kps

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.2159 OF 2011

1 Indian Hotels and Restaurant Association. Represented by its Treasurer Girish B. Salian, B-2, Wadala Shri Ram Ind. Estate, Ground Floor, G.D. Ambedkar Marg, Near Wadala Telephone Exchange, Wadala, Mumbai-400031.

2 Vishwavihar Bar & Restaurant, 31/A, Opp. Cotton Green Railway Station, J.B. Road, Mumbai 400 033. ..PETITIONERS

-Versus-

1 Union Of India Through Joint Secretary, Ministry of Law and Justice, Aaykar Bhavan, M.K.Road, Churchgate, Mumbai 400 021.

2 Secretary, Ministry of Finance, Govt. of India, North Block, Loak Nayak Bhavan No.1 New Delhi.

3 Joint Secretary, Tax Research Unit, Ministry of Finance, Department of Revenue.

4 Central Board of Excise and Customs, North Block, New Delhi 110 001.

Bombay High Court

::: Downloaded on - 12/04/2014 10:06:01 :::

5 Commissioner of Service Tax
4th Floor, Central Excise Bldg.,
115, M.K.Road, Churchgate,
Mumbai 400 020.

6 The Commissioner of
Sales Tax having his office
Vikrikar Bhavan,
Mazgaon 400 010.

7 The State of Maharashtra.
Through the Government Pleader,
Ground Floor, High Court,
Mumbai-400001. ..RESPONDENTS

....

Mr.V.Sridharan, Senior Advocate i/by Ms.Beena Pillai, for the Petitioners.

Mr.Kevik Setalwad, Additional Solicitor General of India a/w Mr.Pradeep Jetly, Mr.Awais Ahmedji, Ms.Sushma Nagraj, for the Respondent Nos.1 to 5.

Mr.B.B.Sharma, for the Respondent Nos.7 and 8.

....

CORAM : S.C.DHARMADHIKARI
&
GIRISH S. KULKARNI, JJ.

Reserved on : 14th March, 2014
Pronounced on : 08th April, 2014

Judgment (Per S.C.Dharmadhikari, J.):

1 Rule.

2 The Respondents waive service. By consent of parties, Rule is made returnable forthwith.

Bombay High Court

::: Downloaded on - 12/04/2014 10:06:01 :::

3 By this Writ Petition under Article 226 of the Constitution of India, the Petitioners are claiming a writ, order or direction declaring clause (zzzzv) of Section 65(105) of the Finance Act, 2010 as ultra-vires the Constitution of India, null, void and of no legal affect. It is prayed that the said provision be struck down as violative of the mandate of Articles 14, 19(1)(g), 245, 246, 265, 300A and 366(29A)(f) of the Constitution of India. Consequently, the relief restraining the Respondents from giving effect to the said provision directly or indirectly, so also, levying or attempting to levy any service tax under the impugned provision is also claimed.

4 Few facts which are necessary for appreciating the rival contentions are that the Petitioner No.1 before us is an Association registered under the Trade Union Act, 1926 and claims that it has 2000 Hotels in Greater Mumbai and 500 Associate members outside Greater Mumbai and within the State of Maharashtra. They are all holding licences to serve the foreign liquor (FL-III licence). The Petitioner No.2 is one of the Restaurant serving food and drinks. It is a member of the Petitioner No.1 Association. After tracing the history as to how the licences to serve foreign liquor are issued, what the Petitioners contend is that the Respondent No.1 is the Union of India. The Respondent Nos.2 to 6 are the Authorities exercising powers for levying, assessing and recovering, so also, collecting service tax.

5 It is then stated that the service tax was introduced in India by the Finance Act, 1994. The Service Tax was legislated by the Parliament under the residuary entry i.e. Entry 97 of List I of the Seventh Schedule to the Constitution of India. Section 65 of the Finance Act deals

Bombay High Court

::: Downloaded on - 12/04/2014 10:06:01 :::

with taxable services. A number of services were sought to be made exigible to service tax by way of amendments to Section 65 of the Finance Act. While so, the Central Government by the Finance Act, 2011 made an amendment to Chapter V of the Finance Act 1994, relating to service tax, inserting sub clause (zzzzv) to clause 105 of Section 65, thereby, including one more category within the Service tax net. Annexure P-2 to the Writ Petition is a copy of the relevant provision as inserted by the Finance Act, 2011. The relevant provision in Section 65 of the Finance Act in relation to air conditioned restaurants which has license to serve alcoholic beverages as it stood after the Finance Act 2011, reads as follows:-

> "Sub clause – (zzzzv) of clause (105) of Sec. 65:
>
> *In this chapter, unless the context otherwise requires a taxable service means any service provided or to be provided to any person by a restaurant, by whatever name called, having the facility of air-conditioning in any part of the establishment, at any time during the financial year, which has license to serve alcoholic beverages, in relation to serving of food or beverage, including alcoholic beverages or both, in its premises".*

6 It is stated that in exercise of the powers conferred under Section 93(1) of the Finance Act 1994, the Government of India, amended with effect from 1.5.2011 the Notification number 1/2006 Service Tax dated 1.3.2006, exempting the taxable services of the description specified in column 3 of the table in the Notification from so much of the service tax leviable thereon under Section 66 of the Finance Act 1994, as is in excess of the service tax calculated on a value which is equivalent to the percentage specified in column number 5 of the said table, of the gross amount charged by the service provider for providing

Bombay High Court

::: Downloaded on - 12/04/2014 10:06:01 :::

the taxable service. Annexure P-3 to the petition is a copy of the notification number 1/2006 – Service Tax dated 1.3.2006 issued by the Ministry of Finance Government of India and Annexure-P4 is a Notification No. 34/2011 dated 25.04.2011 issued by the Government of India, Ministry of Finance, Department of Revenue. The Government of India vide notification No. 31/2011 dated 25.04.2011 also exempted the "taxable service" as referred to in sub-clause (zzzzw) of clause 105 of Section 65 of the Finance Act, when the declared tariff for providing of such accommodation is less than Rs. 1,000/- per day from the whole of the service tax leviable under Section 66 of the said Act. Annexure P-5 to the petition is a copy of the notification No. 31/2011 dated 25.04.2011 issued by the Government of India, Ministry of Finance, Department of Revenue. According to the Petitioners, the Notifications at Annexures P-3 to P-5 came into force with effect from 01.05.2011.

7 It is stated by the Petitioners that the scope and ambit of the Annexures P2, P4 and P5, the amendments in relation to service tax, was clarified by the Ministry of Finance, Government of India, by the communication bearing D.O.F. No. 334/3/2011-TRU dated 28.2.2011 (annexed at Annexure P-6). It has been stated therein that the levy of service tax is intended to be confined to the value of services contained in the composite contract and shall not cover either the meal portion in the composite contract or mere sale of food by way of pick-up or home delivery, as also goods sold at MRP and that the Finance Minister has announced 70% abatement on this service which inter alia meant to separate such portion of the bill as it relates to deemed sale of meals and beverages. By the said Notification No. 29/2011 dated 25.04.2011, the 1st May 2011 was made the appointed date on which the provisions of

Bombay High Court

::: Downloaded on - 12/04/2014 10:06:01 :::

Finance Act, 2011 came into force. Annexure P-7 to the petition is a copy of the Notification No. 29/2011 dated 25.04.2011 issued by the Ministry of Finance. The circular number No. 139/8/2011-TRU dated 10.5.2011 (Annexure P-8 to the petition) was issued by the Ministry of Finance, Government of India purporting to clarify the scope of the said amendment. The circular referred herein states that the taxable services provided by a restaurant in other parts of the hotel for example swimming pool or an open area attached to the restaurant are also liable to service tax as these areas become extensions of the restaurant, inspite of the fact that the amendment does not say so.

8 It is stated that Chapter V of the Finance Act provides for levy of service tax. It is levied on "taxable services" as defined in Section 65(105) thereof. Section 66 is the charging section and Section 68 provides for payment of service tax. The Central Government inserted a new clause (zzzzv) to Section 65(105) of the Finance Act, 1994, by the Finance Act, 2011. According to the aforesaid clause, the service provided by restaurants having specified facilities such as, air-conditioning and license to serve liquor, is liable to service tax with effect from 01.5.2011.

9 It is urged that the definition of “taxable services” does not require that the service receiver must consume the alcoholic beverages. As long as the restaurant has air-conditioned area and a license to serve alcoholic beverages, any service provided by the restaurant will become taxable service. The term "Goods" has been defined in Section 65(50) as under:-

“Section 65(50) "goods" has the meaning assigned to it in Clause (7) of Section 2 of the Sale of Goods Act, 1930.”

Bombay High Court

::: Downloaded on - 12/04/2014 10:06:01 :::

Section 2(7) of the Sale of Goods Act, 1930 defines "goods" to mean:

> *"Goods means every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale."*

10 It is stated that the Restaurants under the Excise law are supposed to sell and serve liquor within a restricted area (being 40% of the total constructed area) in the Restaurant. The Excise law does not allow the restaurants to serve liquor in any place other than in the area demarcated on the plan which has been specifically carved out for the purposes of serving liquor. The Excise department approves the plan and the license is issued to restaurant, specifying the demarcated area, where the liquor is permitted to be sold.

11 According to the Petitioners, the members of the 1st Petitioner association who are running bar hotels are paying Value Added Tax (VAT) under the Maharashtra Value Added Tax (MVAT) Act at the rate of 12.5% on the gross amount paid for food items sold and also VAT as per the provisions of MVAT Act at the rate of 5% on the amount paid for liquor sold. Value Added Tax on the amount paid on food and beverages sold and the turnover tax on the amount of alcoholic beverages sold are levied and collected by the State as the said transactions are sale exigible to tax under the said Acts which exclusively fall under Entry 54 of the List II of the Seventh Schedule to the Constitution of India.

Bombay High Court

::: Downloaded on - 12/04/2014 10:06:01 :::

12 It is stated that the Constitution (Forty-sixth Amendment) Act, 1982 amended Article 366 of the Constitution of India by inserting Clause (29A) therein. By reason of this amendment the States became entitled to levy a tax on the supply of food and drink.

13 It is stated that in the eye of law, the tax on food served in restaurants could not be levied on the sum total of the price charged to the customer. The, restaurants provide services in addition to food, and these had to be accounted for. Thus, restaurants provided an elegant decor, uniformed waiters, good linen, crockery and cutlery. It could even be that they provided music, recorded or live, a dance floor and a cabaret. The bill that the customer pays in the restaurant, therefore, needs to be split up between what was charged for such service and what was charged for the food.

14 It is then stated that the provisions of Sub-clause (f) of Clause (29A) of Article 366 of the Constitution of India need to be analysed. Sub-clause (f) permits the States to impose a tax on the supply of food and drink. The supply can be by way of a service or as part of a service or it can be in any other manner whatsoever. The supply or service can be for cash or deferred payment or other valuable consideration.

15 According to the Petitioners, the tax, therefore, is on the supply of food or drink and it is not of relevance that the supply is by way of a service or as part of a service. Thus, the price that the customer pays for the supply of food and beverages in a restaurant cannot be split up. The supply of food by the restaurant owner to the customer, though it may be a part of the service that he renders by providing good furniture,

Bombay High Court

::: Downloaded on - 12/04/2014 10:06:01 :::

furnishing and fixtures, linen, crockery and cutlery, music, a dance floor and a floor show, is what is the subject of the levy. The patron of a fancy restaurant who orders a plate of cheese sandwiches whose price is shown to be Rs. 50 on the bill of fare knows very well that the innate cost of the bread, butter, mustard and cheese in the plate is very much less, but he orders it all the same. He pays Rs. 50 for its supply and it is on Rs. 50 that the restaurant owner must be taxed.

16 It is stated that the Petitioners are already paying VAT on 100% of the value in respect of food and/or alcohol served in its premises. It is this value which has been taken by the Respondents as the basis of calculation of service tax. The Respondents allows abatement @70% and on the balance 30% the Service has been charged. The net result is that two taxes are recovered in respect of the same service.

17 It is, therefore, stated that the Courts have always held sale of food and beverages in a restaurant as a subject matter of sales tax within the perview of the state. They have expressly upheld that the amount paid by the customer in a restaurant includes payment for the services rendered and both are indivisible.

18 Mr.Sridharan, learned Senior Counsel appearing for the Petitioners, submits that the scheme of the Constitution of India and as enumerated by Articles, Lists I and II of the Seventh Schedule and Entries therein, all of which have been extensively referred in the Petition, reveals that the Parliament may have by the Constitution (Eighty-eighth Amendment) Act, 2003 inserted Entry-92C in List-I relating to "Taxes on services" from the date to be notified. However, no such notification has

Bombay High Court

::: Downloaded on - 12/04/2014 10:06:01 :::

been issued. It may be that the Parliament is taking aid of Entry-97 of List-I and the Constitutional Articles read therewith so as to levy service tax, but levy of sales tax on Hoteliers for sale of food or beverages to the guests demonstrates that the State's power does not extend to splitting of transactions in two parts, one of service and other of sale of foodstuff with a view to bring the later under the purview of the sales tax. This was the position emerging from the judgment of the Honourable Supreme Court in the case of *the State of Punjab v/s M/s Associated Hotels of India Limited*, reported in **(1972) 1 SCC 472**.

19 Equally, the service of meals served to casual visitors to a Restaurant, was not liable to sales tax, whether, the charges are imposed for the meal as a whole or according to the dishes separately ordered. The position continued even after the Review Petition was filed by the State before the Honourable Supreme Court seeking review of the judgment in the case of M/s Northern India Caterers (India) Limited. That was dismissed and with some observations on which Mr.Sridharan places reliance.

20 Mr.Sridharan submitted that subsequently, the Parliament amended the Constitution of India vide the Constitution (Forty-Sixth Amendment) Act, 1982. The Statement of Objects and Reasons appended to the Bill specifically noted the aforesaid judgments holding that sale of food and beverages at a restaurant is a transaction in service not exigible to sales tax under Entry 54 of the List II. Thereafter, new Clause (29A) was inserted in Article 366 vide the Constitution (Forty-Sixth Amendment) Act, 1982. The Parliament also validated the laws levying tax on the supply of food or drinks by the State. Thus, the Parliament

Bombay High Court

::: Downloaded on - 12/04/2014 10:06:01 :::

consciously amended the Constitution to include a tax on the supply of food or drinks by way of service or as a part of service within the exclusive power of the State Legislatures under Entry 54 of the List II.

21 Relying on a judgment in the case of *K.Damodarasamy Naidu & Bros. and others v/s State of T.N. and another* reported in **(2000) 1 SCC 521**, Mr.Sridharan submits that the Honourable Supreme Court upheld the contention of one Assessee from Maharashtra that in case where the residential hotels provided for lodging and boarding comprising of full board i.e. breakfast, lunch and dinner, the State Government shall make rules which set down the formula for determining the component of the composite charge relatable to supply of food and drink excluding the portion relating to lodging i.e. stay in a hotel.

22 Mr.Sridharan submitted that in view of the settled law in the case of *20th Century Finance Corporation Limited and another v/s State of Maharashtra* reported in **(2000) 6 SCC 12**, a tax on supply by way of service or as a part of service of food or any other article for human consumption or any drink, is within the exclusive power of the State Legislature under Entry 54 of the State List.

23 Mr.Sridharan submitted that the provisions of the Finance Act, 1994 were amended by the Finance Act, 2011. The Circular No.334/3/2011-TRU dated 28.02.2011 was issued by the Central Government at the time of introduction of the Finance Bill, 2011. The Circular sought to explain the scope of restaurant services. The Circular clarified that the restaurants provide a number of services in combination with the meal and beverages for consolidated charge. The services related

Bombay High Court

::: Downloaded on - 12/04/2014 10:06:01 :::

to the use of restaurant space and furniture, air-conditioning, well-dressed waiters, linen, cutlery, crockery, music on a dance floor, etc.. Thus, a new clause (zzzzv) was inserted to Section 65(105) of the Finance Act, 1994 by the Finance Act, 2011. According to the said clause, the service provided by a restaurant having specified facilities such as air-conditioning and licence to serve liquor, was liable to service tax with effect from 01.05.2011. According to Mr.Sridharan, further abatement of 70% deemed to be towards sale of meals and beverages was given vide the Notification No.34/2011-ST dated 25.04.2011 issued by the Central Government i.e. the delegatee. Thus, a service tax was payable on 30% of the gross amount charged by the restaurants to its customers. A tax levied under Section 65(105)(zzzzv) read with Section 66 and Section 67 of the Finance Act, 1994 is a service tax on supply of food and beverages in a restaurant falling under sub-clause (f) of Clause 29A of Article 366 read with Entry 54 of List II.

24 Mr.Sridharan submitted that the Finance Act, 2012 carried out major changes to the Finance Act, 1994 with effect from 01.07.2012. New regime is called negative list of taxation of services. Even after the introduction of negative list with effect from 01.07.2012, Section 66E relating to declared services vide Clause (I) provides that the declared services shall include service portion in an activity wherein goods being food or any other article of human consumption or any drink is supplied in any manner as a part of the activity. Rule 2C was inserted in the Service Tax (Determination of Value) Rules, 2006 with effect from 01.07.2012 which provides that a service tax would be levied on 40% of the gross amount charged by a restaurant to its customers and give abatement for so much of the value which relates to sale of food and drinks. A tax levied

Bombay High Court

::: Downloaded on - 12/04/2014 10:06:01 :::

by Section 65B(44) of the Finance Act, 1994 read with Section 66E(i), 66B and 67 is a tax covered by or falling within Article 366(29A)(f) read with Entry 54 of the State List and beyond powers of the Parliament, levy of service tax under the residuary Entry 97 of the List I is nothing but a tax falling within or covered by Article 366(29A)(f) read with Entry 54 of the State List and thus, unconstitutional. The service tax on supply of food and beverages in a restaurant is in pith and substance a tax falling under sub-clause (f) of clause (29A) of Article 366 read along with Entry 54 of List II. Thus, the State Legislature alone shall have the exclusive jurisdiction to levy the tax in question.

25 Mr.Sridharan then submitted that Rule 2C framed under the Finance Act, 1994 giving abatement in value towards sale of food and beverages cannot be of any assistance while judging the validity of levy of service tax under Entry 97 of the Union List. It is a well settled law that the Rules providing for deduction, etc. are not relevant in judging the validity of the levy under the Finance Act. The nomenclature of levy will not be decisive of the true character and nature of a particular levy. For deciding the true character and nature of a particular levy, with reference to the legislative competence, the Court has to look into the pith and substance of the legislation. Mr.Sridharan submitted that it is a well settled principle of law that the measure of tax should not be confused with the nature of tax. For example, excise duty is levied on the manufacture of goods, whereas the value and time for discharge of tax is as provided under the provisions of the Central Excise Act. The Courts have upheld the validity of the levy of tax not confined to manufacturing cost or profit, but considering the sale price of the manufacturer for the reason that the measure has reasonable nexus with the nature of levy. The

Bombay High Court

::: Downloaded on - 12/04/2014 10:06:01 :::

measure of tax is not determinative of its essential character or of the competency of the legislature to levy the tax. What is to be seen is the pith and substance or the real nature and character of the levy which has to be adjudged, with reference to the charge, viz., the taxable event and the incidence of the levy. The measure of levy can be upheld on two possible grounds, namely, (i) where the measure has reasonable nexus with the nature of levy and (ii) where the nature of levy is wide enough to cover the measure i.e. the measure is concomitant with the nature of levy.

26 In support of the above submissions, Mr.Sridharan has placed reliance on the following decisions:-

(1) *(2001) 3 SCC 654*
Municipal Council, Kota, Rajasthan v/s Delhi Cloth & General Mills Co. Ltd., Delhi and others.

(2) *(1972) 1 SCC 472*
The State of Punjab v/s M/s Associated Hotels of India Ltd.

(3) *(1980) 2 SCC 167*
M/s Northern India Caterers (India) Ltd. v/s Lt. Governor of Delhi.

(4) *(2000) 1 SCC 521*
K.Damodarasamy Naidu & Bros. and others v/s State of T.N. and another.

(5) *(2002) 127 STC 475*
Cosmopolitan Club v/s Tamil Nadu Taxation Special Tribunal.

(6) *(1978) 4 SCC 36*
Northern India Caterers (India) Ltd. v/s Lt. Governor of Delhi.

(7) *(1989) 3 SCC 634*
Federation of Hotel & Restaurant Association of India

Bombay High Court

::: Downloaded on - 12/04/2014 10:06:01 :::

v/s Union of India.

(8) *(1989) 3 SCC 677*
Express Hotels Private Ltd. v/s State of Gujarat

(9) *(1989) 3 SCC 698*
Elel Hotels and Investments Limited v/s Union of India

(10) *(2005) 2 SCC 515*
Godfrey Philips India Ltd. v/s State of Uttar Pradesh.

(11) *2013 TIOL 533-HC-Kerala-ST*
Kerala Classified Hotels and Resorts Association v/s Union of India.

(12) *2010 (20) STR 437 (Del.)*
Indian Railways C. & T. Corporation Ltd. v/s Government of NCT of Delhi.

(13) *(2011) 46 VST 35 (Karn)*
Sky Gourmet Catering Private Limited v/s Assistant Commissioner of Commercial Taxes, Bangalore and others.

(14) *(2011) 46 VST 57 (Karn)*
Commissioner of Service Tax, Bangalore v/s LSG Sky Chef India Pvt.Ltd..

(15) *(2000) 6 SCC 12*
20th Century Finance Corporation Ltd. v/s State of Maharashtra.

(16) *(1993) 1 SCC 364*
M/s Gannon Dunkerley and Co. and others v/s State of Rajasthan and others.

(17) *(1969) 72 ITR 203 (SC)*
Income Tax Officer v/s Mani Ram and others.

27 On the other hand, Mr.Setalwad, learned Additional Solicitor

Bombay High Court

::: Downloaded on - 12/04/2014 10:06:01 :::

General of India, submitted that there is absolutely no merit in the challenge of the Petitioners. The Petitioners have not been able to substantiate, in any manner, their challenge that the Parliament is not competent to legislate on service tax. The argument that the service tax cannot be imposed by the Parliament and therefore, the relevant provision in the Finance Act is beyond competence of the Parliament, deserves to be rejected. It is submitted by Mr.Setalwad that under Entry 8 of List II and Entry 54 of List II, the State Legislature has been given the power to legislate in the matter of manufacture, possession, transport, purchase and sale of intoxicating liquors and sale and purchase of goods, but there is no restriction on the Parliament to legislate in relation to levy a tax on services provided by high-end restaurants that are air-conditioned and have the license to serve liquor. The Parliament has the power to make law relating to service tax by virtue of its residuary powers vested under Articles 246 and 248 read with Entry 97 of List I of the Seventh Schedule to the Constitution of India. Article 366(29A)(f) of the Constitution of India permits the States to tax the supply of food, drink or any article for human consumption, as part of any service or any other manner.

28 By placing heavy reliance upon a judgment of the Honourable Supreme Court in the case of *Tamil Nadu Kalyana Mandapam Association v/s Union of India*, reported in **(2004) 5 SCC 632/ AIR 2004 SC 3757**, Mr.Setalwad submits that the controversy before us is squarely covered by this decision. He submits that the judgment of the Honourable Supreme Court analyzes all the Entries and relevant Articles of the Constitution of India and holds that a tax cannot be struck down on the ground of lack of legislative competence by inquiring, whether, the definition accords with the layman's view of “service”. It is submitted by

Bombay High Court

::: Downloaded on - 12/04/2014 10:06:01 :::

Mr.Setalwad that a levy of service tax on a particular kind of service cannot be struck down on the ground that it does not conform to a common understanding of the word "service" so long as it does not transgress any specific restriction contained in the Constitution of India. Mr.Setalwad submits that this principle applies squarely to the case of the present Petitioners. It is submitted that Article 366(29A) and specially sub-clause (f) thereof cannot be interpreted to mean that there was waiver/ exclusion of the Parliament's right to levy service tax on the transactions/ dealings of the nature referred to in the present Writ Petition. Mr.Setalwad submits that the Honourable Supreme Court has consistently held that merely because the State Legislature is competent to impose a tax on sale, does not take away the competence of the Parliament to impose tax on service component. Mr.Setalwad, therefore, submits that the Writ Petition be dismissed.

29 Mr.Setalwad has relied upon the following decisions in support of his above contentions:-

(1) AIR 2004 SC 3757
Tamil Nadu Kalyana Mandapam Association v/s Union of India.

(2) (2011) 2 SCC 352
Association of Leasing and Financial Service Companies v/s Union of India.

(3) (2007) 7 SCC 527
All India Federation of Tax Practitioners and others v/s Union of India.

(4) (2009) 225 CTR (Mad) 289
Madras Hire Purchase Association v/s Union of India.

Bombay High Court

::: Downloaded on - 12/04/2014 10:06:01 :::

30 We have with the assistance of Mr.Sridharan and Mr.Setalwad, carefully perused the Writ Petition and all its annexures. We have also perused the relevant Constitutional provisions. We have also perused the Statutes in question and all judicial pronouncements brought to our notice.

31 The first Petitioner is an Association of hotel owners and has submitted that it provides facilities of lodging and boarding to their guests or casual visitors. It provides a facility like restaurant. The Petitioners are also permitted to sell and provide foreign liquor. Thus, the Association is of the owners of restaurants and hotels. The grievance is that the Parliament has enacted the Finance Act and in the same, vide Section 65(105)(zzzzv), it has purported to define "taxable service". It is defined to mean **any service to be provided or to be provided to any person, by a restaurant, by whatever name called, having the facility of air-conditioning in any part of the establishment, at any time during the financial year, which has licence to serve alcoholic beverages, in relation to serving of food or beverage, including alcoholic beverages or both, in its premises.** Thus, any service provided by a restaurant and having the above facility, so also, the licence is termed as "taxable service" on which the service tax can be imposed in terms of Chapter V of the Finance Act, 1994. The controversy is that this tax cannot be imposed by the Parliament and this tax is, therefore, beyond its competence. Insofar as the present Petitioners are concerned, the service tax cannot be imposed, levied, assessed and recovered.

32 The foundation for this argument is that Entry-54 in List II

Bombay High Court

::: Downloaded on - 12/04/2014 10:06:01 :::

(State List) of the Seventh Schedule to the Constitution of India empowers the States to impose taxes on the sale or purchase of goods other than newspapers, subject to the provisions of Entry 92A of List I (Union List). The further foundation is that such an Entry has not been inserted in List I (Union List). Therefore and by virtue of clause (29A) of Article 366 of the Constitution of India which is definition of the term "tax on the sale or purchase of goods" and particularly by sub-clause (f) thereof, a tax as imposed in the instant case is a tax on sale or purchase of goods. Once the tax in question is included in the tax on sale or purchase of goods other than newspapers, then, the Parliament is not competent to impose it. If the Entries in the Seventh Schedule are understood thus, then, the Parliament is incompetent to impose the service tax on the establishments of the members of the Petitioner No.1 Association.

33 The whole emphasis is that the tax which is sought to be imposed on services in the present case is nothing but a tax on the sale or purchase of goods. It is not possible to accept this contention and for more than one reason. Article 366(29A)(f) is inserted by the Constitution (Forty-sixth Amendment) Act, 1982 so as to take care of the continuing controversy, namely, that while taxing sale or purchase of goods the State Legislature cannot impose a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration. This controversy arose on account of the judgments of the Honourable Supreme Court in the cases of Northern India Caterers (India) Limited (supra) and Associated Hotels of India Limited (supra).

Bombay High Court

::: Downloaded on - 12/04/2014 10:06:01 :::

34 In the *State of Punjab v/s M/s Associated Hotels of India Limited* reported in **(1972) 1 SCC 472**, the Respondents before the Honourable Supreme Court carried on business as hoteliers and conducted several hotels including the "Cecil Hotel" at Simla. Besides conducting hotels, it also carried on restaurant business. As part of its business as hoteliers, the Respondents received guests in its several hotels to whom, besides furnishing lodging, it also served several other amenities such as public and private rooms, bath with hot and cold running water, linen, meals during stated hours, etc.. The bill tendered to the guest is an all inclusive one, namely, a fixed amount for the stay in the hotel for each day was included and did not contain different items of each of the above amenities. This is not the case in its restaurant business where a customer takes his meal consisting either of items of food of his choice or a fixed menu. The primary function of such restaurant was to serve meals desired by a customer although along with the food, the customer got certain other amenities also such as service, linen, etc.. The bill, therefore, takes into account the food items which are consumed and the services and other related amenities. The Respondent before the Honourable Supreme Court had been registered as a Dealer under the Punjab General Sales Tax Act, XLVI of 1948. The Respondent-Company, therefore, applied for a declaration that it was not liable to pay sales tax in respect of meals served in the said Cecil Hotel to the guests coming there for stay. The argument was that the hotel received guests primarily for the purpose of lodging and that when so received, the Management provided them with a number of amenities incidental to such lodging and with a view render his stay in the hotel comfortable. The Honourable Supreme Court referred to all such amenities in paragraph 3 and

Bombay High Court

::: Downloaded on - 12/04/2014 10:06:01 :::

thereafter, analyzes the challenge of the Respondents before it, the judgment of the High Court impugned before it and the contentions of the State of Punjab. In dealing with them, the Honourable Supreme Court has observed as under:-

> *"6. The High Court, on a consideration of the arguments urged before it and relying mainly upon the decision of this Court in Madras v. Gannon Dunkerley and Co. Ltd. to the effect that where a transaction is one and indivisible it cannot be split up so as to attract the Sales Tax Act to a part of it, allowed the writ petition. It held that a transaction between a hotelier and his resident visitor did not involve a sale of food when the former supplied meals to the latter as one of the amenities during his residence, and that if there was one inclusive bill, it was incapable of being split up in the absence of any rates for the meals agreed to between the parties as part of the transaction between the two. The High Court also held that the transaction was primarily one for lodging, that the board supplied by the management amounted to an amenity considered essential in these days in all properly conducted hotels, and that when so supplied, it could not be said to constitute a sale every time a meal was served to such a resident visitor. This appeal, by special leave, is filed against this view of the High Court.*
>
> *13. What precisely then is the nature of the transaction and the intention of the parties where a hotelier receives a guest in his hotel? Is there in that transaction an intention to sell him food contained in the meals served to him during his stay in the hotel? It stands to reason that during such stay a well equipped hotel would have to furnish a number of amenities to render the customer's stay comfortable. In the supply of such amenities do the hotelier and his customer enter into several contracts every time an amenity is furnished? When a traveller, by plane or by steam-ship, purchases his passage-ticket, the transaction is one for his passage from one place to*

Bombay High Court

::: Downloaded on - 12/04/2014 10:06:01 :::

another. If, in the course of carrying out that transaction, the traveller is supplied with drinks or meals or cigarettes, no one would think that the transaction involves separate sales each time any of those things is supplied. The transaction is essentially one of carrying the passenger to his destination and if in performance of the contract of carriage something is supplied to him, such supply is only incidental to that services, not changing either the pattern or the nature of the contract. Similarly, when clothes are given for washing to a laundery, there is a transaction which essentially involves work or service, and if the laundryman stitches a button to a garment which has fallen off, there is no sale of the button or the thread. A number of such cases involving incidental uses of materials can be cited, none of which can be said to involve a sale as part of the main transaction.

14. The transaction in question is essentially one and indivisible, namely, one of receiving a customer in the hotel to stay. Even if the transaction is to be disintegrated, there is no question of the supply of meals during such stay constituting a separate contract of sale, since no intention on the part of the parties to sell and purchase food stuff supplied during meal times can be realistically spelt out. No doubt, the customer, during his stay, consumes a number of food stuffs. It may be possible to say that the property in those food stuffs passes from the hotelier to the customer at least to the extent of the food stuffs consumed by him. Even if that be so, mere transfer of property, as aforesaid, is not conclusive and does not render the event of such supply and consumption a sale, since there is no intention to sell and purchase. The transaction essentially is one of service by the hotelier in the performance of which meals are served as part of and incidental to that service, such amenities being regarded as essential in all well conducted modern hotels. The bill prepared by the hotelier is one and indivisible, not being capable by approximation of being split up into one for residence and the other for meals. No doubt, such a bill would

Bombay High Court

::: Downloaded on - 12/04/2014 10:06:01 :::

be prepared after consideration of the costs of meals, but that would be so for all the other amenities given to the customer. For example, when the customer uses a fan in the room allotted to him, there is surely no sale of electricity, nor a hire of the fan. Such amenities, including that of meals, are part and parcel of service which is in reality the transaction between the parties.

15. *Even in the case of restaurants and other such places where customers go to be served with food and drink for immediate consumption at the premises, two conflicting views appear to prevail in the American courts. According to one view, an implied warranty of wholesomeness and fitness for human consumption arises in the case of food served by a public eating place. The transaction, in this view, constitutes a sale within the rules giving rise to such a warranty. The nature of the contract in the sale of food by a restaurant to customers implies a reliance, it is said, on the skill and judgment of the restaurant-keeper to furnish food fit for human consumption. The other view is that such an implied warranty does not arise in such transactions. This view is based on the theory that the transaction does not constitute a sale inasmuch as the proprietor of an eating place does not sell but "utters" provisions, and that it is the service that is predominant, the passing of title being merely incidental. The two conflicting views present a choice between liability arising from a contract of implied warranty and for negligence in tort, a choice indicative of a conflict, in the words of Dean Pound, between social interest in the safety of an individual and the individual interest of the supplier of food. The principle accepted in cases where warranty has been spelt out was that even though the transaction is not a sale, the basis for an implied warranty is the justifiable reliance on the judgment or skill of the warrantor and that a sale is not the only transaction in which such a warranty can be implied. The relationship between the dispenser of food and one who consumes it on the premises is one of contractual*

Bombay High Court

::: Downloaded on - 12/04/2014 10:06:01 :::

relationship, a relationship of such a nature that an implied warranty of wholesomeness reflects the reality of the transaction involved and an express obligation understood by the parties in the sense that the customer does, in fact, rely upon such dispenser of food for more than the use of due care. (see Cushing v Rodman). A representative case propounding the opposite view in the case of F. W. Woolworth Co. v. Wilson, citing Nisky v. Childs Co., wherein the principle accepted was that such cases involved no sales but only service and that the dispenser of food, such as a restaurant or a drug store keeper serving food for consumption at the premises did not sell and warrant food but uttered and served it and was liable in negligence, the rule in such cases being caveat emptor.

16. *In England, a hotel under the Hotel Proprietors Act, 1956 is an establishment held out by the proprietor as offering food, drink, and if so required, sleeping accommodation, without special contract, to any traveller presenting himself and who appears able and willing to pay a reasonable sum for the services and facilities provided. This definition, which is also the definition of an inn, still excludes, as formerly, boarding houses, lodging houses and public houses which are merely ale-houses and in none of which there is the obligation to receive and entertain guests. An inn-keeper, that is to say, in the present days a hotel proprietor, in his capacity as an in-keeper is, on the other hand, bound by the common law or the custom of the realm to receive and lodge in his inn all comers who are travellers and to entertain them at reasonable prices without any special or previous contract unless he has some reasonable ground of refusal. The rights and obligations of hotel proprietors are governed by statute which has more or less incorporated the common law. The contract between such a hotel proprietor and a traveller presenting himself to him for lodging is one which is essentially a contract of service and facilities provided at reasonable price.*

Bombay High Court

::: Downloaded on - 12/04/2014 10:06:01 :::

> *17. The transaction between a hotelier and a visitor to his hotel is thus one essentially of service in the performance of which and as part of the amenities incidental to that service, the hotelier serves meals at stated hours. The Revenue, therefore, was not entitled to split up the transaction into two parts, one of service and the other of sale of food stuffs and to split up also the bill charged by the hotelier as consisting of charges for lodging and charges for food stuffs served to him with a view to bring the latter under the Act."*

35 All these observations, conclusions and findings in this judgment are heavily relied upon by the Petitioners before us.

36 In the second judgment in the case of *M/s Northern India Caterers (India) Limited v/s Lt. Governor of Delhi*, reported in **(1980) 2 SCC 167**, the Honourable Supreme Court held that when meals were served to casual visitors in the restaurant operated by the Assessee in its hotel, the service was for satisfaction of a human need and did not constitute a sale of food. The Honourable Supreme Court relied on several facts and circumstances in that case and in the judgment which is reported and cited before us. It has dismissed the Review Petition seeking review of its main judgment, by confirming the view taken earlier.

37 Mr.Sridharan, therefore, submits that the amendment made by the Constitution (Forty-Sixth Amendment) Act, 1982 is to get over the above two judgments of the Honourable Supreme Court. Once the Constitutional provisions and particularly sub-clauses (a) to (f) under Article 366(29A) clarified the position, then, the basis of the Supreme Court's judgments itself was altered or taken away. By introduction of this

Bombay High Court

::: Downloaded on - 12/04/2014 10:06:01 :::

Constitutional amendment, the Parliament clarified that the tax on sale or purchase of goods would include a tax on the supply of goods being food or any other article for human consumption or any drink (whether or not intoxicating), by way of or as part of any service or in any other manner whatsoever. Thus, the element of service in the supply of goods, whether by way of or as part of or in any other manner whatsoever, is included in the tax on sale or purchase of goods, contends Mr.Sridharan by relying on this definition.

38 Mr.Sridharan has taken us through all clauses of Article 366(29A) of the Constitution of India to submit that each of the aspects which go into sale or purchase of goods has thus been included so that the State can impose a tax envisaged by Entry 54 of List II. Therefore, a separate tax on service cannot be imposed, levied, assessed or recovered by the Parliament.

39 We are unable to agree as stated above simply because each of these judgments of the Honourable Supreme Court must be seen in the context of the challenge raised and argued before it. The challenge was to several State Acts and particularly levying, assessing and recovering sales tax on the food and meals served in a restaurant. The argument was that this is a service and not a sale of goods and particularly food items or drink. It is in that context and when the Honourable Supreme Court rendered the decisions so as not to empower the States to impose such a sales tax, that the Parliament clarified that the food or drink may have been served in the restaurant or hotel, but it is nothing but a sale of goods within the meaning of the Sales Tax Act. Therefore, it will not be possible for the hoteliers or restaurants to say and urge that they do not sell goods,

Bombay High Court

::: Downloaded on - 12/04/2014 10:06:01 :::

but only provide services. The Parliament, therefore, inserted an inclusive definition in the Constitution vide Article 366(29A) which reads thus:-

"366 (29A) "tax on the sale or purchase of goods" includes—

> *(a) a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;*
>
> *(b) a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;*
>
> *(c) a tax on the delivery of goods on hire-purchase or any system of payment by instalments;*
>
> *(d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;*
>
> *(e) a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;*
>
> *(f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration,*
>
> *and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made."*

40 This inclusive definition was inserted so as not to leave any

Bombay High Court

::: Downloaded on - 12/04/2014 10:06:01 :::

room for argument that a tax on sale or purchase of goods does not include a tax on the supply of goods which may be food or any other article for human consumption or any drink (whether or not intoxicating), by way of or as part of any service or in any other manner whatsoever. It is for that limited purpose and to put an end to the controversy, which was dealt with by the Honourable Supreme Court and to get over the basis of its judgments or to alter them that the Parliament stepped in. Beyond that we do not see as to how a service tax can be said to be a component of tax on sale or purchase of goods envisaged by Entry 54 of List II (State List). To say that the Parliament was denuded of its competence to legislate and impose a tax on service provided by an air-conditioned restaurant serving food and drink, under its taxing power, is to do violence to the plain language of the Constitutional provisions, Articles and Entries.

41 In elaborating our reasons for the aforesaid conclusions, we may rely on the settled principles of interpretation which have to be applied for construing and interpreting the Entries in the Seventh Schedule to the Constitution of India. In the judgment in **Criminal Writ Petition No.4049/2012** (Pragyasingh Thakur v/s State of Maharashtra) decided on 11th October, 2013, this Court observed as under:-

> *"87. What the argument of Mr.Jethmalani overlooks is that while examining the legislative competence of the Parliament to make a law, what is required to be seen is whether the subject matter falls in the State List in which the Parliament cannot enter. If the law does not fall in the State List, then, the Parliament would have legislative competence to enact a law by virtue of the residuary powers under Article 248 read with Entry 97 of the Union List and it would not be necessary to go into the lis whether it falls in entry of the Union List or in concurrent list. Somewhat similar argument*

Bombay High Court

::: Downloaded on - 12/04/2014 10:06:01 :::

*was being considered by the Constitution Bench of the Honourable Supreme Court in the case of Naga People's Movement of Human Rights v/s Union of India reported in **AIR 1998 SC 431** and the Honourable Supreme Court held as under:-*

"20. While examining the legislative competence of parliament to make a law what is required to be seen is whether the subject matter falls in the State List which Parliament cannot enter. If the law does not fall in the State List, Parliament would have legislative competence to pass the law by virtue of the residuary powers under Article 248 read with Entry 97 of the Union List and it would not be necessary to go into the question whether it falls under any entry in the Union List or the Concurrent List. [See : Union of India v. H.S. Dhillon, 1972(2) SCR 33 at pp. 61 and 67-68 : (AIR 1972 SC 1061 at pp. 1074-75 and 1078); S.P. Mittal v. Union of India, 1983(1) SCR 729 at pp.769-770 : (AIR 1983 SC 1 at pp.18-19) and Kartar Singh v. State of Punjab, 1994 (3) SCC 569 at pp. 629-630]. What is, therefore, required to be examined is whether the subject matter of the Central Act falls in any of the entries in the State List. ...."

88. ....

89. It is by now well settled that various entries in three lists are not powers of legislation, but fields of legislation. The power to legislate is given by Article 246 and other Articles of the Constitution of India. The entries in the Lists are mere legislative heads and are of an enabling character. They are designed to define and delimit the respective areas of legislative competence of the Union and State Legislatures. They neither impose any implied restrictions on the legislative power conferred by the Article nor prescribe any duty to exercise that legislative power in any particular manner. The language of these Entries should be given the widest scope of which their meaning is fairly capable because they set up a machinery of Government and each general word

Bombay High Court

::: Downloaded on - 12/04/2014 10:06:01 :::

should be accordingly held to extend to all ancillary or subsidiary matters which can fairly and reasonably be comprehended in it.

90. ....

*91. It is also well settled that there is no prohibition against the Legislature enacting a single statute in exercise of powers conferred by several entries in the list which is within its competence. [see **AIR 1966 SC 619** (Hari Krishna Bargav v/s Union of India) and **AIR 1972 SC 1061** (Union of India v/s Harbhajan Singh Dhillon)].*

92. Further, in case of apparent overlapping between two entries, the doctrine of Pith & Substance has to be applied to find out the true nature and character of the legislation and the entry within which it would fall. The NIA Act does not create any offence by itself. It only provides for creation of a machinery for investigation and prosecution of certain offences and which are carved out in the laws made by the Parliament. Pertinently the Acts in the schedule to the NIA Act are the Acts of the Parliament. They are referable to different entries in List-I. Therefore, if the doctrine of Pith & Substance is applied, the NIA Act would squarely fall under Entry-2 in List-III of the Concurrent List, namely, Criminal Procedure including all matters included in the Code of Criminal Procedure at the commencement of the Constitution. Further, reliance by Mr.Mariarputham on Entry-93 of List-I is also appropriate in the context of competence of the Parliament to enact the NIA Act. If the offences under the Acts specified in the Schedule to the NIA Act, are under the Acts of the Parliament and when the Parliament was competent to create offence under or by virtue of the provisions of the Scheduled Acts, then, all the more those powers would take within their fold and import the power to create a machinery for investigation and prosecution of these offences. Therefore, apart from the entries relied upon by the learned Additional Solicitor General, we find that in

Bombay High Court

::: Downloaded on - 12/04/2014 10:06:01 :::

addition thereto, Entry-93 also could be taken assistance of.”

42 Once we take care of the argument and hold that the very foundation has no basis in law, then, there is no difficulty in holding that the Parliament is fully competent to impose a tax on service. The tax on sale or purchase of goods and a tax on service are, thus, two distinct concepts. The tax on sale or purchase of goods which is envisaged by Entry 54 of List II (State List) is a tax on the transfer of property in any goods, otherwise than in pursuance of a contract. It is a tax on the transfer of property (whether as goods or in some other form) involved in the execution of a works contract. It is a tax on the delivery of goods on hire-purchase or any system of payment by instalments. It is a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period). It is a tax on the supply of goods by any unincorporated association or body of persons to a member thereof and equally, it is a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating). This is how the Constitution of India envisages a tax on sale or purchase of goods. That such a tax is fully within the competence of the State Legislature. In imposing, levying, assessing or recovering such tax, the State Government does not tax the services. That entry enables the State to impose a tax on sale or purchase of goods and in doing so, the State is enabled to tax the above aspect or matter in the course of sale or purchase of goods. In order to enable the State to levy, assess and recover the sales tax that the Parliament inserted the inclusive definition of a tax on sale or purchase of goods, as above. When the State imposes or levies the sales

Bombay High Court

::: Downloaded on - 12/04/2014 10:06:01 :::

tax on goods, it is not charging or taxing the services, but sale thereof. The service tax does not charge or tax the sale of goods. It charges or taxes the services and which may or may not be provided in sale of goods. It was argued and prior to the Constitution (Forty-Sixth Amendment) Act, 1982 that the State cannot impose the sales tax on the establishments like restaurants or hotels because they do not sell goods. They only provide services and while rendering and providing such services, they may be incidentally selling the goods. However, their predominant activity is rendering services and not selling the goods. It is that argument or stand which is taken care of vide the above Constitutional definition.

43 The above aspect becomes clear if one peruses the judgment in the case of *K.Damodarasamy Naidu & Bros. and others v/s State of T.N. and another*, reported in **(2000) 1 SCC 521**. Pertinently, there also the argument was that the State cannot levy tax on sale of food and drink. The argument was elaborated by relying on the decisions in the cases of Associated Hotels of India Limited and Northern India Caterers Limited (supra). The Honourable Supreme Court referred to the Constitution (Forty-Sixth Amendment) Act, 1982 and particularly the definition noted above and held as under:-

> *"8. Learned Counsel next contended, relying upon the judgments aforementioned, that, in the eye of the law, the tax on food served in restaurants could not be levied on the sum total of the price charged to the customer. In his submission, restaurants provided services in addition to food, and these had to be accounted for. Thus, restaurants provided an elegant decor, uniformed waiters, good linen, crockery and cutlery. It could even be that they provided music, recorded or live, a dance floor and a cabaret. The bill that the customer paid in the restaurant had, therefore, to be spilt up between what was charged for*

Bombay High Court

::: Downloaded on - 12/04/2014 10:06:01 :::

such service and what was charged for the food.

9. *The provisions of Sub-clause (f) of Clause (29A) of Article 366 need to be analysed. Sub-clause (f) permits the States to impose a tax on the supply of food and drink. The supply can be by way of a service or as part of a service or it can be in any other manner whatsoever. The supply or service can be for cash or deferred payment or other valuable consideration. The words of Sub-clause (i) have found place in the Sales Tax Acts of most States and, as we have seen, they have been used in the said Tamil Nadu Act. The tax, therefore, is on the supply of food or drink and it is not of relevance that the supply is by way of a service or as part of a service. In our view, therefore, the price that the customer pays for the supply of food in a restaurant cannot be split up as suggested by learned Counsel. The supply of food by the restaurant owner to the customer, though it may be a part of the service that he renders by providing good furniture, furnishing and fixtures, linen, crockery and cutlery, music, a dance floor and a floor show, is what is the subject of the levy. The patron of a fancy restaurant who orders a plate of cheese sandwiches whose price is shown to be Rs. 50 on the bill of fare knows very well that the innate cost of the bread, butter, mustard and cheese in the plate is very much less, but he orders it all the same. He pays Rs. 50 for its supply and it is on Rs. 50 that the restaurant owner must be taxed.*

10. *..........*

11. *Learned Counsel for the owners of residential hotels in the State of Maharashtra (Writ Petition No. 9901 of 1983) raised much the same contention, but in the context of residential hotels. He pointed out that residential hotel provided only lodging or lodging and boarding. The boarding could comprise full board, i.e., breakfast, lunch and dinner or breakfast and one meal or breakfast alone. In Mr. Salve's submission, the composite charge that the hotel owner levied for lodging and such boarding had to be split up and only the element thereof that related to the supply of meals could be subjected to the tax. The tax could not be*

Bombay High Court

::: Downloaded on - 12/04/2014 10:06:01 :::

levied on the composite charge for boarding and lodging unless the State made Rules which set down formulae for determining that component of the composite charge which was exigible to the tax on food and drink.

12. *It was not disputed by learned Counsel for the State of Maharashtra that the tax on food and drink could be imposed only upon that component of the composite charge for lodging and boarding at a residential hotel as related to the supply of food and drink. But, in his submission, no Rules in this behalf were necessary; the Sales Tax Officers would make assessments depending upon the facts of each individual case.*

13. *There are several hundred residential hotels in the State of Maharashtra. They provide lodging and boarding to several thousands of customers in every assessment year. It is in practical terms impossible for the sales tax authorities to make assessments upon the basis of the facts relevant to each individual customer in each individual hotel. Generalisations are, therefore, inevitable and there is every likelihood that the basis of the generalisation made by one Sales Tax Officer would differ from the basis of the generalisation made by another, leading to unacceptable arbitrariness. Rules that indicate to Sales Tax Officers how to treat composite charges for lodging and boarding would eliminate substantial differences in their approach and, thus, arbitrariness.*

14. *We, therefore, direct that the State of Maharashtra shall henceforth not make assessments of the tax on the supply of food and drink on hotel owners who provide lodging and boarding for a composite sum until it frames Rules that set out formulae for such assessment which take account of the fact that residential hotels may provide lodging and full or part board as set out above. If the Rules are framed by 1st June, 2000 the assessments that are not completed only by reason of this order may be proceeded with. If the Rules are not framed by the said date, these assessments shall lapse. No proceedings for assessments shall be commenced hereafter until the*

Bombay High Court

::: Downloaded on - 12/04/2014 10:06:01 :::

> *Rules have been framed. At the same time, completed assessments as of today shall not be affected by this order, and the assessees would be entitled to adopt proceedings there against, subject to the law."*

44 The Honourable Supreme Court, thus, negatived the challenge and dismissed the Writ Petitions.

45 It is, therefore, clear that a sales tax is on sale of goods. While selling, supply thereof is contemplated and covered by Article 366(29A)(f) of the Constitution of India. It does not mean that the service during the course of or while supplying the goods is taxed, but the tax is and remains on sale of goods. That is why the State Legislatures were held to be empowered to impose, levy, assess and recover a tax on sale of articles of food and drink which have been termed as "goods". Once the observations of the Honourable Supreme Court and the Constitutional definition is understood in this context, then, we do not feel that any assistance can be derived by the Petitioners from the judgment in K.Damodarasamy Naidu (supra). This judgment of the Honourable Supreme Court in no way decides the controversy before us far from holding that the Parliament is incompetent to impose and levy a tax on services provided in an air-conditioned Restaurant.

46 In this context if one refers to amendment to the Finance Act and Chapter-V of the Finance Act, 1994, it would be clear that what is imposed is a service tax. To enable imposition thereof, a "taxable service" has been defined to mean **any service provided or to be provided to any person, by a restaurant, by whatever name called, having the facility of air-conditioning in any part of the establishment, at any**

Bombay High Court

::: Downloaded on - 12/04/2014 10:06:01 :::

time during the financial year, which has licence to serve alcoholic beverages, in relation to serving of food or beverage, including alcoholic beverages or both, in its premises. Therefore, a service must be to any person by the Restaurant and which can be called by any name such as hotel, lunch home, dining or lunch & dinner home having the facility of air-conditioning in any part and that is termed as an establishment. That restaurant and which has licence to serve food or alcoholic beverages or both in its premises, is rendering a taxable service. When it renders such service that service can be taxed in terms of the Finance Act. A service tax, therefore, has to be levied on a restaurant having air-conditioning facility in any part at any time during the financial year.

47 A service tax or tax on a service, which is made taxable by the Finance Act is thus, a completely distinct tax. It should not be and cannot be confused leave alone equated with a tax on sale or purchase of goods. The ordinary and plain meaning of the term "sale" as found in **"Advanced Law Lexicon, by P. Ramanatha Aiyar, 3rd Edition, Reprint 2007"**, is as under:-

> *"A sale, in its broadest sense, may be defined as the transfer of the property in a thing for a price in money, usually the term "sale" is confined to a personal property. A sale may be defined as an agreement whereby one party, called the seller, transfers to the other party, called the buyer pays or agrees to pay. A sale of goods is also termed a "bargain and sale" and an "executed contract of sale".*
>
> *A sale, as defined by Blackstone, is a transmutation of property from one man to another in consideration of some price or recompense in value."*

Bombay High Court

::: Downloaded on - 12/04/2014 10:06:01 :::

48 A "service" has been defined to mean the action of serving, helping or benefiting. This is conceptualized as a public service. It is also understood as something provided, usually for a fee, that may not be classed as manufacturing or production in any form. That is how professional services are identified and known. The other category of service means any benefit or any act resulting in promoting interest or happiness. It may be contractual, professional, public, domestic, legal, statutory, etc.. In this context, a reference can usefully be made to the judgment of the Honourable Supreme Court in the case of *Lucknow Development Authority v/s M.K. Gupta* reported in **AIR 1994 SC 787**. While interpreting Section 2(o) of the Consumer Protection Act, 1986, the Honourable Supreme Court held as under:-

> *"4. .... The answer to all this shall depend on understanding of the word "service". The term has variety of meanings. It may mean any benefit or any act resulting in promoting interest or happiness. It may be contractual, professional, public, domestic, legal, statutory etc.. The concept of service thus is very wide. How it should be understood and what it means depends in the context in which it has been used in an enactment. ...."*

49 By no stretch of imagination, therefore, a service tax can be the same as a tax on sale and purchase of goods. By the nature of the tax, which has been imposed, so also, bearing in mind the wording of the entries in the Seventh Schedule to the Constitution of India, it would be evident that a service tax is not a tax on supply of goods. It is not a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating). By the Finance

Bombay High Court

::: Downloaded on - 12/04/2014 10:06:01 :::

Act, 1994, the Constitutional provisions and entries in the Seventh Schedule, a service tax is understood as a tax on varied services rendered and by several entities in several ways. The taxable service in this case is provided or to be provided to any person by a restaurant, having the facility of air-conditioning in any of its part at any time during the financial year, which has licence to serve alcoholic beverages, in relation to serving of food or beverage, including alcoholic beverages or both, in its premises. An air-conditioned restaurant or a restaurant having the facility of air-conditioning in any of its part at any time during the financial year and licenced to serve alcoholic beverages, if it is serving alcoholic beverages to any person, is identified and named in this case. Any service provided or to be provided by the above restaurant is defined as taxable service. It is a tax on the establishment which is a restaurant having the facility of air-conditioning in any part of the same and any time during the financial year. It is a tax in relation to serving of food or beverage by the said restaurant in its premises. If this definition is carefully perused and analyzed, it is clear that a taxable service in relation to serving of food or beverage including alcoholic beverages or both, is stated to be rendered to any person by a restaurant and by whatever name called. It should be having the facility of air-conditioning in any part of the establishment. Such air-conditioning facility may be functional at any time during the financial year. The services provided ought to be in relation to serving of food or beverages including alcoholic beverages or both. That should be in the premises of the restaurant.

50 We fail to understand as to how this tax can be equated with a tax on sale or purchase of goods. The definition in the Constitution of India and which we have referred to above, does not make a tax on sale

Bombay High Court

::: Downloaded on - 12/04/2014 10:06:01 :::

or purchase of goods a service tax. All the incidental or ancillary acts which have been performed during the course of sale or purchase of goods have been included in the definition (Article 366(29A)(f)). Such incidental or ancillary act being performed during the course of sale or purchase of goods would not mean that a tax on sale or purchase of goods is not on sale of goods. The sale of goods may include supply by way of or as part of any service or in any other manner whatsoever, of goods which may be food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration. Such supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply of such goods is made. Thus, by a deeming fiction, the supply of goods is sale thereof by the person making the supply and purchase of those goods by the person to whom the supply is made. By a deeming fiction, a tax on the supply thus, includes a tax on sale or purchase of goods. That is a component or concomitant of sales tax or tax on sale or purchase of goods. However, what is contemplated by Article 366(29A)(f) is the supply, by way of or as part of any service or in any other manner whatsoever of goods. Thus, the goods which may be food or any other article for human consumption or any drink (whether or not intoxicating), being supplied in the course of their sale, does not mean that the tax imposed on them is a service tax. The tax is on the sale or purchase of goods. That includes the supply of goods. The service during such course is not taxed. The sales tax, therefore, cannot be termed as a service tax. The food or article for consumption of human beings or any drink is sold. Therefore, the State Legislature can levy the sales tax thereon. The Parliament levies the

Bombay High Court

::: Downloaded on - 12/04/2014 10:06:01 :::

service tax when a service is rendered by a restaurant to any person and noted as above.

51 In these circumstances we are of the view that the Parliament cannot be said to have transgressed into leave alone encroached upon the power of the State Legislature to impose a tax on sale or purchase of goods vide Entry 54 of List II. The taxing power of the Parliament and traceable to Article 248 of the Constitution of India r/w Entry 97 of List I of the Seventh Schedule enables it to impose a service tax. To enable it to so impose, the term "taxable service" has been defined. The definition of the term "taxable service" makes the nature of the tax clear and precise. Therefore, we see no substance in the argument of Mr.Sridharan that the Parliament lacks competence to impose a service tax. Equally, we do not see any force in his argument that in imposing such service tax the Parliament has encroached upon the taxing powers of the State Legislature vide Entry 54 of the State List (List II).

52 Mr.Sridharan contends that the Parliament has so encroached because in his submission a service tax can be imposed by the Parliament vide Entry 92C in List I (Union List) inserted by the Constitution (Eighty-eighth Amendment) Act, 2003. However, this Amendment Act has not been brought into force or effect. Once it is not brought into effect, the Parliament lacks competence to impose a service tax, is the submission of Mr.Sridharan. We do not see any force or substance therein simply because the wording of Entry 97 in List I enables the Parliament to impose the tax in question so long as the said tax is not mentioned in either List II (State List) or List III (Concurrent List). Mr.Sridharan concedes that there is no entry in relation to a tax in the concurrent list. The Entry 54 in List II

Bombay High Court

::: Downloaded on - 12/04/2014 10:06:01 :::

(State List) alone is pressed into service. We have already held that same does not envisage a service tax or tax on service rendered by a restaurant to any person and which restaurant is of the nature referred to in Section 65(105)(zzzzv) of the Finance Act. For these reasons, we are of the opinion that the foundation or basis for the challenge fails. The challenge, therefore, cannot be upheld. The Parliament by the Finance Act, 2011 specified or expanded the scope of the taxable services by amending Chapter V of the then prevailing Finance Act, 1994. (*see clause 71 of the Bill to amend the Finance Act published on 28th February, 2011*). Thus, the Entry 92C of List I being not brought into force cannot be of any consequence.

53 Reliance placed by Mr.Sridharan on the judgments which we have noted above is totally misplaced. We have elaborately discussed the judgments rendered prior to insertion of Article 366(29A)(f) and thereafter. The only other judgment and stated to be dealing with this controversy is that of the learned Single Judge of Kerala High Court in the case of *Kerala Classified Hotels and Resorts Association v/s Union of India* reported in **2013-TIOL-533-HC-Kerala-ST**. The learned Single Judge of Kerala High Court beyond referring to three Supreme Court judgments, namely, Associated Hotels of India Ltd. (supra), Northern India Caterers Limited (supra) and K.Damodarasamy Naidu (supra), neither observes or holds that the tax in question is covered by the State List (Entry 54). A categoric finding in that regard is necessary. The analysis of the learned Single Judge and of the Constitutional definition, with respect, cannot be accepted. The attempt by the learned Single Judge to get over the judgments of the Honourable Supreme Court relied upon by the learned Additional Solicitor General, does not commend to us. The learned Single

Bombay High Court

::: Downloaded on - 12/04/2014 10:06:01 :::

Judge has not underscored and noted the distinction, with respect, referred by us in detail. We are, therefore, unable to agree with the view of the learned Single Judge of Kerala High Court.

54 There is much substance in the contentions of the learned Additional Solicitor General. His reliance on the decision of the Honourable Supreme Court in Tamil Nadu Kalyana Mandapam (supra) is well founded. There, the Honourable Supreme Court was considering an identical controversy. The Association of various Kalyana Mandapam and providing facilities during the course of letting out Mandapam to their clients, challenged the Constitutional validity of Sections 66, 67(o) of the Finance Act, 1994 and Rule 2(1)(d)(ix) of the Service Tax Rules, 1994 and other provisions related to Kalyana Mandapams. In dealing with the challenge, so also, the definition of the term "taxable service" in relation to such Kalyana Mandapams, the Honourable Supreme Court held thus:-

> *"40. In the present case, service tax levied on services rendered by Mandap-Keeper as defined in the said Act under Sections 65, 66 and 67 of the Finance Act has been challenged by the appellants on the following two grounds:*
>
> *a) That it amounts to the tax on land and, therefore, by reason of Entry 49 of List 2 of the Seventh Schedule of the Constitution, only the State Government is competent to levy such tax and;*
>
> *b) Insofar as it levies a tax on catering services, it amounts to a tax on sale and purchase of goods and, therefore, is beyond the competence of Parliament, particularly in view of the definition of tax on sale and purchase of goods contained in Article 366 (29A) (f) of the Constitution.*
>
> *41. ......*
>
> *42. ......*
>
> *43. As far as the above point is concerned, it is well settled that for the tax to amount to a tax on sale of goods, it must amount to a sale according to the established*

Bombay High Court

::: Downloaded on - 12/04/2014 10:06:01 :::

concept of a sale in the law of contract or more precisely the Sale of Goods Act, 1930. Legislature cannot enlarge the definition of sale so as to bring within the ambit of taxation transactions, which could not be a sale in law. The following judgments and the principles laid down therein can be very well applied to the case on hand.

1. M/s. J.K. Jute Mills Co. Ltd. vs. The State of U.P. & Anr. [1962] 2 SCR 1;

2. M/s Gannon Dunkerley & Co. and Ors. vs. State of Rajasthan & Ors. (1993) 1 SCC 364;

3. The State of Madras vs. Ganon Dunkerley & Co. (Madras) Ltd. [1959] SCR 379;

4. The Sales Tax Officer, Pilibhit vs. M/s. Budh Prakash Jai Prakash, [1955] 1 SCR 243;

5. M/s George Oakes (P) Ltd. vs. State of Madras, [1962] 2 SCR 570.

44. In regard to the submission made on Article 366(29A)(f), we are of the view that it does not provide to the contrary. It only permits the State to impose a tax on the supply of food and drink by whatever mode it may be made. It does not conceptually or otherwise includes the supply to services within the definition of sale and purchase of goods. This is particularly apparent from the following phrase contained in the said sub-article "such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods." In other words, the operative words of the said sub-article is supply of goods and it is only supply of food and drinks and other articles for human consumption that is deemed to be a sale or purchase of goods.

45. The concept of catering admittedly includes the concept of rendering service. The fact that tax on the sale of the goods involved in the said service can be levied does not mean that a service tax cannot be levied on the service aspect of catering. Mr. Mohan Parasaran, learned senior counsel for the appellant submitted that the High Court before applying the aspect theory laid down by this Court in the case of

Bombay High Court

Federation of Hotel and Restaurant vs. Union of India & Ors. (supra) ought to have appreciated that in that matter Article 366 (29A)(f) of the Constitution was not considered which is of vital importance to the present matter and that the High Court ought to have differentiated the two matters. In reply, our attention was invited to paras 31 and 32 of the judgment of the High Court in which service aspect was distinguished from the supply aspect. In our view, reliance placed by the High Court on Federation of Hotel and Restaurant (supra) and, in particular, on the aspect theory is, therefore, apposite and should be upheld by this Court. In view of this, the contention of the appellant on this aspect is not well founded.

46. It is well settled that the measure of taxation cannot affect the nature of taxation and, therefore, the fact that service tax is levied as a percentage of the gross charges for catering cannot alter or affect the legislative competence of Parliament in the matter.

51. Taxable services, therefore, could include the mere providing of premises on a temporary basis for organizing any official, social or business functions, but would also include other facilities supplied in relation thereto. No distinction from restaurants, hotels etc which provide limited access to property for specific purpose.

52. It may be noted that in recent times the service sector has grown phenomenally all over the world and, therefore, it was recommended by Dr. Raja Chelliah Committee in the early 90s that it should be taxed. Pursuant thereto, service tax was first levied in 1994 by way of the Finance Act. The power to levy such tax can be traced to Sl.No. 97 of List I of Seventh Schedule and this Court in Laghu Udyog Bharati vs. Union of India (supra) found no lack of legislative competence as far as the levy of service tax was concerned.

53. It is also emphasized that a tax cannot be struck

Bombay High Court

::: Downloaded on - 12/04/2014 10:06:01 :::

down on the ground of lack of legislative competence by enquiring whether the definition accords what the layman's view of service. It is well settled that in matters of taxation laws, the court permits greater latitude to pick and chose objects and rates for taxation and has a wide discretion with regard there to. We may in this context refer to the decision of Mafatlal Industries Ltd. and Others vs. Union of India and Others (1997) 5 SCC 536 para 343 at page 740.

".....In the matter of taxation laws, the court permits a great latitude to the discretion of the legislature. The State is allowed to pick and choose districts, objects, persons, methods and even rates for taxation, if it does so reasonably. The courts view the laws relating to economic activities with greater latitude than other matters."

54. Therefore, a levy of service tax on a particular kind of service could not be struck down on the ground that it does not conform to a common understanding of the word "service" so long as it does not transgress any specific restriction contained in the Constitution."

55 There is no substance in the contentions of Shri Sridharan that Kalyana Mandapams cannot be equated with restaurants. We are bound by the above conclusions because of the distinction and differentiation made in paragraph 45 by the Honourable Supreme Court. In our view, the problem or controversy can be approached from a slightly different angle bearing in mind this binding judgment of the Honourable Supreme Court. The Honourable Supreme Court, with respect, held that the concept of catering admittedly includes a concept of rendering service. The fact that the tax on sale of goods involved in the said service can be levied, does not mean that the service tax cannot be levied on the service aspect of catering. With respect, this means that when a restaurant renders to any person a service, the tax on sale of goods involved in the

Bombay High Court

::: Downloaded on - 12/04/2014 10:06:01 :::

said service can be levied. That does not mean that a service tax cannot be levied on the act of serving food at a restaurant. That is the tax in this case imposed by the Parliament. There could be a sale during the course of rendering of service at a restaurant and therefore, a sales tax could be imposed by the State Legislature. So long as there is no prohibition against imposition of service tax on the services rendered, then it must be held that the Parliament is competent to impose a service tax in question. Mr.Sridharan has not pointed out any provision which would enact a prohibition against the imposition of service tax by the Parliament. It is not his argument that the levy in question is hit by Double taxation. If only the lack of competence in the Parliament is the argument, then, that can be dealt with and disposed of by holding that the Honourable Supreme Court does not rule out, but rather permits imposition of a tax on service even if during rendering of the same, the sale of goods takes place.

56 For the reasons aforestated, we are of the view that there is no merit in the Writ Petition.

57 Before parting, in all fairness, we must also refer to the decisions cited by the learned Additional Solicitor General. He has referred to the case of *Association of Leasing and Financial Service Companies v/s Union of India* reported in **(2011) 2 SCC 352.** That judgment elaborately discussed the imposition of tax on hire-purchase/ leasing of goods. Equally, same also discussed the imposition of service tax on the services rendered by the Banks and Financial Institutions during the course of such leasing. In doing so, the Honourable Supreme Court, with approval, refers to the judgment in the case of Tamil Nadu Kalyana

Bombay High Court

::: Downloaded on - 12/04/2014 10:06:01 :::

Mandapam (supra). The Honourable Supreme Court held thus:-

> *"67. Lastly, we may state that this Court has on three different occasions upheld the levy of service tax with reference to Entry 97 of List I in the face of challenges to the competence of Parliament based on the entires in List II and on all the three occasions, this Court has held that the levy of service tax falls within Entry 97 of List I. The decisions are in T.N.Kalyana Mandapam Assn., Gujarat Ambuja Cements Ltd. and All India Federation of Tax Practitioners."*

58 The same reasoning is applied in the case of *All India Federation of Tax Practitioners and others v/s Union of India* reported in **(2007) 7 SCC 527**. However, we do not make any reference to the same as Mr.Sridharan submits that the attention of the Honourable Supreme Court was not invited to the fact that the Constitution (Eighty-eighth Amendment) Act, 2003 has not been brought into effect.

59 The Writ Petition is, accordingly, dismissed. Rule is discharged. No costs.

(Girish S. Kulkarni, J) **(S.C. Dharmadhikari, J)**

Bombay High Court

::: Downloaded on - 12/04/2014 10:06:01 :::