Leasehold rights are taxable

The case involves the **Builders Association of Navi Mumbai** and **Neelsidhi Realties** challenging the levy of GST on a one-time lease premium charged by the **City and Industrial Development Corporation of Maharashtra Limited (CIDCO)** under long-term lease agreements. Key points:

1. **Petitioners' Argument**:
   - Long-term leases of 60 years are akin to a sale of immovable property and should not attract GST.
   - The one-time premium is a lump-sum payment and distinct from periodic lease rent.
   - CIDCO, being a statutory planning authority, performs government functions and not business activities, which should exempt it from GST under Section 7 of the GST Act.
   - The transaction should be treated as a transfer of immovable property rather than as a supply of services.

2. **Respondents' Defense**:
   - CIDCO's activities qualify as the supply of services under the GST Act.
   - The one-time lease premium is taxable under GST as consideration for a service.
   - CIDCO is not exempt from GST as it operates as a corporate entity and not purely as a government body.
   - The GST Act's provisions clearly cover such transactions, and reliance on earlier rulings under different tax laws is misplaced.

3. **Court's Decision**:
   - The High Court ruled that GST on the one-time lease premium is valid.
   - It found no merit in the argument that CIDCO's actions fall outside the scope of GST or constitute a sale.
   - The transaction is considered a supply of services under the GST Act, and the demand for GST was deemed lawful.

The petition was dismissed, affirming that the levy of GST on such lease premiums is in accordance with the law.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 12194 OF 2017

1. Builders Association of Navi Mumbai registered under the Bombay Public Trust Act, 1950 and the Society Registration Act, 1860, having Regn. No. MH/371-2002/Thane, having its office at 308/309, Persipolis Co-op. Soc., Plot No. 74, Sector-17, Vashi, Navi Mumbai - 400 703

2. Neelsidhi Realties a partnership firm, having its address at 2nd floor, The Emerald Building, besides Neel Sidhi Towers CHS, Navi Mumbai - 400 703 } Petitioners

versus

1. Union of India Through the Secretary, Ministry of Finance, Department of Revenue, Govt. of India, MSEB Building, 2nd floor, Estrella Battery Compound, Labour Compound, Dharavi, Matunga, Mumbai - 400 019

2. The Commissioner of Goods and Service Tax, Thane District, 16th floor, Satra Plaza, Plot No. 19/D, Palm Beach Road, Vashi, Navi Mumbai, Maharashtra

3. The Commissioner of Goods and Service Tax, CBD Belapur District, 1st floor, CGO Complex, Opp. Police Commissioner's office, CBD Belapur, Navi Mumbai - 400 614, Maharashtra

4. City Industrial and Development Corporation of Maharashtra Limited, Nirmal, 2nd floor, Nariman Point, Mumbai - 400 021

5. The State of Maharashtra through the Government Pleader Bombay High Court (OS), Bombay

6. The Commissioner of Goods and Service Tax, Maharashtra, GST Bhavan, Byculla (East), S. Chapsi Road, Tadwadi, Mazgaon, Mumbai - 400 010 ... Respondents

Mr. Vikram Nankani-Senior Advocate with Mr. Chirag Mody, Mr. Aman Kacheria i/b. M/s. DSK Legal for the petitioners.

Mr. Pradeep S. Jetly with Mr. Jitendra B. Mishra for respondent nos. 1 to 3.

Mr. B. B. Sharma for respondent no. 4.

Mr. B. V. Samant-AGP for State.

CORAM :- S. C. DHARMADHIKARI &
PRAKASH. D. NAIK, JJ.

DATED :- MARCH 28, 2018

ORAL JUDGMENT:- (Per S. C. Dharmadhikari, J.)

1. Rule. Respondents waive service. By consent, Rule is made returnable forthwith.

2. By this writ petition under Article 226 of the Constitution of India, the petitioners are challenging an order levying/collecting the Goods and Service Tax (GST) on the one-time lease premium charged by respondent no. 4 while letting plots of land on lease basis. By prayer clause (b), the petitioners seek a writ of mandamus or any other appropriate writ, order or direction in the nature thereof directing the respondents not to collect the Central Goods and Service Tax on the long term lease granted by respondent no. 4 to the members of petitioner no. 1, including respondent no. 2.

3. Before us is the first petitioner styled as Builders' Association of Navi Mumbai, which is a registered public charitable trust governed by the Bombay, now Maharashtra Public Trust Act, 1950 and the Societies Registration Act, 1860. The second petitioner is a partnership firm carrying on business as Builder and Developer. The first, second and the third respondents are the Union of India, through the Secretary, Ministry of Finance, Department of Revenue, the Commissioner of Goods and Service Tax, Thane District and the Commissioner of

Goods and Service Tax, Central Business District (CBD), Belapur. Respondent no. 4 is the City Industrial and Development Corporation of Maharashtra Limited (CIDCO), whereas, the sixth respondent is the Commissioner of Goods and Service Tax, Maharashtra.

4. The argument of the petitioners is that their members are reputed Builders and Developers of Navi Mumbai and areas surrounding it. They have contributed to the growth and development of Navi Mumbai by constructing and developing several residential and commercial properties. These projects are undertaken and carried out after the fourth respondent, which is registered as a company under the Companies Act, 1956, exercises the statutory functions in terms of section 113(3A) of the Maharashtra Regional and Town Planning Act, 1966 (hereinafter referred to as "the MRTP Act"). Insofar as the nature of the activities and functions of the fourth respondent, the petitioners, in para 6 of this petition, state as under:-

> "6. Respondent No. 4 was incorporated on 17th March, 1970 with the specific aim for creating a new planned, self-sufficient and sustainable city on the main land across Thane Creek adjoining the Mumbai City and it disposes of the land for development for 60 years to various builders and developers under the Navi Mumbai Land Disposal (Amendment) Regulation, 2008 by charging them a one-time lease premium. In addition to this one-time lease premium a separate lease rental is charged annually for the period of lease. Respondent No. 4 is a special planning authority for the areas of Navi Mumbai. The multi-

dimensional activity undertaken by Respondent No. 4 under the supervision of the Government of Maharashtra are classified under three broad concepts as enumerated from the website of Respondent No. 4, (i) Planning and development of new towns; (ii) Consultancy, project management and designing; and (iii) Development of new towns, setting up of industrial face of the city with the help of planned urban development with the social economic facility. In other words, Respondent No. 4 is acting as a special planning authority on behalf of the Government of Maharashtra and is not carrying on any business activities as such. A copy of introduction page taken from the website of Respondent No. 4 is appended hereto and marked as **Exhibit "1"**."

5. It is stated that in its ordinary and normal course of business, the fourth respondent invites offers from various entities to acquire, on lease, residential-cum-commercial plots and three/four star hotel plots in Panvel and Navi Mumbai from time to time. One such invitation was issued in April, 2017 inviting offers for various plots at Navi Mumbai and Panvel. The members of petitioner no. 1 applied for allotment of various plots. The members were allotted these plots. Under the scheme, the tenderer/bidder is required to make an offer by quoting a rate per square meter on account of payment of lease premium. The plots are to be allotted on long term lease of 60 years. A base price is already fixed for the plot in the annexure to the tender for the payment of one-time lease premium amount and the tenderer is required to quote a price above the base price per square meter of the plot which the tenderer is interested in acquiring. After the offers are scrutinised, respondent no. 4 usually allots plots on

lease basis to the bidder quoting the highest rate per square meter of the one-time lease premium amount provided such a bidder is eligible as far as the remaining terms and conditions of the tender document.

6. Thus, the petitioners have obtained plots in the above areas, but what they are questioning is that when the allotment letter was issued, the allottee was called upon to pay, on the one-time lease premium amount, the GST separately by a Demand Draft drawn in the name of the fourth respondent payable at Mumbai/Navi Mumbai. The fourth respondent collected GST on the total one-time lease premium amount payable by the successful allottee at the rate of 18%. The details of these allottees and the one time lease premium, the GST payable have been indicated in a chart in para 12 of the petition. In these circumstances, a grievance was raised by approaching the Goods and Service Tax Commissionerate as to how the GST is collected on the above amount and demanded from the petitioners. There was correspondence initiated and finally, when the authorities did not respond, the present petition has been filed.

7. The argument of Mr. Nankani learned senior counsel is that such a tax, as is demanded, cannot be levied, assessed and recovered. A long term lease of 60 years tantamounts to sale of

the immovable property, since the lessor is deprived of, by the allotment the right to use, enjoy and possess the property. Our attention is invited to section 105 of the Transfer of Property Act, 1882. The one-time premium amount is the lumpsum consideration paid for entering into the lease. Our attention is also invited to the fact that the lease of 60 years and with a statutory authority is based on the position and status of that authority. In that regard, our attention is invited to section 113 and particularly sub-section (3A) of the MRTP Act. A new town is set up by the fourth respondent. It is a planning authority. It is a creature of the statute. Our attention is also invited to sub-sections (1) to (3) of section 118 of the MRTP Act. Mr. Nankani would submit that the CIDCO discharges a Government function and duty. In any event, it discharges a statutory obligation. The argument of Mr. Nankani is that by virtue of Article 36, Schedule I to the Maharashtra Stamp Act, 1958, the present transaction is treated as a conveyance. Thus, such an instrument styled as conveyance and conveying a right, title and interest in the immovable property is brought into existence. Hence, the whole transaction is akin to sale. If that is the position, then, section 7 of the GST Act cannot have any application. Once the position in law is understood in this perspective, then, there is no warrant for imposition of the GST. Our attention is invited to Schedule II

of the GST Act and some of the clauses therein to urge that if the intention of the legislation was to charge GST on this one-time lease premium, then, appropriate provisions would have been inserted. They not being inserted, as there was a clear intent to leave out a transaction tantamounting to a sale. Mr. Nankani attempted to point out that one-time lease premium is different and distinct from lease rent. It is not a periodical payment, but a one time. It is not, therefore, conceivable that on such a premium, the tax could be levied, assessed and recovered. The premium is akin to *Salami* and our attention is invited to its plain dictionary meaning as set out in the legal dictionary. Our attention is also invited to a judgment of the Hon'ble Supreme Court in the case of *Commissioner of Income Tax Assam, Tripura and Manipur vs. Panbari Tea Co. Ltd.*[1]. Then, our attention is invited to a judgment of the Hon'ble Supreme Court in the case of *R. K. Palshikar (HUF) vs. Commissioner of Income Tax, M. P., Nagpur*[2]. Finally, Mr. Nankani would heavily rely upon an order passed by this court on 23rd August, 2017 in the case of *Commissioner of Central Excise, Nashik vs. Maharashtra Industrial Development Corporation*[3]. He would submit that this judgment and order dealt with a similar issue concerning the

1 AIR 1965 SC 1871
2 (1988) 3 SCC 594
3 Central Excise Appeal No. 164 of 2015

Maharashtra Industrial and Development Corporation. Hence, we should abide by the same.

8. In any event, the argument is that the reliance by the respondents on a Division Bench judgment of the Allahabad High Court is misplaced. The Allahabad High Court, in the case of *Greater Noida Industrial Dev. Authority vs. Commissioner of Customs, Central Excise*[4] did not notice the judgment of the Hon'ble Supreme Court in the case of *Shri Ramtanu Co-operative Housing Society Ltd. and Anr. vs. State of Maharashtra and Ors.*[5]. For all these reasons, it is submitted that the petitioners be granted the reliefs as prayed.

9. On the other hand, Mr. Jetly appearing for the Central Goods and Sales Tax Commissionerate and the Union of India would urge, based on the affidavit in reply, that this is a petition which seeks to pre-empt the levy assessment and recovery of GST. In any event, if the GST being now paid, then, the issue raised is purely academic. Apart therefrom, the law does not make any distinction between governmental and non-governmental agencies and supply of goods or services attracts GST. The CIDCO cannot be treated as Government. Its position as a new town planning authority is of no consequence. Once the

4 2015(40) STR 95
5 1970() SCC 323

legal provisions are clear, unambiguous and plain, then, regardless of the consequences, the tax is leviable. The whole edifice of Mr. Nankani's argument is based on the judgments delivered not in the context of the GST Act. The affidavit in reply at page 198 of the paper book and particularly paragraph no. 8 points out that the transaction is of supply of services. Once the Income Tax Act deals with a tax on income, then, the tests are different. The concepts are also different. It is, therefore, risky to read into one law the definition or provision to similar effect but from different law. A different and distinct tax law with its object and purpose cannot be, therefore, ignored and no automatic borrowing of any definition from another taxing statute is permissible. For all these reasons, Mr. Jetly would submit that the writ petition be dismissed.

10. For properly appreciating the rival contentions, we would make a reference to the GST Act. The GST Act is an Act to make a provision for levy and collection of tax on intra-state supply of goods or services or both by the Central Government and for the matters connected therewith or incidental thereto. Chapter I contains preliminary provisions and section 2 therein defines certain expressions and words. The term “business” is defined in inclusive manner in section 2(17). The expression includes any

trade, commerce, manufacture, profession, vocation, adventure, wager or any other similar activity, whether or not it is for a pecuniary benefit. It also includes any activity or transaction undertaken by the Central Government or State Government or any local authority in which they are engaged as public authorities. The other definition, which is material and relevant is to be found in section 2(31) is of the word "consideration". Section 2(31) reads as under:-

> "2(31) "Consideration" in relation to the supply of goods or services or both includes-
>
> (a) any payment made or to be made, whether in money or otherwise, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government;
>
> (b) the monetary value of any act or forbearance, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government:
>
> Provided that a deposit given in respect of the supply of goods or services or both shall not be considered as payment made for such supply unless the supplier applies such deposit as consideration for the said supply."

11. Then, the definition of the term "person" appearing in section 2(84) is also relevant. Chapter II contains provisions in relation to administration and then follows Chapter III, which is the charging section. Section 7 is heavily relied upon and therefore, we reproduce the same:-

"7. (1) For the purposes of this Act, the expression "supply" includes-

(a) all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business;

(b) import of services for a consideration whether or not in the course or furtherance of business;

(c) the activities specified in Schedule I, made or agreed to be made without a consideration; and

(d) the activities to be treated as supply of goods or supply of services as referred to in Schedule II.

(2) Notwithstanding anything contained in sub-section (1),-

(a) activities or transactions specified in Schedule III; or

(b) such activities or transactions undertaken by the Central Government, a State Government or any local authority in which they are engaged as public authorities, as may be notified by the Government on the recommendations of the Council, shall be treated neither as a supply of goods nor a supply of services.

(3) Subject to the provisions of sub-sections (1) and (2), the Government may, on the recommendations of the Council, specify, by notification, the transactions that are to be treated as-

(a) a supply of goods and not as a supply of services; or

(b) a supply of services and not as a supply of goods."

12. A perusal of sections 7, 8, 9, 10 and 11 falling in this Chapter leaves us in no manner of doubt that the expression "supply" includes all forms of supply of goods or services or both

such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business. By sub-section (2) and which opens with a non-obstante clause, such activities or transactions undertaken by the Central Government, a State Government or any local authority in which they are engaged as public authorities, as may be notified by the Government on the recommendations of the Council, shall be treated neither as a supply of goods nor a supply of services. Equally, subject to the provisions of sub-sections (1) and (2), the Government may, on the recommendation of the Council, specify, by notification, the transactions that are to be treated as a supply of goods and not as a supply of services or a supply of services and not as a supply of goods. Pertinently, no notification and traceable to sub-section (2) of section 7 has been brought to our notice.

13. What is heavily relied upon before us is the position of CIDCO. The CIDCO relies upon a notification issued under the MRTP Act. It may be designated as a New Town Development Authority for the purpose of the MRTP Act. For designation of a site as a new town and for development of any area as a site for the new town, sub-section (3A) of section 113 enables the State Government to require the work of developing and disposing of

land in the area of new town by any such Corporation, company or subsidiary company as referred in sub-section (2) of section 113 thereof. It could be declared, by a notification in a Official Gazette, to be the New Town Development Authority for that area. Pertinently, this notification, which is relied upon and which notifies the Navi Mumbai Disposal of Land (Amendment) Regulations, 2008 reinforces the position that by a final notification in Official Gazette, the CIDCO is constituted and designated as the New Town Development Authority.

14. On a plain reading of the GST Act, we do not see how we can agree with Mr. Nankani. Mr. Nankani also relies upon Schedule II, which is referable to section 7. These are the activities to be treated as supply of goods or services. The substantive provision section 7 in clearest terms says that the activities specified in Schedule I made or agreed to be made without a consideration and the activities to be treated as supply of goods or supply of services referred to in Schedule II would be included in the expression "supply". However, clause (a) of sub-section (1) of section 7 includes all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business. We referred to

the definitions simply to reinforce our conclusion that the CIDCO is a person and in the course or in furtherance of its business, it disposes of lands by leasing them out for a consideration styled as one-time premium. Therefore, if one refers to Schedule II, section 7, then, Item No. 2 styled as land and building and any lease, tenancy, licence to occupy land is a supply of service. Any lease or letting out of a building, including commercial, industrial or residential complex for business, either wholly or partly is a supply of service. It is settled law that such provisions in a taxing statute would have to be read together and harmoniously in order to understand the nature of the levy, the object and purpose of its imposition. No activity of the nature mentioned in the inclusive provision can thus be left out of the net of the tax. Once this law, in terms of the substantive provisions and the Schedule, treats the activity as supply of goods or supply of services, particularly in relation to land and building and includes a lease, then, the consideration therefor as a premium/one-time premium is a measure on which the tax is levied, assessed and recovered. We cannot then probe into the legislation any further.

15. The reliance placed on the judgment of the Hon'ble Supreme Court in the case of *Panbari Tea Co. Ltd.* (supra) is entirely misplaced. There, a registered lease deed by the assessee, under

which two estates were leased out to a firm for a period of 10 years, was in issue. The lease was executed for a consideration as and by way of premium and annual rent to be paid by the lessee to Panbari. The premium was made payable as noted in the Hon'ble Supreme Court's judgment. What went before the Income Tax Officer is the issue of treatment to the installment paid towards the premium in the relevant accounting year. The Income Tax Officer treated this as a revenue receipt of the assessee. On appeal, this order was confirmed. On further appeal, the tribunal also held that the premium was really the rent payable under the lease deed and, therefore, it was chargeable to income tax. After the matter was carried to the High Court, the assessee succeeded because the question posed for the High Court's consideration was answered by holding that this receipt is a capital receipt. The question that arose before the Hon'ble Supreme Court was whether this finding is correct. It is in that context and how to treat this income, whether as a revenue receipt or a capital receipt that all the further observations are made. Even by terming the gain or income as *Salami*, what the Hon'ble Supreme Court was essentially concerned with is not the transaction or the nature thereof, but the income generated or derived from it. Its treatment, therefore, led to the Hon'ble Supreme Court referring to section 105 of the Transfer of Property Act, 1882. In these

circumstances, the opinion rendered is that the income was treated rightly as a capital receipt. In the context, a lease of immovable property is a transfer of right to enjoy the property as termed by the Transfer of Property Act, 1882 for a price paid. That is how it being a transfer that the income derived in relation to lease of immovable property was treated as above.

16. Similarly, in the case of *R. K. Palshikar* (supra), the agricultural land of the assessee was diverted to non-agricultural purpose by developing it as housing site several years ago and it was not disputed that the land in question constitutes a capital asset within the meaning of section 2(4A) of the Income Tax Act, 1961. The question was whether section 12-B of that act can be brought in to play in this case as the transfer is of leasehold interest in immovable property for 99 years and not an outright sale or transfer of the complete interest of the transferor in the immovable property. The assessee was not agreeable to pay the tax as demanded and tried to escape the levy by urging that this was not a transaction which would invite or attract capital gain tax. In these circumstances, the question was answered by the Hon'ble Supreme Court and in that context, the observations heavily reiled upon by Mr. Nankani are made. Once again, we cannot ignore that the observations are in the context of the

provisions, and the interpretation to be placed thereon, but found in the Income Tax Act, 1961. That is an assessment of the tax on income. We are concerned here with the GST Act and the tax on supply of goods and services. It is not disputed that the position of the CIDCO for the purpose of orderly planning and development will be of no assistance in the sense while developing a new township, the objective of the planning authority is not to earn money, but to develop the area so that the purpose of setting up a township is achieved by more people wanting to live in the area in lieu of the various amenities provided in the area. The CIDCO is one such authority. It is entirely for the legislature, therefore, to exercise the powers conferred by sub-section (2) of section 7 of the GST Act and issue the requisite notification. Absent that notification, merely going by the status of the CIDCO, we cannot hold that the lease premium would not attract or invite the liability to pay tax in terms of the GST Act.

17. Even the judgment in the case of *Shri Ramtanu Co-operative Housing Society Ltd.* (supra) is of no assistance. There, the constitutional validity of the Maharashtra Industrial Development Act, 1962 was challenged. The argument was that this is not an enactment and in pith and substance referable to the constitutional entry, namely, Schedule VI List I, Entries 7 and

52, List II Entry 24 within the meaning of Article 246 of the Constitution of India. It is in this context that the functions and powers of the Maharashtra Industrial Development Corporation (MIDC) were referred and the court came to the conclusion that the Corporation is not a Government company and cannot be termed as a trading corporation as well. It provides amenities and facilities in industrial areas, when it allots industrial plots for setting up industries so as to achieve a balanced development and growth of industries. It is performing that function and which, therefore, enabled the Hon'ble Supreme Court to hold that the constitutional entries would not allow the power of competent legislature to make the law. This judgment is of no assistance.

18. In the case of *Commissioner of Central Excise, Nashik* (supra), the demand of service tax was in issue. The Finance Act, 1994 and particularly section 65 clause (64) was relied upon to urge that the service charges collected by the MIDC from the allottees of the plots are in relation to services provided by the MIDC to the plot holders and the same is covered by the category "maintenance, management and repairs" under clause (64) of section 65 of the Act. It is in relation to such a controversy that the Hon'ble Supreme Court's judgment in the case of *Shri Ramtanu Co-operative Housing Society Ltd.* (supra) outlining the

legal position and the status of the Corporation is referred by the Division Bench. The issue raised related to collection of service charges, but whether the services rendered are taxable services or not. The Division Bench noted that this consideration is an amount received for the facilities and amenities provided. That is a statutory function. It is in these circumstances that the Revenue's appeal was dismissed. All the observations in the paragraphs relied upon must be seen in the backdrop of the essential controversy noted above. With respect, it cannot be said that the activities performed by sovereign or public authorities under the provisions of law, which are in the nature of statutory obligations are excluded from the purview of the present enactment. Pertinently, the dividing line between governmental and non-governmental, sovereign and regal functions and otherwise is not very thin and post globalisation, liberalisation and privatisation. In that context, a useful reference can be made to a judgment of the Hon'ble Supreme Court in the case of *N. Nagendra Rao and Co. vs. State of Andhra Pradesh*[6]. The observations in paras 23 and 24 are extremely relevant. These paragraphs read as under:-

> "23. In the modem sense the distinction between sovereign or non-sovereign power thus does not exist. It all depends on the nature of power and manner of its exercise. Legislative supremacy under the Constitution arises out of

6 **AIR 1994 SC 2663**

constitutional provisions. The legislature is free to legislate on topics and subjects carved out for it. Similarly, the executive is free to implement and administer the law. A law made by a legislature may be bad or may be ultra vires, but since it is an exercise of legislative power, a person affected by it may challenge its validity but he cannot approach a court of law for negligence in making the law. Nor can the Government in exercise of its executive action be sued for its decision on political or policy matters. It is in public interest that for acts performed by the State either in its legislative or executive capacity it should not be answerable in torts. That would be illogical and impractical. It would be in conflict with even modem notions of sovereignty. One of the tests to determine if the legislative or executive function is sovereign in nature is whether the State is answerable for such actions in courts of law. For instance, acts such as defence of the country, raising armed forces and maintaining it, making peace or war, foreign affairs, power to acquire and retain territory, are functions which are indicative of external sovereignty and are political in nature. Therefore, they are not amenable to jurisdiction of ordinary civil court. No suit under Civil Procedure Code would lie in respect of it. The State is immune from being sued, as the jurisdiction of the courts in such matter is impliedly barred.

24. But there the immunity ends. No civilised system can permit an executive to play with the people of its country and claim that it is entitled to act in any manner as it is sovereign. The concept of public interest has changed with structural change in the society. No legal or political system today can place the State above law as it is unjust and unfair for a citizen to be deprived of his property illegally by negligent act of officers of the State without any remedy. From sincerity, efficiency and dignity of State as a juristic person, propounded in nineteenth century as sound sociological basis for State immunity the circle has gone round and the emphasis now is more on liberty, equality and the rule of law. The modern social thinking of progressive societies and the judicial approach is to do away with archaic State protection and place the State or the Government on a par with any other juristic legal entity. Any watertight compartmentalization of the functions of the State as "sovereign and non-sovereign" or "governmental and non-governmental" is not sound. It is contrary to modem jurisprudential thinking. The need of the State to have extraordinary powers cannot be doubted. But with the conceptual change of statutory power being statutory duty for sake of society and the people the claim of a common man or ordinary citizen cannot be thrown out

merely because it was done by an officer of the State even though it was against law and negligent. Needs of the State, duty of its officials and right of the citizens are required to be reconciled so that the rule of law in a Welfare State is not shaken. Even in America where this doctrine of sovereignty found its place either because of the "financial instability of the infant American States rather than to the stability of the doctrine's theoretical foundation", or because of "logical and practical ground", or that "there could be no legal right as against the State which made the law" gradually gave way to the movement from, "State irresponsibility to State responsibility". In Welfare State, functions of the State are not only defence of the country or administration of justice or maintaining law and order but it extends to regulating and controlling the activities of people in almost every sphere, educational, commercial, social, economic, political and even marital. The demarcating line between sovereign and non-sovereign powers for which no rational basis survives has largely disappeared. Therefore, barring functions such as administration of justice, maintenance of law and order and repression of crime etc. which are among the primary and inalienable functions of a constitutional Government, the State cannot claim any immunity. The determination of vicarious liability of the State being linked with negligence of its officers, if they can be sued personally for which there is no dearth of authority and the law of misfeasance in discharge of public duty having marched ahead, there is no rationale for the proposition that even if the officer is liable the State cannot be sued. The liability of the officer personally was not doubted even in Viscount Canterbury (supra). But the Crown was held immune on doctrine of sovereign immunity. Since the doctrine has become outdated and sovereignty now vests in the people, the State cannot claim any immunity and if a suit is maintainable against the officer personally, then there is no reason to hold that it would not be maintainable against the State."

19. To the similar effect are the findings in the later judgment of the Hon'ble Supreme Court in the case of *Agricultural Produce Market Committee vs. Ashok Hari Kuni*[7] (see paras 22 and 31 to 33)

7 **AIR 2000 SC 3116**

20. In the passing, we are of the opinion that the High Court of Judicature of Allahabad, while considering the demand, not arising out of the GST, but under the Finance Act in relation to the services of renting of immovable property of Greater Noida, has rightly arrived at the conclusion that the same was a taxable service and on the consideration received, the service tax could have been levied and demanded. Once we agree with the reasoning of the Division Bench, then, we do not feel it necessary to reproduce the paragraphs in the Division Bench judgment. We are not in agreement with the learned senior counsel appearing for the petitioners that the demand is contrary to law or unfair, unjust and unreasonable in any manner.

21. We are, therefore, of the clear view that the demand for payment of GST is in accordance with law. The said demand cannot be said to be vitiated by any error of law apparent on the face of the record. In these circumstances, we do not find any merit in the writ petition. It is accordingly dismissed. Rule is discharged. There would be no order as to costs.

(PRAKASH.D.NAIK, J.) **(S.C.DHARMADHIKARI, J.)**