ application being W.P. No. 948 of 2016 for recalling/ withdrawal of the letters issued by the defendant to the plaintiff, insisting them for furnishing bank guarantee and indemnity bond. The writ petition filed by the plaintiff was disposed of by the Hon'ble Court on 24th February, 2017, by directing the defendant to pay an amount of Rs. 3,94,34,035/- being the reimbursement amount of service tax within two weeks. The Hon'ble Court directed the plaintiff to submit the original discharge certificate issued by the service tax department in Form VCES-3 to the defendant. As per the order passed by the Hon'ble Court, the defendant has reimbursed an amount of Rs. 3,94,34,035/- to the plaintiff on 10th March, 2017.

h. The defendant has reimbursed the service tax only after the order passed by the Hon'ble Court and have not paid any interest for delay in reimbursement of the service tax and have also not returned the interest paid by the plaintiff, the plaintiff has filed the present suit claiming interest in view of the liberty granted by the Hon'ble Court by an order dated 24th February, 2017.

3. <u>Case of the defendant is as follows :</u>

a. The plaintiff is not entitled to any reimbursement of service tax unless and until the plaintiff submitted to the defendant suitable documentary evidence in original during the subsistence of the contract so as to enable the defendant to avail corresponding input credit. The plaintiff has not paid the service tax during the subsistence of the contract. The plaintiff has also not submitted the discharge certificate in Form VCES-3 which was the required to prove payment under VCES-3 scheme and a pre request for availing of input credit.

b. The defendant by a letter dated 17th September, 2015, called upon the plaintiff to submit Form VCES-3 and subsequent several reminders were made to the plaintiff for submission of documents but the plaintiff has not submitted the same till the order passed by the Hon'ble Court dated 24th February, 2017. The defendant had legitimately required the plaintiff to submit a bank guarantee in as much as input credit in all likelihood would have disallowed by the Service Tax Department without Form VCES-3.

c. The Service Tax Authority was impleaded as party respondent in the writ petition being W.P. No. 948 of 2016. The service tax department has filed an affidavit in the said writ application wherein it has been clarified that as per the Circular No. 176/2/2014-ST dated 12th January, 2014, issued by the CBEC clarifies that CENVAT Credit shall only be available after payment of entire service tax dues with interest, if any and obtaining discharge certificate in Form of VCES-3.

d. The plaintiff has paid total service tax only on 31st December, 2014 with interest and has not submitted discharge certificate till the order passed by the Hon'ble Court dated 24th February, 2017 and thus the plaintiff is not entitled to get any interest as prayed for.

4. <u>As per the pleadings and suggested issues filed by the parties, the following issues were framed:</u>

1. Is the plaintiff entitled to a decree for a sum of Rs. 2,81,59,025 as claimed?
2. Is the plaintiff entitled to interest and if so, at what rate?
3. Is the claim in the suit barred by the law of limitation?
4. To what other relief, if any, the plaintiff entitled to?

5. <u>Evidence of the plaintiff:</u>

a. The plaintiff has examined one witness namely Dinesh Arya as P.W.1. During his evidence altogether 16 documents were marked as Exhibits "A to P".

b. Admitted documents of the defendant were also marked as Exhibit "1 to 7".

c. Though the Counsel for the defendant has cross examined the witness of the plaintiff but the defendant has not adduced any evidence on its behalf.

6. <u>Decisions with reasons:</u>

a. All issues have taken up together for consideration.

Clause 2.13 and 3.12 of the contract which are similar reads as follows:

> *"2.13. The rate quoted by the bidders shall be inclusive of all Taxes and duties. However, Service Tax & Educational Cess if applicable will be re-imbursed by*

> *KOPT at actuals on production of documentary evidence. Service Tax & Educational Cess will not be considered for the evaluation of the Tender.*
>
> *3.12. The rate quoted by the bidders shall be inclusive of all Taxes and duties. However, Service Tax & Educational Cess, if applicable, will be re-imbursed by KOPT at actual on production of documentary evidence. Service Tax & Educational Cess will not be considered for the evaluation of the Tender."*

Total service tax liability with respect of eight agreements accessed at Rs. 3,94,34,035/- and out of which the plaintiff has made payment of Rs. 2,40,00,000/- on 31st December, 2013 and the balance amount of Rs.1,54,34,035/- was paid on 31st December, 2014 along with interest of Rs. 13,97,767/-. The claim of the plaintiff is that after payment of the first tranche i.e. Rs.2,40,00,00/- on 31st December, 2013, the plaintiff has requested for reimbursement of the said amount but the defendant neglected to reimburse the same due to which delay was caused for payment of the balance amount.

The plaintiff claims that after payment of first tranche of the service tax, the plaintiff has applied for reimbursement by enclosing debit notes dated 1st January, 2014 i.e the documentary evidence as per Clauses 2.13 and 3.12 of the Contract. Similarly, the plaintiff after payment of second tranche applied for reimbursement of the said amount by enclosing debit notes dated 10th August, 2015, as documentary evidence but inspite of receipt of the said documentary evidence, the defendant has not reimbursed the service tax paid by the plaintiff.

The defendant was not satisfied with the debit notes as documentary evidence submitted by the plaintiff for reimbursement of service tax as the plaintiff has not submitted discharge certificate in Form VCES-3 and called upon the plaintiff for furnishing bank guarantee of the said amount and an indemnity bond cum undertaking for reimbursement of service tax. The plaintiff has challenged the said demand of the defendant in a writ proceeding. In the said writ proceeding, the plaintiff has impleaded the service tax authority as party respondent in the writ proceeding. The service tax department has filed an affidavit in the said writ application wherein it has been clarified that:

> *"(c) That according to petitioner's query dated 12.07.2106 as to whether the amount paid under VCES is Cenvatable or not the Assistant Commissioner in his reply dated 20.07.2016 has categorically pointed out that in terms of Rule 6(2) of the Service Tax Voluntary Compliance Encouragement Rules, 2013 CENVAT Credit cannot be utilized for payment of tax dues under the Scheme. Except this condition all issues relating to admissibility of CENVAT Credit are to be determined in terms of the provision of the CENVAT Credit Rules.*
>
> *(d) As regards admissibility of CENVAT Credit Rule 9(1)(bb) and Rule 9(1)(e) of CENVAT Credit Rules, 2004 is to be followed.*
>
> *(e) That in terms of Circular n o.176/2/2104-ST dated 12.01.2014 issued by CBEC clarifies that CENVAT Credit shall only to be available after payment of entire service tax dues with interest, if any and obtaining discharge certificate in Form of VCES-3 since the declaration made under he Scheme become conclusive only on issuance of discharge certificate under section 107(7) of the*

Finance Act, 2013 and acknowledge of which is obtained by the Petitioner.

(f) That the respondent no.1 is entitled to CENVAT Credit on the basis of supplementary invoices issued by the petitioner."

The writ proceeding was disposed of on 9th December, 2016, wherein the following directions were passed:

"The Court: The Kolkata Port Trust shall pay to the writ petitioner No. 1 a sum of Rs. 3,94,34,035/- against the 8 supplementary invoices raised by the Kolkata Port Trust towards reimbursement of service tax. Such payment shall be made within two weeks from date, simultaneously with the wit petitioner No.1 making over to the Kolkata Port Trust the original discharge certificate issued by the service tax department in Form VCES-3, a copy whereof has been annexed to the writ petition as Annexure "P-9" thereto, and without demanding any further documents and/or security of any nature. After the writ petitioner No.1 has received the sum of Rs. 3,94,34,035/- s directed hereinbefore, it shall be open to the writ petitioner No.1 and/or the Kolkata Port Trust to pursue their respective legal remedies in respect of any other claims that they may have against each other before the appropriate forum, with liberty to each of the said parties to defend the same.

The Service Ta Department will be making available to the Kolkata Port Trust the necessary Cenvat Credit for the said sum of Rs.3,94,34,035/- paid towards service tax on the basis of the supplementary invoices and the original discharge certificate as aforesaid issued by the Service Tax Department as per the statement made in paragraph 3(e) and 3(f) of the affidavit in opposition affirmed on 22nd day of January, 2017 by and on behalf of the Service Tax authority, and thus shall not demand the original discharge certificate from the writ petitioner No.1 for any related or other purpose whatsoever.

Since no affidavit in opposition has been filed the allegations are deemed to have been denied.

W.P. No.948 of 2016 stands disposed of."

Circular No. 176/2/2014-ST dated 20th January, 2014, reads as follows:

"Circular No. 176/2/2014-ST, *dated the 20th January, 2014*

Subject: Clarification regarding issue of Discharge Certificate under VCES and availment of CENVAT credit – regarding.

Trade and industry has sought clarification as to whether the first installment of tax dues paid under Voluntary Compliance Encouragement Scheme (VCES), 2013 would be available as Cenvat Credit immediately after payment or Cenvat credit can be availed only after payment of tax dues in full and receipt of Acknowledgement of Discharge in form VCES-3.

2. The issue has been examined. As per VCES, under Section 108 (2) of the Finance Act, 2013, a declaration made under Section 107 (1) shall become conclusive only upon issuance of acknowledgement of discharge under Section 107 (7). Further, in terms of Rule 7 of the Service Tax VCES Rules 2013, the acknowledgement of discharge in form VCES-3 shall be issued within a period of 7 working days from the date of furnishing of details of payment of tax dues in full along with interest, if any, by the declarant.

3. It would be in the interest of VCES declarants to make payment of the entire service tax dues at the earliest and obtain the discharge certificate within 7 days of furnishing the details of payment. As already clarified in the answer to Question no. 22 on FAQs issued by CBEC dated 08.08.2013, eligibility of CENVAT credit would be governed by the CENVAT Credit Rules, 2004.

4. Chief Commissioners are also advised that upon payment of the tax dues in full, along

> *with interest, if any, they should ensure that discharge certificates is issued promptly and not later than the stipulated period of seven days."*

The defendant has reimbursed the service tax paid by the plaintiff on 10th March, 2017, as per the direction passed by the Hon'ble High Court in the writ proceeding dated 24th February, 2017, after submission of discharge certificate by the plaintiff. The plaintiff has submitted discharge certificate as per the direction passed by the Hon'ble Court.

The plaintiff admittedly not paid the service tax during the subsisting of contracts. The plaintiff has paid service tax firstly on 31st December, 2013 and secondly on 31st December, 2014 with interest. Admittedly, at the time of claim of reimbursement of service tax, the plaintiff has not submitted discharge certificate in Form VCES-3.

As per circular dated 20th January, 2014, it is clarified that under Section 108(2) of the Finance Act, 2013, a declaration made under Section 107(1) shall become conclusive only upon issuance of acknowledgement of discharge under Section 107(7). It is also clarified that in terms of Rule 7 of the Service Tax VCES Rule 2013, the acknowledgement of discharge in form VCES-3 shall be issued within a period of 7 working days from the date of furnishing of details of payment of tax dues in full along with interest, if any, by the declarant. It is also clarified that in the interest of VCES declarants to make payment of the entire service tax dues at the earliest and obtain the discharge certificate within 7 working days of furnishing details of the payment.

In the present case, the plaintiff has paid part of the service tax on 31st December 2013 and subsequently the balance amount was paid on 31st December 2014 with interest. After payment of service tax in both occasions, the plaintiff has applied for reimbursement of the said amounts enclosing debits notes as documentary evidence but admittedly, the plaintiff has not submitted discharge certificate in both the occasions. The plaintiff has disclosed the discharge certificate in the writ proceedings. The Hon'ble Court considering the Circular dated 20th January, 2014, and the copy of the discharge certificate enclosed in the writ petition, directed the defendant to pay to the plaintiff a sum of Rs. 3,94,34,035/- towards the reimbursement of service tax and the plaintiff was directed to submit the original discharge certificate issued by the service tax department in Form VCES-3.

In view of the above, this Court finds that the plaintiff has paid service tax in two instalments and in both occasions, the plaintiff has applied for reimbursement of service tax by enclosing debit notes and has not submitted the original discharge certificate issued by the service tax department in Form VCES-3. The petitioner has submitted discharge certificate only after the order passed by the Hon'ble High Court. As per the order passed by the Hon'ble Court and on receipt of discharge certificate, the defendant has released the amount of Rs.

3,94,34,035/- on 10th March, 2017, thus, the plaintiff is not entitled to get any interest as claimed by the plaintiff.

7. **C.S. No. 9 of 2019** is thus **dismissed**. Decree be drawn accordingly.

(Krishna Rao, J.)