

Tamil Nadu Hotels Association Vs Union of India (UOI)

Court: Madras High Court

Date of Decision: July 25, 2001

Acts Referred: Constitution (Forty-Sixth Amendment) Act, 1982 & Article 366(29A)

Constitution of India, 1950 & Article 14, 248, 248(2)

Finance Act, 1994 & Section 65, 65(1), 65(16), 65(19), 65(2)

Service Tax Act & Section 65(24), 65(41), 67

Transfer of Property Act, 1882 & Section 3

Citation: (2001) 78 ECC 584 : (2001) 133 ELT 265 : (2006) 2 STR 513

Hon'ble Judges: V.S. Sirpurkar, J; A. Kulasekaran, J

Bench: Division Bench

Advocate: V. Ramachandran for Subbiah, for the Appellant; M. Chandrasekaran, Sr. CGSC for K. Veeraraghavan, ACGSC, for the Respondent

Final Decision: Dismissed

Judgement

V.S. Sirpurkar, J.

This Writ petition in one sense has really become redundant because the provisions, constitutionality of which is

challenged in this Writ petition, are no more on the statute book. However, since those provisions created a liability for the period they were on the

statute book, the petitioner, which is a representative body of the hotels is pressing the challenge. The following facts would be necessary to

understand the controversy.

2. It is common knowledge that while presenting the Budget in the year 1994-95, the Finance Minister proposed to introduce a tax on certain

services and pursuant to the same, Chapter V of the Finance Act, 1994 introduced provisions for the levy of the tax known as the "service tax",

which was defined as the tax chargeable under the provisions of Chapter V. This tax was to apply to all the "taxable services" provided after the

commencement of Chapter V. Section 66 of the Finance Act, 1994 is a charging section. Few other provisions would be necessary to be seen.

Section 65(16) as it stood then defined the "taxable service" while, Section 67 provides for the manner in which the "taxable service" was to be

valued for charging the service tax. It also provided that every person responsible for collecting the service tax under Chapter V shall within such

time and in such manner and in such form as may be prescribed make an application for registration under this Chapter to the Central Excise

Officer. Section 70 provided that every person responsible for collecting the service tax shall furnish or cause to be furnished to the Central Excise

Officer in the prescribed form and verified in the prescribed manner a quarterly return within fifteen days of the end of the preceding quarter giving

various particulars required under the said provision. This Finance Act was substantially amended by Finance Act, 1997 and number of other

services were brought into the tax dragnet. Section 65(8) defined the term ""caterer"" as follows :

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 accountrements for any purpose or occasion.

Section 65(19) defined the term ""mandap"", which is as follows :

Mandap means any immovable property as defined in Section 3 of the Transfer of Property Act, 1882 (4 of 1882) and includes any furniture,

light fittings and floor covering therein let out for consideration for organising any official, social or business function.

Section 65(20) defined the term ""mandap keeper"". It is as under:

Mandap-keeper means a person who allows temporary occupation of a mandap for consideration for organising any official, social or business

function.

Section 65(24) defined the term ""outdoor caterer"", which reads as follows :

Outdoor caterer means a caterer engaged in providing services in connection with catering at a place other than his own.

Section 65(41)(n) and (p) defines ""taxable service"" as under:

Taxable service means, any service provided

(n) to a client, by an outdoor caterer;

(p) to client by a mandap keeper in relation to 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.

Section 67(m) and (o) are also relevant sections and they are as under:

67(m) Valuation of taxable services for charging service tax 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 nonalcoholic beverages or crockery and similar articles or accountrements provided to such client for any purpose or on any occasion.

67(o) Valuation of taxable services in relation to service provided by mandap keeper to a client, shall be the gross amount charged by such keeper

from the client for the use of mandap including the facilities provided to the client in relation to such use and also the charges for catering, if any.

3. In this petition, the petitioner is challenging the constitutional validity of the service tax levied for the services provided by the mandap-keeper

and secondly, regarding the services provided by the outdoor caterer. In so far as the services provide by the ""mandap keeper"", the said services

which were provided for in Finance Act, 1977 were continued in Finance Act No. 2/98 which was brought into with effect from 16-10-1998.

However, the services provided by the outdoor caterer, who was defined u/s 65(24) came to be deleted form the list of ""taxable services"". In the

amended Act Section 65(48) defined the term ""taxable services"" whereas in the earlier Act those services were defined u/s 65(41) and the services

provided by the outdoor caterer was defined by Section 65(41)(n). Both those provisions, viz. Section 65(24) and Section 65(41)(n) were

deleted. With the result, the said services remained taxable only during the period when the earlier Act was in force. Thus, the period during which

the said tax remained on the statute book is only between July, 1997 and July, 1998. We are thus left with only the challenge to the constitutionality

of the provisions regarding the mandap keeper and the outdoor caterer.

4. Before we proceed to consider the challenge to these provisions, we must observe that we have dismissed the challenge to the constitutionality

of Section 65(22) and Section 65(48)(m). We have already pointed out that these two provisions came in place of the provisions of Section

65(19) and Section 65(41)(p) of the unamended Act. We have already held that the service tax provided u/s 65(48)(m) is a valid tax and the

provisions of Section 65(22), (23) and (48)(m) are constitutionally valid by our judgment in W.P. No. 1617 of 1998, etc. dated 30-4-2001. It is,

therefore, obvious that the challenge to Section 65(19), Section 65(20) and Section 65(41)(p) in the old Act must fail for the reasons stated in that

judgment. We thus left with only the challenge to the provisions of Section 65(24) and Section 65(41)(n).

5. The challenge of these provisions is two fold. It is firstly stated that this enactment is under the residuary Entry 97 of List I under the Seventh

Schedule. The learned Senior Counsel, Mr. Ramachandran suggests that if this legislation can be ascribed to any of the entries in the State List

(List II) or Concurrent List (List III) then the impugned provisions would obviously rendered without legislative competence. There can be no

dispute that the plain import of Article 248 is that the Parliament could legislate under the residuary powers under Entry 97 of List I only if the said

impugned legislation cannot be covered under List II or List III of the Seventh Schedule. Even Article 248(2) provides that such power to legislate

would also include the power to legislate for imposing a tax not mentioned in either of those lists. The learned Counsel, therefore, points out that

the tax in question is nothing but pure and simple sales tax on the sale of food stuffs. For this purpose the learned Counsel invited our attention to

Entry 54 of List II, which reads as under :

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

It is not necessary for us to see Entry 92A in List I as it pertains to the tax on the sale or purchase of goods where such sale or purchase takes

place in the course of inter state trade or commerce. That is not the subject here. The learned Counsel, however, suggests that a "caterer" is

defined in the Act as a person who supplies any food, edible preparations, alcoholic or nonalcoholic beverages at the place other than his own. It is

pointed out further by the learned Counsel that this would be nothing but a sale as Section 67(m) specifically provides that such service would be

valued on the basis of the gross amount charged by such caterer from the client for the services in relation to such catering which would also

include the charges for food, edible preparations, alcoholic or non-alcoholic beverages, etc. The learned Counsel, therefore, points out that this

service would include the sale of food, edible preparations, alcoholic or non-alcoholic beverages, etc. To buttress his contention, the learned

Counsel further invites our attention to Article 366(29A) and points out that a tax on the sale or purchase of goods includes a tax on the supply by

way of or as a part of any service or in any other manner whatsoever of food or any other article for human consumption or any drink whether

toxicated or intoxicated, whether such supply of service is for cash or deferred payment or for other valuable consideration. The learned Counsel

points out that under sub-clause (f) of Article 366(29A) it is further provided that such transfer, delivery or supply and purchase of these goods

shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and purchase of these goods by the person to

whom such transfer, delivery or supply is made. The learned Counsel, therefore, argues very vehemently that any supply made by the outdoor

caterer of the food or any other article for human consumption or alcoholic or non-alcoholic beverages would simply amount to a sale of goods

and, therefore, would be completely covered under Entry 54 of the State List (List II). The learned Counsel argues that it is an established position

in law that while examining the legislative competence of the particular provision, which is legislated under the residuary Entry 97 of the List I if that

entry is claimed to be related to any other entry in the List II (State List) or List III (Concurrent List) then that entry will have to be given a

broadest possible interpretation.

6. We have therefore to consider whether any provision relating to ""outdoor caterer"" was in fact attributable to Entry 54 of the State List (List II).

We have deliberately quoted earlier the definitions of the terms ""caterer"" and ""outdoor caterer"". From those definitions, it is clear that the term

caterer"" is a definition of broader concept while the term ""outdoor caterer"" is the specie of the genus. The only difference is that an ""outdoor

caterer"" caters at a place other than his own. We need not go to the definitions to consider as to what is meant by a ""place other than his own

because that is not the relevant aspect for the argument.

7. The only argument raised is that when a caterer or as the case may be an outdoor caterer offers catering services as contemplated in the then

Section 65(41)(n), he actually carried on the sale of the taxable articles like food or alcoholic or non-alcoholic beverages to the client and,

therefore, the tax imposed on the sale price would amount to sale tax and would be cover-able within Article 366(29A)(f) and ultimately relatable

to Entry 54 of List II. Precisely this argument has been negated by us in our judgment dated 30-4-2001 in W.P. No. 1617 of 1999, etc.

Tamilnadu Kalyana Mandapam Owners Association Vs. Union of India and Others, where we were considering the challenges to the services

offered by mandap keeper and more precisely to Section 65(19), 65(2), 65(41)(p) and Section 67(1). It will be seen that a taxable service

offered to the client by a mandap keeper included the service for user of the mandap and also included the services rendered as a caterer. So also,

under the amended Section 67(1) the valuation of the service provided by the mandap keeper was defined as the gross amount charged by the

mandap keeper from the client for the user of the mandap-and also the charges for catering. The argument before us in that batch of writ petition

was that even in providing the services to the client by a mandap keeper, the mandap keeper was effecting the sale of food articles. An identical

argument was addressed before us on the aspect of the legislative competence with reference to Article 366(29A)(f) and also Entry 54. In

paragraphs 28, 29, 30, 31, 32, 33,34,35, 36, and 37 we have dealt with this aspect and held that the said tax was more particularly relatable to

the aspect of services offered by the mandap keeper and not a mere sale of goods. In coming to that conclusion we have relied upon the

celebrated decision of the Apex Court in Federation of Hotels and Restaurants v. Union of India AIR 1990 SC 1637 and found that while dealing

with the identical question regarding the ""expenditure tax"", the Supreme Court had held that the tax levied could not be said to be relatable to sale

of goods but was relatable to expenditure alone. While addressing the history of the constitutional amendment which introduced Article 366(29A)

(f), we have also considered the earlier decided cases reported in 1972 STC 113 and Northern India Caterers (India) Ltd. Vs. Lt. Governor of

Delhi, . We have also rejected the contention raised in that case that the decision of the Apex Court in Federation of Hotels and Restaurants case,

cited supra, was without consideration of Article 366(29A)(f) and, therefore, was not binding on us. We have also given reason as to why no

reference was made in that decision to Article 366(29A)(f). The reason being the Apex Court in that case had found a distinct aspect of the

expenditure though there was involvement of the sale of food stuffs in that case. We have said in paragraph 32 as follows :

32. We feel that the aspect of service is extremely important and can be viewed as a ""distinct and independent aspect"" from the very language of

Section 65(48)(m). That provision spells out the ""taxable service"" and, therefore, can legitimately be read as fixing the tax liability along with

Section 66. u/s 65(48)(m) what is taxed is taxable service to a client by a ""mandap keeper"" in relation to use of a ""mandap"" in any manner and

includes the facilities provided to the clients in relation to such use. The last words are extremely important and they are:

and also the services, if any, rendered as a caterer.

What is, therefore, to be taxed is the ""service"" given by the ""mandap keeper"", which would mean the ""user of the mandap"" and the ""facilities

provided therein"", which ""facilities"" would be in relation to the ""user"" and also the services rendered by the ""mandap keeper"" as a ""caterer.

Therefore, the last words of the provision clearly bring out a position that it is the service provided by the ""mandap keeper"" as a ""caterer"" which is

taxable and not the supply made by him of food, drink, etc.

In the same manner we can say that it is only the aspect of service in providing food stuffs at a place desired by the client which essentially would

not be the place of the caterer would be the distinct and separate aspect in respect of the service provided by the outdoor caterer. We have also

taken therein the stock of the argument that the charges for catering were included in the valuation of the taxable services in case of the services

provided by the mandap keeper to the client. Section 67(m) as it stood then in the unamended Act was almost in the identical terms which we may

quote even at the cost of repetition:

67(m) Valuation of taxable services for charging service tax 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 nonalcoholic beverages or crockery and similar articles or accountrements provided to such client for any purpose or on any occasion.

The language with Section 65 as it stood then, which is the impugned provision now and Section 65(1) (post amendment) which we have

considered in W.P. No. 1617 of 1999 and batch of writ petitions is strikingly similar. We have also taken the stock of the earlier decided cases as

also the later judgments of the Supreme Court reported in 2001 (1) SCC 521. We have no doubt that the judgment of ours in W.P. No. 1617 of

1991, etc. would clinch the issue in the present case also. We are, therefore, of the clear opinion that the present impugned provisions cannot be

attributed to Entry 54 of List II (State List) and, therefore, it cannot be said that there is lack of legislative competence in respect of the impugned

provisions.

8. The learned Counsel again harped on the aforementioned decisions of the Northern India Caterers and Associated Hotels. However, for the

reasons that we have given in paragraph 29 and in the subsequent paragraphs of our decision in W.P. 1617 of 1999, etc., we have no hesitation in

holding that these cases which paved the way for the 46th amendment and introduction of Article 366(29A)(f) would be of no consequence

presently particularly after the decision in the Federation of Hotels and Restaurants case on which we have relied on. The argument that such

services provided by the outdoor caterers amount to a sale is clearly incorrect and rejected.

9. This takes us to the last argument which was very vehemently made by the learned Senior Counsel. The argument was that the services included

in taxable services within the meaning of Section 65, as it stood then, as also the valuation of such service as defined in Section 67 of the Act took

into its sweep the actual services offered to the client. However, it could not be so about the ""mandap keeper"" or an ""outdoor caterer"". In short,

the argument was that these two categories in the first place did not provide any service and, therefore, to treat them in the same manner like other

persons offering other services would be arbitrary and impermissible under Article 14. According to the learned Counsel that would be a case of

treating unequal as equals. The argument is clearly wrong. When we consider the terms ""mandap keeper"" as also the ""outdoor caterer"", it is

extremely clear that the ""mandap keeper"" offers the service by offering the user of the mandap for consideration for organising any official, social or

business function. The permission to allow the user itself is a service which is clear from the language of the provisions. Similarly, an ""outdoor

caterer"" is a caterer who offers the service of catering at a place other than his own essentially, therefore, meaning the place where his services are

required by the client. It is obvious that a client would want such service to be provided where such catering service may not be available - it could be

a picnic spot, a spot in a jungle or a spot away from the hub of the city where the catering services may not be available. When a caterer

provides the catering service at such a place then obviously he is providing a service. Therefore, it cannot be said that there is no element of service

involved and the ""outdoor caterer"" and the ""mandap keeper"" do not actually provide any service and, therefore, they should be out of the tax

dragnet of the service tax. The argument is, therefore, rejected.

10. The learned Counsel further argued that in the first place the Parliament was not competent to include the value of food stuffs and drinks

supplied for the purpose of service tax at all. The further argument was that even if that was so, the entire transaction of providing the facilities or

amenities and the supply of eatables, drinks, etc. was considered as a single item for taxable service flowing out of a single item for taxable service

flowing out of a single contract. The argument was that therefore the tax has become unreasonable and arbitrary. We do not at all agree. As to on

what items should the legislature impose a tax is for the legislature to decide. In fact, it is a wide ""discretion"" on the part of the legislature and the

Courts have always recognised such ""discretion"" in the legislature. In the aforementioned judgment of Tamil Nadu Kalyana Mandapam Owners"

Association, we have negated the challenge to the provisions regarding ""mandap keeper"", viz. Section 65(48)(m) and 67(1) under Article 14 of

the Constitution of India. In paragraph 42 of that judgment we have dealt with the cases of Mafatlal Industries Ltd. and Others Vs. Union of India

(UOI) and Others, as also the reported judgment in R.K. Garg and Others Vs. Union of India (UOI) and Others, . We have relied on the

following observations:

laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion, etc. It

has been said by no less a person than Holmes, J. that the legislature should be allowed some play in the joints, because it has to deal with complex

problems which do not admit of solution through any doctrinaire or straitjacket formula and this is particularly true in case of legislation dealing with

economic matters, where, having regard to the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the

legislature. The Court should feel more inclined to give judicial deference to legislative judgment in the field of economic regulation than in other

areas where fundamental human rights are involved. The Court must always remember that legislation is directed to practical problems, that the

economic mechanism is highly sensitive and complex, that many problems are singular and contingent, that laws are not abstract propositions, and

do not relate to abstract units and are not to be measured by abstract symmetry; that exact wisdom and nice adaption of remedy are not always

possible and that judgment is largely a prophecy based on meagre and uninterrupted experience.

Similarly, in the same decision, the following observations in paragraph 88 of the decision reported in His Holiness Kesavananda Bharati

Sripadagalvaru Vs. State of Kerala, were also referred. The observations are :

In exercising the power of judicial review, the Courts cannot be oblivious of the practical needs of the Government. The door has to be left open

for trial and error. Constitutional law like other mortal contrivances has to take some chances. Opportunity must be allowed for vindicating

reasonable belief by experience.

We, therefore, do not find that the impugned provisions particularly Section 65(24), Section 65(41)(n) and Section 67(m) of the Service Tax Act

are in any way arbitrary or discriminatory.

11. Lastly, the learned Senior Counsel argued that there was no guidelines in the Act as to which part of the gross amount charged from the client

was to be taxed and which not to be taxed. We do not think that there is any such deformity. The provisions are clear that the gross charges are to

be taken into consideration while assessing the service tax. In our opinion, there is no vagueness. We took the same view in the aforementioned

Tamil Nadu Kalyana Mandapam Owners" Association case. We have pointed out that the charge which has to be paid by the assessee is to be

fully covered by the gross charge in respect of the services provided. In our view, there would be no arbitrariness on this account.

12. A feeble argument was then addressed that while the hoteliers who were providing the indoor service were not being taxed while relatively

weaker section of the persons who go out and offer the catering services were being taxed. The learned Counsel argued that if a person has a

restaurant on Marina beach, he may not be taxed while a person who offers the service under the sky would be liable to be taxed and that is

arbitrary. In our opinion, this is not the situation. We have already explained that it is open to the legislature to select the items and areas to be

taxed. It is the legislature's discretion and in the taxing statutes the Apex Court has always found a slightly wider discretion in the legislature. From

the reported decisions to which we have already referred like Municipal Corporation of Delhi Vs. Ganesh Razak and Another, ; Mafatlal

Industries Ltd. and Others Vs. Union of India (UOI) and Others, In Re: The Special Courts Bill, 1978, as also the judgment in R.K. Garg and

Others Vs. Union of India (UOI) and Others, we are of the clear opinion that even this challenge must fail.

13. To sum up, therefore, we must hold that the petitioner has not been able to establish that any of the aforementioned provisions is or can be

described to be arbitrary, unreasonable and discriminatory and, therefore, invalid as being opposed to the principles under Article 14 of the

Constitution of India.

14. We see no merit in the writ petition. The writ petition is liable to be dismissed and, accordingly, it is dismissed. No costs.