Tamil Nadu Kalyana Mandapam Assn vs Union Of India & Ors on 15 April, 2004

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Author: Ar. Lakshmanan

Bench: S. Rajendra Babu, Ar. Lakshmanan

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           CASE NO.:
Appeal (civil)  2727 of 2002

PETITIONER:
Tamil Nadu Kalyana Mandapam Assn.

RESPONDENT:
Union of India & Ors.

DATE OF JUDGMENT: 15/04/2004

BENCH:
S. Rajendra Babu & Dr. AR. Lakshmanan

JUDGMENT:
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J U D G M E N T Dr. AR. Lakshmanan, J.

The present appeal is directed against the judgment and order dated 30.04.2001 in Writ Petition No. 1617 of 1998 passed by the High Court of Judicature at Madras whereby the Division Bench of the Madras High Court dismissed the writ petition of the appellant-Association and held Sections 66, 67 (o) of the Finance Act, 1994 and Rule 2(1)(d)(ix) of the Service Tax Rules, 1994 and other provisions related to Kalyana Mandapams and Mandap-Keepers to be intra vires of the Constitution of India.

The appellant is an Association of various Kalyana Mandapams bearing Registration No. 513 of 1992. The appellant-Association has been formed to protect the interest of the owners of Kalyana

Mandapams in the city of Madras and elsewhere in the State of Tamil Nadu. The owners of Kalyana Mandapams/Mandap-Keepers let out mandapas/premises to the clients. In addition to letting out the Kalyana Mandaps, the Mandap Keepers also provide other facilities such as catering, electricity, water etc. to their clients.

Service Tax was introduced in India vide the Finance Act, 1994. Service Tax is legislated by the Parliament under the residuary entry i.e. Entry 97 of List I of the Seventh Schedule of the Constitution of India. The service tax provisions have the following scheme.

(i) Section 65 of the Act provides for taxable services;

(ii) Section 66 of the Act provides for the charge of service tax by the person designated as 'the person responsible for collecting the service tax" for the Government;

(iii) Section 67 of the Act provides for the value of taxable service which is to be subjected to 5% Service tax, and

(iv) Section 68 of the Act provides for the collection and payment mechanism for service tax.

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.

In 1997, the scope of the service sector was proposed to be widened and a number of services were sought to be made exigible to service tax. Amongst other services, Chapter VI of the Finance Act, 1997 made the services rendered by the Mandap-Keepers exigible to service tax.

To enable the Government to widen its net of service tax, certain changes were sought to be made to the Finance Act, 1994.

New clauses were added to Section 65 of the Finance Act, 1994. The clauses which are relevant for the purposes of the present appeal are reproduced hereinbelow:-

> "(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; (19) 'Mandap' means any immovable property as defined in Section 3 of the Transfer of Property Act, 1882 and includes any furnitures, fixtures, light fittings and floor coverings therein let out for consideration for organising any official, social or business function;
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> (20) 'Mandap-Keeper' means a person who allows temporary occupation of a mandap for consideration for organising any official, social or business function."

In Clause (41) of Section 65 of the Finance Act, 1994, few sub-clauses were inserted and insofar as they are relevant to this appeal, they are reproduced herein- below:-

> "(41) (p) 'Taxable Service' means any service provided 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."

It is relevant to mention here that some of the sub-sections of Section 65 were renumbered by the Finance Act 2 of 1998, which came into force from 16.10.1998. Section 65(19) was renumbered as S.65(22), while S.65(20) was renumbered as S.65(23). S.65(41)(p) was renumbered as S.65(48)(m). However, by the Finance Act, 1998 only the numbers were changed and the language of the provisions remained the same.

S.66 of the Finance Act, 1994 was sought to be replaced by a new Section which is reproduced hereinbelow:-

> "S.66(1) On and from the commencement of this Chapter, there shall be charged a tax (hereinafter referred to as service tax) @ 5% of the value of the taxable services referred to in sub-clauses (a), (b) and (d) of Clause 41 of S.65, which are provided to any person by the person responsible for collecting the service tax.
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> (2) With effect from the date notified under S.85 of the Finance Act (No.2) 1996 there shall be charged a service tax at the rate of five percent of the value of taxable services referred in sub-clauses (c) (e) and (f) of Clause (41) of Section 65 which are provided to any person by the person responsible for collecting the service tax.
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> (3) With effect from the date notified under Section 84 of the Finance Act, 1997 there shall be charged a service tax at the rate of five percent of the value of taxable service referred to in sub clauses (g)(h)(i)(j)(k)(l)(m)(n)(o)(p)(l) and (4) of Clause (41) of Section 65 which are provided to any person by the person responsible for collecting the service tax."

Changes were also made to Section 67 of the Finance Act, 1994. The relevant sub-section (i) of S.67 which is relevant for the purpose of the present appeal is reproduced hereinbelow:

> "67. Valuation of taxable services for charging service tax.- For the purposes of this chapter, the value of taxable services,
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> (i) in relation to service provided by a 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."

The Central Government in exercise of the power conferred on it by S.93 of the Finance Act, 1994 issued a Notification dated 26.06.1997. Under the said Notification, the Central Government exempted an amount of service tax leviable on a mandap- keeper, in excess of the amount of service tax calculated on 60% of the gross amount charged from the client by the Mandap-Keeper for the use of the mandap including the facilities provided to the clients in relation to such use and also for certain charges. The said Notification also provided that the exemption shall apply only in such cases where the Mandap-Keepers also provide catering services i.e. supply of food and drinks and the bill issued for this purpose indicates that it is inclusive of charges for catering services. The said Notification came into force on 01.07.1997.

In exercise of the power conferred on it by S.88 of the Finance Act, 1994, the Central Government issued a Notification No.19/97, whereby the Central Government appointed the 1st day of July, 1997 as the date on which the service tax on taxable services specified in sub clauses (i) and (p) of Clause 41 of Section 65 of the Finance Act, 1994 will come into force.

On the basis of the said Notification, the Commissioner of Central Excise, Service Tax vide Trade Notice No.9/97 dated 01.07.1997 informed all the concerned persons that as per Clause 19 of S.65 of the Finance Act, 1994 'Mandap' means any immovable property as defined in S.3 of the Transfer of Property Act, 1882 and includes any furniture, fixtures, light fittings and floor coverings therein let out for consideration for organising any official, social or business function. The Trade Notice further stated that the scope of the said Notice was very wide and it included within its scope places like Kalyan Mandap, Marriage Halls, Banquet Halls, Conference Halls etc. and hotels and restaurants providing any such facilities would also be included in the coverage of service tax.

The said Notice also mentioned that where a Mandap-Keeper was providing catering services i.e. supply of food, in addition to letting out of a Mandap and charges the customer for supply of foods, service tax would be levied on 60% of the total amount of the Bill in such cases.

The appellant-Association submitted representations dated 29.03.1997 and 09.06.1997 to Respondent No.2 citing out in detail the various problems and complication that might arise as a result of the said Notification and requested to desist from including the mandap-keepers within the Finance Act. Even though the said representations were duly acknowledged by Respondent No.2, the same were not replied to.

On 04.02.1998, the appellant filed Writ Petition No.1617 of 1998 challenging the provisions relating to mandap-keepers in the Finance Act, 1997 whereby the mandap- keepers were sought to be brought within the net of service tax. The prayer in the writ petition runs as follows:-

> "It is prayed that this Court may be pleased to issue a Writ of Declaration or any other appropriate Writ, order or direction in the nature of a Writ of Declaration declaring that the provisions of Chapter V of the Finance Act, 1994 and, in particular, Sections 66, 67(o) and Rule 2(1)(d)(ix) of the Service Tax Rules, 1994 and other provisions insofar as it relates to Kalyana Mandapams and Mandap-Keepers are illegal, ultra vires and unenforceable and liable to be struck down as unconstitutional

> and pass such further or other orders as this Court may deem fit and proper and thus render justice."

On 17.11.1999, the Additional Commissioner - Service Tax, issued Service Tax Notice No.4/99 whereby it was clarified that service tax would be levied on any open land/ground if the same is let out for organizing any official, social or business function, even if no accompanying/incidental services were rendered by the mandap-keeper to the clients hiring the open land/ground for any of the above-mentioned purposes.

After three years of the writ petition having been filed, respondents filed a common Counter Affidavit on 04.12.2000.

The Division Bench of the High Court dismissed the batch of writ petitions including the writ petition filed by the appellant-Association herein vide order dated 30.04.2001.

Aggrieved against the dismissal of the writ petition, the present appeal was filed.

We heard the arguments of Mr. Mohan Parasaran, learned senior counsel assisted by Mr. Krishnamurthi Swami, learned counsel for the appellant and Mr. Jaideep Gupta, learned senior counsel assisted by Mr. K.C. Kaushik, learned counsel for the respondents.

Mr. Mohan Parasaran, learned senior counsel appearing for the appellant, submitted that -

a) Service tax on the mandap-keepers is clearly a colourable legislation and unconstitutional as the said tax is not on services but is in pith and substance only a tax on 'goods' and/or 'land'. ;

b) The very definition of 'Mandap' and 'Mandap-Keepers' would amply demonstrate that the impugned provisions are not within the domain of the Union and that only the State Legislatures have the competence to levy taxes of this nature in exercise of its legislative powers under Entries 54, 49 and 18 of List II of the Seventh Schedule read with Article 246 of the Constitution;

c) The definition of 'Mandap' and 'Mandap Keepers' are reproduced hereinbelow:-

> Sec. 65(19) 'Mandap' means any immovable property as defined in Section 3 of the Transfer of Property Act, 1882 and includes any furnitures, fixtures, light fittings and floor coverings therein let out for consideration for organizing any official, social or business function. Section 65(20) 'Mandap-Keeper' means a person who allows temporary occupation of a mandap for consideration for organizing any official, social or business function;
>
> d) Under Service Tax Notice No.4/99, any open land/ground is exigible to service tax if the same is let out for organizing any official, social or business function, even if no services whatsoever are rendered by the mandap-keeper. Therefore, the service tax levied on the mandap-

keepers, is in fact a tax on land per se which is a subject specifically earmarked for the State Legislatures under Entries 18 and 49 of List II of the Constitution.

e) Furthermore, on a bare perusal of the yardstick prescribed in the Finance Act, 1994 for charging service tax from the mandap-keepers, it would become amply clear that in the garb of taxing services, the Parliament has in fact imposed a tax on sale of goods including food items, drinks etc., over which the Parliament does not have the Constitutional sanction to legislate particularly in the light of the 46th Amendment to Article 366(29A)(f) of the Constitution.

f) Had the Parliament intended to levy a tax on the services rendered by the mandap-keepers, then the Parliament would have devised a formula for segregating the service component from the transaction and levied tax on that component alone. However, under the formula contained in the Finance Act, 1994, service tax is levied on 60% of the gross amount charged by the mandap-keepers from their clients, in cases where the mandap keepers are also providing catering services.

g) The amount charged by the mandap keepers from their clients is a composite amount which consists mainly of the expenses towards food, electricity, furniture, tents etc. and the services incidental thereto;

h) The service component in the composite amount charged by the mandap-keepers is a very small percentage of the same and cannot be segregated.

i) Article 366(29A)(f) of the Constitution deems any service in any manner whatsoever related to providing food, articles for human consumption and drinks, to be only a sale of goods. It recognises the fact that there is an element of service in it but still it deems that transaction only to be transaction of 'Sale of Goods'. Hence no question of service tax being imposed when by a specific amendment of the Constitution such service has been deemed to be sale of good. Furthermore, no recourse can be had to the residuary Entry 97 of List-I, for imposing such a tax, in light of the several pronouncements of this Court. Article 366(29A)(f) of the Constitution is reproduced hereinbelow:-

> "Article 366(29A) "tax on the sale or purn chase of goods"

includes (f) a tax on the supply, by way of or as a 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.

and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, deliver or supply is made;"

> j) Though the High Court appreciated this position, it erroneously invoked the 'Aspect Doctrine' as evolved by this Court in the case of Federation of Hotel and

Restaurant vs. Union of India & Ors. AIR 1990 SC 1637 and upheld the levy of service tax thus allowing the Parliament to encroach upon the subjects specifically demarcated for the State Legislatures under the Constitution.

k) If the reasonings given by the High Court were accepted, then it would empower the Parliament under Entry 97 of List-I to legislate even on the legislative fields specifically demarcated for the state legislatures in the Constitution, merely because such transactions have some element of providing service aspect in them. Therefore, this would lead to a violation of the federal taxing structure as envisaged in the Constitution.

In conclusion, he submitted that the Division Bench of the Madras High Court is not correct in its conclusion in the light of the scheme in the Constitution and has erroneously dismissed the batch of writ petitions, which compelled the appellant-Association approaching this Court by way of this appeal.

Mr. Mohan Parasaran, learned senior counsel for the appellant placed strong reliance on the following decisions in support of his contention.

1. M/s Khandelwal Metal and Engineering Works and Another vs. Union of India and Others [(1985) 3 SCC 620 at 641]

2. M/s Ujagar Prints and Others (II) vs. Union of India and Others etc. [(1989) 3 SCC 488 at 513]

3. S.P Mittal vs. Union of India and Others etc. [1983 (1) SCC 51, 78, 79, 82]

4. Goodyear India Ltd. and Others vs. State of Haryana and Another etc. [(1990) 2 SCC 71]

5. Synthetics and Chemicals Ltd. and Others vs. State of U.P. and Others [(1990) 1 SCC 109]

6. Shri Prithvi Cotton Mills Ltd. and Another vs. Broach BoroughMunicipality and Others [1969 (2) SCC 283]

7. Ralla Ram vs. The Province of East Punjab [AIR 1949 FC 81]

8. The Government of Andhra Pradesh and Another vs. Hindustan Machine Tools Ltd. [1975 (2) SCC 274]

9. K. Damodarasamy Naidu & Bros. and Others vs. State of T.N. and Another [(2000) 1 SCC 521 para 8 & 9 Countering the argument of learned senior counsel for the appellant, Mr. Jaideep Gupta, learned senior counsel for the respondents submitted that the levy and collection of service tax by the Union Parliament on Mandap-Keepers is correct and is in accordance with law and not violative of Articles14 and 19(g) of the Constitution. It is submitted that service tax on Mandap-Keepers is a tax on the consideration received for allowing temporary occupation of the Mandap for organizing

any official, social or business function and that it is not a tax on "good" and/or "land", both of which are state subjects under Entries 18, 49 and 54 of List II of the Seventh Schedule to the Constitution.

It is also contended by learned senior counsel that the Entry 49 of List II, tax on land and/or building does not concern with levy and collection of service tax on Mandap-Keepers, because the tax on land/or building is charged because such land and/or building exists irrespective of the fact whether they are used or not. Their very existence is taxable, whereas it is the use of the immovable property in a particular manner, which amounts to providing of service has been made taxable.

It is also further submitted that the inclusion of the service rendered as a caterer in the definition is clearly beyond the "legislative competence" of the Parliament as that subject is covered in Entry 54 of List II. The learned senior counsel submitted that it is the service provided by the Mandap-Keeper as a Caterer' which is taxable and not the supply made by him of the food or drinks etc. and thus it is clear that the levy of service tax on Mandap-Keepers is not covered under Entry 54 of List II as contended by learned senior counsel for the appellant.

He would further urge that the term "Mandap" under service tax has been defined to mean any immovable property as defined in Section 3 of the Transfer of Property Act, 1882. Accordingly, any open land or ground is also an immovable property qualifying as mandap and when the same is let out for a specified purpose, service tax is chargeable and that the levy of service tax is not a subject matter covered under List II and is very much covered under residual power of the Union Parliament under Entry 97 of List I and Union Parliament is competent to levy service tax by virtue of Entry 97 of List I. It is also contended that Entries 18, 49 and 54 of List II of Seventh Schedule to the Constitution are not at all concerned with the levy of service tax on Mandap- Keepers and the same is imposed by the Parliament by virtue of the residual powers vested with it by Entry 97 of List I of Seventh Schedule to the Constitution.

In reply to the argument of the learned senior counsel for the appellant that this Court in the case of Federation of Hotel and Restaurant vs. Union of India & Ors. (supra) has not considered Article 366 (29A) (f), which case was relied upon by the High Court of Madras and applied the aspect theory to distinguish the service aspect from the supply aspect of food and drink etc. Learned senior counsel for the respondents invited our attention to para Nos. 31 and 32 of the Judgment of the High Court in which the service aspect was distinguished from the supply aspect. In view of this, it is submitted that the contention of the appellant that Article 366 (29A) (f) of the Constitution was not considered by this Court and the High Court has not differentiated between service and supply is not at all correct. In conclusion, he submitted that the Mandap-Keepers are required to pay the service tax during the following month or the quarter, as the case may be, depending upon whether they are limited company or individual/partnership, of the month during which the service was rendered. So, the question of payment of service tax even before rendering the service does not arise and hence the cancellation of bookings, if any, will not affect the appellant in any way. Further, refund in terms of Sec. 11B of the Central Excise Act, 1944 as well as suo moto adjustment of excess service tax paid by the appellants themselves on fulfilling certain conditions are very much available under sub-rule 3 of Rule 6 of the Service Tax Rules, 1994. Learned senior counsel for the respondents, relied on the

following judgments in support of his arguments:-

1. India Cement Ltd. and Others vs. State of Tamil Nadu and Others [(1990) 1 SCC 12]

2. M/s J.K. Jute Mills Co. Ltd. vs. The State of Uttar Pradesh and Another [1962] 2 SCR 1

3. M/s Gannon Dunkerley and Co. and Others vs. State of Rajasthan and Others [(1993) 1 SCC 364]

4. The State of Madras vs. Gannon Dunkerley & Co., (Madras) Ltd.

[1959] SCR 379

5. The Sales Tax Officer, Pilibhit vs. Messrs. Budh Prakash Jai Prakash [1955] 1 SCR 243

6. M/s George Oakes (P) Ltd. vs. State of Madras [1962] 2 SCR 570

7. Doypack Systems Pvt. Ltd. vs. Union of India and Others [1988 (Supp) SCC 792]

8. Regional Director, Employees' State Insurance Corporation vs. High Land Coffee Works of P.F.X. Saldanha and Sons and Another [(1991) 3 SCC 617]

9. Renusagar Power Co. Ltd. vs. General Electric Company and Another [(1984) 4 SCC 679]

10. Thyssen Stahlunion GMBH vs. Steel Authority of India Ltd. [(1999) 9 SCC 334]

11. Laghu Udyog Bharati vs. Union of India [1999 (112) E.L.T 365]

12. Mafatlal Industries Ltd. and Others vs. Union of India and Others [(1997) 5 SCC 536] On the above factual and legal submissions made by both the parties, the following questions of law would emerge for our consideration:-

i) Whether the High Court was correct in coming to the conclusion that the provisions in the Finance Act, 1994 imposing service tax on the services rendered by the Mandap-Keepers are intra vires of the Constitution?

ii) Was the High Court correct in not construing the specific entries in List II viz. Entries 18, 49 and 54 by giving the widest amplitude, particularly when the Union was seeking to justify the levy under the residuary Entry 97 in List I of the Seventh Schedule of the Constitution?

iii) Has not the impugned judgment of the High Court virtually rendered the 46th Amendment of the Constitution, creating a deeming fiction of a transaction which otherwise is not a sale

transaction, to be a sale transaction, redundant, in particular, Article 366(29A)(f) of the Constitution?

iv) Whether the High Court was correct in applying the 'Aspect Theory' laid by this Court in the case of Federation of Hotel and Restaurant vs. Union of India & Ors. (supra) to the facts of the present case, when it is amply clear that the application of the 'Aspect Theory' to the facts of the present case would break down the Federal Taxing Structure provided for in the Constitution?

v) Whether the High Court was correct in coming to the conclusion that the impugned provisions in the Finance Act, 1994 are not violative of Article 14 and 19(1)(g) of the Constitution?

vi) Whether the High Court has correctly appreciated the Service Tax Notice No.4/99, whereby the Parliament under the garb of levying service tax has in fact imposed a tax on land per se which is a subject specifically earmarked for the State Legislatures under Entry 18 of List II of the Constitution?

We have carefully analysed the rival submissions made by learned senior counsel for the respective parties with reference to the pleadings and the judgments cited by both the parties.

In regard to Legislative competence, Mr. Mohan Parasaran, learned senior counsel for the appellant, relied on M/s Khandelwal Metal & Engg. Works & Anr. vs. Union of India & Ors [1985 (3) SCC 620 at 641] "With respect to" brings in the doctrine of pith and substance, he placed reliance on M/s Ujagar Prints & Ors. vs. Union of India & Ors. [1989 (3) SCC 488 at 513] and S.P. Mittal vs. Union of India & Ors. [1983 (1) SCC 51, 78, 79 and 82].

The case of Goodyear India Ltd. & Ors. vs. State of Haryana & Anr. [1990 (2) SCC 71] was relied upon by learned senior counsel for the appellant for the proposition that nomenclature of tax not conclusive for determining the true character or nature of a particular tax and that the Court will look into its pith and substance. He also relied on Synthetics & Chemicals Ltd. & Ors. vs. State of U.P. & Ors. [1990 (1) SCC 109 at 153, 154] for the proposition that the taxing power can be derived only from specific taxing taxing entry in the legislative lists.

The following three decisions were cited on Entry 49, List II Taxes on Land and Buildings:-

1. Shri Prithvi Cotton Mills Ltd. & Anr. vs. Broach Borough Municipality & Ors. [1969 (2) SCC 283]

2. Ralla Ram vs. The Province of East Punjab [AIR 1949 FC 81]

3. The Govt. of A.P. & Anr. vs. Hindustan Machine Tools Ltd.

[1975 (2) SCC 274] The judgment in the case of K. Damodarasamy Naidu & Bros. and Ors. vs. State of T.N. & Anr. reported in 2000 (1) SCC 521 at 528 para 8 & 9 was relied on for the proposition 'Sale' Article 366 (29A) (b).

In the present case, service tax levied on services rendered by Mandap-Keeper as defined in the said Act under Sections 65, 66 and 67 of the Finance Act has been challenged by the appellants on the following two grounds:

> a) That it amounts to the tax on land and, therefore, by reason of Entry 49 of List 2 of the Seventh Schedule of the Constitution, only the State Government is competent to levy such tax and;
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> b) Insofar as it levies a tax on catering services, it amounts to a tax on sale and purchase of goods and, therefore, is beyond the competence of Parliament, particularly in view of the definition of tax on sale and purchase of goods contained in Article 366 (29A) (f) of the Constitution.

With regard to the first aspect, it is submitted that in order to constitute a tax on land, it must be a tax directly on land and a tax on income from land cannot come within the purview of the said Entry. This was affirmed by a Seven-Judge Bench of this Court in India Cement Ltd. & Ors. vs. State of Tamil Nadu & Ors/ (1990) 1 SCC 12 para 22 relying upon several judgments of this Court including S.C. Nawn vs. W.T.O., Calcutta (1969) 1 SCR 108; Asstt. Commissioner of Urban Land Tax vs. Buckingham & Carnatic Co. Ltd. (1970) 1 SCR 268 at 278; Second Gift Tax Officer vs. D.H. Nazareth (1971) 1 SCR 195; Union of India vs. H.S. Dhillon (1971) 2 SCC 779 at 792; Bhagwan Dass Jain vs. Union of India (1981) 2 SCR 808 and Western India Theatres Ltd. vs. Cantonment Board, Poona Cantonment (1959) Supp. 2 SCR 63 at

69. The proposition has been followed in several judgments of this Court.

In our view, if no Entry is found in List 2 and List 3 of the Schedule, which could cover the tax levied, the question of Parliament lacking legislative competence to do so would not arise.

Tax on catering services does not amount to tax on sale & purchase of goods As far as the above point is concerned, it is well settled that for the tax to amount to a tax on sale of goods, it must amount to a sale according to the established concept of a sale in the law of contract or more precisely the Sale of Goods Act, 1930. Legislature cannot enlarge the definition of sale so as to bring within the ambit of taxation transactions, which could not be a sale in law. The following judgments and the principles laid down therein can be very well applied to the case on hand.

1. M/s. J.K. Jute Mills Co. Ltd. vs. The State of U.P. & Anr. [1962] 2 SCR 1;

2. M/s Gannon Dunkerley & Co. and Ors. vs. State of Rajasthan & Ors. (1993) 1 SCC 364;

3. The State of Madras vs. Ganon Dunkerley & Co. (Madras) Ltd. [1959] SCR 379;

4. The Sales Tax Officer, Pilibhit vs. M/s. Budh Prakash Jai Prakash [1955] 1 SCR 243;

5. M/s George Oakes (P) Ltd. vs. State of Madras [1962] 2 SCR 570. In regard to the submission made on Article 366(29A) (f), we are of the view that it does not provide to the contrary. It only permits the State to impose a tax on the supply of food and drink by whatever mode it may be made. It does not conceptually or otherwise includes the supply to services within the definition of sale and purchase of goods. This is particularly apparent from the following phrase contained in the said sub-article "such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods." In other words, the operative words of the said sub-article is supply of goods and it is only supply of food and drinks and other articles for human consumption that is deemed to be a sale or purchase of goods.

The concept of catering admittedly includes the concept of rendering service. The fact that tax on the sale of the goods involved in the said service can be levied does not mean that a service tax cannot be levied on the service aspect of catering. Mr. Mohan Parasaran, learned senior counsel for the appellant submitted that the High Court before applying the aspect theory laid down by this Court in the case of Federation of Hotel and Restaurant vs. Union of India & Ors. (supra) ought to have appreciated that in that matter Article 366 (29A) (f) of the Constitution was not considered which is of vital importance to the present matter and that the High Court ought to have differentiated the two matters. In reply, our attention was invited to paras 31 and 32 of the judgment of the High Court in which service aspect was distinguished from the supply aspect. In our view, reliance placed by the High Court on Federation of Hotel and Restaurant (supra) and, in particular, on the aspect theory is, therefore, apposite and should be upheld by this Court. In view of this, the contention of the appellant on this aspect is not well founded.

It is well settled that the measure of taxation cannot affect the nature of taxation and, therefore, the fact that service tax is levied as a percentage of the gross charges for catering cannot alter or affect the legislative competence of Parliament in the matter.

The legislative competence of Parliament also does not depend upon whether in fact any services are made available by the Mandap-Keepers within the definition of taxable service contained in the Finance Act. Whether in the given case taxable services are rendered or not is a matter of interpretation of the statute and for adjudication under the provisions of the statute and does not affect the vires of the legislation and/or the legislative competence of Parliament. In fact, a wide range of services are included in the definition of taxable services as far as Mandap-Keepers are concerned. The said definition includes services provided "in relation to use of Mandap in any manner" and includes "the facilities provided to the client in relation to such use"

> and also the services "rendered as a caterer". The phrase "in relation to" has been construed by this Court to be of the widest amplitude. In M/s Doypack Systems Pvt. Ltd. vs. Union of India and Others (1988) 2 SCC 299 at 302, this Court observed as under:
>
> "The expressions 'pertaining to', 'in relation to' and 'arising out of', used in the deeming provision, are used in the expansive sense. The expression 'arising out of' has been used in the sense that it comprises purchase of shares and lands from

> income arising out of the Kanpur Undertaking. The words "pertaining to" and "in relation to" have the same wide meaning and have been used interchangeably for among other reasons, which may include avoidance of repetition of the same phrase in the same clause or sentence, a method followed in good drafting. The word 'pertain' is synonymous with the word 'relate'. The term 'relate' is also defined as meaning to bring into association or connection with. The expression 'in relation to' (so also 'pertaining to'), is a very broad expression which presupposes another subject matter. These are words of comprehensiveness which might have both a direct significance as well as an indirect significance depending on the context."

In Renusagar Power Co. Ltd. vs. General Electric Company and Another (1984) 4 SCC 679, this Court observed as under:

> "Expressions such as "arising out of" or "in respect of" or "in connection with" or "in relation to" or "in consequence of" or "concerning" or "relating to"

the contract are of the widest amplitude and content and include even questions as to the existence validity and effect (scope) of the arbitration agreement."

In Thyssen Stahlunion GMBH vs. Steel Authority of India Ltd. (1999) 9 SCC 334, this Court observed as under:

> "The phrase "in relation to arbitral proceedings" cannot be given a narrow meaning to mean only pendency of the arbitration proceedings before the arbitrator. It would cover not only proceedings pending before the arbitrator but would also cover the proceedings before the court and any proceedings which are required to be taken under the old Act for the award becoming a decree under Section 17 thereof and also appeal arising thereunder. The contention that if it is accepted that the expression "in relation to arbitral proceedings" would include proceedings for the enforcement of the award as well, the second limb of Section 85(2)(a) would become superfluous and cannot be accepted."

The phrase "including" has also been construed to expand the definition as held by this Court in Regional Director, Employees' State Insurance Corporation vs. High Land Coffee Works of P.F.X. Saldanha and Sons & Anr. (1991) 3 SCC 617 at 618 observed as under:

> "The word "include" in the statutory definition is generally used to enlarge the meaning of the preceding words and it is by way of extension, and not with restriction. The word "include" is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used, these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import but also those things which the interpretation clause declares that they shall include."

Taxable services, therefore, could include the mere providing of premises on a temporary basis for organizing any official, social or business functions, but would also include other facilities supplied in relation thereto. No distinction from restaurants, hotels etc which provide limited access to property for specific purpose.

It may be noted that in recent times the service sector has grown phenomenally all over the world and, therefore, it was recommended by Dr. Raja Chelliah Committee in the early 90s that it should be taxed. Pursuant thereto, service tax was first levied in 1994 by way of the Finance Act. The power to levy such tax can be traced to Sl.No. 97 of List I of Seventh Schedule and this Court in Laghu Udyog Bharati vs. Union of India (1999) 112 E.L.T. 365 found no lack of legislative competence as far as the levy of service tax was concerned.

It is also emphasized that a tax cannot be struck down on the ground of lack of legislative competence by enquiring whether the definition accords what the layman's view of service. It is well settled that in matters of taxation laws, the court permits greater latitude to pick and chose objects and rates for taxation and has a wide discretion with regard there to. We may in this context refer to the decision of Mafatlal Industries Ltd. and Others vs. Union of India and Others (1997) 5 SCC 536 para 343 at page 740 " In the matter of taxation laws, the court permits a great latitude to the discretion of the legislature. The State is allowed to pick and choose districts, objects, persons, methods and even rates for taxation, if it does so reasonably. The courts view the laws relating to economic activities with greater latitude than other matters."

Therefore, a levy of service tax on a particular kind of service could not be struck down on the ground that it does not conform to a common understanding of the word "service" so long as it does not transgress any specific restriction contained in the Constitution.

In fact, making available a premises for a period of few hours for the specific purpose of being utilized as a Mandap whether with or without other services would itself be a service and cannot be classified as any other kind of legal concept. It does not certainly involve transfer of moveable property nor does it involve transfer of moveable property of any kind known to law either under the Transfer of Property Act or otherwise and can only be classified as a service.

In fact, mandap-keepers provide a wide variety of services apart from the service of allowing temporary occupation of mandap. As per Section 65 (19) of the Finance Act, 1994, Mandap means any immovable property as defined in Section 3 of the Transfer of Property Act, 1882 and includes any furniture, fixture, light fittings and floor coverings therein let out for consideration for organising any official, social or business function. A mandap-keeper apart from proper maintenance of the mandap, also provides the necessary paraphernalia for holding such functions, apart from providing the conditions and ambience which are required by the customer such as providing the lighting arrangements, furniture and fixtures, floor coverings etc. The services provided by him cover method and manner of decorating and organising the mandap. The mandap-keeper provides the customer with advice as to what should be the quantum and quality of the services required keeping in view of the requirement of the customer, the nature of the event to be solemnized etc. In fact the logistics of setting up, selection and maintenance is the responsibility

of the mandap keeper. The services of the mandap-keeper cannot possibly be termed as a hire purchase agreement of a right to use goods or property. The services provided by a mandap-keeper are professional services which he alone by virtue of his experience has the wherewithal to provide. A customer goes to a mandap-keeper, say a star hotel, not merely for the food that they will provide but for the entire variety of services provided therein which result in providing the function to be solemnized with the required effect and ambience. Similarly the services rendered by out door caterers is clearly distinguishable from the service rendered in a restaurant or hotel inasmuch as, in the case of outdoor catering service the food/eatables/drinks are the choice of the person who partakes the services. He is free to choose the kind, quantum and manner in which the food is to be served. But in the case of restaurant, the customer's choice of foods is limited to the menu card. Again in the case of outdoor catering, customer is at liberty to choose the time and place where the food is to be served. In the case of an outdoor caterer, the customer negotiates each element of the catering service, including the price to be paid to the caterer. Outdoor catering has an element of personalized service provided to the customer. Clearly the service element is more weighty, visible and predominant in the case of outdoor catering. It cannot be considered as a case of sale of food and drink as in restaurant. Though the Service Tax is leviable on the gross amount charged by the mandap-keeper for services in relation to the use of a mandap and also on the charges for catering, the Government has decided to charge the same only on 60% of the gross amount charged by the mandap-keeper to the customer.

In the case of Additon Advertising vs. Union of India [1998 (98) E.L.T. 14 (Guj HC DB)], the High Court of Gujarat rejected the contention that levy of tax on advertising services is ultra vires and observed that "the tax is not on advertisement but on the services rendered. It results in an advertisement which can be published and republished and copied". Extending the same analogy, it is submitted that there is a difference between the food and beverages supplied by outdoor caterers and outdoor catering services. As a result of the outdoor catering services rendered, the food and beverages desired by the customer, are caused to be prepared or procured, transported to the place specified by the customer at the time desired by him and served in the manner required. Therefore, the contention of the appellant that there is no service element in outdoor catering is not based on fact. In such catering services the person who participate and avail the service give more importance to the manner of service than the quality of food provided for consumption.

A tax on services rendered by mandap-keepers and outdoor caterers is in pith and substance, a tax on services and not a tax on sale of goods or on hire purchase activities. Section 65 clause 41 sub clause (p) of the Finance Act, 1994, defines the taxable service (which is the subject matter of levy of service tax) as any service provided to a customer by a mandap-keeper in relation to use of a mandap in any manner including the facilities provided to a customer in relation to such use also the services, if any, rendered as a caterer. The nature and character of this service tax is evident from the fact that the transaction between a mandap-keeper and his customer is definitely not in the nature of a sale of hire purchase of goods. It is essentially that of providing a service. In fact, as pointed out earlier, the manner of service provided assumes predominance over the providing of food in such situations which is a definite indicator of the supremacy of the service aspect. The legislature in its wisdom noticed the said supremacy and identified the same as a potential region to collect indirect taxes. Moreover, it has been a well established judicial principle that so long as the

legislation is in substance, on a matter assigned to a legislature enacting that statute, it must be held valid in its entirety even though it may trench upon matters beyond its competence. Incidental encroachment does not invalidate such a statute on the grounds that it is beyond the competence of the legislature (Prafulla Kumar vs. Bank of Commerce). Article 246(1) of the Constitution specifies that the Parliament has exclusive powers to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule to the Constitution. As per Article 246(3), the State Government has exclusive powers to make laws with respect to matters enumerated in List II (State List). In respect of matters enumerated in List III (Concurrent List) both Parliament and State Government have powers to make laws. The service tax is made by Parliament under the above residuary powers.

The impugned Act was challenged on the ground that it infringed on the State's power to levy tax on luxury vide Entry 62 of the State List.

It would be appropriate to quote Mr. Justice Venkatachelliah who ruled that "the law with respect to a subject might incidentally affect another subject in some way, but that is not the same thing as the law being on the latter subject. There might be overlapping, but the overlapping must be in law. The transaction may involve two or more taxable events in its different aspects. But the fact that there is an overlapping does not detect from the distinctiveness of the aspects. The consequences and facts of the legislation are not the same thing as legislative subject matter."

For the foregoing reasons, the appellants have not made out any case either on facts or on law and there is no merit in this appeal. We, therefore, have no hesitation in dismissing this appeal by confirming the judgment of the High Court for our own reasons recorded in this judgment. No costs.