IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: May 28, 2012
Decision on: July 4, 2012

OMP 955 of 2011 and IA No.20953 of 2011

RAGHUBIR SARAN CHARITABLE TRUST ..... Petitioner
Through: Mr. Simran Mehta, Advocate

Versus

PUMA SPORTS INDIA PVT. LTD. ..... Respondent
Through: Mr. Chinmoy Pradip Sharma and
Mr. Sayan Ray, Advocates

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT
04.07.2012

1. The challenge by Raghubir Saran Charitable Trust in this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') is to an Award dated 14th December 2011 passed by the learned Arbitrator in the dispute between the Petitioner and the Respondent, Puma Sports India Pvt. Ltd., in relation to the service tax liability arising out of the renting of premises belonging to the Petitioner by the Respondent. By the impugned Award, the learned Arbitrator has interpreted Clause 7.1 of the lease deed to mean that the service tax liability in respect of the renting of the premises would be that of the Petitioner.

Background Facts

2. The Petitioner Trust owns the premises at E-10, Block E, Inner Circle, Connaught Place, New Delhi ('the premises'). The Petitioner leased out the said premises to the Respondent by a lease deed dated 25th April 2007. The lease was for an initial period of 60 months which was renewable at the sole option of the Respondent for a further period of 48 months on the same

terms and conditions. For the initial period of 36 months the rent was fixed at Rs.19 lakhs per month. For the remaining 24 months, the rent was agreed to be enhanced at 20% to Rs.22,80,000. In the event of renewal, the rent payable for the initial period of 12 months out of the 48 months was to remain at Rs.22,80,000.

3. The lease stood terminated by consent of both the parties on 30th September 2011 and the premises was handed over to the Petitioner. The last rent paid to the Petitioner was Rs.22,80,000 per month. By virtue of the Finance Act, 2007 an amendment was introduced in the Finance Act, 1994 ('Finance Act') by incorporating in Section 65 (105) a sub-clause (zzzz). By virtue of the said amendment the renting of immovable property for commercial purposes was defined to be a 'taxable service' and attracted service tax. Consequent upon the said amendment, the Petitioner in its rent bill for June 2007 sent to the Respondent included service tax at 12.36% and cess thereon. The Petitioner continued to include service tax and cess in every rent bill thereafter till April 2009. However, the Respondent refused to pay the service tax component on the ground that under Clause 7.1 of the lease deed, the service tax liability was that of the Petitioner. The Petitioner issued a demand notice 27th December 2007 calling upon the Respondent to pay Rs. 12,00,031 being the service tax liability for the period 1st June till 31st December 2007. When the Respondent refused to pay, the Petitioner paid the said sum to avoid prosecution and penalty.

4. The Petitioner sent a notice dated 12th January 2008 to the Respondent invoking the arbitration clause under Clause 16.2 of the lease deed. When the Respondent did not concur on the appointment of an arbitrator, the Petitioner filed Arbitration Application No.92 of 2008 under Section 11 of the Act. By an order dated 21st November 2008, the Court appointed the sole Arbitrator. Before the learned Arbitrator, the Petitioner filed a claim

on 27th October 2009 for a sum of Rs.37,42,954 being the service tax payable for the period from 1st June 2007 to 31st March 2009 along with interest at 18% per annum.

5. From April 2009 onwards the Petitioner stopped including the service tax component and cess in the rent bills issued to the Respondent as by a judgment dated 18th April 2009 in ***Home Solutions Retail India Ltd. v. Union of India 158 (2009) DLT 722 (DB)*** (hereafter ***Home Solutions-1***) a Division Bench of this Court struck down as unconstitutional the aforementioned amendment to the Finance Act 1994. The challenge to the said judgment in the Supreme Court is stated to be pending. Later by the Finance Act 2010, the service tax liability for renting of premises for commercial purpose was reintroduced with retrospective effect from 1st June 2007. This was again challenged but the challenge was negatived by a Full Bench of this Court by a judgment dated 23rd September 2011 in ***Home Solutions Retails (India) Ltd. v. Union of India 182 (2011) DLT 548 (FB)*** (hereafter ***Home Solutions-2***). The Full Bench overruled the judgment of the Division Bench in ***Home Solutions-1***. The appeals against the said judgment of the Full Bench are also stated to be pending in the Supreme Court

6. It may also be noted that the question of the liability to pay service tax for the subsequent period from 1st April 2009 to 30th September 2011 has been referred to a separate arbitration.

7. By the impugned Award dated 14th December 2011 the learned Arbitrator interpreted Clause 7.1 of the lease deed as requiring the Petitioner to bear the liability of all property taxes and other outgoing to including the service tax liability. The learned Arbitrator distinguished the decision of the learned Single Judge of this Court in ***Pearey Lal Bhawan***

Association v. Satya Developers Pvt. Ltd. 173 (2010) DLT 685 on the ground that Clause 7.1 of the lease deed in the present case was differently worded from the relevant clauses of the lease deed in that case. The Petitioner's claim against the Respondent for reimbursement of the service tax paid by it for the period 1st June till 31st December 2007 was accordingly dismissed.

Submissions of counsel

8. Mr. Simran Mehta, learned counsel for the Petitioner, referring to Clause 7.1 of the lease deed, submitted that the intention of the parties was that the liability to pay any property taxes, cesses and levies and other such outgoings with respect to the premises were to be borne by the Petitioner. However, service tax was not a levy that was in the contemplation of the parties at the time the lease deed was executed. Service tax was an indirect tax and the ultimate burden of service tax would fall on the beneficiary of the service. This flowed from a reading of Section 83 of the Finance Act with Section 12-A of the Central Excise Act 1944. Reliance was placed on the decision of the learned Single Judge in ***Pearey Lal Bhawan Association v. Satya Developers Pvt. Ltd.*** where while interpreting a clause in the lease deed similar to Clause 7.1 in the present case, the Court held that the burden of the service tax liability would be on the beneficiary and not the service provider. As in the case of other indirect taxes, the service provider no doubt was the assessee in terms of Section 68 of the Finance Act, but was in effect only collecting the service tax from the beneficiary and passing it on to the authority. In other words, the Petitioner was only an agency for identification, assessment and collection of the levy on behalf of the Government. Reliance is placed on the decisions in ***All-India Federation of Tax Practitioners v. Union of India (2007) 7 SCC 527, Coca Cola India (P) Ltd. v. Commissioner of Central Excise 2009(15) STR 657, All India Taxpayers Welfare Association v. Union of India***

2006(4) STR 14 (Madras Division Bench), Andaman Chamber of Commerce and Industry v. Union of India 2006(2) CHN 290 (Calcutta Division Bench), Indian National Shipowners Association v. UOI, (2009) 244 CTR (Bom) 197 and ***T.N. Kalyana Mandapam Assn. v. UOI (2004) 5 SCC 632***. It is submitted that the learned Arbitrator proceeded to pass the impugned Award on the assumption that the judgment of this Court in ***Home Solutions -1*** was still good law when, in fact the said judgment was overruled by the Full Bench in ***Home Solutions-2***.

9. It is submitted by Mr. Mehta that Clause 7.1 of the lease deed only covers those levies which would otherwise be payable by the Petitioner even if the premises were not let out such as property tax or other outgoings in respect of the premises on a stand-alone basis. In other words, Clause 7.1 covers only those taxes and levies which are payable 'on the premises' and not on a 'service' in respect of the premises. It is submitted that the words 'other outgoings' had to be read *ejusdem generis* with the words 'property tax' and not other kinds of indirect taxes like service tax which was not even in the contemplation of the parties at the time of the execution of the lease deed.

10. Mr. Mehta points out that since the Award was not pronounced by the learned Arbitrator for more than a year after final arguments were heard on 7th July 2010, the Petitioner had filed in this Court OMP No.919 of 2011 under Section 14(1)(a) read with Section 15(2) of the Act for terminating the mandate of the learned Arbitrator. The impugned Award was passed on 14th December 2011, two days after the above petition was listed for hearing on 12th December 2011. Notice was issued on 13th December 2011 returnable on 4th January 2012. It is submitted that it is not a mere coincidence that an Award which was pending for over a year came to be pronounced within two days of the first listing of the above petition. It is,

accordingly, submitted that the learned Arbitrator did not act fairly or in an unbiased manner.

11. Mr. Chinmoy Pradip Sharma, learned counsel for the Respondent, first submitted that the judgment in ***Pearey Lal Bhawan Association v. Satya Developers Pvt. Ltd.*** was the subject matter of an appeal before a Division Bench of this Court in RFA (OS) No.24 and 25 of 2011 in which an order was passed on 11th August 2011 staying the execution of the decree. Therefore, the said decision could not be treated to be a precedent. It is submitted that the above fact was suppressed by the Petitioner in the present proceedings. Secondly, it is submitted that Section 68 of the Finance Act stipulates that it is the service provider who has to pay service tax since it was in the form of a 'consumption based tax'. Even where service tax is construed to be an indirect tax, the passing on of the burden thereof to the service recipient is not a statutory mandated mode of collection of tax. It could be resorted to only if the service recipient agreed to take on the burden of the service tax which was otherwise that of the service provider. Reliance is placed on the decision in ***Rashtriya Ispat Nigam Limited v. M/s. Dewan Chand Ram Saran 2012 (4) SCALE 588*** which lays down that the passing on of the service tax liability would be governed by the contract between the service provider and service recipient. Relying on the decision in ***Kerala State Electricity Board v. Commissioner of Central Excise, Thiruvananthapuram (2008) 1 SCC 780*** it is submitted that it is the express term of the contract which would determine whether a service provider or the service recipient is liable to bear the burden of service tax.

12. It is submitted by Mr. Sharma that the interpretation placed on Clause 7.1 of the lease deed by the learned Arbitrator does not call for interference as it was consistent with the law. It is submitted that the word 'other

outgoings' in Clause 7.1 of the lease deed would include all taxes, levies and cesses levied from time to time. The said words were of wide import. It is submitted that the principle of *ejusdem generis* cannot have application where there is a mention of a single species such as property tax. Reliance is placed in the decision in ***United Towns Electric Co. Ltd. v. Attorney-General for Newfoundland (1939) 1 All ER 423*** which was referred to by the Supreme Court in ***Rajasthan State Electricity Board, Jaipur v. Mohan Lal AIR 1967 SC 1857***. The words in the lease deed had to be interpreted to give effect to the intention of the parties. Reliance was placed on the decisions in ***Brett v. Rogers (1897) 1 QBD 525, Farlow v. Stevenson (1900) 1 Ch. 128*** and ***Greaves v. Whitmarsh, Watson & Co. Limited (1906) KBD 340***. Lastly, reliance is placed on Section 64A of the Sale of Goods Act ('SGA') whereby a liability to pay any future tax that was not in existence at the time of making the contract would be inferred as per the terms of the contract governing the parties. Reliance is also placed on the decision in ***Numaligarh Refinery Ltd. v. Daelim Industrial Co. Ltd. (2007) 8 SCC 466*** which held that where a new levy is introduced which was not in existence at the time of entering into the agreement, the party which has agreed to bear the tax has to pay the new levy. The interpretation of the clauses of the agreement was within the domain of the Arbitrator. Relying on the decision in ***H.P. State Electricity Board v. R.J. Shah and Company (1999) 4 SCC 214*** it is submitted that the construction of the terms of the contract does not amount to an error of jurisdiction and, therefore, no interference under Section 34 of the Act is called for.

13. Mr. Sharma points out that the final arguments in the arbitration proceedings were concluded on 22nd February 2011 and not 7th July 2010 as contended by the counsel for the Petitioner. He denies that the learned Arbitrator acted in a biased manner as alleged and submits that the said submission of the Petitioner is wholly without basis.

Delay and Bias

14. First the Court would like to deal with the submission concerning the delay in pronouncing the Award and the allegations of bias. As far as bias is concerned, no factual or legal foundation has been laid by the Petitioner in support thereof. The Court is therefore not inclined to entertain the said plea. As regards delay, even if one goes by the submission of the learned counsel for the Respondent that arguments were concluded in February 2011, the delay in pronouncing the Award nearly ten months thereafter does give cause for concern. It is essential that awards are pronounced without unnecessary delay to allay apprehensions of the fairness of the process. However, when faced with a challenge to the validity of an Award the pronouncement of which is shown to have been extraordinarily delayed, the Court has to examine if the Award deals comprehensively with the issues involved. In other words, the mere fact that the Award was delayed will not by itself constitute sufficient ground for setting aside the Award if it is otherwise a reasoned one. As far as the present case is concerned, the Court finds that the impugned Award does deal with the issues involved in a detailed and reasoned manner. Consequently, the Court is not inclined to hold that the Award is vitiated on account of the delay in its pronouncement.

Service Tax liability

15. The central issue that arises for consideration is whether the impugned Award insofar as it holds the Petitioner and not the Respondent liable to pay service tax in respect of the renting of the premises in question suffers from any patent illegality or is opposed to the public policy of India as contemplated under Section 34 of the Act.

16. At the outset it must be observed that the question of constitutional

validity of the amendment to the Finance Act by which the leasing of premises for commercial purposes was brought within the ambit of 'taxable service' has only a limited bearing as far as the present case is concerned. The decision of the Full Bench upholding the validity of sub-clause (zzzz) of Section 65 (105) of the Finance Act in ***Home Solutions-2*** is pending consideration in the Supreme Court. If the provision is upheld, the question would still arise whether in terms of Clause 7.1 of the lease deed in the present case the liability to pay the service tax is that of the Petitioner or the Respondent. However, in the event that the amendment is struck down by the Supreme Court, the question of the Respondent paying any service tax on the lease rentals would not arise since the invalidity of the provision would attach from the inception of its enactment. In that event, the only question would be whether the Petitioner can seek refund of the service tax it has already paid. Such a question is at this stage hypothetical and in any event not within the scope of the present proceedings.

17. Given the above position, the parties could have awaited the decision of the Supreme Court on the issue of constitutional validity before proceeding with the arbitration. However, it appears that the Petitioner has itself not challenged the validity of the imposition of service tax and is eager for the reimbursement of the service tax it has paid. It therefore pressed for a decision in the arbitration proceedings. In the event, nothing turns on the learned Arbitrator not noticing that the decision in ***Home Solutions-1*** has been overruled in ***Home Solutions-2***. With the question still at large in the Supreme Court, the learned Arbitrator had to necessarily interpret Clause 7.1 of the lease deed in the present case to determine the central question that arose before him. This is in fact what he has done. Consequently, the Court will confine itself to the said question as far as the present petition is concerned.

18. Clause 7.1 of the lease deed reads as under:

> "Clause 7.1 – It is agreed by and between the Parties that the Lessor shall be liable to pay property taxes and other outgoings in respect of the Premises, whatsoever payable and as levied from time to time promptly and timely, including any revisions thereto, directly to the authorities concerned and no claim for contribution towards such taxes, cesses, levies or increases shall be made by the Lessor or be entertained by the Lessee."

19. The last four lines of the above Clause state that "no claim for contribution towards such taxes, cesses, levies or increases" will be made by the lessor (the Petitioner) or be entertained by the lessee (the Respondent). The word "such" refers to "property taxes and other outgoings in respect of the premises whatsoever payable and as levied from time to time" including "any revisions thereto." The word "outgoings" suggests a wide range of levies not confined to tax on the property. The expression 'from time to time' accounts for new levies. The expression 'increases' denotes the possibility of a future levy resulting in enhancement of the tax burden beyond what was prevalent at the time of execution of the lease. There is no scope for reading the expression "other outgoings" *ejusdem generis* with the words "property tax". The words "taxes, cesses, levies or increases" denote the range of possible levies and signifies the wide nature of the expression "other outgoings" following the words "property taxes". The expression 'other outgoings' would include taxes 'in respect of the premises' and not limited to a tax 'on the premises' as suggested by learned counsel for the Petitioner. Service tax could well be an "outgoing" 'in respect of the premises' although it pertains to the use of the premises and is not a tax 'on the premises'. In ***Brett v. Rogers*** it was held that the words "duties imposed in respect of the premises" are wide enough to include the expenses incurred by the landlord for replacing a new drain under the Public Health (London) Act, 1891 which was enacted after

the commencement of the lease.

20. Turning to the decision in ***Pearey Lal Bhawan Association v. Satya Developers Pvt. Ltd.*** it is seen Clause 5 and Clause II (1) of the lease deed in that case were not identical to Clause 7.1 in the present case. The said clauses read as under:

> "5. 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".
>
> II (1) That the Lessor to pay all rates, taxes, ground rent, house-tax charges, firefighting tax, easements and outgoing charges imposed or payable to the MCD, L&DO, DDA or Government in respect of the demised premises payable by the Lessor and discharge all its obligations well in time".

21. The expression "outgoing charges" in Clause II (1) cannot be said to have same connotation as the expression "other outgoings" in Clause 7.1. The word "other" preceding "outgoings" indicates a wider nature of the possible levies. Secondly, the learned Single Judge did not in the said judgment actually examine whether the expression "outgoing charges" could include service tax. The Court went by the objective of the levy which made service tax an indirect tax and which necessarily meant that the consumer of the services had to bear the burden. Even while referring to Section 64A SGA the Court did not dwell on the opening words of the said provision: "unless a different intention appears to the terms of the contract". In the circumstances it is not possible to accept the contention of the learned counsel for the Petitioner that the decision in ***Pearey Lal Bhawan Association v. Satya Developers Pvt. Ltd.*** covers the case on hand in its favour. The learned Arbitrator committed no error in distinguishing the said decision.

22. There is merit in the contention that as far as the present case is concerned, Clause 7.1 of the lease deed is wide enough to include the service tax "in respect of" the premises. Merely because levy was not statutorily operative at the time of entering into the lease deed did not mean that the said liability did not attach to the Petitioner. The fact that Section 83 of the Finance Act read with Section 12-A of the Central Excise Act 1944 indicates that service tax is an indirect tax which will be presumed to have been passed on to the service recipient does not decide the issue of who should in fact bear the burden. Those provisions are relevant for the assessee being the service provider and being the person, under Section 68 of the Finance Act, who has to in fact remit the tax to the government. It will be no defence for him to avoid that liability by pleading that he did not pass on the burden to the service recipient.

23. In a given case, a service provider may well decide to undertake the burden of service tax itself without passing it on to the service recipient. What the intention of the parties in that regard is can be determined only by examining the relevant clause in the agreement they execute. Even Section 64A of the SGA is useful in understanding the importance of the contract governing the parties. It opens with the words "unless a different intention appears to the terms of the contract". Therefore it is the contract, and not the nature of the levy, which will determine which party, the service provider or recipient, is liable to bear the burden of service tax.

24.1 In ***Numaligarh Refinery Ltd. v. Daelim Industrial Co. Ltd.*** the question that arose was the liability to pay the countervailing excise duty which was not specifically provided for in the clauses of the contract and was imposed after the execution of the contract. The relevant clauses in the said contract were clause 2(b) and 6 which read as under:-

> "2 (b) All taxes and duties in respect of job mentioned in the aforesaid contracts shall be the entire responsibility of the contractor....
>
> "6. It is specifically understood and agreed between the parties hereto that if there is any liability towards taxes/ duties (including customs duty on foreign component of supply portion) as may be assessed/claimed/demanded by the Indian or foreign authorities concerned, it shall be the sole responsibility/liability of the contractor to pay all such taxes/duties and that the owner shall not be responsible at all for the payment of such taxes/duties…"

24.2 As regards Section 64A of the SGA it was observed by the Supreme Court as under:-

> "This section 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. In this connection, the intention of the parties is to be ascertained, as per the clauses mentioned above."

24.3 Ultimately it was decided that on an interpretation of the above clauses of the contract, it was the contractor who was liable to bear the burden of the countervailing excise duty.

25.1 In ***Rashtriya Ispat Nigam Ltd. v. M/s. Dewan Chand Ram Saran*** it was emphasized that collection of service tax may be the liability of the service provider but the question whether the liability would be that of the recipient or the provider would be determined by the contract. The question that arose in that case was whether the service tax liability that was imposed after the execution of the contract had to be borne by the contractor. The appellant, a public sector undertaking ('PSU'), was the consumer and the Respondent M/s. Dewan Chand Ram Saran was the service provider. Clause 9.3 of the tender terms in the said contract reads

as under:-

> "9.3. The Contractor shall bear and pay all taxes, duties and other liabilities in connection with discharge of his obligations under this order. Any income tax or any other taxes or duties which the company may be required by law to deduct shall be deducted at source and the same shall be paid to the Tax Authorities for the account of the Contractor and the Company shall provide the Contractor with required Tax Deduction Certificate."

25.2 Interpreting Clause 9.3, the Supreme Court held as under:-

> "25. It was submitted on behalf of the Respondent that Clause 9.3 and the contract must be read as a whole and one must harmonise various provisions thereof. However, in fact when that is done as above, Clause 9.3 will have to be held as containing the stipulation of the contractor accepting the liability to pay the service tax, since the liability did arise out of the discharge of his obligations under the contract. It appears that the rationale behind Clause 9.3 was that the Petitioner as a Public Sector Undertaking should be thereby exposed only to a known and determined liability under the contract, and all other risks regarding taxes arising out of the obligations of the contractor are assumed by the contractor.
>
> 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."

25.3 It was further held that "Clause 9.3 will have to be read as incorporated only with a view to provide for contractor's acceptance of the tax liability arising out of his obligation under the contract."

26. In the present case, the wording of Clause 7.1 of the lease reflects the intention of the parties that it is the Petitioner who would bear the incidence of all taxes. In light of the decisions in ***Numaligarh Refinery Ltd. v. Daelim Industrial Co. Ltd.*** and ***Rashtriya Ispat Nigam Ltd. v. M/s. Dewan Chand Ram Saran,*** the view of the learned Arbitrator that in terms of Clause 7.1 of the lease deed, the service tax liability is that of the service provider, i.e. the Petitioner, is a plausible one. No ground for interference under Section 34 of the Act is made out.

27. The petition is, accordingly, dismissed, with costs of Rs.5,000 which shall be paid by the Petitioner to the Respondent within four weeks.

S. MURALIDHAR, J.

July 4, 2012
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