
due to death of her husband is not taken away or restricted by the provisions of the Fatal Accidents Act. The act of killing of a person on whom the plaintiff was dependent and thereby deprived of her livelihood itself furnishes a new cause of action to her. That cause of action is independent of the loss to the estate of the deceased or the right of the deceased to claim damages for the injury sustained by him had he been alive. By intentionally killing a person on whom the plaintiff was dependent upon, the defendant caused an injury to the plaintiff who can enforce her remedy in her own right against the killer for the loss suffered by her. What is to be borne in mind is that, in cases where actions are brought arising out of an accident resulting in death, the wrong done is not strictly the death; the wrong done which gives rise to the cause of action is injury which may or may not sooner or later result in death. A person who is still alive can always and has been able to bring an action in such circumstances and in the event of death of such a person, the right of that person to seek damages for the injury caused to him has been given to his dependents under the Fatal Accidents Act. That right of the person, who sustained the injury which ultimately resulted in his death, is independent of the right of his dependents for the personal loss suffered by the dependents. The provisions of the Indian Fatal Accidents Act, 1855 are supplemental in addition to the rights of the plaintiff to claim damages under the ordinary civil law. Since the plaintiff has not filed the suit under the Fatal Accidents Act, it cannot be said that the suit is barred by time under Article 82 of the Limitation Act, 1863.

(14) I, therefore, do not find any merit in this appeal and the same is accordingly dismissed.

S.C.K.

Before Jawahar Lal Gupta & N. K. Agrawal, JJ

M/S KIRAN HOUSE (K.T.H.) AND OTHERS,—Petitioners

versus

UNION OF INDIA & OTHERS,—Respondents.

CWP 1820 of 1999

10th February, 1999

Constitution of India, 1950—Arts. 14, 246 & 249—Service tax—Whether Parliament has power to legislate—Whether levy discriminatory.

Held that, the levy is on the providing of services. Architects, Stock Brokers, Insurance Agents, Caterers etc. do not really sell any goods. They provide services. The law as at present enacted, provides for tax on the services. Learned Counsel has not been able to show or refer to any entry in List II which may provide for the levy of tax on service. In the absence of any entry in List II which may specifically cover the field of service tax, it cannot be said that the Parliament is not competent to legislate with regard to the particular matter. It is only when a particular subject is included in List II that it may be possible to contend that the jurisdiction of the Central Legislature has been ousted. However, in the absence of a provision in List II or even in List III (in pursuance to which the State Legislature may have promulgated a legislation), the Parliament shall have the undoubted power to legislate. In fact, under the Constitution, the power of the Parliament to exclusively legislate in respect of the matters covered in List I and even to legislate in respect of the matters covered in List II in the national interest is duly recognised under Articles 246 and 249 of the Constitution. As the law stands, the Parliament shall have the power to legislate in respect of every matter which is not covered by List II. Since there is no entry with regard to the levy of service tax in List II, the jurisdiction of the Parliament to legislate shall be presumed. That being so, the argument that the legislation is beyond the legislative competence of the Parliament, cannot be sustained.

(Para 8)

Further held, that the presumption is in favour of constitutionality. The burden of proving discrimination lies on the person who levels this charge. The petitioners have produced nothing on record to show that they are similarly situated as the persons providing shamiana services.

(Para 16)

S. P. Jain, Sr. Advocate with Chetan Mittal, Advocate,—*for the Petitioners.*

JUDGMENT

JAWAHAR LAL GUPTA, J. (ORAL)

(1) The petitioners complain that the show cause notices issued to them (which are in similar terms) regarding the levy of service tax are illegal. They pray that the notices be quashed.

(2) We have heard Mr. S. P. Jain, learned counsel for the petitioners. He contends that the Parliament had no legislative

competence to levy the service tax. He further contends that the petitioners are covered by the exemption granted by the Government of India,—*vide* notification dated 2nd June, 1998. Despite the exemption, the respondents have issued show cause notices. Lastly, it is contended that the action of the respondents is violative of Article 14 of the Constitution. On this basis, the counsel prays that the show cause notices, a copy of one of which has been produced as Annexure P. 2, be quashed.

(3) The concept of 'service tax' was introduced by the Finance Act of 1994. Initially, the service tax was imposed in regard to the telephone, insurance and stock brokerage services. With the passing of years, the levy of service tax has been extended to various other services. The provisions as enacted after the Finance Act of 1998 are contained in Chapter V of "Nabhi's Service Tax Guidelines." The levy extends to the whole of India except the State of Jammu & Kashmir. Section 65 defines various expressions used in the Chapter. Clauses 10, 22 and 23 define a 'caterer', a 'mandap' and a 'mandap-keeper'. These read as under :—

10. "Caterer" means any person who supplies, either directly or indirectly, any food, edible preparations, alcoholic or non-alcoholic beverages or crockery and similar articles or accoutrements for any purpose or occasion ;"
22. "mandap" means any immovable property as defined in section 3 of the Transfer of Property Act, 1882 (4 of 1882) and includes any furniture, fixtures, light fittings and floor coverings therein let out for consideration for organising any official, social or business function ;
23. "mandap keeper" means a person who allows temporary occupation of a mandap for consideration for organising any official, social or business function ;

(4) Clause 41 defines a service tax as a tax "leviable under the provisions of this Chapter". Taxable services have been defined in Clause 48. These include the services :—

- (m) to a client, by a mandap keeper in relation to the use of a mandap in any manner including the facilities provided to the client in relation to such use and also the services, if any, rendered as a caterer ;

(5) Section 66 provides for the levy of the service tax and Section 67 lays down the method of valuation. In relation to the services

provided by the goods transport operators, outdoor caterers, a pandal or shamiana contractor and a mandap keeper, the provisions are contained in Clauses (l), (m) and (n). These read as under:—

- “(l) in relation to service provided by goods transport operators to a customer, shall be the gross amount charged by such operator for services in relation to carrying goods by road in a goods carriage and includes the freight charges but does not include any insurance charges ;
- (m) in relation to service provided by an outdoor caterer to a client, shall be the gross amount charged by such caterer from the client for services in relation to such catering including the charges for food, edible preparations, alcoholic or non-alcoholic beverages or crockery and similar articles or accoutrements provided to such client for any purpose or on any occasion ;
- (n) in relation to service provided by a pandal or shamiana contractor to a client, shall be the gross amount charged by such contractor from the client for services in relation to the setting up of a pandal or shamiana including the supply of furniture, fixtures, lights and lighting fittings, floor coverings and similar articles used therein and also the charges for catering, if any.”

(6) Section 69 provides for registration. It is compulsory for every person providing the relevant service to be registered with the Central Excise Officer. Section 71 provides for assessment.

(7) Mr. Jain contends that the legislation is beyond the legislative competence of Parliament. The argument is based on Entry 54 in List II. The Entry is in the following terms :—

“Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of entry 92A of List I.”

(8) A perusal of the above entry would show that the State Legislatures are competent to provide for the levy of taxes on “the sale or purchase of goods.....” However, in the present case, no tax is being levied either on the sale or purchase of any goods. The levy is on the providing of services. Architects, Stock Brokers, Insurance Agents, Caterers etc. do not really sell any goods. They provide services. The law as at present enacted, provides for tax on the services. Learned counsel has not been able to show or refer to any entry in List II which may provide for the levy of tax on service. In the absence of any entry in List II which may specifically cover the field of service tax, it cannot

be said that the Parliament is not competent to legislate with regard to the particular matter. It is only when a particular subject is included in List II that it may be possible to contend that the jurisdiction of the Central Legislature has been ousted. However, in the absence of a provision in List II or even in List III (in pursuance to which the State Legislature may have promulgated a legislation), the Parliament shall have the undoubted power to legislate. In fact, under the Constitution, the power of the Parliament to exclusively legislate in respect of the matters covered in List I and even to legislate in respect of the matters covered in List II in the national interest is duly recognised under Articles 246 and 249 of the Constitution. As the law stands, the Parliament shall have the power to legislate in respect of every matter which is not covered by List II. Since there is no entry with regard to the levy of service tax in List II, the jurisdiction of the Parliament to legislate shall be presumed. That being so, the argument that the legislation is beyond the legislative competence of the Parliament, cannot be sustained. It is, consequently, rejected.

(9) Learned counsel has also referred to the provisions of Clause 29A of Article 366 to contend that a tax on the sale or purchase of goods also includes "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."

(10) The argument cannot be accepted. Clause 29A deals with the tax on the sale or purchase of goods. It is only when a tax is being levied on sale or purchase of goods that the fiction as contemplated under sub-clause (f) shall be deemed to be included in the expression. Still further, whenever there is a tax on the supply of goods which form a part of a service, it shall be deemed to be a tax on the sale or purchase of goods. Even the goods have been specified to mean food or other articles for human consumption. In the present case, there is nothing before us to indicate that any goods being food etc. are being supplied by the petitioners on which a service tax is being levied.

(11) It was then contended that the service provided by the petitioners has in fact been exempted,—*vide* notification dated 2nd June, 1998. If that be so, one fails to understand as to what is the cause of action which has compelled the petitioners to approach the court. All that the petitioners needed to do was to raise the argument before the competent authority. For reasons best known to them, they have chosen not to do so and have approached the Court. It is in this situation that the question needs to be examined by the court.

(12) The notification issued by the Government is in the following terms:—

“Notification No. 49/98-Service Tax New Delhi, dated the 2nd June, 1998, 12 Jyaishta, 1920 (Saka)

GSR (E)—In exercise of the powers conferred by Section 93 of the Finance Act, 1994 (32 of 1994) the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the taxable services provided :—

- (a) to a costomer, by a goods transport operator in relation to carriage of goods by road in a goods carriage ;
- (b) to a client, by an outdoor caterer ; and
- (c) to a client, by a pandal or shamiana contractor in relation to a pandal or shamiana in any manner and also includes the services, if any, rendered as a caterer.

From the whole of service tax leviable thereon under Section 66 of the said Act.

(T. R. RASTAGI)
Joint Secretary to the
Government of India.”

(13) On a perusal of the above, it appears that the Central Government has granted exemption in respect of the taxable services provided by a goods transport operator, by an outdoor caterer and by a pandal or shamiana contractor to a client “in relation to a pandal or shamiana in any manner and also includes the services, if any, rendered as a caterer.” As at present, nothing has been produced on the record to show as to what services are being actually provided by the petitioners. Still further, it has not even been specified as to whether or not the petitioners are providing any services in respect of transport of goods or any catering services in relation to the pandals or shamianas. There is no averment in the petition which may specifically indicate the factual position. In the absence of the facts, it is totally impossible to accept the contention of the petitioners that they are covered by the exemption contained in the notification.

(14) Faced with this situation, learned counsel has contended that the action suffers from the vice of discrimination in as much as the mandap-keepers are being burdened with the levy of service tax while those who provide shamiana services are being exempted.

(15) The contention is misconceived. We are unable to accept it.

(16) Firstly, it is well settled that the presumption is in favour of constitutionality. The burden of proving discrimination lies on the person who levels this charge. The petitioners have produced nothing on record to show that they are similarly situated as the persons providing shamiana services.

(17) Secondly, it has not been shown as to what exactly are the activities of the petitioners. In paragraph 1, the averments made by the petitioners are that they are "engaged in the business of supplying Mandap-keeper (marriage places) etc." In paragraph 2, it has been stated that they are "engaged in the business of tent house." Are the petitioners providing both kinds of services? Are they engaged in only one of the two? Nothing is clear on the record. In this situation, it is clear that complete facts are not available. Thus, it cannot be said that two persons who are similarly situated are being differently treated.

(18) Lastly, it also deserves mention that the petitioners have rushed to the court at a state when only show cause notices have been issued. By the impugned show cause notice, one of the petitioners has been given an opportunity to explain the factual position. It appears that similar notices may have been given to even the other petitioners. That being so, the facts have yet to be found. The petitioners are only being called upon to disclose facts whereupon the authority has to consider the matter and record a finding. They have rushed to impugn the show cause notices with all kinds of allegations in the petition. Unless facts are really established, the charge of discrimination cannot even be appropriately examined.

(19) No other point has been raised.

(20) In view of the above, we find no merit in this writ petition. It is, consequently, dismissed in limine.

S.C.K.

Before Jawahar Lal Gupta & N.K. Agrawal, JJ

M/S INDIAN OIL CORPORATION LTD.,—Petitioner

versus

**THE EXCISE AND TAXATION OFFICER, AMBALA CANTT.
AND OTHERS,—Respondents**

CWP No. 4394 of 1999

5th May, 1999

*Haryana General Sales Tax Act, 1973—S. 2(1) (iv)—Sale—
Meaning of -LPG cylinders provided to consumers on furnishing*