**REPORTABLE**

**IN THE SUPREME COURT OF INDIA**

**CIVIL APPELLATE JURISDICTION**

**CIVIL APPEAL NO.9952 OF 2017**

UNION OF INDIA & ORS. …APPELLANTS

VERSUS

BENGAL SHRACHI HOUSING DEVELOPMENT LIMITED & ANR. ...RESPONDENTS

**J U D G M E N T**

**R.F. Nariman, J.**

1. The present appeal arises from service tax payable under a clause in the deed of lease dated 1.9.2012, between the Appellants (lessee) and the Respondents (lessor). By this deed of lease between the lessor and the lessee for a period of three years at a rent of Rs.16,34,967/- per month, it was agreed that:

> "6. The lessor/lessors shall pay all rates, taxes, assessment, charges and other outgoings whatsoever of every description which under the statutes are primarily leviable upon the lessor and shall keep the premises free from all encumbrances and interference in this behalf. Rates and taxes

primarily leviable upon the occupier shall be paid by the Government."

2. Since disputes and differences arose between the parties as to who was liable to pay service tax for the aforesaid commercial premises, a writ petition was filed by the Respondents-herein before the Calcutta High Court, in which it was prayed that a Writ of Mandamus be issued commanding the Appellants to make payment of service tax for the aforesaid premises. The learned single Judge by his judgment dated 15.5.2014, referred to the aforesaid Clause 6 in the deed of lease between the parties, and further went on to refer to a judgment of the Delhi High Court in **Pearey Lal Bhawan Association v. M/S. Satya Developers Pvt. Ltd.**, (2010) 173 DLT 685, in which it was held that as the authorities in that case did not visualize that a service tax levy would be made in respect of lease or rentals of commercial properties and that since the levy was made effective only from 2007 onwards, it was held that as service tax is essentially an indirect tax, the user of the premises who avails the service has to bear it. This being the case, on the facts of that case, it was held that the

lessee should be made to pay service tax. A judgment of the Allahabad High Court dated 16.01.2013 in **M/s Bhagwati Security Services (Regd.) v. Union of India**, to the same effect was also followed by the learned single Judge. The single Judge, therefore, held that liability to bear service tax being that of the recipient of the service, there cannot be an escape from the conclusion that the Appellants i.e. the Union of India would be liable to pay the said tax.

3. An appeal to the Division Bench yielded the same result. The Division Bench, in the impugned judgment dated 9.9.2014, referred to various provisions of the Finance Act, 1994 and adopted the same reasoning as that of the learned single Judge and, therefore, held that Clause 6, if properly construed, would yield the same result as was found by the learned single Judge and, therefore, dismissed the appeal.

4. Shri A.K. Sanghi, learned senior counsel appearing on behalf of the Appellants, has referred in detail to various provisions of the Finance Act, 1994 along with amendments thereto and has argued that the person primarily liable to pay

service tax under the Act read with the Service Tax Rules, 1994, is the service provider i.e. the lessor in the present case. He, therefore, stated that on a proper reading of Clause 6, it is clear that service tax being “primarily leviable on the lessor” within the meaning of Clause 6, would have to be borne by the lessor alone and not his client.

5. On the other hand, Shri Jaideep Gupta, learned senior counsel appearing on behalf of the Respondents, supported the judgments of the courts below. According to him, on a proper reading of the said clause, since service tax, by its essential nature is an indirect tax, being nothing other than a value added tax on consumption of service, the levy under the Service Tax Act of 1994, as amended, would fall upon the lessee. In any case, according to the learned counsel, on a reading of various judgments of this Court, it is clear that the person on whom this tax is primarily leviable is the lessee and that, therefore, it is the Appellant who should bear this tax.

6. Having heard learned counsel for both the parties, it is necessary to first advert to the relevant statutory provisions.

Service tax was introduced by Chapter 5 of the Finance Act of 1994. Under Section 65 thereof, an assessee is defined to mean:

> "Section 65. Definitions
>
> In this Chapter, unless the context otherwise requires, --
>
> (7) **"assessee**" means a person liable to pay the service tax and includes his agent;"

Under Section 65 (105), **"taxable service**" means any service provided or to be provided -

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

7. Under Section 66, as it stood substituted by the Finance Act of 2007, the tax was leviable in the following manner:

> "66. **Charge of service tax** – There shall be levied a tax (hereinafter referred to as the service tax) at the rate of twelve per cent of the value of taxable services referred to in sub-clauses (a), (d), (e), (f), (g,) (h), (i), (j),(k), (l), (m), (n), (o), (p), (q), (r), (s), (t), (u), (v), (w), (x), (y), (z), (za), (zb), (zc), (zh), (zi), (zj), (zk),(zl), (zm), (zn), (zo), (zq), (zr), (zs), (zt),

(zu), (zv), (zw), (zx), (zy), (zz), (zza), (zzb), (zzc), (zzd), (zze), (zzf), (zzg), (zzh), (zzi), (zzk), (zzl), (zzm), (zzn), (zzo), (zzp), (zzq), (zzr), (zzs), (zzt), (zzu), (zzv), (zzw), (zzx), (zzy), (zzz), (zzza), (zzzb), (zzzc), (zzzd), (zzze), (zzzf), (zzzg,) (zzzh), (zzzi), (zzzj), (zzzk), (zzzl), (zzzm), (zzzn), (zzzo), (zzzp), (zzzq), (zzzr), (zzzs), (zzzt), (zzzu), (zzzv), (zzzw), (zzzx), (zzzy), (zzzz), (zzzza), (zzzzb), (zzzzc), (zzzzd), (zzzze), (zzzzf), (zzzzg), (zzzzh), (zzzzi), (zzzzj), (zzzzk), (zzzzl), (zzzzm), (zzzzn), (zzzzo), (zzzzp),(zzzzq) (zzzzr) (zzzzs) (zzzzt),(zzzzu), (zzzzv) (zzzzv) and (zzzzw) of clause (105) of section 65 and collected in such manner as may be prescribed:

Provided that the provisions of this section shall not apply with effect from such date as the Central Government may, by notification, appoint."

8. On and from 1.7.2012, under Section 66B, the tax was levied in the following manner:

"66B. **Charge of Service Tax -** There shall be levied a tax (hereinafter referred to as the service tax) at the rate of twelve per cent on the value of all services, other than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another and collected in such manner as may be prescribed."

It is this last Section with which we are directly concerned as the lease deed between the parties is dated 1.9.2012.

9. Section 68 is important and reads as follows:-

> “68. **Payment of service tax**. – (1) Every person providing taxable service to any person shall pay service tax at the rate specified in section 66B in such manner and within such period as may be prescribed.
>
> (2) Notwithstanding anything contained in sub-section (1), in respect of such taxable service as may be notified by the Central Government in the Official Gazette, the service tax thereon shall be paid by such person and in such manner as may be prescribed at the rate specified in section 66B and all the provisions of this chapter shall apply to such person as if he is the person liable for paying the service tax in relation to such service:
>
> Provided that the Central Government may notify the service and the extent of service tax which shall be payable by such person and the provisions of this Chapter shall apply to such person to the extent so specified and the remaining part of the service tax shall be paid by the service provider."

10. The Service Tax Rules, 1994 have been made in exercise of powers under the rule making Section, namely, Section 94 of the Finance Act, 1994 which came into force on 1.4.1994. Rule 2(1)(d) is important from our point of view and reads as follows:-

> “2. Definitions
>
> (1) In these rules, unless the context otherwise requires, -
>
> ….
>
> (d) "person liable for paying service tax", -

(i) in respect of the taxable services notified under sub-section (2) of section 68 of the Act, means,-

…….

(E) in relation to services provided or agreed to be provided by Government or local authority except,-

(a) renting of immovable property, and

(b) services specified sub-clauses (i), (ii) and (iii) of clause (a) of section 66D of the Finance Act,1994,

to any business entity located in the taxable territory, the recipient of such service;

……

(ii) in a case other than sub-clause (i), means the provider of service."

11. Under Rule 4 of the aforesaid Rules, every person liable to pay service tax is to apply for registration under the Act, and under Rule 7, every such assessee shall submit a half yearly return in the relevant form prescribed therein.

12. A reading of the Act and the Rules, therefore, makes it clear that "assessee", as defined, means the person liable to pay service tax under the Act. In the present case, we are concerned with the taxable service of renting of immovable property. It is clear that under Section 66B, the levy of service tax at the rate of 12% is on the value of the service of renting of

immovable property that is provided or agreed to be provided by one person to another and collected in such manner as may be prescribed. Section 68 whose marginal note reads - “payment of service tax”, makes it clear that it is the person providing the taxable service to another, who is to pay service tax at the rate specified in Section 66B, in such manner and within such period as may be prescribed, unless otherwise specified by the Central Government. Therefore, the person liable for paying service tax is to be determined on a reading of the Rules.

13. When we come to the Rules, it is clear that under Rule 2(1)(d), the person liable for paying service tax, where the service of renting immovable property is agreed to be provided by the Government, is the provider of such service. Even in a converse situation, which is the situation in the facts of the present case, it is the provider of the service alone, who is liable for paying service tax.

14. The question with which we are faced is the meaning to be given to the expression “primarily leviable on the lessor” in Clause 6 of the deed of lease dated 1.9.2012.

15. This Court has, in several judgments delineated the extent of and the meaning of service tax. Thus, in **Tamil Nadu Kalyana Mandapam Assn v. Union of India & Ors.,** (2004) 5 SCC 632 at 637, this Court held as follows:-

> “4. Service tax is an indirect tax and is to be paid on all the services notified by the Government of India for the said purpose. The said tax is on the service and not on the service provider. However, under Section 68 of the Finance Act, 1994 as amended by the Finance Act, 1997 read with Rule 2(1)(d)(ix) of the Service Tax Rules, 1994, the service provider (in the present case the mandap-keeper) is expected to collect the tax from the client utilizing his services.”

16. In **All India Federation of Tax Practitioners & Ors.** v. **Union of India & Ors.,** (2007) 7 SCC 527 at 536, 542, this Court held as follows:

> **“Reason for imposition of service tax**
> 4. Service tax is an indirect tax levied on certain services provided by certain categories of persons including companies, associations, firms, body of individuals, etc. Service sector contributes about 64% to GDP. “Services” constitute a heterogeneous spectrum of economic activities. Today services

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

5. In the late seventies, the Government of India initiated an exercise to explore alternative revenue sources due to resource constraints. The primary sources of revenue are direct and indirect taxes. Central excise duty is a tax on the goods produced in India whereas customs duty is the tax on imports. The word “goods” has to be understood in contradistinction to the word “services”. Customs and excise duty constitute two major sources of indirect taxes in India. Both are consumption specific in the sense that they do not constitute a charge on the business but on the client. However, by 1994, the Government of India found revenue receipts from customs and excise on the decline due to WTO commitments and due to rationalisation of duties on commodities. Therefore, in the year 1994-1995, the then Union Finance Minister introduced the new concept of “service tax” by imposing tax on services of telephones, non-life insurance and stockbrokers. That list has increased since then. Knowledge economy has made “services” an important revenue earner.

**Findings**

*(i) Meaning of “service tax”*

> 22. As stated above, the source of the concept of service tax lies in economics. It is an economic concept. It has evolved on account of service industry becoming a major contributor to the GDP of an economy, particularly knowledge-based economy. With the enactment of the Finance Act, 1994, the Central Government derived its authority from the residuary Entry 97 of the Union List for levying tax on services. The legal backup was further provided by the introduction of Article 268-A in the Constitution vide the Constitution (Eighty-eighth Amendment) Act, 2003 which stated that taxes on services shall be charged by the Central Government and appropriated between the Union Government and the States. Simultaneously, a new Entry 92-C was also introduced in the Union List for the levy of service tax. As stated above, as an economic concept, there is no distinction between the consumption of goods and consumption of services as both satisfy human needs. It is this economic concept based on the legal principle of equivalence which now stands incorporated in the Constitution vide the Constitution (Eighty-eighth Amendment) Act, 2003. Further, it is important to note, that "service tax" is a value added tax which in turn is a general tax which applies to all commercial activities involving production of goods and provision of services. Moreover, VAT is a consumption tax as it is borne by the client."

17. In **Association of Leasing & Financial Service Companies** v. **Union of India,** (2011) 2 SCC 352 at 367-368, this Court under the caption "nature and character of service tax" held as follows:-

“38. *In All-India Federation of Tax Practitioners case* [(2007) 7 SCC 527] this Court explained the concept of service tax and held that service tax is a value added tax (“VAT”, for short) which in turn is a destination based consumption tax in the sense that it is levied on commercial activities and it is not a charge on the business but on the consumer. That, service tax is an economic concept based on the principle of equivalence in a sense that consumption of goods and consumption of services are similar as they both satisfy human needs. Today with the technological advancement there is a very thin line which divides a “sale” from “service”. That, applying the principle of equivalence, there is no difference between production or manufacture of saleable goods and production of marketable/saleable services in the form of an activity undertaken by the service provider for consideration, which correspondingly stands consumed by the service receiver. It is this principle of equivalence which is inbuilt into the concept of service tax under the Finance Act, 1994. That service tax is, therefore, a tax on an activity. That, service tax is a value added tax. The value addition is on account of the activity which provides value addition, for example, an activity undertaken by a chartered accountant or a broker is an activity undertaken by him based on his performance and skill. This is from the point of view of the professional. However, from the point of view of his client, the chartered accountant/broker is his service provider. The value addition comes in on account of the activity undertaken by the professional like tax planning, advising, consultation, etc. It gives value addition to the goods manufactured or produced or sold. Thus, service tax is imposed every time service is rendered to the customer/client. This is clear from the provisions of Section 65(105)(zm) of the Finance Act, 1994 (as amended). Thus, the taxable event is each exercise/activity undertaken

> by the service provider and each time service tax gets attracted.
>
> 39. The same view is reiterated broadly in the earlier judgment of this Court in *Godfrey Phillips India Ltd. v. State of U.P*. [(2005) 2 SCC 515] in which a Constitution Bench observed that in the classical sense a tax is composed of two elements: the person, thing or activity on which tax is imposed. Thus, every tax may be levied on an object or on the event of taxation. Service tax is, thus, a tax on activity whereas sales tax is a tax on sale of a thing or goods."

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

purchaser. In the present case, therefore, the "taxable event" is the provision of the service of renting out immovable property, and the "taxable person", that is the person liable to pay tax, is the service provider, namely the lessor.

19. It needs to be clarified at this juncture that our Constitution, unlike the British North America Act of 1867, makes no distinction, constitutionally speaking, between direct and indirect taxes.[1]

20. In **Chhotabhai Jethabhai Patel and Co. v. The Union of India and Anr.,**1962 Supp. (2) SCR 1 at 20-21, this Court was faced with the challenge of the levy of a retrospective excise duty. One of the arguments made against the levy of such duty is that excise duty being indirect, which is that it is ultimately to be passed on to the consumer, a retrospective levy would be ultra vires the legislative competence of Parliament as it could not possibly be passed on. This argument was repelled in the following terms:

[1] Section 92(2) provides for a provincial legislature exclusively making laws in relation to direct taxation within the province "in order to the raising of a revenue for provincial purposes".

“There is no doubt that excise duties have been referred to by the economists and in the judgments of the Privy Council as well as in the Australian decisions as an instance of an "indirect tax", but in construing the expression "duty of excise" as it occurs in Entry 84 we are not concerned so much with whether the tax is "direct" or "indirect" as upon the transaction or activity on which it is imposed. In this context one has to bear in mind the fact that the challenge to the legislative competence of the tax-levy is not directed to the imposition as a whole but to a very limited and restricted part of it. This challenge is confined (a) to the operation of the tax between the period March 1, 1951, and April 28, 1951, and (b) even in regard to this limited period, it is restricted to the imposition of the additional duty of six annas per lb. which was levied, beyond the eight annas per lb. collected from the appellants by virtue of the Finance Bill under the provisions of the Provisional Collection of Taxes Act, 1931. It would seem to be rather a strange result to achieve that the tax imposed satisfies every requirement of a "duty of excise" in so far as the tax operates from and after April 28, 1951, but is not a "duty of excise" for the duration of two months before that date.

Learned Counsel conceded, as he had to, that even on the decision relied upon by him, the fact that owing to the operation of economic forces it was not possible for the taxpayer to pass on the burden of the tax, did not alter the nature of the imposition and detract from its being a "duty of excise". For instance, the state of the market might be such that the duty imposed upon and collected from the producer or manufacture might not be capable of being passed on to buyers from him. Learned Counsel urged that this would not matter, as one had to have regard to "the general tendency of the tax" and "the expectation of the taxing authority" and to the possibility of its being passed on and not

> to the facts of any particular case which impeded the operation of natural economic forces.
>
> The impediment to the duty being passed on might be due not merely to private bargains between the parties or abnormal economic situations such as the market for a commodity being a buyers' market. Such impediments may be brought about by the operation of other laws which Parliament might enact, such for instance, as control over prices. If in such a situation where the price which the producer might charge his buyer is fixed by the statute, say under the Essential Supplies Act, and a "duty of excise" is later imposed on the manufacturer, it could not be said that the duty imposed would not answer the description of an "excise duty". Learned Counsel had really no answer to the situation created by such a control of economy except to say that it would be an abnormal economic situation. It could hardly be open to argument that a tax levied on a manufacturer could be stated not to be a "duty of excise", merely because by reason of the operation of other laws the tax payer was not permitted to pass on the tax-levy. The retrospective levy of a tax would be one further instance of such inability to pass on, which does not alter the real nature or true character of the duty."

21. It is thus clear that the judgments of this Court which referred to service tax being an indirect tax have reference only to service tax being an indirect tax in economic theory and not constitutional law. The fact that service tax may not, in given circumstances, be passed on by the service provider to the recipient of the service would not, therefore, make such tax any

the less a service tax. It is important to bear this in mind, as the main prop of Shri Jaideep Gupta's argument is that service tax being an indirect tax which must be passed on by virtue of the judgments of this Court, would make the recipient of the service the person on whom the tax is primarily leviable.

22. Let us now examine some of the judgments relating to another indirect tax, namely excise duty. Like service tax, excise duty is also in the economic sense, an indirect tax. The levy is on manufacture of goods; and the taxable person is usually the manufacturer of those goods. In the matter of the **Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act**, 1938 RCP, A.I.R. 1939 Federal Court 1, the Federal Court decided, through Chief Justice Maurice Gwyer, that excise duty under the Government of India Act, 1935 is a power to impose duty of excise upon the manufacturer of excisable articles at the stage of or in connection with manufacture or production. In a separate judgment, Jayakar J. held that all duties of excise are levied on manufacture of excisable goods and can be levied and collected at any subsequent stage up to consumption.

23. In **R.C. Jall vs. Union of India,** 1962 Supp. (3) SCR 436 at 451, this Court after referring to the judgment in **Central Provinces and Berar Sales** (supra) and certain other judgments held:

> "With great respect, we accept the principles laid down by the said three decisions in the matter of levy of an excise duty and the machinery for collection thereof. Excise duty is primarily a duty on the production or manufacture of goods produced or manufactured within the country. It is an indirect duty which the manufacturer or producer passes on to the ultimate consumer, that is, its ultimate incidence will always be on the consumer. Therefore, subject always to the legislative competence of the taxing authority, the said tax can be levied at a convenient stage so long as the character of the impost, that is, it is a duty on the manufacture or production, is not lost. The method of collection does not affect the essence of the duty, but only relates to the machinery of collection for administrative convenience. Whether in a particular case the tax ceases to be in essence an excise duty, and the rational connection between the duty and the person on whom it is imposed ceased to exist, is to be decided on a fair construction of the provisions of a particular Act."

24. In the present case, it is clear that the expression "primarily leviable upon" has reference to the "taxable person", i.e. the person who is liable to pay the tax. The tax that is levied on "service" may be collected either from the service

provider or the recipient of the service. The person assessed to tax, who is primarily liable to pay the tax is, on the facts of this case, the lessor.

25. Shri Gupta cited a judgment of this Court in **Peekay Re-Rolling Mills (P) Ltd.** v. **Assistant Commissioner and another,** (2007) 4 SCC 30, for the well worn distinction between levy and collection of a tax. What is important to note from this judgment is that the expression "levy" would include "assessment", though it would not include "collection". This being the case, it is clear that the expression "primarily leviable upon the lessor" makes it clear that the lessor should be the person upon whom levy takes place - in the sense that "assessment" has to be of such person. "Levy", in all cases of indirect taxes, is never upon an individual – it is upon a specific aspect of what is sought to be taxed. In the case of a service tax, like the present, the activity of renting out immovable property is sought to be taxed. Therefore, when the expression "primarily leviable" is used in relation to a person and not an activity, it has reference to the assessee upon whom

assessment is made under the Act. Thus construed, it is clear that, in the present case, the person liable to pay the tax, who is the assessee under the said Act, in all cases like the present, is only the service provider and not the recipient of the service.

26. Shri Gupta then referred to Section 83 of the Finance Act, 1994, by which Section 12B of the Central Excise Act, 1944, so far as may be, would apply in relation to service tax as it applies in relation to a duty of excise. Section 12B is set out hereinbelow:

> "12B - **Presumption that incidence of duty has been passed on to the buyer -** Every person who has paid the duty of excise on any goods under this Act shall, unless the contrary is proved by him, be deemed to have passed on the full incidence of such duty to the buyer of such goods."

27. Based on this Section, Shri Gupta has argued, in support of the Division Bench judgment, that since there is a presumption that the incidence of duty has been passed on to "the buyer", who is the recipient of the service in the present case, unless the contrary is proved, such passing on shall be deemed in law to have occurred and, therefore, it is the

Appellant before us who is the person on whom the duty is primarily leviable. This argument, which found favour with the Division Bench, is again incorrect for the basic reason that the reason for extending Section 12B of the Central Excise Act to service tax is for the reason that when refund of service tax is claimed in case the tax paid is found to be in excess or not payable at all, the same cannot be made over to the assessee unless the assessee proves that the said tax is not passed on to the recipient of the service. This Section only casts the burden of proof upon the service provider to prove negatively that he has not passed on the incidence of the tax to the recipient of the service. This Section, which is part of the machinery for refund, can in no way help Shri Gupta to determine as to who is the person primarily liable to pay service tax which has to be determined on a reading of the Act and the Rules.

28. Shri Gupta then relied upon the judgment of the learned Single Judge in **Pearey Lal** (supra). In that case, clause 5 of the lease deed read as follows:

> “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.”

29. In para 12, the learned Single Judge made the significant observation that there is no dispute that the parties did not visualize that service tax would be imposed when they entered into the lease. This being the case, the learned Single Judge held:

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

30. In an appeal to the Division Bench of the Delhi High Court, the Delhi High Court was more specific in rejecting the

plea that service tax should be borne by the lessor. Thus, the Division Bench in **Satya Developers Pvt. Ltd. and Ors. v. Pearey Lal Bhawan Association and Ors**, (2015) 225 DLT 377 stated:

> "31. Thus a contract has to be construed by looking at the document as a whole and the meaning of the document has to be what the parties intended to give to the document keeping the background in mind and conclusion that flouts business commonsense must yield unless expressly stated. In the present case it will also have to borne in mind whether the parties intend to include taxes which were not contemplated at the time of the agreement as indubitably the agreements between the parties in the three suits were entered into prior to the Finance Act, 2007 coming into force w.e.f. June 01, 2007.
>
> xxx xxx xxx
>
> 33. As regards the lease deed and the agreement of maintenance of common services and facilities between Satya and PLBA Clause 5 of the lease deed as noted above provides that the lessor shall continue to pay all or any taxes, levies or charges imposed by the MCD, DDA, L&DO and or Government, Local Authority etc. By use of the words "Lessor shall continue to pay" it is evident that the parties contemplated the existing taxes, levies or charges and not future. Even as per the agreement of maintenance of common service facilities though the same has no application to the service tax however, still the said clause II(1) cannot be said to exclude HDFC Bank from paying future service tax."

A reading of these two judgments would, therefore, show that, on facts, it was held that since payment of service tax was not contemplated by the parties and it was agreed that the lessor shall continue to pay taxes, it was evident that the parties contemplated only existing taxes and not taxes which may arise in the future. This being the overwhelming circumstance in that case, any observations made on law have to be read in light of the facts of that case.

31. Shri Gupta then adverted to another judgment of the Division Bench of the Delhi High Court in **Raghubir Saran Charitable Trust v. Puma Sports India Pvt. Ltd.**, 2013 SCC OnLine Del 1972, decided on 15.5.2013. In this judgment, clauses 7 and 9 of the lease deed read as follows:

> "7. **MAINTENANCE, ELECTRICITY; WATER**
>
> 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 and increases shall be made by the Lessor or be entertained by the Lessee.

xxx xxx xxx

9. **COVENANTS OF THE LESSEE**

The Lessee, for itself, its successors and permitted assigns and to the intent that its obligations may continue through the term hereby created, but not exceeding the Initial Term, covenants with the Lessor as follows:

xxx xxx xxx

(d) To pay all taxes necessary for carrying on its business within the Premises, other than municipal taxes and other related property taxes."

32. An arbitration award construed the aforesaid clauses stating that service tax would have to be paid by the lessor. This, according to the Division Bench, was not a possible construction inasmuch as the Division Bench bifurcated taxes that were payable by the lessor and the lessee. Clause 7 being confined to property taxes and clause 9 referring to taxes other than property taxes, the judgment of the Division Bench stated:

"…….Thus, Clause 7.1 is clearly confined to property taxes or other outgoings in respect of the 'premises'. It has to be a tax on the premises or the property. Such a tax may be of any nature whatsoever and thus even a new tax on the premises would be covered by this clause and absolves the lessee of the liability in this behalf, this clause nowhere envisaging an indirect tax of the

nature of a service tax. The aforesaid view is further reinforced by Clause 9 (d) which in fact puts the responsibility on the lessee to pay all taxes necessary for carrying on its business within the premises other than the municipal taxes and related property taxes. Thus, any tax on the business activity is on the lessee and the only exclusion made is of municipal tax and related property taxes for which there is a specific Clause 7.1. It is not as if there is a singular clause relating to taxes in the agreement being the Lease Deed which puts the burden on the lessor alone. The nature of taxes if bifurcated into two categories; one borne by the lessor and the other to be borne by the lessee. The aforesaid becomes important in the context of the nature of service tax which is a tax on the commercial activity and to that extent would, thus, fall within the parameters of Clause 9 (d) and not Clause 7.1.

We thus have not the slightest of doubt that these are not clauses which can brook of any two interpretations, but there can by only one interpretation on a plain reading of the clauses. The language of a clause cannot be twisted to come to a conclusion as is sought to be done by the learned Arbitrator. It appears that Clause 9 (d) seems to have been completely lost by the learned Arbitrator. ……"

33. In this view of the matter, the arbitration award was set aside. This judgment again turned on the language of the particular clauses in the lease deed and would have no application to the facts of the present case.

34. At the fag end of the argument, however, Shri Gupta referred us to a sanction letter dated 27th April, 2012 and a letter dated 30th April, 2012. The sanction letter of 27th April, 2012 issued by the Government of India conveying sanction for hiring of the lease premises in the present case to the Director General, Indian Coast Guard, specifically states:

> "…… The registration charges, stamp duty, service taxes, etc. (if applicable) is the liability of the lessee……"

35. The letter dated 30th April, 2012, written by the Deputy Inspector General, Chief Staff Officer, to the Respondent, in turn, in paragraph 3(c) reiterated the same position as that of the sanction letter. The learned single Judge in dealing with the letter dated 30th April, 2012 has held:

> "12. Turning to the facts of the present case, it appears that clause 6 extracted supra delineated the respective obligations of the lessor and the lessees. The parties agreed that the rates and taxes primarily leviable upon the occupier would be paid by the Government. That the respondents were not oblivious of their obligation to bear service charge is reflected from the letter dated April 30, 2012. Although the said deed does not specifically refer to service tax, the letter dated April 30, 2012 expressly

> provides that Government of India had sanctioned the terms and conditions of hiring including, inter alia, the liability of the "*lessee in respect of registration charges, stamp duty, service tax etc., (if applicable)*". The words "if applicable" in brackets follows "etc." and not "service tax". Therefore, it is not a case that if obligation to make payment of service tax arises, the respondents would have discretion to foist the responsibility on the lessor (the first petitioner). Liability to bear service tax being that of the person receiving service, there can be no escape from the conclusion that the respondents are liable to bear service tax."

36. This being the case, though in law and under clause 6 of the lease deed the Appellant is not required to pay service tax, we are loathe to upset the finding of the learned single Judge based upon a letter by the Appellant to the Respondent in which the Appellant has expressly stated that it was liable to pay service charges. Having thus clarified the legal position, given the sanction letter of 27th April, 2012 and the letter dated 30th April, 2012, in which it was made clear that the Union of India alone will bear the service charges, we refuse to exercise our discretion under Article 136 of the Constitution of India in favour of the Union of India. Thus, the impugned Division

Bench judgment is set aside on law, but the appeal fails on the facts of the present case.

**……J.**
**(R.F. Nariman)**

**……J.**
**(Sanjay Kishan Kaul)**

**New Delhi;**
**November 07, 2017.**