IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE THOTTATHIL B.RADHAKRISHNAN
&
THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

TUESDAY, THE 21ST DAY OF OCTOBER 2014/29TH ASWINA, 1936

WA.No. 1125 of 2013 () IN WP(C).15938/2011

WP(C) 15938/2011 of HIGH COURT OF KERALA

APPELLANT(S)/RESPONDENTS 1 TO 3 :
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1. UNION OF INDIA
REP BY SECRETARY TO GOVERNMENT
MINISTRY OF FINANCE(DEPARTMENT OF REVENUE)NEW DELHI-110001

2. CENTRAL BOARD OF EXCISE AND CUSTOMS,
DEPARTMENT OF REVENUE, MINISTRY OF FINANCE
GOVERNMENT OF INDIA, NEW DELHI

3. COMMISSIONER OF CENTRAL EXCISE,
CUSTOMS AND SERVICE TAX, C R BUILDING, I S PRESS ROAD
COCHIN-682018

BY ADV. SRI.JOHN VARGHESE,SC,CEN.BOARD OF EXCISE

RESPONDENT(S)/PETITIONERS & 4TH RESPONDENT :
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1. KERALA BAR HOTELS ASSOCIATION
REP BY ITS SECRETARY M.D. DANESH, 35/1697, KBHA HOUSE
SOUTH JANATHA ROAD, PALARIVATTOM, COCHIN-682025

2. HOTEL LAKE PALACE,
A REGISTERED FIRM, REP BY ITS MANAGING PARTNER
D.RAJEEV, ANCHALUMMOODU, KOLLAM-691602

3. STATE OF KERALA
REP BY SECRETARY TO GOVERNMENT , TAXES, DEPARTMENT
THIRUVANANTHAPURAM-695001

R1 & R2 BY ADV. SRI.VENKATARAMAN-SENIOR ADVOCATE
R1 & R2 BY ADV. SRI.A.SUDHI VASUDEVAN
R1 & R2 BY ADV. SMT.K.PUSHPAVATHI
R1 & R2 BY ADV. SRI.K.P.ABDUL RASSAK
R1 & R2 BY ADV. SRI.V.L.SHENOY
R1 & R2 BY ADV. SRI.L.JAYAWANTH
R3 BY SPL. GOVT. PLEADER FOR TAXES SRI.SEBASTIAN CHAMPAPILLY

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 1.9.2014, ALONG WITH WA. 1180/2013, & CONNECTED CASES, THE COURT ON 21.10.2014 DELIVERED THE FOLLOWING:

C.R.

THOTTATHIL B.RADHAKRISHNAN

&

P.B.SURESH KUMAR, JJ.

Writ Appeal Nos.1125, 1180, 1207, 1210, 1289 of 2013

Dated 21st October, 2014.

J U D G M E N T

P.B.Suresh Kumar, J.

These appeals are preferred against the common judgment, by which, the learned single Judge, allowed a batch of writ petitions, holding that sub clauses (zzzzv) and (zzzzw) of Clause 105 of Section 65 of the Finance Act, 1994, as amended by Finance Act, 2011 are illegal and unenforceable. Sub-clauses (zzzzv) and (zzzzw) of Clause 105 of Section 65 of the Finance Act, 1994, as amended by Finance Act, 2011, read as follows :

> "(zzzzv) services provided or to be provided, to any person, by a restaurant, by whatever name called, having the facility of air-conditioning in any part of the establishment, at any time during the financial year, which has license to serve alcoholic beverages, in relation to serving of food or beverage, including alcoholic beverages or both, in its premises;
>
> (zzzzw) Services provided or to be provided, to any person, by a hotel, inn, guest house, club or camp-site, by whatever name called, in relation to providing of accommodation for a continuous period of less than three months;"

The aforesaid amendment was brought by the Union, in exercise of the residuary power under Entry 97 of List I of the Seventh Schedule to the Constitution. Entry 97 reads as follows:

> "Any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists."

By virtue of the aforesaid amendment, the services enumerated in the clauses referred to above were brought within the service tax net. Consequently, on and from the commencement of the Amendment Act, the services enumerated therein became taxable services for levy of service tax.

2. Petitioners in the writ petitions were hoteliers running air-conditioned restaurants, serving alcoholic beverages. They challenged the Amendment Act, referred to above on the ground that the matters covered by the newly introduced sub clauses are enumerated in Entries 54 and 62, respectively, of List II of the Seventh Schedule to the Constitution and therefore, the union was incompetent to introduce the said sub clauses in Clause 105 of Section 65 of the Finance Act, 1994. Entries 54 and 62 of List II of the

Seventh Schedule of the Constitution read as follows:

> "54. Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of Entry 92-A of List I.
> 62. Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling."

According to the writ petitioners, Article 366 (29A) of the Constitution, introduced by virtue of the Constitution (Forty Sixth Amendment) Act, makes the supply of food and beverages in a restaurant, enumerated in sub clause (zzzzv) of Clause 105, a deemed sale of those articles, enabling the States to impose tax on the same, invoking Entry 54 of List II of the Seventh Schedule. As far as the matter enumerated in sub clause (zzzzw) is concerned, the case of the petitioners is that the same is a matter covered by Entry 62 of List II of the Seventh Schedule and invoking the said Entry, the State legislature had already enacted the Kerala Tax on Luxuries Act, by which, tax is imposed and levied by the State Government for the matters enumerated in that sub clause. According to the petitioners, they are remitting value added tax on the entire value of the consideration received from their customers

towards the supply of food and beverages in the restaurants and remitting luxury tax for the consideration received for providing accommodation in the Hotels owned by them. The case of the petitioners, therefore, is that by virtue of the impugned legislation, the Parliament has encroached upon the legislative powers of the State under Entries 54 and 62 of List II of the Seventh Schedule.

3. The learned single Judge found that the matters covered by sub clauses (zzzzv) and (zzzzw) of Clause 105 of Section 65 of the Finance Act, 1994, as amended by Finance Act, 2011, are matters enumerated in Entries 54 and 62 respectively, of List II of the Seventh Schedule to the Constitution and hence, beyond the legislative competence of the Union to impose tax on such matters, invoking Entry 97 of List I of the Seventh Schedule of the Constitution. Hence, these appeals by the Union of India.

4. Heard Adv.Sri.John Varghese, Adv.Sri.Thomas Mathew Nellimoottil, Adv.Sri.Saiby Jose Kidangoor and Adv. Sri.Tojan J.Vathikulam, for the appellants and Senior Counsel Sri.N.Venkataraman, for the respondents.

5. To appreciate the case of the petitioners in the

writ petitions, the interpretations given by the Apex Court on the concept of "sale of goods", in the context of "works contract" and "supply of food in restaurant", prior to and after the Constitution (Forty Sixth Amendment) Act need to be understood. In **State of Madras v. Gannon Dunkerley** & **Co.** (1958 (9) STC 353), the Apex Court considered the question as to the legislative competence of the provisional legislatures under the Government of India Act, 1935 to impose a tax on the supply of materials used in building contracts under Entry 48 of List II of Seventh Schedule of the said Act. The Entry was "taxes on sale of goods". It was held by the Apex Court in the said case that the expression "sale of goods" is a n*omen juris,* its essential ingredients being an agreement to sell movables for a price and property passing therein pursuant to that agreement and therefore, a building contract which is an indivisible contract, cannot be brought within the purview of "sale of goods", for the purpose of imposition and levy of tax. On that basis, it was held that it was not within the competence of the provisional legislature under Entry 48 to impose a tax on the supply of the materials used in a building contract, treating it as a sale. The conclusion part of the said judgment reads

thus:

> "To sum up, the expression "sale of goods" in Entry 48 is a *nomen juris*, its essential ingredients being an agreement to sell movables for a price and property passing therein pursuant to that agreement. In a building contract which is, as in the present case, one, entire and indivisible - and that is its norm, there is no sale of goods, and it is not within the competence of the Provincial Legislature under Entry 48 to impose a tax on the supply of the materials used in such a contract treating it as a sale."

In **Northern India Caterers(India) Ltd. v. Lt. Governor of Delhi** (1978 (42) STC 386), the Apex Court considered the question whether the supply of food in a restaurant is taxable as a sale under the Bengal Finance (Sales Tax) Act, 1941. It was held that the true essence of the transaction is service and it does not involve a transfer of the general property in the food supplied. The relevant finding of the Apex Court in the said case reads thus :

> "It has already been noticed that in regard to hotels this Court has in M/s. Associated Hotels of India Limited adopted the concept of the English law that there is no sale when food and drink are supplied to guests residing in the hotel. The court pointed out that the supply of meals was essentially in the nature of a service provided to them and could not be identified as a transaction of sale. The court

> declined to accept the proposition that the revenue was entitled to split up the transaction into two parts, one of service and the other of sale of food-stuffs. If that be true in respect of hotels, a similar approach seems to be called for on principle in the case of restaurants. No reason has been shown to us for preferring any other. The classical legal view being that a number of services are concomitantly provided by way of hospitality, the supply of meals must be regarded as ministering to a bodily want or to the satisfaction of a human need. What has been said in Electa B., Merrill appears to be as much applicable to restaurants in India as it does elsewhere. It has not been proved that any different view should be taken, either at common law, in usage or under statute."

It is thus evident that in the case of building contract, the law was that the transaction is indivisible and therefore, the same would not come within the scope of "sale of goods" for imposition and levy of tax by the States and in the case of supply of food and beverages in a restaurant, the law was that the whole transaction is a service and therefore, the same would not come within the scope of "sale of goods", for the purpose of imposition and levy of tax by the States.

6. It is in the aforesaid background, the Constitution (Forty Sixth Amendment) Act, introduced a new definition for "tax on sale or purchase of goods". Article 366

(29A) of the Constitution (Forty Sixth Amendment) Act, reads as follows :

> “(29A) 'tax on the sale or purchase of goods' includes--
>
> (a) a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;
>
> (b) a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;
>
> (c) a tax on the delivery of goods on hire-purchase or any system of payment by instalments;
>
> (d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;
>
> (e) a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;
>
> (f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration,
>
> 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, delivery or supply is made;]"

For the purpose of this case, we need only consider clauses (b) and (f) of Article 366 (29A). By virtue of the said amendment, transfer of property in goods involved in the execution of works contracts and supply of goods, by way of service or otherwise, being food and other articles of human consumption, were deemed to be sale of those goods by the person making the transfer or supply to whom such transfer or supply is made. The effect of the said amendment was that works contracts were liable to be split up and the transfer of property in goods involved in the works contract was exigible to tax. The value of service involved in the works contract was not deemed to be a sale and therefore, was not exigible to tax. This position has been stated by the Apex Court in **Builders Association of India v. Union of India** (1989 (73) STC 370), the relevant portion of the judgment reads as follows :

> "Even after the decision of this Court in the *State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd.* [1958] 9 STC 353; [1959] SCR 379 it was quite possible that where a contract entered into in connection with the construction

> of a building consisted of two parts, namely, one part relating to the sale of materials used in the construction of the building by the contractor to the person who had assigned the contract and another part dealing with the supply of labour and services, sales tax was leviable on the goods which were agreed to be sold under the first part. But sales tax could not be levied when the contract in question was a single and indivisible works contract. After the 46th Amendment the works contract which was an indivisible one is by a legal fiction altered into a contract which is divisible into one for sale of goods and the other for supply of labour and services. After the 46th Amendment it has become possible for the States to levy sales tax on the value of goods involved in a works contract in the same way in which the sales tax was leviable on the price of the goods and materials supplied in a building contract which had been entered into in two distinct and separate parts as stated above".

Later, in **Gannon Dunkerley and Co. v. State of Rajasthan** (1993) 88 STC 204), the Apex Court had catalogued the elements of services to be deductible and not liable to tax. The relevant portion of the judgment in **Gannon Dunkerley and Co. v. State of Rajasthan** reads thus :

> The amounts so deductible would have to be determined in the light of the facts of a particular case on the basis of the material produced by the contractor. The value of goods involved in the execution of a works contract will, therefore, have to be determined by taking into account the value of

> the entire works contract and deducting therefrom the charges towards labour and services which would cover:
> (a) labour charges for execution of the works;
> (b) amount paid to a sub-contractor for labour and services;
> © charges for planning, designing and architect's fees;
> (d) charges for obtaining on hire or otherwise machinery and tools used for the execution of the works contract;
> (e) cost of consumables such as water, electricity, fuel, etc., used in the execution of the works contract the property in which is not transferred in the course of execution of a works contract; and
> (f) cost of establishment of the contractor to the extent is relatable to supply of labour and services;
> (g) other similar expenses relatable to supply of labour and services;
> (h) profit earned by the contractor to the extent it is relatable to supply of labour and services."

When matters stood thus, the Parliament brought the value of services involved in the execution of works contract within the service tax net, by introducing sub clause (zzzza) in clause (105) of section 65 of the Finance Act 1994, with effect from 1.6. 2007. Rule 2A of the Service Tax (Determination of Value) Rules, would indicate that imposition of service tax was limited to the elements of services, deductible from the cost of the works contract, while imposing tax on the goods involved in the works contract. Rule 2A of the Service Tax (Determination of

Value) Rules reads thus:

> "(1) Subject to the provisions of section 67, the value of taxable service in relation to services involved in the execution of a works contract (hereinafter referred to as works contract service), referred to in sub-clause (zzzza) of clause (105) of section 65 of the Act, shall be determined by the service provider in the following manner:-
>
> (i) Value of works contract service determined shall be equivalent to the gross amount charges for the works contract less the value of transfer of property in goods involved in the execution of the said works contract:
>
> *Explanation:* For the purposes of this rule,--
>
> (a) gross amount charges for the works contract shall not include Value Added Tax (VAT) or sales tax, as the case may be, paid, if any, on transfer of property in goods involved in the execution of the said works contract;
>
> (b) value of works contract service shall include,--
>
> (i) labour charges for execution of the works;
>
> (ii)amount paid to a sub-contractor for labour and services;
>
> (iii)charges for planning, designing and architect's fees;
>
> (iv)charges for obtaining on hire or otherwise, machinery and tools used for the execution of the works contract;
>
> (v) cost of consumables such as water, electricity, fuel, used in the execution of the works contract;
>
> (vi) cost of establishment of the contractor relatable to

supply of labour and services;

(vii)other similar expenses relatable to supply of labour and services; and

(viii)profit earned by the service provider relatable to supply of labour and services; “

7. Coming to the transaction involved in the supply of food and beverages in a restaurant, as indicated above, prior to the Constitution (Forty Sixth Amendment) Act, the same was considered to be wholly a service. When the whole transaction was held to be a service, the States could not have imposed tax in respect of that transaction. However, by virtue of the Constitution (Forty Sixth Amendment) Act, this transaction was also deemed to be a sale, conferring authority on the States to tax on the whole consideration received by the person making the supply of food and beverages. A Constitution Bench of the Apex Court in **K.Damodarasamy Naidu and Bros. v. State of Tamil Nadu and another** (2000 (117) STC 1), considered the question whether the consideration received by the owner of a restaurant from the customer for the supply of food can be split up between what was charged for the food and for other services. It was held

that the price that a customer pays for the supply of food and services in a restaurant cannot be split up and that the whole amount collected from the customer is liable for levy of sales tax. The relevant portion of the judgment reads thus :

> **"**8. Learned counsel next contended, relying upon the judgments aforementioned, that, in the eye of the law, the tax on food served in restaurants could not be levied on the sum total of the price charged to the customer. In his submission, restaurants provided services in addition to food and these had to be accounted for. Thus, restaurants provided an elegant decor, uniformed waiters, good linen, crockery and cutlery. It could even be that they provided music recorded or live, a dance floor and a cabaret. The bill that the customer paid in the restaurant had, therefore, to be split up between what was charged for such service and what was charged for the food.
>
> 9. The provisions of sub-clause (*f*) of clause (29-A) of Article 366 need to be analysed. Sub-clause (*f*) permits the States to impose a tax on the *supply* of food and drink. The supply can be by way of a service or as part of a service or it can be in any other manner whatsoever. The supply or service can be for cash or deferred payment or other valuable consideration. The words of sub-clause (*f*) have found place in the Sales Tax Acts of most States and, as we have seen, they have been used in the said Tamil Nadu Act. The tax, therefore, is on the *supply* of food or drink and it is not of relevance that the supply is by way of a service or as part of a service. In our view, therefore, the price that the customer pays for the supply of food in a restaurant cannot

> be split up as suggested by learned counsel. The supply of food by the restaurant-owner to the customer though it may be a part of the service that he renders by providing good furniture, furnishing and fixtures, linen, crockery and cutlery, music, a dance floor and a floor show, is what is the subject of the levy. The patron of a fancy restaurant who orders a plate of cheese sandwiches whose price is shown to be Rs 50 on the bill of fare knows very well that the innate cost of the bread, butter, mustard and cheese in the plate is very much less, but he orders it all the same. He pays Rs 50 for its supply and it is on Rs 50 that the restaurant-owner must be taxed."

Thus, after the Constitution (Forty Sixth Amendment) Act, tax could be imposed and levied by the States on the value of the goods involved in the works contract and tax could be imposed and levied by the Union for the value of the services involved in the works contract. As far as the supply of food and beverages in a restaurant is concerned, after the Constitution (Forty Sixth Amendment) Act, tax could be imposed and levied for the whole amount of the consideration received by the person making the supply of the food and beverages.

8. According to the petitioners, after the Constitution (Forty Sixth Amendment) Act, since the supply of food and beverages in a restaurant is deemed to be a sale of those articles by the person making the supply and since the

whole amount of the consideration received by the person making the supply is eligible to tax, the supply of food and beverages in a restaurant cannot any more be treated as a service for levy of service tax. In other words, having characterised constitutionally the subject matter of supply of food in a restaurant as a sale, it is not open to the Parliament to tax the very same subject matter under Entry 97 of List I. Thus, according to them, the inevitable corollary of the Constitution (Forty Sixth Amendment) Act is that the power of taxation on the supply of food and other articles of the human consumption is exclusively with the State legislatures.

9. It is beyond dispute that the impugned amendment is brought by the Union invoking the residuary field of legislation contained in Entry 97 of List I of the Seventh Schedule. It is settled that before exclusive legislative competence is claimed for the Parliament, by resorting to the residuary Entry, the legislative incompetence of the State legislature must be clearly established. As provided for in Entry 97 itself, a matter can be brought under that Entry only if it is not enumerated in List II or List III and in the case of tax, if it is not mentioned in either of those Lists. [See **International**

Tourist Corporation v. State of Haryana [(1981) 2 SCC 318]. It is also settled by now that the power to legislate is engrafted under Article 246 of the Constitution and the various entries in the three lists of the Seventh Schedule are the "fields of legislation". The different entries being legislative heads are all of enabling character and are designed to define and delimit the respective areas of legislative competence of the Union and the State Legislatures. They neither impose any restrictions on the legislative powers nor prescribe any duty for exercise of the legislative power in any particular manner. It has been a cardinal principle of construction that the language of the entries should be given the widest scope of which their meaning is fairly capable and while interpreting an entry of any list it would not be reasonable to import any limitation therein. We are also conscious of the principle that when the vires of enactment is challenged, the court primarily presumes the constitutionality of the statute by putting the most liberal construction upon the relevant legislative entry so that it may have the widest amplitude and the substance of the legislation will have to be looked into. [See **Union of India and others v. Shah Goverdhan L.Kabra Teachers' College** [(2002) 8

SCC 228]. Coming to the service tax, it is a destination based consumption tax levied on certain services provided by certain categories of persons. It is a tax on services and the taxable event is the rendition of service. (See the decision of the Apex Court in **All India Federation of Tax Practitioners and others v. Union of India** [(2007)7 SCC 527]).

10. Applying the above principles to the present case, we are of the view that sub clause (zzzzv) of Clause 105 of Section 65 of the Finance Act, 1994, relates to the supply of food and other consumables in restaurants. As indicated earlier, after the Constitution (Forty Sixth Amendment) Act, the said activity is deemed as a sale of goods. After the Constitution (Forty Sixth Amendment) Act, it cannot be said that it is an activity of service. When the said activity is deemed to be a sale of the food and other articles of human consumption, by a constitutional definition, tax on the said activity can be imposed only by the States in view of Entry 54 in List II of the Seventh Schedule. In **K. Damodarasamy Naidu** (supra), the Constitution Bench of the Apex Court had also held that in view of the words used in article 366(29A) (f), the bill raised on the customer cannot be split as charged for

the service part and as charged for the food part and that the supply of food by the restaurant owner to the customer, though it may be a part of the service that he renders by providing good furniture, furnishings and fixtures, linen, crockery and cutlery, music etc., tax is leviable for the whole amount of the consideration received by the restaurant owner. In other words, in view of the aforesaid constitutional amendment, it cannot be said that there is any service involved in the supply of food and other articles of human consumption in a restaurant. It is thus evident that the matter covered by sub-clause (zzzzv) of Clause 105 of Section 65 of the Finance Act, 1994, as amended by Finance Act, 2011 is a matter enumerated in Entry 54 of List II of Seventh Schedule and the States alone have the legislative competence to enact any law imposing tax on the said matter.

11. Coming to sub-clause (zzzzw) of Clause 105 of Section 65 of the Finance Act, 1994, as amended by Finance Act, 2011, as found by the learned single Judge, the Constitution Bench of the Apex Court in **Godfrey Philips India Ltd v. State of U.P.** [(2005) 2 SCC 515], held that the word “luxuries” in Entry 62 of List II means the activity of enjoyment

of or indulgence in that which is costly or which is generally recognized as being beyond the necessary requirements of an average member of society. It is not disputed that invoking Entry 62 of List II, the State legislature had enacted the Kerala Tax on Luxuries Act and as per the terms of the said statute, the State Government is levying tax on matters covered by sub-clause (zzzzw) of Clause 105 of Section 65 of the Finance Act, 1994. In this context, it is worth quoting Sections 2(f) and 4 of the said Act, which read as follows:

> "2(f) "Luxury provided in a hotel, house boat, hall, auditorium, Kalyanamandapam or place of like nature" means accommodation for residence or use and other amenities and services provided in a hotel or house boat or hall or auditorium or kalanamandapam or place of like nature the rate of charges of accommodation for residence and other amenities and services provided excluding charges of food and liquor is one hundred and fifty rupees per day or more".
>
> Section 4. Levy and collection of luxury tax - Subject to the provisions of this Act, three shall be levied and collected a tax, hereinafter called the 'laxury tax', in respect of any luxury provided,-
>
> (i) in a hotel, house boat, hall, auditorium or kalayanamandapam or including those attached to hotels, clubs, kalanamandapam and places of the like nature which are rented for accommodation for residence or used for conducting functions, whether public or private, exhibition;
>
> (ii) by cable operators;

(iii) in a hospital; and
(iv) in a home stay
Provided that the sub-section shall not apply to halls and auditoriums located within the premises of 'places of worship' owned by such institutions;"

In view of the decision of the Apex Court in **Godfrey Philips India Ltd**(supra), we have no hesitation to hold that the matter covered by sub-clause (zzzzw) of Clause 105 of Section 65 of the Finance Act, 1994, as amended by Finance Act, 2011, is a matter enumerated in Entry 62 of List II of Seventh Schedule and the States alone have the legislative competence to enact any law imposing tax on the said matter.

12. The learned counsel for the appellants, relying on **T.N.Kalyana Mandapam Assn. v. Union of India and others** [(2004)5 SCC 632], contended that Article 366(29A) (f) 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 conceptionally or otherwise include the supply of services within the definition of sale and purchase of goods. At the outset, we must point out that the Apex Court in that case was dealing with the liability of mandap keeper to pay service tax, 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. Paragraph 56 of the said judgment deals with the variety of services extended by such mandap keepers to their customers. The said judgment does not deal with the supply of food in a restaurant. The supply of food and other consumables in a restaurant cannot be equated with the services rendered by a mandap keeper in relation to the use of mandaps and also the services, if any, rendered by him/her as a caterer. As such, we do not think that the said judgment is of any help to the appellants.

13. The learned counsel for the appellants relying on the decision of the Apex Court in **Bharat Sanchar Nigam Ltd. v. Union of India** [(2006)3 SCC 1] then contended that the supply of food and other consumables in a restaurant is a composite transaction, where the splitting of the service and sale has been constitutionally permitted. The question that came up for consideration in the said case was as to whether there is sale involved in telephone service, and the question whether splitting of the service and sale in the transaction of supply of food in a restaurant was not the subject matter of that case at all.

14. The learned counsel for the appellants, relying on the decision in **Faaborg-Gelting Linien A/S v. Finanzamt Flensburg** of a European court, contended that restaurant transactions can only be characterised by a cluster of features and acts, of which the provision of food is only one component and in which services largely predominate and that therefore they must be regarded as supplies of services. No doubt, this has been the position in India as well, but the Constitution (Forty Sixth Amendment) Act, which introduced Article 366 (29A) in the Constitution, has changed the characteristics of this transaction, for the purposes of imposition and levy of tax.

15. The learned counsel for the appellants brought to our notice the decision rendered by the Bombay High Court in a Writ Petition challenging sub clause (zzzzv) of Clause 105 of Section 65 of the Finance Act, 1994, as amended by Finance Act, 2011. It is seen that the Bombay High Court has taken the view that merely for the reason that an inclusive definition was inserted in the Constitution for the sale and purchase of goods so as not to leave any room for argument that a tax on sale or purchase of goods does not include a tax on the supply of food or any other article for human consumption, by way of or as

part of the service, it cannot be contended that the Parliament was denuded of its competence to legislate and impose a tax on the service provided by air conditioned restaurants. It is beyond dispute that by virtue of the provision in Article 366 (29A) of the Constitution, even the service part involved in the supply of food and other articles of human consumption, is deemed as a sale to enable the States to impose tax on the same. The point, therefore, is as to whether, having characterised constitutionally the subject matter of supply of food in a restaurant, including the service part of it, as a sale, can the Parliament characterise the same transaction as a service for imposition and levy of service tax. We are of the view that since the whole of the consideration received by a restaurant owner for supply of food and other articles of the human consumption, including the service part of the transaction, is exigible to tax by the State by virtue of the constitutional definition, it is not open to the Union to characterise the same transaction as a service for imposition and levy of service tax. We are, therefore, unable to agree with the view taken by the Bombay High Court.

In the aforesaid view of the matter, we do not find

any reason to interfere with the decision of the learned single Judge. The Writ Appeals are, accordingly, dismissed.

Sd/-

THOTTATHIL B.RADHAKRISHNAN, JUDGE.

Sd/-

P.B.SURESH KUMAR, JUDGE.

tgs/smv

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