
(2010) 09 KAR CK 0008

In the Karnataka High Court

Case No : W.A. No"s. 3282 of 2010 (T-RES) connected with 3283, 3285, 3286-3297 of 2010 and 3310-3321 of 2010 (T-RES)

Bharat Sanchar Nigam Ltd.

APPELLANT

Vs

State of Karnataka and Others

RESPONDENT

Date of Decision : 03-09-2010

Acts Referred:

Citation : (2011) 44 VST 446

Hon'ble Judges : N. Kumar, J;H.S. Kempanna, J

Bench : Division Bench

Advocate : Mohan Parasaran, Additional Solicitor General, Maninder Singh and Smt. Prathiba M. Singh for P.S. Dinesh Kumar and Atul Alur, for the Appellant; K.G. Raghavan, for K.J. Kamath and Kamath and Kamath, for the Respondent

Final Decision : Allowed

Judgement

N. Kumar, J.—These appeals are by the assessee challenging the interim order passed by the learned single judge directing them to deposit a sum of Rs. 550 crores within four weeks as a condition for staying the impugned reassessment order passed by the third respondent. The assessee is a public limited company, which is engaged in the business of telecommunications (i.e., data transfers) at Bangalore, under the name and style of M/s. Bharat Sanchar Nigam Limited. The main business activity of the assessee is data transfers (telecommunications). In the impugned order it is stated that telecommunication is all about data transfers only, in the telecom network. Various types of data routinely transferred in telecommunications can be broadly classified into three categories--audio data, video data and textual data. Whatever the type of data be, data of all kinds are basically lifeless and, therefore, lack spontaneous movement of its own. To cause transfer/movement of such data from one place to another, some specific carrier (energy) is indispensably required. Without such carrier, the data cannot even be imagined to move an inch forward, let alone at the speed of light. According to the assessing officer, such data carrier energy is the artificially created light

energy (ACLE) which is acting as the sole driving force behind every type of data transfer in telecommunications. ACLE is possessable in the same sense as the electrical energy, as the customers can use it any time they want during the agreement period to transfer any quantum of his data to any destination, without any hindrance/restrictions from the assessee. This is despite the fact that the custody of the network as a whole, including the energy, rests with the assessee. The light carrier/ACLE works very much like "electrical energy" which has been held as "goods" by the honourable Supreme Court in the case of Commissioner of Sales Tax, Madhya Pradesh, Indore Vs. Madhya Pradesh Electricity Board, Jabalpur, and National Thermal Power Corporation Ltd. Vs. State of Andhra Pradesh and Others, In simple terms, electrical energy is a "flow of electrons" while ACLE is a "flow of protons". They operate in a very similar way, but with different and distinct properties, utilities and fields of application. Therefore, if flow of electrons is held as goods, why not flow of protons.

2. At para 25 of the order it is stated that, even presuming for a moment that dominant intention is not sale of goods, the transfer of property in goods that is taking place in these telecom contracts for data transfers would take the shape of compulsory/involuntary transfer of property in goods for a consideration, in which case too, these transactions would constitute a deemed sale, in terms of article 366(29A)(a) of the Constitution. The plain actual fact is that after reaching the first mile tower in mobile telephone connections, the data gets carried to the destination, only by OFC's invariably. The scientific reason for this is that radio frequencies have limited transmission capacity, and, therefore, can carry data on electromagnetic energy only over very short distances. Thus, without the very substantial back end support of the OFC's, mobile telephone network cannot render instant global data transfers. The data carrier in telecommunications, always and without exception, is energy, associated with the frequencies, and not the frequencies themselves. The difference between frequencies and the energy is comparable to the difference between goods vehicle carrying parcel loads on the roads--parcel loads being comparable to data, goods vehicle to the data carrier energy, frequencies being comparable to roads. According to the assessing officer, these facts were not taken note of by the apex court while rendering the judgment in Bharat Sanchar Nigam Ltd. and Another Vs. Union of India (UOI) and Others, Therefore, he held, notwithstanding the aforesaid judgment of the apex court, the law declared by the Supreme Court is not applicable to the facts of this case and, therefore, the assessee is liable to pay sales tax and for some years value added tax. It is that order which is challenged by the assessee before the learned single judge.

3. The learned single judge has passed an interim order of stay subject to the condition assessee depositing Rs. 550 crores and he has listed the matter for final hearing on September 14, 2010. Assailing the said order it is contended that, when the impugned order passed by the assessing officer is contrary to the law declared by the apex court and when the stand of the assessee was accepted in the original proceedings, the learned single judge was not justified in passing

an interim order and directing the assessee to pay Rs. 550 crores. The order does not disclose any reasons for such conditional order and, therefore, it is submitted the condition imposing depositing of Rs. 550 crores is liable to be set aside.

4. Per contra, the learned counsel appearing for the State submitted that, though the order does not give reasons for such direction, in appeal this court can consider the material on record and find out whether in the facts of this case, the said order is justified. He further contended that the writ petition itself is not maintainable as the assessee has an alternate remedy by way of an appeal. He also relied on a judgment of the apex court which set aside the order passed by a Division Bench of this court and contended in those circumstances, no case for interference of the impugned order is made out.

5. The learned counsels for both the parties have also made submissions on the merits for the purpose of considering the interim prayer.

6. The learned counsel for the State submitted that though the apex court has laid down the law in the case of the assessee only, that was rendered in the context of mobile phones which has no application for transfer of data which is the subject-matter of these proceedings. On the contrary, the submission on behalf of the assessee is that the judgment covers the whole gamut of electromagnetic waves and telecommunication services.

7. Though the said judgments commence by setting out the facts of one of those cases where the question involved was the nature of transfer by which mobile phone communications are enjoyed, is it a sale or service or both, while considering the question on behalf of several States, contentions raised on different aspects were considered and the points that were framed for consideration as contained in para 32 reads as under:

These broadly speaking are the respective contentions and in our opinion, the issues which arise for consideration in these matters are:

(A) What are "goods" in telecommunication for the purposes of article 366(29A)(d)?

(B) Is there any transfer of any right to use any goods by providing access or telephone connection by the telephone service provider to a subscriber?

(C) Is the nature of the transaction involved in providing telephone connection a composite contract of service and sale? If so, is it possible for the States to tax the sale element?

(D) If the providing of a telephone connection involves sale, is such sale an inter-State one?

(E) Would the "aspect theory" be applicable to the transaction enabling the States to levy sales tax on the same transaction in respect of which the Union Government levies service tax?

8. A reading of the aforesaid issues do not indicate that the apex court was considering only the case of mobile telephones.

9. In dealing with those questions, the apex court made the following observations (pages 122-130 in 3 VST):

57. The State-respondents in their submissions had initially differed as to what constituted "goods" in telecommunication. Ultimately, the consensus among the respondents appeared to be that the "goods" element in telecommunication were the electromagnetic waves by which data generated by the subscriber was transmitted to the desired destination. The inspiration for the argument has been derived from the provisions of the Indian Telegraph Act, 1885 which defines telegraph as meaning:

3. (1AA) "telegraph" means any appliance, instrument, material or apparatus used or capable of use for transmission or reception of signs, signals, writing, images and sounds or intelligence of any nature by wire, visual or other electro-magnetic emissions, radio waves or Hertzian waves, galvanic, electric or magnetic means;

Explanation.--"Radio waves" or "Hertzian waves" means electro-magnetic waves of frequencies lower than 3,000 giga-cycles per second propagated in space without artificial guide".

59. Section 4 of the 1885 Act gives exclusive privilege in respect of telecommunication and the power to grant licences to the Central Government. Pursuant to such power, licences have been granted to service providers. According to the service providers in terms of their licence no further transfer of the rights to use the telegraph could be effected by them. Therefore, what was provided was a service by the utilization of the telegraph licensed to the service providers for the benefit of the subscribers.

60. We will proceed on the basis that incorporeal rights may be goods for the purposes of levying sales tax. Assuming it to be so, the question is whether these electromagnetic waves can fulfil the criteria laid down in Tata Consultancy for goods. In our opinion the question must be answered in the negative. Electromagnetic waves have been described in Telecommunications Law: David Gilles & Roger Marshal: Butterworths:

1.14. Electromagnetic waves travel through free space from one point to another but can be channelled through waveguides which may be metallic cables, optical fibres or even simple tubes. All electromagnetic waves are susceptible to interference from one another and unrelated electrical energy can distort or destroy the information they carry. To reduce these problems they have been organized within the spectrum into bands of frequencies or wavelengths for the transmission of particular types of services and information.

61. The process of sending a signal is as follows:

Data is superimposed on a carrier current or wave by means of a process called modulation. Signal modulation can be done in either of two main ways: analog and digital. In recent years, digital modulation has been getting more common, while analog modulation methods have been used less and less. There are still plenty of analog signals around, however, and they will probably never become totally extinct. Except for DC signals such as telegraph and baseband, all signal carriers have a definable frequency or frequencies. Signals also have a property called wavelength, which is inversely proportional to the frequency. (Encyclopedia of Technology Terms of Techmedia)

62. It is clear, electromagnetic waves are neither abstracted nor are they consumed in the sense that they are not extinguished by their user. They are not delivered, stored or possessed. Nor are they marketable. They are merely the medium of communication. What is transmitted is not an electromagnetic wave but the signal through such means. The signals are generated by the subscribers themselves. In telecommunication what is transmitted is the message by means of the telegraph. No part of the telegraph itself is transferable or deliverable to the subscribers.

63. The second reason is more basic. A subscriber to a telephone service could not reasonably be taken to have intended to purchase or obtain any right to use electromagnetic waves or radio frequencies when a telephone connection is given. Nor does the subscriber intend to use any portion of the wiring, the cable, the satellite, the telephone exchange, etc. At the most the concept of the sale in a subscriber's mind would be limited to the handset that may have been purchased for the purposes of getting a telephone connection. As far as the subscriber is concerned, no right to the use of any other goods, incorporeal or corporeal, is given to him or her with the telephone connection.

64. We cannot anticipate what may be achieved by scientific and technological advances in future. No one has argued that at present electromagnetic waves are abstractable or are capable of delivery. It would, therefore, appear that an electromagnetic wave (or radio frequency as contended by one of the counsel for the respondents), does not fulfil the parameters applied by the Supreme Court in Tata Consultancy for determining whether they are goods, right to use of which would be a sale for the purpose of article 366(29A)(d).

70. For the reasons stated by us earlier we hold that the electromagnetic waves are not "goods" within the meaning of the word either in article 366(12) or in the State legislations. It is not in the circumstances necessary for us to determine whether the telephone system including the telephone exchange was not goods but immovable property as contended by some of the petitioners.

83. As we have said article 366(29A) has no doubt served to extend the meaning of the word "sale" to the extent stated but no further. We cannot presume that the Constitutional Amendment was loosely drawn and must proceed on the basis that the parameters of "sale" were carefully defined. But having said that, it is

sufficient for the purposes of this judgment to find, as we do, that a telephone service is nothing but a service. There is no sales element apart from the obvious one relating to the handset, if any. That and any other accessory supplied by the service provider in our opinion remain to be taxed under the State sales tax laws. We have given the reasons earlier why we have reached this conclusion.

10. In the end they have answered those questions as under (pages 132 and 133 in 3 VST):

91. For the reasons aforesaid, we answer the questions formulated by us earlier in the following manner:

(A) Goods do not include electromagnetic waves or radio frequencies for the purpose of article 366(29A)(d). The goods in telecommunication are limited to the handsets supplied by the service provider. As far as the SIM cards are concerned, the issue is left for determination by the assessing authorities.

(B) There may be a transfer of right to use goods as defined in answer to the previous question by giving a telephone connection.

(C) The nature of the transaction involved in providing the telephone connection may be a composite contract of service and sale. It is possible for the State to tax the sale element provided there is a discernible sale and only to the extent relatable to such sale.

(D) The issue is left unanswered.

(E) The aspect theory would not apply to enable the value of the services to be included in the sale of goods or the price of goods in the value of the service.

11. From the aforesaid judgment it is clear the apex court has held that, in telecommunication what is transmitted is the message by means of the telegraph. No part of the telegraph itself is transferable or deliverable to the subscribers. As far as the subscriber is concerned, no right to the use of any other goods, incorporeal or corporeal, is given to him or her with the telephone connection. An electromagnetic wave or radio frequency does not fulfil the parameters applied by the Supreme Court in Tata Consultancy for determining whether they are goods, right to use of which would be a sale for the purpose of article 366(29A)(d). Therefore, they held that the electromagnetic waves are not "goods" within the meaning of the word either in article 366(12) or in the State legislations. There is no sales element. Finally, they concluded that, goods do not include electromagnetic waves or radio frequencies. The goods in telecommunication are limited to the handsets supplied by the service provider.

12. Therefore, we understand the aforesaid judgment as laying down the law to the effect goods do not include electromagnetic waves or radio frequencies for the purpose of article 366(29A)(d). The goods in telecommunications are limited to handsets supplied by service provider. In our view it is not confined only to the mobile telephones. Further, it is made clear by the apex court that there may be

a transfer of right to use goods as defined in answer to the previous question by giving a telephone connection.

13. In page 17, the assessing officer has referred to the opinion of an expert Dr. Reji Philips, Associate Professor of Raman Research Institution, which is as under:

In my opinion, there is no sale of "light energy". Light is just a carrier of the data in a fiber. In the same way as electromagnetic radiation in the kilohertz (10 HZ+) to GHz (10 HZ) region, which propagates through space, is the carrier for audio and video signals in radio and TV transmission. Moreover, light itself is nothing but high frequency electromagnetic radiation in 10 HZ frequency region.

When light, which is modulated by data, is transmitted through the optical fiber lines, data/information is transmitted. If the light is not modulated, data cannot be transmitted. These optical fiber lines are within the control of the company and they can reuse, remove or redirect the lines as per the needs of the company.

"Light" has energy in it, so light propagating through a fiber also will have some energy. Light is only medium to carry data and light cannot be possessed or stored.

14. The committee on subordinate legislation after passing of the aforesaid judgment by the apex court felt the said judgment is a hurdle to collect sales tax from BSNL. Therefore, they took the decision to seek for review of the said order and accordingly a review petition came to be filed which has been rejected. It is thereafter the assessing officer was of the view that the said judgment has no application to the facts of the case as the question involved herein firstly was not brought to the notice of the apex court, secondly it was not considered and, therefore, he has independently considered the facts of the case and that is how the assessment order is passed.

15. The question whether it is sale of goods or not is yet to be decided at the highest level. On the face of it, the judgment of the apex court applies to the facts of this case. Unless the law declared by the apex court is held not to be applicable to this case or varied or modified, any demand of tax by the State contrary to the law of the land prima facie cannot be sustained. It is settled law, for every levy of tax there should be a statutory authority. That is precisely what is to be decided in an appropriate proceeding. The very fact that the assessing authority chose to accept the case of the assessee and did not raise a demand and such a demand is raised by way of re-assessment order on the ground that though apex court has declared the law to which the State is a party and after an attempt to get the order reviewed did not materialise, when this order is passed, certainly the said order is to be carefully scrutinised before the assessee is made to pay tax. The assessee's contention is they are service providers. They are not in the business of sale of goods. As service providers they have already paid tax. As the learned single judge has set down the case for final hearing on September 14, 2010 and the assessee being a public sector undertaking and the question of law is yet to be decided, we are of the view that the assessee is entitled to an

absolute stay order. Accordingly, we pass the following order: (i) Appeals are allowed in part.

(ii) The direction issued in the interim order passed by the learned single judge to the effect that the assessee should deposit Rs. 550 crores within four weeks from the date of the order is hereby set aside.

(iii) The rest of the order remains undisturbed.

It is made clear, the observations made in this order is only for the purpose of these appeals against an interlocutory order. The learned single judge shall proceed to hear the case on the merits, without being in any way influenced by any of the observations made by this court in this order.