

CASE NO.:
Writ Petition (civil) 507 of 2002

PETITIONER:
C. K. Jidheesh

RESPONDENT:
Union of India & Ors.

DATE OF JUDGMENT: 27/10/2005

BENCH:
S. N. Variava & P. P. Naolekar

JUDGMENT:
J U D G M E N T
S. N. VARIAVA, J.

By this Writ Petition, the Petitioner seeks to challenge a letter dated 9th July, 2001, issued by the Ministry of Finance as being arbitrary and discriminatory being in violation of Articles 14 and 19(1)(g) of the Constitution, and also violative of the Finance Act, 1994 as amended by the Act 14 of 2001. The Petitioner also prays for an Order directing the Respondent to bifurcate the gross receipts of processing of photographs into the portion attributable to goods and that attributable to services. The Petitioner claims that the Respondents must tax only that portion of the receipts, which is attributable to the services rendered.

Briefly stated the facts are that the Petitioner is the owner of one Ajantha Colour Lab, Kottakkal, Malappuram, Kerala. The Petitioner is running the business of developing and printing of colour photographic films. The Petitioner develops the negatives supplied by the customer and gives to the customer positive prints as per the order of the customer. By the impugned letter it has been clarified that the service tax would be on the entire amount recovered by persons like the Petitioner.

Mr. Mohd. Yusuf raises a preliminary objection. He submits that the Kerala Colour Labs Association had filed a Writ Petition in the Kerala High Court challenging the constitutional validity of the provisions in the Finance Act, which permits levy of service tax on services like those rendered by the Petitioner. He submits that that Writ Petition came to be dismissed by a Judgment of the Kerala High Court dated 31st January, 2002. He points out that against that Judgment two SLPs were filed. SLP (C) No. 11614 of 2002 was dismissed on 10th July, 2002. He points out that the second SLP bearing CC No. 6811 of 2002 filed by the Kerala Colour Labs Association was also dismissed on 8th January, 2003. He points out that in the synopsis attached to this Petition it is stated that the issues covered in this Writ Petition are already pending before this Court in the SLP filed by the Kerala Colour Labs Association. He submits that in view of the dismissal of the two SLPs challenging the constitutional validity of the provision levying service tax on persons like the Petitioner, this Petition should also be dismissed.

On the other hand, Mr. Venugopal submits that on 8th January, 2003 when this Court dismissed SLP (CC) No. 6811/02 (Kerala Colour Lab Association's SLP), this Court bifurcated this Writ Petition and listed it in the next week. He submits that thereafter this Court has issued Rule in this Writ Petition on 17th January, 2003. He submits that therefore this Court has already recognized the fact that this Writ Petition is not covered by the dismissal of Kerala Colour Labs Association's SLP.

A reading of the averments made by the Petitioner, in the synopsis, in the Writ Petition and in I.A. No. 4 filed by him, makes it clear that the Petitioner was initially claiming that the issues in this

Petition and in the pending SLP of Kerala Colour Labs Association were the same. However, on finding that against the Judgment of the Kerala High Court dated 31st January, 2002, SLP (C) No. 11614 of 2002 has been dismissed, this Petition was got separated from Kerala Colour Labs Association's SLP on the ground that the issues were similar to those raised in an SLP filed by the State of Meghalaya challenging an Order of the Gauhati High Court dated 5th September, 2001. It is for that reason that Rule was issued on 17th January, 2003 and there was an Order tagging it with SLP (CC) No. 4253 of 2002 (which is the SLP filed by the State of Meghalaya). We have looked at the papers of the SLP filed by the State of Meghalaya. We find this Petition has nothing to do with that SLP. It is for that reason that this Writ Petition was delinked from the SLP filed by the State of Meghalaya by an Order dated 7th July, 2004. We find substance in the contention that the Writ Petition should have been dismissed with the dismissal of the SLP filed by Kerala Colour Labs Association. However, as another Court has already issued rule, judicial discipline requires that the matter be now heard on merits.

As has been mentioned above, the challenge is ostensibly to the letter issued by the Ministry of Finance. But the real challenge is to the amendment in the Finance Act. That letter is only clarifying what Section 67 of the Finance Act, 1994, as amended by Act 14 of 2001, provides.

Section 65(47) defines Photography as including still photography, motion picture photography, laser photography, aerial photography and fluorescent photography. Section 65(48) defines Photography studio or agency as including any professional photographer or a commercial concern engaged in the business of rendering service relating to photography. Section 65(72)(zb) defines Taxable service in relation to photography studio or agency as any service provided to a customer, by a photography studio or agency in relation to photography, in any manner. Section 66 is the charging Section. Sub-section 5 levies a service tax at the rate of five per cent of the value of the taxable services referred to in clause (zb) of Sec. 65 (72). Section 67 provides that the value of taxable service shall be the gross amount charged by the service provider for such service rendered by him. The Explanation to Section 67 exempts only the cost of unexposed photography film, unrecorded magnetic tape or such other storage device if any, sold to the client during the course of providing the service.

As some doubt was raised regarding the interpretation of these provisions by that Letter the Ministry of Finance has merely clarified as follows:

"4. The value of taxable service [in photography service] is the gross amount charged from the customer for the service rendered. However, the cost of unexposed photography films sold to the customer is excluded. No other cost (such as photographic paper, chemicals, etc.) is excluded from the taxable value."

Thus, a mere challenge to such a clarificatory letter is not enough. The challenge has to be to the provisions of the Finance Act.

The provisions of the Finance Act had been challenged by the Kerala Colour Labs Association. That challenge had been repelled by the Kerala High Court and an SLP against that Judgment has already been dismissed by this Court. We have read the Judgment of the Kerala High Court. In our view, the Judgment correctly considers all aspects including the aspect of double taxation. We find no infirmity in that Judgment. The principles set out therein fully apply here also.

There is one further difficulty in the way of the Petitioner. This Court has, in the case of Rainbow Colour Lab & Anr. vs. State of M. P. & Ors., reported in (2000) 2 SCC 385, held that contracts of the type entered into by persons like the Petitioner are nothing else but service contracts pure and simple. It is held that in such contracts

there is no element of sale of goods. This Judgment is binding on this Court. In view of this Judgment, the question of directing the Respondent to bifurcate the receipts into an element of goods and the element of service cannot and does not arise. We see no substance in the contention that facts in Rainbow Colour Labs case were different inasmuch as in that case the Court was dealing with a case where photographers take photographs, develop them and then give the photos to the customer. In our view, the ratio of Rainbow Colour Lab's case also applies to cases like the present.

Faced with this situation, Mr. Venugopal submitted that the correctness of Rainbow Colour Lab's case has been doubted by a Bench of three Judges in the case of Associated Cement Companies Ltd. vs. Commissioner of Customs, reported in (2001) 4 SCC 593. He relied upon the following observations of this Judgment:

"26. In arriving at the aforesaid conclusion the Court referred to the decision of this Court in Hindustan Aeronautics Ltd. v. State of Karnataka [(1984) 1 SCC 706 : 1984 SCC (Tax) 90] and Everest Copiers [(1996) 5 SCC 390]. But both these cases related to the pre-Forty-sixth Amendment era where in works contract the State had no jurisdiction to bifurcate the contract and impose sales tax on the transfer of property in goods involved in the execution of a works contract. The Forty-sixth Amendment was made precisely with a view to empower the State to bifurcate the contract and to levy sales tax on the value of the material involved in the execution of the works contract, notwithstanding that the value may represent a small percentage of the amount paid for the execution of the works contract. Even if the dominant intention of the contract is the rendering of a service, which will amount to a works contract, after the Forty-sixth Amendment the State would now be empowered to levy sales tax on the material used in such contract. The conclusion arrived at in Rainbow Colour Lab case, in our opinion, runs counter to the express provision contained in Article 366(29-A) as also of the Constitution Bench decision of this Court in Builders' Assn. of India v. Union of India [(1989) 2 SCC 645]."

He submitted that, in view of these observations, the Judgment in Rainbow Colour Lab case must be deemed to have been overruled and/or in any event it is required to be reconsidered by a larger Bench.

We are unable to accept this submission. In Associated Cement Companies' case, the question was whether or not custom duty could be levied on drawings, designs, diskettes, manuals etc. The argument there was that these were intangible properties and not goods as defined in Section 2(22) of the Customs Act. The question of levy of service tax did not arise in that case. The observations relied upon are mere passing observations and do not overrule Rainbow Colour Lab's case. Even otherwise, the questions raised in this Petition are fully covered and answered by the decision of the Kerala High Court, which we confirm as laying down the correct law.

It was next submitted by Mr. Venugopal that neither Rainbow Colour Lab's case nor Kerala Colour Lab's case considered the question of discrimination which has been raised by the Petitioner in this Writ Petition. He submits that the Petitioner has also challenged the discriminatory attitude of the Respondent in levying service tax on gross receipts in photographic business when on other pure service providers like stock brokers, travel agent etc. the tax is levied only on the commission. In our view, there is no discrimination. It has already been held by this Court that such cases are contracts of service pure and simple. In other cases, referred to, there is a bifurcation because service is provided and goods are sold.

We thus see no substance in this Writ Petition. The same stands dismissed. There will be no order as to costs.

JUDIS