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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Decision: 28th March, 2023*

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+ RFA 59/2021 & CM APPL. 3993/2021

HDFC BANK LIMITED

..... Appellant

Through: Mr. Amol Sharma & Ms. Divya
Rana, Advocates.

versus

JAGDISH LAL SHARMA

..... Respondent

Through: Mr. Anand and Ms. Rajeshri
Niruratirao Reddy, Advocates on Record.

98

+ RFA 196/2021

JAGDISH LAL SHARMA

..... Appellant

Through: Mr. Anand and Ms. Rajeshri
Niruratirao Reddy, Advocates on Record.

versus

HDFC BANK LTD & ANR

..... Respondents

Through: Mr. Amol Sharma & Ms. Divya
Rana, Advocates.

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

JUDGEMENT

JYOTI SINGH, J. (ORAL)

1. RFA No.59/2021 has been filed by HDFC Bank Ltd. (hereinafter referred to as 'the Bank') assailing the impugned judgment and order dated 23.12.2019 passed by the Trial Court whereby the Trial Court has decreed the suit for recovery, declaration and mandatory injunction filed by Shri Jagdish Lal Sharma

(hereinafter referred to as 'the Plaintiff') against the Bank, for a sum

Signature Not Verified

Signed By: KAMAL KUMAR RFA 59/2021 & RFA 196/2021

Signing Date: 17.04.2023
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of Rs.27,86,374/- with future interest @ 12% per annum for the lease period w.e.f. 01.06.2007 to 30.05.2015, subject to payment of deficient court fees. RFA No.196/2021 has been filed by the Plaintiff assailing the judgment and decree dated 23.12.2019 to the extent the Trial Court has rejected the claim for grant of *pendente lite* interest on the decretal amount for the lease period w.e.f. 01.06.2007 to 30.05.2015. Plaintiff seeks *pendente lite* interest on the service tax deposited for the said period @ 18% per annum. Since both the appeals arise out of a common judgment and the issues are inextricably linked, they were heard together and are being decided by this common judgment.

2. At the outset, learned counsel for the Respondent apprises the Court that deficient court fees, directed by the Trial Court in paragraph 52 of the impugned judgment has been deposited and hands over a photocopy of the e-Court receipt, reflecting the said payment. The document is seen by the counsel for the Bank and he is satisfied by the compliance. The receipt is taken on record and shall form a part of the paper books in the present appeals.

3. Factual matrix to the extent relevant and necessary is that Plaintiff had let out the basement and ground floor of the premises bearing No.499, Kohat Enclave, Pitampura, Delhi to the erstwhile Centurion Bank of Punjab Ltd., now amalgamated with the Bank, for carrying out its business of banking. Premises was initially leased out vide Lease Deed dated 07.05.2007 for the period 01.06.2006 to 30.05.2009 and lease was further renewed for two terms i.e. from 01.06.2009 to 30.05.2012 and 01.06.2012 to 30.05.2015, by Registered Lease Deeds.

4. Case set up by the Plaintiff before the Trial Court was that at the time of executing the Lease Deed, service tax was not in operation

and hence no clause pertaining to service tax was incorporated in the Lease Deed. Notification dated 22.05.2007 and the Circular dated 04.01.2008, pertaining to levy of service tax was struck down by the Division Bench of this Court in W.P.(C) 1659/2008 and the Statute was later amended by Section 76 of Finance Act, 2010 but made effective retrospectively w.e.f. 01.06.2007. Consequently, rental income from immovable properties for 'commercial purposes' was subjected to service tax by inserting Sub-section 90(a) in Section 65 of Chapter V of Finance Act, 2007 vide Section 135, thereof. As a result, service tax became payable w.e.f. 01.06.2007 and Plaintiff vide letter dated 24.04.2012 called upon the Bank to pay the service tax on the rent, along with arrears. Bank, however, refused to pay and sent a letter dated 31.05.2012, taking a stand that the liability to pay the service tax was of the Plaintiff, he being the 'service provider'.

5. Plaintiff deposited part amount of the outstanding service tax, amounting to Rs.3,94,962/- for the years 2007, 2012 and 2013 and demanded the amount from the Bank, but to no avail, leading to filing the suit, as the last resort to recover his alleged dues. Upon being served with the summons, Bank filed written statement and contested the suit on the ground that it was inducted as a tenant vide Registered Lease Deed dated 22.12.2009, after merger with the erstwhile lessee, for a period of six years and as per Clause 7 of the Lease Deed, all property taxes, municipal taxes and other outgoings in respect of the premises were payable by the lessor i.e. the Plaintiff. The Lease Agreement contained no stipulation for passing the burden of service tax on the Bank. It was also the stand of the Bank that Section 68(1) of Finance Act, 1994 affixed the liability to pay service tax on the service provider and not on the recipient and the suit was not even maintainable.

6. On 18.12.2014, the suit was pending in this Court and the following issues were framed :-

“1. Whether the defendant is not liable to pay the service tax in view of the terms of the lease as claimed by the defendant? OPD.

2. Relief.”

7. Significantly at the time of framing the issues, Court recorded that since the issues arising in the suit were purely legal and Lease Deed was an admitted document, no evidence was required and accordingly, listed the matter for final arguments. Later, vide order dated 07.12.2015, suit was transferred to the Trial Court on account of enhancement of pecuniary jurisdiction of District Courts. The Trial Court, after hearing arguments, decreed the suit in favour of the Plaintiff holding him entitled to recovery of service tax with future interest, declining however, to grant *pendente lite* interest.

8. The prime and the only argument pressed by the learned counsel for the Bank is that the Trial Court failed to appreciate that Clause 7 of the Lease Deed dated 22.12.2009 had two components: (a) property tax, municipal tax and all other outgoings in respect of the subject premises were payable by the lessor; and (b) in case of any future increment in taxes, only the difference will be borne by the Bank. Therefore, as per the agreement between the parties, as reflected from the Lease Deed, not only the taxes but all other outgoings were payable by the lessor and the outgoings could be in the form of future taxes or any other payments incidental to and/or attached with the property, but the Court has not given any heed/meaning to the words ‘all other outgoings’. Insofar as the second limb of Clause 7 is concerned, Bank had only agreed to pay ‘increment’ in the value of existing taxes and not the outgoings and this assumes significance in light of the fact that at the time the Lease Deed was executed, service

tax was not even in existence or envisioned. Learned counsel relies on the judgment of the Supreme Court in ***Union of India and Others v. Bengal Shrachi Housing Development Limited and Another, (2018) 1 SCC 311***, to argue that the liability to pay service tax is on the lessor and laid special emphasis on the following passages :-

“18. It is thus clear, on a conspectus of the authorities of this Court, that service tax is an indirect tax, meaning thereby that the said tax can be passed on by the service provider to the recipient of the service. Being a tax on service, it is not a direct tax on the service provider but is a value added tax in the nature of a consumption tax on the activity which is by way of service. It is settled by various judgments of this Court that, in order to have conceptual clarity, the taxable event and the taxable person are distinct concepts. Thus, in Babu Ram Jagdish Kumar & Co. v. State of Punjab [Babu Ram Jagdish Kumar & Co. v. State of Punjab, (1979) 3 SCC 616 : 1979 SCC (Tax) 265] , this Court made it clear that, in the case of a purchase tax, the “taxable event” is the purchase of paddy, whereas the “taxable person”, who is the person liable to pay the tax, is the purchaser. In the present case, therefore, the “taxable event” is the provision of the service of renting out immovable property, and the “taxable person”, that is the person liable to pay tax, is the service provider, namely the lessor.”

9. Without prejudice, it is urged that even assuming for the sake of arguments that otherwise in law, service tax is payable by the recipient and not the service provider, in the present case, the parties to the suit were governed by the express covenants of the Lease Deed, which they willingly executed and the contract between the parties will have an overriding effect on any other provision under the service tax regime.

10. Learned counsel for the Plaintiff, *per contra*, argues that the legal issue that arises for consideration in the present appeals is squarely covered by the judgments of the learned Single Judges of this Court in ***Pearey Lal Bhawan Association v. M/s Satya Developers Pvt. Ltd., 2010 SCC OnLine Del 3649*** and ***M/s Meattles Pvt. Ltd. v. HDFC Bank Ltd., 2012 SCC OnLine Del 5508***. Both the judgments were upheld by the Division Bench by a common judgement in

appeals being RFA No.59/2021 RFA No.196/2021 reported as *Satya Developers Pvt. Ltd. v. Pearey Lal Bhawan Association, 2015 SCC OnLine Del 12756*. To the same effect is the judgement of the Division Bench of this Court in *Raghubir Saran Charitable Trust v. Puma Sports India Pvt. Ltd., 2013 SCC OnLine Del 1972*. In all these judgements it is held that it is the lessee who has to bear the liability of service tax and not the lessor. In fact, in *Pearey Lal (supra)*, the learned Single Judge has also held that while the contracts between the parties speak of lessor's liability to pay municipal, local and other taxes, however, service tax is a tax which parties did not envision while entering into the arrangements and therefore, while the service provider may deposit the tax at the initial stage, but he will be legally entitled to recover the same from the lessee. In *M/s Meattles (supra)*, the learned Single Judge held that the legislative intent behind Section 12A and 12B of Central Excise and Salt Act, 1944 in relation to Service Act is clear that service tax is to be ultimately borne by the recipient of the service though service provider is statutorily liable to pay the tax to the exchequer. Both judgments were upheld by the Division Bench of this Court in *Satya Developers (supra)* and have attained finality. It is argued that Trial Court has only followed the judgements of this Court, which it was bound to and no infirmity can be found with the impugned judgment, entailing dismissal of the Appeal filed by the Bank.

11. Judgment of the Supreme Court in *Bengal Shrachi (supra)* is sought to be distinguished on the ground that it does not deal with the specific and the only issue arising in the present case i.e right of the service provider to recover the amount of service tax from the recipient of the service, which issue is squarely covered in favour of the Plaintiff by the judgments of this Court.

12. Counsel for the Plaintiff seeks grant of *pendente lite* interest on the entire amount of service tax paid by the Plaintiff for the lease period w.e.f. 01.06.2007 to 30.05.2015 and contends that the Trial Court erred in rejecting the claim on the ground that in the absence of the Plaintiff having paid any penalty or interest on the service tax, it would be inequitable to allow *pendente lite* interest. This finding is in the teeth of the law on this issue, which is fairly well settled. It has been held in *Aditya Mass Communications (P) Ltd. v. A.P. SRTC, (2003) 11 SCC 17*, that a party, wrongly denied the use of its own money, must be compensated appropriately. In the present case, Trial Court has rendered a finding in favour of the Plaintiff that Bank was liable to pay the future tax, which would include service tax and having so decreed the suit in favour of the Plaintiff, it ought to have awarded *pendente lite* interest as the Bank had retained the money belonging to the Plaintiff, without any authority of law, for a prolonged period, constraining him to litigate. Had the Bank reimbursed the service tax amount to the Plaintiff on time, he may have invested the money in Fixed Deposits/Mutual Funds/PPF account, etc. and would have earned substantially from the deposits.

13. I have heard learned counsels for the parties and examined their respective submissions.

14. Indisputably, no evidence was led by the parties before the Trial Court since it was recorded by the Court, while framing issues that the matter involved only a legal issue and Lease Deed was an admitted document. The issues that arises for consideration is: (a) whether the burden of service tax should be borne by the lessor i.e. the service provider or the lessee i.e. the service recipient; and (b) whether Plaintiff is entitled to *pendente lite* interest and if so, for what period.

15. Having heard the respective counsels and examined the matter, in my view, Plaintiff is right in his submission that the controversy is covered on all four corners by the judgments of this Court, relied by him, as aforementioned.

16. I may first refer to the judgment of the learned Single Judge of this Court in **Pearey Lal (supra)**, where the Plaintiff filed two suits being CS(OS) Nos.1016/2008 and 1018/2008, seeking declaration that Defendant was liable to bear the service tax liability in respect of the rentals paid by the Defendant and received by the Plaintiff. The Court held as follows:

“11. The following issues arise for consideration:

1) On whom does the incidence of taxation fall, in this case, having regard to the materials and documents on the record;

2) Is the plaintiff entitled to the money decree, as claimed, or any other relief: OPP

3) Relief.

Issue No. 1

12. The controversy requiring decision by the Court is narrow and limited. It is whether the burden of service tax, levied on the service or facility of leasing (of the suit premises) should be borne by the lessor (i.e. the service provider) or the lessee (i.e. the defendant, user). There is no dispute that the parties did not visualize that this kind of a levy would be made in respect of lease, or rental of commercial properties; it is also undisputed that the levy was made effective in 2007, after the parties had entered into the agreement. The defendant denies liability to pay, submitting that the conditions in the contract clearly stipulate that all taxes, etc. are to be borne by the plaintiff landlord. It relies on principles of interpretation of contract, to submit that when parties visualize situations and provision for them, it is not open to either of them to roam outside the express terms, and try to discover obligations when none exist.

13. The Supreme Court, in All India Federation of Tax Practitioners v. Union of India, (2007) 7 SCC 527, speaking about the nature of service tax liability, held that:

“4. Service tax is an indirect tax levied on certain services provided by certain categories of person including companies, associations, firms, body of individuals, etc., Service sector contributes about 64% to GDP. “Services” constitute a heterogeneous spectrum of economic activities. Today services cover wide range of activities such as management, banking

insurance, hospitality, consultancy, communication, administration, entertainment, research and development activities forming part of retailing sector. Service sector is today occupying the centre stage of the Indian economy. It has become an Industry by itself. In the contemporary world, development of service sector has become synonymous with the advancement of the economy. Economics hold the view that there is no distinction between the consumption of goods and consumption of services as both satisfy the human needs.

In late seventies, Government of India initiated an exercise to explore alternative revenue sources due to resource constraints. The primary sources of revenue are direct and indirect taxes. Central excise duty is a tax on the goods produced in India whereas customs duty is the tax on imports. The word “goods” has to be understood in contradistinction to the word “services”. Customs and excise duty constitute two major sources of indirect taxes in India. Both are consumption specific in the sense that they do not constitute a charge on the business but on the client...”

Similarly, in All India Taxpayers Welfare Association v. Union of India & Ors., (2006) (4) STR 18) it was held that:

“9. The provider of service is an assessee under s.65 of the Finance Act, 1994 and he has to collect service tax from the users of service as contemplated under ss. 12A and 12B of the central Excise Act. In this context, it is necessary to refer that s. 12A of the Central Excise Act contemplates that notwithstanding anything contained in this Act or any other law for the time being in force, every person who is liable to pay duty of excise on any goods shall, at the time of clearance of the goods, prominently indicate in all the documents relating assessment, sales invoice, and other like documents, the amount of such duty which will form part of the price at which such goods are to be sold. Sec. 12B of the Central Excise Act contemplates that every person who has paid the duty of excise on any goods under this Act, shall, unless the contrary is proved by him, be deemed to have passed on the full incidence of such duty to the buyer of such goods. Thus, the provider of service only being an assessee according to s. 65 of finance Act is to collect service-tax from the users of service as contemplated under ss. all bills the details including service tax which is payable by the users”.

It would also be necessary to notice here that Sections 12-A of the Central Excise Act, which are also made applicable by virtue of Section 83 of the Service Tax Act, prescribe that the provider of goods (in this case, service) has the obligation to indicate the quantum of tax, on the goods or services, sold or offered, for sale. The said provisions are as follows:

“12A. PRICE OF GOODS TO INDICATE THE AMOUNT OF DUTY PAID THEREON.

Notwithstanding anything contained in this Act or any other law for the time being in force, every person who is liable to pay duty of excise on any goods shall, at the time of clearance of the goods, prominently indicate in all the documents relating to assessment, sales invoice, and other like documents, the amount of such duty which will form part of the price at which such goods are to be sold....”

14. *It is true, that the contracts entered into between the parties in this case, spoke of the plaintiff lessor's liability to pay municipal, local and other taxes, in at least two places. The Court, however, is not unmindful of the circumstance that service tax is a species of levy which the parties clearly did not envision, while entering into their arrangement. It is not denied that leasing, and renting premises was included as a “service” and made exigible to service tax, by an amendment; the rate of tax to be collected, is not denied. If the overall objective of the levy - as explained by the Supreme Court, were to be taken into consideration, it is the service which is taxed, and the levy is an indirect one, which necessarily means that the user has to bear it. The rationale why this logic has to be accepted is that the ultimate consumer has contact with the user; it is from them that the levy would eventually be realized, by including the amount of tax in the cost of the service (or goods).*

15. *It would be noteworthy to recollect Section 64-A of the Sale of Goods Act, 1930, which visualizes and provides for situations where levies of tax are imposed after the contract (for sale of goods) is entered into. The provision prescribes that:*

“64-A. In contracts of sale, amount of increased or decreased taxes to be added or deducted. - (1) *Unless a different intention appears from the terms of the contract, in the event of any tax of the nature described in sub-section (2) being imposed, increased, decreased or remitted in respect of any goods after the making of any contract for the sale or purchase of such goods without stipulation as to the payment of tax where tax was not chargeable at the time of the making of the contract, or for the sale or purchase of such goods tax-paid where tax was chargeable at that time, -*

(a) if such imposition or increase so takes effect that the tax or increased tax, as the case may be, or any part of such tax is paid or is payable, the seller may add so much to the contract price as will be equivalent to the amount paid or payable in respect of such tax or increase of tax, and he shall be entitled to be paid and to sue for and recover such addition; and

(b) if such decrease or remission so takes effect that the decreased tax only, or no tax, as the case may be, is paid or is payable, the buyer may deduct so much from the contract price as will be equivalent to the decrease of tax or remitted tax, and he shall not be liable to pay, or be sued for, or in respect of, such deduction.

(2) *The provisions of sub-section (1) apply to the following taxes, namely; -*

(a) *any duty of customs or excise on goods;*

(b) *any tax on the sale or purchase of goods.”*

The above provision also clearly says that unless a different intention appears from the terms of the contract, in case of the imposition or increase in the tax after the making of a contract, the party shall be entitled to be paid such tax or such increase. Although there is no explicit provision to that effect, enabling lessors such as the plaintiff, to the service tax component, this Court is of the view that there is sufficient internal indication in the Act, through Section 83 read with Section 12-A and Section 12-B suggesting that the levy is an indirect tax, which can be collected from the user (in this case, the lessee). This issue, is therefore, answered in the plaintiff's favour, and against the defendant.

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17. In view of the findings on issue No. 1, this Court is of the opinion that the plaintiff is entitled the declaration and injunctions claimed against the defendant, to the effect that the latter is liable to pay and refund the service tax liability. The plaintiff is also entitled to the amounts claimed. The second issue is answered accordingly.”

17. In the case of *M/s Meattles (supra)*, a suit was filed by the Plaintiff for declaration, recovery of money and injunction and the prime issue before the Court was whether the Defendant was liable to pay service tax on the rent. Relevant passages from the judgment, deciding the issue in favour of the Plaintiff are as follows:-

“5. ISSUE NO. 1:

The first question which comes for consideration in this case is as to whether the lease deed executed between the parties deals with the payment of service tax and if so, who under which term of the said deed is liable to pay the said tax. Clause 4(v) of the lease deed reads as under:-

“The municipal taxes, rates, charges and other outgoings in respect of the demised premises that would be determined/fixed/varied from time to time by the Municipal Corporation/Municipality/Gram Panchayat or any other local authority shall be paid by the Lessor or the Lessee as specified/stipulated in the schedule annexed herewith and shall keep the other party indemnified at all times against the same.”

Clause 7 in the schedule to the lease deed reads as under:-

“Monthly payment of To be borne by the Lessor only. Corporation/Municipal rates, Charges, taxes cessess and all other outgoings”

6. Since the lease deed having been executed on 9.6.2004 and the service tax having been levied retrospectively with effect from 1.6.2007, it is obvious that the payment of service tax could not have been in contemplation of the parties at the time this deed was executed. Therefore, there could have been no agreement between the parties specifically with respect to payment of service tax. The question which then arises is as to whether service tax can be said to be covered under the above referred clause of the lease deed. Admittedly, service tax is neither a municipal tax nor a charge, this being a tax on services levied by Union of India. As regards, the expression 'outgoings' used in the above referred clause, a careful examination of the clause would show that the expression 'outgoings' is qualified by the words 'that would be determined/fixed/varied from time to time by the Municipal Corporation/Municipality/Gram Panchayat or any other local authority'. Therefore, this clause refers only to those outgoings in respect of the tenanted premises, which are levied by Municipal Corporation/Municipality/Gram Panchayat or any other local authority. Since service tax is not levied/recovered by Municipal Corporation/Municipality/Gram Panchayat or any other local authority, it can hardly be disputed that this is not included in the term 'outgoings', as qualified in clause 4(v) of the lease deed. Since the expression 'outgoings', for the purpose of clause 7 of the schedule has to be read in terms of clause 4(v) of the lease deed, it is obvious that the liability of the lessor would be to pay only those taxes, charges and other outgoings which are levied by Municipal Corporation/Municipality/Gram Panchayat or any other local authority. It is, thus, quite clear that payment of service tax is not at all covered under the covenants contained in the lease deed dated 25.11.2004.

7. The next question which arises for consideration is as to whether in the absence of an agreement for payment of service tax by the tenant, can the landlord recover the same from the tenant. The contention of the learned counsel for the plaintiff was that under the lease deed, the plaintiff agreed to let out the premises on receipt of a particular amount for rent and that amount cannot be reduced to his disadvantage by fastening the liability of service tax on it. The next contention of the learned counsel for the plaintiff was that service tax being a tax on service, it is the recipient of the service who has to bear the same and even in the absence of an agreement to this effect, the service provider can recover the amount of service tax from the recipient of the service. The learned counsel for the defendant, on the other hand, has contended that the defendant had agreed to pay a particular amount of rent for the use of the tenancy premises and the liability of the defendant cannot be increased by recovering the amount of service tax from it.

8. Vide Section 83 of Finance Act, the provisions of Section 12A and 12B of Central Excise Act have been applied in relation to service tax as they apply to excise. Section 12A of Central Excise Act provides that every person who is liable to pay duty of excise on any

goods shall, at the time of clearance of the goods, prominently indicate in all the documents relating to assessment, sales invoice, and other like documents, the amount of such duty which will form part of the price at which such goods are to be sold. Section 12B of the said Act provides that every person who has paid the duty of excise on any goods under this Act shall, unless the contrary is proved by him, be deemed to have passed on the full incidence of such duty to the buyer of such goods.

9. As a result of application of the provisions contained in Section 12A and 12B of Central Excise and Salt Act 1944 in relation to service tax, there is a statutory presumption that the person paying the service tax has passed on the liability to the recipient of the service. The legislative intent, therefore, is quite clear i.e. the service tax is to be ultimately borne by the recipient of the service, though it is the service provider who is statutorily liable to pay the said tax to the exchequer. It was contended by the learned counsel for the defendant that the service provider can recover the service tax from the recipient of the service only by entering into an agreement with him in this regard and in the absence of such an agreement, the liability cannot be shifted to the recipient of the service. In my view, the contention of the learned counsel for the defendant cannot be accepted. Section 83 of the Finance Act read with Sections 12A and 12B of Central Excise and Salt Act, 1944, in my view, gives ample legal right to the service provider to recover the amount of service tax paid by him from the recipient of the service. Had that not been the legislative intent, there would have been no occasion to apply Sections 12A and 12B of Central Excise and Salt Act in relation to service tax. Even in the absence of Sections 12A and 12B of Central Excise and Salt Act in relation to service tax, nothing prevented the service provider from entering into an agreement with the recipient of the service, for reimbursement of the amount of service tax, by the recipient of the service to its provider. Extension of Sections 12A and 12B of Central Excise and Salt Act in relation to the service tax gives a legal right to the service provider to recover the amount of service tax from the recipient of the service, even if there is no agreement between them for reimbursement of such tax by the recipient of the service to its provider.”

18. It was finally held by the Court that Plaintiff was entitled to recover service tax from the Defendant to the extent the liability had not become barred by limitation. Both the judgments were taken up in appeal before the Division Bench of this Court in RFA(OS) 24-25/2011 and RFA(OS) 105/2014 and decided by a common judgment on 13.10.2015 in **Satya Developers (supra)**, upholding the decrees passed by the learned Single Judges and dismissing the appeals.

Relevant part of the judgment of the Division Bench is as under:

“12. Learned counsel for Satya contends that the learned Single Judge erroneously relied upon the provisions of Sales of Goods Act, 1930 which have no application to service tax. Section 12B of the Central Excise Act relied upon by the learned Single Judge applies only to refund of duty and does not provide for the liability of the consumer to pay service tax. Section 68 of the Finance Act, 1994 and 1997 provided for collection of service tax which term has been changed by the Finance Act of 1998 and the liability has been fixed on the service provider to pay the service tax. By the lease agreement the parties had contracted that taxes would be borne by the lessor and PLBA cannot now wriggle out of the terms of the contract. Section 67 of the Finance Act provides for valuation of the service tax which would be included in the ‘gross amount’ charged by a service provider which provision has been ignored by the learned Single Judge. The case of Satya is covered by the decision of Supreme Court reported as (2011) 13 SCC 497 Ultra Tech Cement Ltd. (Earlier Ultratech Cemco Ltd.) v. State of Maharashtra Reliance is also placed on the decisions reported as 2012 (26) STR 289 SC Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran, 2011 (22) STR 387 Max New York Life Insurance Co. Ltd. v. Insurance Ombudsman and 2011 (22) STR 5 MP Ravishankar Jaiswal v. Jabalpur Development Authority Referring to the decision reported as AIR 1961 SC 1047 Commissioner of Sales Tax, Uttar Pradesh v. The Modi Sugar Mills Ltd. it is contended that in interpreting the taxing statute, equitable considerations are entirely out of place nor can any taxing statute be interpreted on any presumptions or assumptions.

13. Learned counsel for HDFC Bank contends that Section 68(2) of the Finance Act provides that notwithstanding anything contained in sub-section (1) the Central Government is empowered to notify in the official gazette the service tax on taxable services, as notified, to be paid by such person and in such a manner as may be prescribed. However, there is no notification directing the lessee to make the payment of service tax and hence in the absence of a notification no tax liability can be fastened on HDFC. Referring to the decision reported as JT 2005 (1) SC 449 Maruti Udyog Ltd. v. Ram Lal it is contended that in construing a legal fiction, the purpose for which it is created should be kept in mind and should not be extended beyond the scope thereof or beyond the language by which it is created. Further a deeming provision cannot be pushed too far so as to result in an anomalous or absurd position. Referring to the decision reported as 2012 (191) DLT 183 Raghbir Saran Charitable Trust v. Puma Sports India Pvt. Ltd. it is contended that the service tax liability has to be determined in terms of the contract between the parties.

14. Learned counsel for PLBA on the other hand contends that it is well settled that service tax is a Value Added Tax (VAT) and being a consumption tax it is not a charge on the business but on the consumer and would be thus leviable to whom the services are provided. It is further contended that ordinarily the burden of service tax has to be borne in law by the service recipient. Since service tax is an indirect tax, the service provider can by an agreement assume the burden of such tax and relieve the service recipient/consumer of the same. It is contended that from the terms of the lease agreement and also the agreement for maintenance, the service provider has not assumed the burden of paying the service tax and the liability would be that of the service recipient. The fact that execution of the lease deed dated October 09, 2006 precedes the imposition of tax liability, there was no possibility of any conscious assumption of any liability by PLBA as no such liability existed. The words 'shall continue to pay all or any tax' in the lease agreement indicates that the liability of the lessor was confined only to the existing levies which already stood imposed at the time of execution of lease deed. Reliance is placed on the decision reported in (2007) 7 SCC 527 All India Federation of Tax Practitioners v. Union of India, (2011) 2 SCC 352 Association of Leasing and Financial Service Companies v. Union of India, 182 (2011) DLT 548 (FB), Home Solutions Retails (India) Ltd. Union of India

15. Shri Balbir Singh, Senior Advocate who had been requested to assist this Court in this matter points out that the three essentials of a taxing statute are chargeability, receivability and assessment component. Service tax being an indirect tax, though leviable on the consumer of the services however, there is no mechanism by which the government can recover the same from the consumer. Thus the liability of payment of the service tax has been fixed on the service provider, that is, the lessor to be recoverable from the recipient, that is, the lessee. Referring to Section 64A of Sales of Goods Act, 1930 it is stated that unless it is contracted to the contrary, the consumer of the goods and thus the consumer of the services has to bear the liability of the tax. Referring to the decision of the Supreme Court reported in (1997) 5 SCC 536 Mafat Lal Industries v. Union of India it is contended that in case of indirect tax the Court would presume until a contrary is established that a duty of excise or a custom duty has been passed on to the consumer. It is undoubtedly a rebuttable presumption but the burden of rebutting it lies on the person who claims the refund. It is stated that Section 64A of the Sales of Goods Act is based on rule of equity. Service tax being an indirect tax it is possible that it may be passed on. Further the statutory provision can be of no relevance to determine the rights and liabilities between the parties to the contract and there is nothing in law to prevent the parties from entering into an agreement with the burden of any tax arising out of obligation of a party under the contract to be borne by such party. Mr. Balbir Singh, Senior Advocate points out that pursuant to the 8th report of the Law Commission goods under the Sales of Goods Act, 1930 were provided to include the electricity,

gas and water and amendments were also brought by insertion of Section 64A by replacing Section 10 of the Tariff Act. Section 64A of the Sales of Goods Act is a rule of equity based on the basic principle that indirect taxes can be passed on. It is stated that it is akin to a situation where Limitation Act may not apply however, the principles of Limitation Act would apply and thus the principles of passing on the liability as under the Excise Act, Customs Act and Sales Tax Act would apply to the Service Tax as well. Indirectly provisions relating to goods in Central Excise Tax have been made applicable to the Service Tax.

16. The Supreme Court in the decision reported in All India Federation of Tax Practitioners (Supra) noted that service tax is an indirect tax levied on certain services provided by certain categories of persons including companies, associations, firms, body of individuals etc. Service sector contributes about 64% to the GDP. It noted that in contemporary world, development of service sector has become synonymous with the advancement of the economy and the Economists hold the view that there is no distinction between the consumption of goods and consumption of services as both satisfy the human needs. It was noted that 'Value Added Tax' (in short 'VAT') which is a general tax applies in principle to all commercial activities involving production of goods and provision of services. The Supreme Court held that VAT is a consumption tax as it is borne by the consumer and 'Service Tax' is a VAT which in turn is destination based consumption tax. The Supreme Court noted that just as excise duty is a tax on value addition on goods, Service tax is on value addition by rendition of services. Broadly 'Services' fall into two categories, namely, property based services and performance based services. Property based services cover service providers such as architects, interior designers, real estate agents, construction services, mandapwalas etc. and the later being services provided by stock-brokers, practising chartered accountants, practising cost accountants, security agencies, tour operators, event managers, travel agents etc.

17. In the decision reported as AIR 2012 SC 2829 Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran it was held:

"26. As far as the submission of shifting of tax liability is concerned, as observed in paragraph 9 of Laghu Udyog Bharati (Supra), service tax is an indirect tax, and it is possible that it may be passed on. Therefore, an Assessee can certainly enter into a contract to shift its liability of service tax. Though the Appellant became the Assessee due to amendment of 2000, his position is exactly the same as in respect of Sales Tax, where the seller is the Assessee, and is liable to pay Sales Tax to the tax authorities, but it is open to the seller, under his contract with the buyer, to recover the Sales Tax from the buyer, and to pass on the tax burden to him. Therefore, though there is no difficulty in accepting that after the amendment of 2000 the liability to pay the service tax is on the Appellant as the Assessee, the

liability arose out of the services rendered by the Respondent to the Appellant, and that too prior to this amendment when the liability was on the service provider. The provisions concerning service tax are relevant only as between the Appellant as an Assessee under the statute and the tax authorities. This statutory provision can be of no relevance to determine the rights and liabilities between the Appellant and the Respondent as agreed in the contract between two of them. There was nothing in law to prevent the Appellant from entering into an agreement with the Respondent handling contractor that the burden of any tax arising out of obligations of the Respondent under the contract would be borne by the Respondent."

18. Sections 65(105) states 'Taxable Service' means any service provided or to be provided:

"(zzzz)to any person, by any other person in relation to renting of immovable property for use in the course or furtherance of business or commerce.

Explanation 1.—For the purposes of this sub-clause, "immovable property" includes—

(i) building and part of a building, and the land appurtenant thereto;

(ii) land incidental to the use of such building or part of a building;

(iii) the common or shared areas and facilities relating thereto; and

(iv) in case of a building located in a complex or an industrial estate, all common areas and facilities relating thereto, within such complex or estate, but does not include-

(a) vacant land solely used for agriculture, aquaculture, farming, forestry, animal husbandry, mining purposes;

(b) vacant land, whether or not having facilities clearly incidental to the use of such vacant land;

(c) land used for educational, sports, circus, entertainment and parking purposes; and

(d) building used solely for residential purposes and buildings used for the purposes of accommodation, including hotels, hostels, boarding houses, holiday accommodation, tents, camping facilities.

Explanation 2.—For the purposes of this sub-clause, an immovable property partly for use in the course or furtherance of business or commerce and partly for residential or any other purposes shall be deemed to be immovable property for use in the course or furtherance of business or commerce; ... "

19. Section 83 of the Finance Act, 2007 makes certain provisions of the Central Excise Act, 1944 as in force from time to time applicable

in relation to Service Tax as they apply in relation to a duty of excise:

“83. Application of certain provisions of Act 1 of 1944:

The provisions of the following section of the Central Excise Act, 1944 (1 of 1944), as in force from time to time, shall apply, so far as may be, in relation to service tax as they apply in relation to a duty of excise : -

9C, 9D, 11B, 11BB, 11C, 12 12A, 12B. 12C, 12D, 12E, 14, [14AA], 15, 33A, 35F, 35-FF to 35-O (both inclusive), 35Q, 36, 36A, 36B, 37A, 37B, 37C, 37D, [38A]* and 40.”*

20. Section 12(b) of the Central Excise Act reads as under:

“12B. PRESUMPTION THAT INCIDENCE of DUTY HAS BEEN PASSED ON TO THE BUYER.

Every person who has paid the duty of excise on any goods under this Act shall, unless the contrary is proved by him, be deemed to have passed on the full incidence of such duty to the buyer of such goods.”

21. Thus Section 83 of the Finance Act is a legislation by incorporation applying inter alia Section 12B of the Central Excise Act to the Service Tax. Halsbury's Law of England (4th Edn., Vol.44 (1)), para 127 page 744 deals with incorporation of other enactments by reference as under:

“It is a common device of legislative drafters to incorporate earlier statutory provisions by reference, rather than setting out similar provisions in full. This saves space and also attracts the case law and other learning attached to the earlier provision. Its main advantage is a Parliamentary one, however, since it shortens Bills and cuts down the area for debate.”

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27. Thus as a legislation by reference sub-Section (2) of Section 64A of the Sales of Goods Act making applicable sub-Section (1) of Section 64A to any duty of Customs or Excise on goods and as a legislation by incorporation Section 83 of the Finance Act making applicable Section 12B of the Central Excise Act to Service Act, Section 64A(1) is applicable to Service Tax. From the provisions as noted and the decisions of the larger benches it is evident that a service tax is a VAT which in turn is a destination based consumption tax and is to be borne by the consumer of goods. Further unless contracted to the contrary, the consumer of service is liable to refund the said tax to the service provider who in turn is liable to pay to the government.

28. From the legal position as noted it is evident whether the service tax liability has been agreed not to be passed on to the recipient of the service would depend on the interpretation of clauses entered into between the parties. Before adverting to the relevant clauses inter se the parties in the present case it would be appropriate to note a few decisions on the interpretation of a contract.

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32. *Thus a contract has to be construed by looking at the document as a whole and the meaning of the document has to be what the parties intended to give to the document keeping the background in mind and conclusion that flouts business common sense must yield unless expressly stated. In the present case it will also have to borne in mind whether the parties intend to include taxes which were not contemplated at the time of the agreement as indubitably the agreements between the parties in the three suits were entered into prior to the Finance Act, 2007 coming into force w.e.f. June 01, 2007.*

33. *In the agreement between HDFC Bank and Meattles Clause 4(v) imposes liability of municipal taxes, rates, charges and other outgoings in respect of the demised premises that would be determined/fixed/varied from time to time by the Municipal Corporation/Municipality/Gram Panchayat or any other local authority only. It is well settled that the Municipal Corporation, Municipality, Gram Panchayat or local authority is distinct from the government and thus the clause inter se the parties cannot be said to cover the exemption of HDFC Bank to pay to Meattles service tax paid by it to the government pursuant to the Finance Act, 2007.*

34. *As regards the lease deed and the agreement of maintenance of common services and facilities between Satya and PLBA Clause 5 of the lease deed as noted above provides that the lessor shall continue to pay all or any taxes, levies or charges imposed by the MCD, DDA, L&DO and or Government, Local Authority etc. By use of the words "Lessor shall continue to pay" it is evident that the parties contemplated the existing taxes, levies or charges and not future. Even as per the agreement of maintenance of common service facilities though the same has no application to the service tax however, still the said clause II(1) cannot be said to exclude HDFC Bank from paying future service tax.*

35. *In view of the discussion aforesaid the judgments and the decrees passed by the learned Single Judge in the three suits are upheld. Appeals are dismissed. Parties will bear their own costs."*

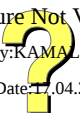
19. It is, therefore, clear from the conspectus of the aforementioned judgments that it is the service recipient/lessee who is to bear the liability of service tax and not the lessor/service provider. In fact, in **Pearey Lal (supra)**, learned Single Judge has categorically observed that the Court is not unmindful of the circumstance that service tax is a species of levy which parties clearly did not envision while entering into their arrangement. Having so observed, the Court held that if the

Signature Not Verified overall objective of the levy was to be taken into consideration, it is

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the service which is taxed and the levy is an indirect one, which necessarily means that the user has to bear it. The rationale, why this logic is to be accepted is that the ultimate consumer has contact with the ‘user’ and it is from them that the levy would ultimately be realized by including the amount of tax in the cost of service or goods. To reiterate, in *M/s. Meattles (supra)*, the learned Single Judge observed that the legislative intent is clear i.e. service tax is to be ultimately borne by the service recipient though the provider is statutorily liable to pay the tax to the exchequer. The Court rejected the contention of the Defendant that service provider can recover the service tax from the recipient only by entering into an agreement in this regard and in the absence of such an agreement, liability cannot be shifted. The Court held that Section 83 of the Finance Act read with Section 12A and 12B of Central Excise and Salt Act, 1944, gives legal right to the service provider to recover the service tax paid by him from the recipient and had the legislative intent been otherwise, there was no occasion to apply these provisions to service tax.

20. Another Division Bench of this Court in *Raghubir Saran (supra)*, held that service tax is neither a ‘property tax’ nor ‘outgoing’ in respect of the premises, but is a tax on the commercial activity carried on. Pertinently, the Division Bench was dealing with Clause 7.1 of the Lease Deed therein, which placed the responsibility of paying property taxes and other outgoings on the lessor and the Court held that Clause 7.1 only deals with taxes which are relatable to the property and not the activity carried out in the premises, which is on what service tax is levied.

21. Perusal of the impugned judgment passed by the Trial Court shows that the Trial Court considered the case of the parties in the backdrop of the judgments of this Court, mentioned above and

decreed the suit. Relevant paras of the impugned judgment are as follows, for ready reference:-

"26. The tax liabilities are however conceived by the parties in clause 7 of the lease deed. Clause 7 of the deed provided that the property tax, municipal tax and all other outgoings in respect of leased premises shall be payable by the lessor. The clause however further provided that in case of any future increment in the taxes, only the difference will be borne by the bank.

27. It is not denied that at the time of entering into the agreement dated 07.05.2007 and 22.12.2009 parties had not perceived imposition of service tax. Service tax was imposed later on with retrospective effect. Hence, there could not have been any clause in the lease deed in respect to the payment of service tax because it was a subsequent levy.

28. Though it has been held by Hon'ble Supreme court in Union of India and Ors. case (supra) that payment of service tax is the liability of the lessor, however, defendant has rightly taken a stand in the written statement that when there is a written contract between the parties it would be necessary to see the intention of parties executing a particular contract, which can be gathered from the terms and conditions agreed upon by the parties.

29. Though the Apex Court had decided the issue of liability of payment of service tax holding that the same was payable by lessor, however the findings in the judgment in the case of Satya Developers Pvt Ltd Vs Pearey Lal Bhawan Association with HDFC Bank Ltd Vs Meattles Pvt Ltd (supra) were not disturbed by the Apex Court observing "A reading of these two judgments would, therefore, show that on the facts, it was held that since payment of service tax was not contemplated by the parties and it was agreed that lessor shall continue to pay taxes, it was evident that the parties contemplated only existing taxes and not taxes which may arise in future. This being the overwhelming circumstance in that case, any observations made on law have to be read in the light of the facts of that case".

30. Now coming back to facts of the case in hand, liability to pay service tax was not contemplated by the parties at the time of entering into lease agreements dated 07.05.2007 and 22.12.2009.

31. Parties entered into an specific clause related to the payment of existing tax liabilities being clause no. 5 of lease deed dated 07.05.2007 and clause no. 7 in lease deed dated 22.12.2009.

32. It is rightly contended by learned defence counsel that the existing property tax, municipal tax and all other outgoings in respect of premises were payable by lessor i.e. the plaintiff in the present case. However, it has to be kept in mind that in case of any future increment, the lessee i.e. the defendant bank had agreed to bear the additional amount of the property tax, municipal tax and all other outgoings, as levied or increased by the concerned authorities.

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34. *In the humble opinion of this court the intention of the parties was that the plaintiff shall bear the existing tax(es), however the defendant shall bear the future increment in taxes. Though there was no clear stipulation as regards the imposition of new tax like service tax imposed subsequently, however if the analogy of clause 7 is extended to the new tax, said new tax is an increase in taxes which the plaintiff has to pay and as per agreement between the parties should be borne by the defendant bank.*

35. *As already observed, the imposition of service tax was not contemplated by the parties at the time of entering into agreements dated 07.05.2007 and 22.12.2009, however any future increment in the taxes was to be borne by the defendant bank. The plaintiff is not shying away from paying the existing tax liability over the property at the time of entering into the agreements but is only claiming a new tax imposed with retrospective effect subsequent to the execution of the lease agreements. In the humble opinion of this court the plaintiff was supposed to pay existing taxes in respect of his premises at the time of leasing the property in favour of defendant. As per clause 7 of lease deed dated 22.12.2009, the intention of the parties was that future increment in the taxes would be borne by the defendant. The defendant is thus liable to pay the new tax imposed by the government in respect of the premises by Finance Act 2007. Defendant is thus liable to bear the service tax imposed upon the premises because same may be covered in "any future increment in the taxes only the difference will be borne by the Bank". The imposition of service tax has only increased the liability of the taxes to be paid by the plaintiff in respect of the demised premises. This court is thus of the humble opinion that parties though did not specifically stipulated because the service tax was not in their contemplation, but had agreed that future increase/levy of taxes would be borne by the defendant."*

22. Having perused the impugned judgment, in light of the judgments of this Court, this Court finds no merit in the contentions raised by the Bank. Clause 5 of Lease Deed dated 07.05.2007 and Clause 7 of Lease Deed 22.12.2009 are the same and Clause 7 is extracted hereunder for ready reference:-

"The Lessee agrees to pay all charges for water and electricity consumption on the presentation of the bill for the said building every month for the period for which the lease shall continue .to be in force. For the sake of convenience, separate electric meter will be provided in the said premises by the lessor. The property tax, Municipal Tax and all other outgoings in respect of the said premises shall be payable by the lessor and in case of any future

increment in the Taxes only the difference will be borne by the Bank.”

23. It is true that when the Lease Deeds were executed by the parties, there was no stipulation with respect to service tax and this was introduced later by the Finance Act, 2007. However, in view of the judgements of this Court holding that the legislative intent is quite clear that the service tax is to be ultimately borne by the recipient of the service, though it is the service provider who is statutorily liable to pay the said tax to the exchequer, the Appellant must fail in its challenge in the present Appeal. Courts have also negated the contention of the service recipient in those cases that the service provider can recover the service tax from the recipient of the service only by entering into an agreement with him in this regard and in the absence of such an agreement, the liability cannot be shifted to the recipient of the service. It was held that Section 83 of the Finance Act read with Sections 12A and 12B of Central Excise and Salt Act, 1944, gives ample legal right to the service provider to recover the amount of service tax paid by him from the recipient of the service and had that not been the legislative intent, there would have been no occasion to apply Sections 12A and 12B of Central Excise and Salt Act, 1944 in relation to service tax. It was further held that even in the absence of Sections 12A and 12B of Central Excise and Salt Act, 1944 in relation to service tax, nothing prevented the service provider from entering into an agreement with the recipient of the service, for reimbursement of the amount of service tax, by the recipient of the service to its provider. In view of the clear observation of the Courts that there vests a legal right in the service provider to recover the amount of service tax from the recipient of the service, even if there is no agreement between them for reimbursement of such tax by the

recipient of the service to its provider, this Court finds no reason warranting interference with the impugned order of the learned trial court.

24. Insofar as the Bank places reliance on the judgment of the Supreme Court in ***Bengal Shrachi (supra)***, suffice would it be to state that the Trial Court has rightly held that though the Supreme Court has held that liability of payment of service tax is on the lessor, however, Court has not disturbed the findings of this Court in ***Satya Developers (supra)***, that while the service provider is liable to pay the service tax to the exchequer, it is entitled to recover the same from the service recipient as also that when the Lease Deeds or contracts were entered into between the parties, service tax was not envisioned and parties contemplated only existing taxes. This being an overwhelming circumstance, cannot come in the way of a lessor recovering the service tax from the lessee. In view thereof, no infirmity can be found with the impugned order to this extent.

25. Coming to the argument of the Plaintiff with respect to the grant of *pendente lite* interest on the entire service tax amount of Rs.27,86,374/-, in my view, the Plaintiff is only partially correct. The suit was filed by the Plaintiff on 06.12.2013 and therefore, he cannot lay a claim to *pendente lite* interest for any period prior thereto. Insofar as interest from 06.12.2013 to 30.05.2015 is concerned, the Court finds merit in the plea of the Plaintiff. Courts have repeatedly held that no person or authority can retain money belonging to another person or party without authority of law and if the Court comes to a conclusion on a given set of facts that a party has been wrongly denied use of its money, it is the duty of the Court to see that the party is appropriately compensated. [Ref.: ***Aditya Mass Communications (P) Ltd. (supra)***]. There is no doubt that the Bank was retaining the

money due to the Plaintiff between 01.06.2007 to 30.05.2015. Bank cannot be blamed for the Plaintiff having approached the Court only in 2013 and, therefore, Plaintiff is held entitled to interest @ 12% per annum from the Bank, for the period 06.12.2013 to 30.05.2015.

26. In view of the aforesaid discussion, analysis and conclusion, the decree passed by the Trial Court is upheld with the aforementioned modification with respect to the *pendente lite* interest component.

27. Appeal being RFA No.59/2021 is dismissed and the appeal being RFA No.196/2021 is partly allowed, with no order as to costs. CM APPL. 3993/2021 in RFA 59/2021 also stands disposed of.

MARCH 28, 2023/pkv/kks

JYOTI SINGH, J