Union Of India vs Coastal Container Transporters ... on 26 February, 2019

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Bench: R. Subhash Reddy, Uday Umesh Lalit

C.A.@ SLP(C)No.25699/18

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2276 OF 2019
[Arising out of S.L.P.(C)No.25699 of 2018]

Union of India & Ors. ...

Versus

Coastal Container Transporters
Association & Ors. ...

J U D G M E N T

R. Subhash Reddy, J.

1. Leave granted.

2. This civil appeal is filed by Union of India and others, respondents in Special Civil Application No.6679 of 2016 filed before the High Court of Gujarat at Ahmedabad, aggrieved by the judgment and order dated 18.12.2017. By the aforesaid order, the High Court has quashed the show cause notices dated 08.10.2015 and 30.09.2015 issued by the appellants, in exercise of power under Section 73(1) of the Finance Act, 1994 (for short, 'the Act').

The first respondent is Coastal Container Transporters Association and the second and third respondents are, Yamuna Shipping Logistics Pvt. Ltd. and Pushpak Logistics Pvt. Ltd. who are engaged in the transport business. They have filed the aforesaid writ petition under Article 226 of the Constitution of India before the High Court. Though show cause notices dated 08.10.2015 and

30.09.2015 were issued to respondent nos.2 and 3, in anticipation of similar notices to its members, the first respondent-association also joined respondent nos.2 and 3 in the writ petition. In the aforesaid writ petition, the appellants herein have filed Civil Application No.2952 of 2017 raising preliminary objection with regard to maintainability of the writ petition itself. While allowing the Special Civil Application, the said civil application is also rejected by the High Court, by impugned order.

4. Necessary facts, in brief, are as under :

> First respondent is an association, whose members are transport operators engaged in the business of transportation of goods entrusted by the customers. By way of impugned show cause notices, the appellants have proposed to demand service tax from the respondents under the category of "cargo handling service", while it is the case of the respondents that the service which is being provided by them, falls under the taxable category of "goods transport agency". The respondents, to bolster their case, have placed reliance upon circulars dated 06.08.2008 and 05.10.2015 issued by the Central Board of Excise and Customs (CBEC).

Based upon the intelligence gathered by the officers of Rajkot Regional Unit, which revealed that several business entities including respondent nos.2 and 3 who are engaged in doing the business of cargo handling in west coastal region but had got themselves registered under "good transport agency", by taking approval from the competent authorities, searches were conducted in the premises of respondent nos.2 and 3. It is alleged that during such searches several incriminating documents, including the quotations submitted by the respondent- companies to their customers were seized and statements of the Directors were recorded as per the provisions of Central Excise Act, 1944 read with the provisions under Finance Act, 1994. Subsequently, the show cause notices dated 08.10.2015 and 30.09.2015, were issued to respondent nos.2 and 3, which are impugned in the writ petition filed before the High Court.

5. It is the case of the appellants that the respondents, with a view to evade payment of service tax, have split the whole transactions into three parts, i.e., from the place of consignor to Kandla/Mundra Port by road, from Kandla/Mundra Port in Gujarat to Kochi/Tuticorin Ports in South India by sea route and from Kochi/Tuticorin Ports in South India to the place of the consignee by road. It is the further case of the appellants that if the respondents are registered under the category of "cargo handling service", no abatement would have been admissible and whole of the transaction from the consignor to consignee would be covered under the taxable services which attract higher rate of service tax.

6. On the other hand, it is the case of the respondent – original petitioners in the writ petition that the show cause notices, impugned in the writ petition, have been issued contrary to the provisions of Finance Act, 1994 and also contrary to the circulars issued by the CBEC itself from time to time. It is the further case of the respondents that when they receive orders from customers there is a clear understanding between the customers and them, that they merely provide service of transportation of goods by road, whereas services at port area and transportation of goods through waterways

would be provided by shipping lines. The respondents would raise a bill for transportation of goods by road and debit note for recovery of expenses which they incur for shipping lines for providing services at port area and transportation of goods through waterways. It is also their case that they would not add any margin while recovering money from their customers towards port and shipping line charges.

7. In the writ petition filed before the High Court, a preliminary objection was raised on behalf of appellant nos.2 and 3 with regard to maintainability of the petition. Firstly, it was pleaded that as the writ petition itself was directed against the show cause notices, such petition was not maintainable. Secondly, on the ground that as the controversy relates to classification of services and even if the show cause notices were to culminate into final order, appeal would lie before the Supreme Court, as such, High Court, in exercise of writ jurisdiction, should refrain from entertaining the petition which involves a classification dispute. It was pleaded that it was not either a case of lack of jurisdiction or a case where the principles of natural justice are violated, so as to entertain the petition in which only show cause notices were challenged.

8. On the other hand, it was the case of the respondent-original writ petitioners that there is no absolute prohibition for not maintaining the petition under Article 226 of the Constitution of India, even at the stage of show cause notice. It was their case that even taking the contents, as mentioned in the show cause notices, the contract does not amount to providing “cargo handling service” as defined under Entry 23 of Section 65 of the Act. By placing reliance on Circular No.B11/1/2002-TRU dated 01.08.2002 issued by the CBEC, it was the case of the respondents that “cargo handling service” means loading, unloading, packing or unpacking of cargo and includes cargo handling services, services provided for freight in special containers or in non- containerised freight, services provided by container freight terminal or any other freight terminal, for all modes of transport or any other service incidental to freight. It was their case that the respondents were not packing or unpacking, as such, it cannot be classified under “cargo handling service”.

9. Before the High Court, it was the case of appellant nos.2 and 3 that w.e.f. 01.07.2012, the scheme of service tax has changed and the negative list regime has been brought into force. It was their case that the circulars issued prior to the amendment in the parent Act would not be applicable subsequent to such amendment. It was their case that with a view to evade payment of service tax, the respondents have split the whole transaction into three parts. If the respondents were registered under the category of “cargo handling service”, no abatement would have been admissible, as the whole of the transaction from consignor to consignee would be covered under taxable service. Reference was made to Section 66F of the Act which provides the principles of interpretation of specified descriptions of services or bundled services, more particularly, to sub-section (3) thereof which provides for the manner of determination of the taxability of bundled service. Clause (b) thereof provides that if various elements of such service are not naturally bundled in the ordinary course of business, it shall be treated as provision of the single service which results in highest liability of service tax. By referring to the definition of “cargo handling service”, as stood prior to its substitution by Finance Act, 2008, it was submitted that the earlier definition of “cargo handling service” did not include transportation and w.e.f. 16.05.2008, the definition of “cargo handling service” came to be amended by including the service of packing together with transportation of

cargo or goods, with or without one or more other services like loading, unloading, packing, unpacking.

10. Precisely, it was the case of the appellants that once members of the respondent-association undertake the responsibility to deliver goods from consignor to consignee and more particularly, when they are also providing cargo handling service, with the help of other service providers, the service provided by them would fall within the ambit of cargo handling service, inasmuch as the help from other service providers does not change the nature of service that is being provided by them. It was also stated that shipping lines raise bills in the name of respondents and if any service tax has been charged, the respondents would be within their rights to take cenvat credit of the same in accordance with the rules and regulations. However, that would not change the nature of services rendered by them.

11. While considering the contentions advanced on both sides, the High Court has over-ruled the objection of maintainability of the petition and has recorded a finding that the services rendered by the members of the respondent-association are classifiable under “goods transport agency” but not under “cargo handling service”. High Court has referred to the definition of “cargo handling service” under Section 65(23) of the Act, Circular No.B11/1/2002-TRU dated 01.08.2002 and by referring to the instructions dated 06.08.2008 issued in circular no.104/7/2008-S.T. and circular bearing no.186/5/2015-S.T. dated 05.10.2015, has held that even after introduction of new regime w.e.f. 01 st July 2012, the activity of the respondents falls within the classified category of “goods transport agency” but not “cargo handling service”. High Court has further held that so far as the service of loading and unloading at the port and shipping of goods from one port to other is concerned, the respondents are the recipients of such service from the shipping lines and/or cargo handling service on behalf of the customers. The High Court has held that so far as the service rendered by shipping line is concerned, the shipping line issues invoice in favour of the respondents, who, in turn, issue debit note to the customer without adding any charge in respect of such service. Further, it is held that, if transportation is to be included in “cargo handling service”, packing is an essential ingredient of the same. In conclusion, it is held by the High Court that in view of the binding circulars issued by the CBEC, the service rendered by the respondents has to be considered on the basis of main service provided by them, viz., good transport agency and it is not permissible for the appellants to take a stand contrary to such circulars. The High Court has held that the notices impugned in the writ petition, are contrary to the binding circulars issued by the CBEC, in such circumstances, respondents are entitled to invoke the writ jurisdiction of the court. Further, it is held that as there are no factual disputes and only legal issue is required to be decided and by placing reliance on the judgment of this Court in the case of Deputy Commissioner, Central Excise & Anr. v. Sushil and Company1, has over-ruled the objection of maintainability 1 (2016) 13 SCC 223 of the writ petition raised by the appellants. With the aforesaid findings, the High Court has taken the view that no useful purpose would be served in relegating the respondents - original writ petitioners to the adjucating authority for adjudication pursuant to show cause notices which were issued without any legal basis, while allowing the writ petition filed by the respondents, quashed the notices dated 08.10.2015 and 30.09.2015 and further rejected Civil Application No.6679 of 2016 filed by the appellants raising the preliminary objection with regard to maintainability of the writ petition.

12. We have heard Sri K. Radhakrishnan, learned senior counsel for the appellants and Dr. A.M. Singhvi, learned senior counsel for the respondents.

13. Learned senior counsel, Sri Radhakrishnan, appearing for the appellants has submitted that the High Court has committed a serious error in entertaining the petition which itself is directed against the show cause notices. It is submitted that as the issue relates to classifiability for the purpose of taxation, more so, against the final order, appeal is provided to the Supreme Court, High Court ought not to have entertained the writ petition at all. It is further submitted that once the respondents undertook the responsibility of delivery of goods from consignor to consignee and more particularly when they are also providing cargo handling service, may be with the help from other service providers, the service provided by them would fall within the ambit of "cargo handling service". It is submitted that shipping lines raise bill in the name of respondents and if any service tax is charged, the respondents are well within their rights to take cenvat credit of the same in accordance with the rules. However, that would not change the nature of service rendered by the respondents from "cargo handling service" to "goods transport agency". It is contended that circulars which are relied on by the High Court are applicable only in cases where transportation is undertaken by road. It is submitted that circulars are not correctly interpreted by the High Court, so as to extend the benefit of such circulars to the respondents. Learned senior counsel has made reference to Rule 5 sub-rule (2)(ii) of Service Tax (Determination of Value) Rules, 2006 which are framed in exercise of powers under Section 94 of the Finance Act, 1994. While referring to the judgment of this Court in the case of Deputy Commissioner, Central Excise & Anr. v. Sushil and Company (supra), which is relied on by the High Court, it is submitted that in the aforesaid case, the assessee was only supplying labour and such labour was not doing any work of loading and unloading of any cargo. In such event and as the very contract was only for supply of labour, this Court has held that such service cannot be said to be cargo handling service to impose service tax. It is submitted that the said judgment will not support the case of the respondents at all. Further, it is contended that it is not a case of either lack of jurisdiction or notices are issued in violation of principles of natural justice, so as to entertain the writ petition at the stage of show cause notice. It is further submitted that as the issue relates to classification of taxable service, the High Court should not have entertained the writ petition at all. In support of his contention, learned counsel has placed reliance on the judgment of this Court in the case of Union of India & Anr. v. Guwahati Carbon Limited2 and also in the case of Union of India v. Hindustan Dev. Corpn. Ltd.3. It is submitted that in the aforesaid judgment in the case of Hindustan Dev. Corpn. Ltd. 2 (2012) 11 SCC 651 3 1998 (100) ELT 14 (S.C.) (supra) it is clearly held by this Court, that writ petition is not to be entertained at show cause notice stage when the dispute relates to classification.

14. On the other hand, it is contended by Dr. Singhvi, learned senior counsel appearing for the respondents that there are absolutely no grounds to interfere with the well considered judgment of the High Court. It is submitted that the respondents are engaged in providing service of delivery of cargo from factories situated in Gujarat via Kandla/Mundra ports in Gujarat to Kochi, Mangalore and Tuticorin ports in Kerala through road and sea route. In order to provide service to the customers, respondent-companies take services of various intermediaries like lorry owners, shipping agencies etc. However, all the intermediaries raise the invoices in the name of aforesaid respondent companies only. It is submitted that the shipping agencies provide service to the

respondent companies by raising invoice in their name and they issue a debit note of the same amount in the name of the customers. The respondent companies undertake the composite responsibility. It is submitted that the main activity of the respondents falls in the category of "goods transport agency" as defined under Section 65(50b) of the Act. It is further submitted that the respondents do not carry out any activity of packing or unpacking and if at all any activity of loading or unloading is undertaken, same is merely incidental to the main activity of "goods transport agency". It is submitted that circulars dated 06.08.2008 and 05.10.2015 also support the case of the respondents. Further, it is submitted by learned senior counsel that the issue of classifiability is also squarely covered by the judgment of this Court in the case of Deputy Commissioner, Central Excise & Anr. v. Sushil and Company (supra). It is contended by learned senior counsel that circulars issued by CBEC are binding on the departmental authorities and they cannot take a contrary stand. Learned senior counsel has also placed reliance on a judgment of this Court in the case of Paper Products Ltd. v. Commissioner of Central Excise4.

15. Having heard learned senior counsels on both sides, we have perused the entire material placed on record.

16. The controversy in the present case relates to the classification of services rendered by the respondents. It is also not in dispute that if the show cause notices 4 1999 (112) ELT 765 (S.C.) culminate into an order, the appeal would lie to this Court. When the show cause notices are issued to respondent nos.2 and 3-members, the writ petition is filed by the first respondent-association and the recipients of show cause notices who are respondent nos.2 and 3.

17. It is the case of the appellants that if service as a whole, is taken into consideration, it falls within the classifiable category of "cargo handling service" but not "goods transport agency". On the other hand, it is the case of the respondents that they only undertake road transportation, and so far as cargo handled by shipping agencies is concerned, they prepare bills in the name of the respondent companies and in turn respondents issue debit note to their customers to the extent of charges payable to the shipping agencies, as such their service falls in the category of "goods transport agency" but not "cargo handling service". While it is the case of the respondents that, show cause notices issued run contrary to circulars dated 06.08.2008 and 05.10.2015 issued by the CBEC, it is the case of the appellants that such circulars are not applicable to the respondents, and the circulars are applicable only when transportation is only by road. In the writ petition filed before the High Court, appellants have filed civil application by raising preliminary objection with regard to the maintainability of the petition under Article 226 of Constitution of India at the stage of show cause notices. Such objection is also rejected by the High Court by recording a finding that there are no factual disputes and also in view of the judgment of this Court in the case of Deputy Commissioner, Central Excise & Anr. v. Sushil and Company (supra).

18. As we are not in agreement with the view taken by the High Court, in entertaining the writ petition against show cause notices, we refrain from recording any finding on contentious issues which arise for consideration. If any finding is recorded by this Court at this stage, same will prejudice either of the parties. Having regard to the contentions raised, it cannot be said that there are no factual disputes. Applicability of the circulars dated 06.08.2008 and 05.10.2015 is also in

serious dispute. Further the classifiability of service rendered by a particular assessee is to be considered with reference to facts of each case depending upon nature of service rendered and the contract entered into. There cannot be any general declaration, as prayed for. The judgment of this Court in the case of Deputy Commissioner, Central Excise & Anr. v. Sushil and Company (supra) also cannot be applied to the facts of the case on hand to come to the conclusion that the services rendered by the respondents will fall in the category of "goods transport agency" but not "cargo handling service". In the aforesaid judgment, the contract was only for supply of labour and it was the specific case of the assessee that such labour was not doing any work of packing, unpacking, loading, unloading of any cargo. In view of such written contract for limited services referred above, this Court has held that such service cannot be held to be "cargo handling service". The said judgment is distinguishable on facts and same cannot be applied to the case on hand, so as to accept the case of the respondents that their service is to be classified in the category of "goods transport agency" but not "cargo handling service". Further, learned senior counsel appearing for the respondents, Dr. Singhvi, also placed reliance on a judgment of this Court in the case of Paper Products Ltd. (supra) in support of his argument that circulars issued by the CBEC are binding on departmental authorities and they cannot take a contrary stand. It is true that circulars issued by the CBEC are binding on the authorities, but at the same time, such circulars are applicable or not, is a matter which is to be considered with reference to facts of each case. When it is the case of the appellants that such circulars referred above would apply only in case of road transportation but not otherwise, then it is a case for consideration by competent authority on receipt of the explanation but same is no ground to quash the show cause notices. In that view of the matter, we are of the view that the judgment of this Court relied on by learned senior counsel in the case of Paper Products Ltd. (supra) also would not render any support.

19. On the other hand, we find force in the contention of the learned senior counsel, Sri Radhakrishnan, appearing for the appellants that the High Court has committed error in entertaining the writ petition under Article 226 of Constitution of India at the stage of show cause notices. Though there is no bar as such for entertaining the writ petitions at the stage of show cause notice, but it is settled by number of decisions of this Court, where writ petitions can be entertained at the show cause notice stage. Neither it is a case of lack of jurisdiction nor any violation of principles of natural justice is alleged so as to entertain the writ petition at the stage of notice. High Court ought not to have entertained the writ petition, more so, when against the final orders appeal lies to this Court. The judgment of this Court in the case of Union of India & Anr. v. Guwahati Carbon Ltd. (supra) relied on by the learned senior counsel for the appellants also supports their case. In the aforesaid judgment, arising out of Central Excise Act, 1944, this Court has held that excise law is a complete code in order to seek redress in excise matters and held that entertaining writ petition is not proper where alternative remedy under statute is available. When there is a serious dispute with regard to classification of service, the respondents ought to have responded to the show cause notices by placing material in support of their stand but at the same time, there is no reason to approach the High Court questioning the very show cause notices. Further, as held by the High Court, it cannot be said that even from the contents of show cause notices there are no factual disputes. Further, the judgment of this Court in the case of Malladi Drugs & Pharma Ltd. v. Union of India 5, relied on by the learned senior counsel for the appellants also supports their case where this Court has upheld the judgment of the High Court which refused to interfere at show cause notice

stage.

20. For the aforesaid reasons, we allow this appeal and set aside the judgment and order dated 18.12.2017 passed by the High Court of Gujarat in Special Civil Application No.6679 of 2016.

21. We, however, grant four weeks' time, to file responses/further responses to the show cause notices dated 08.10.2015 and 30.09.2015, to the respondent nos.2 and 3. On receipt of such responses from the respondents or after expiry of the aforesaid time, it is open for the appellants to consider the same on their own merits and pass appropriate orders, uninfluenced by any of the observations made by this Court in this judgment.

.....J. [Uday Umesh Lalit] .....J. [R. Subhash Reddy] New Delhi.

February 26, 2019.

5 2004 (166) ELT 153 (S.C.)