(2007) 03 KAR CK 0049

In the Karnataka High Court

Case No : Writ Petition No. 1537 of 2007

Bharti Airtel Ltd. (Formerly Bharti Tele Ventures Ltd.) APPELLANT

Vs

State of Karnataka and Others RESPONDENT

Date of Decision : 16-03-2007

Acts Referred:
Constitution of India, 1950 — Article 366 (29A) (d)

Citation : (2007) 7 VST 505

Hon'ble Judges : D.V. Shylendra Kumar, J

Bench : Single Bench

Advocate : V. Sridharan, for G. Shivadass and Suresh Astekar, for the Appellant; Udaya Holla, General and Niloufer Akbar, AGA for R-1 to 3 and 5, for the Respondent

Final Decision : Dismissed

Judgement

D.V. Shylendra Kumar, J.—Writ petition by an assessee who is aggrieved by the reassessment order and demands raised pursuant to that under the provisions of the Karnataka Value Added Tax Act, 2003.

2. Petitioner though has statutory remedy of appeal has invoked jurisdiction of this Court on the premise that the decision of the assessing authority is clearly illegal and untenable in the light of the law laid down by the Supreme Court in the case of Bharat Sanchar Nigam Ltd. and Another Vs. Union of India (UOI) and Others, .

3. Sri. Sridharan, learned Sr. counsel appearing for the petitioner has raised several contentions, mainly amongst which is that Supreme Court had in the case of Bharat Sanchar Nigam emphatically declared that so far as the Electro Magnetic Waves or Radio Frequency is concerned, it cannot be considered as goods and therefore there is no transfer of any right of ownership in goods within the meaning of Article 366(29-A)(d). Submission of the learned Counsel for the petitioner, is that when once it has been declared that electro magnetic waves

are not goods, levying tax in respect of a transaction on the premise that the service provided by the petitioner to its subscribers which is virtually in the nature of transfer of electro magnetic waves is clearly contrary to this ruling of the Supreme Court and therefore matter warrants interference even in writ jurisdiction bypassing the statutory remedies.

4. Learned Counsel for the petitioner has also placed reliance on the decision of the Supreme Court in the case of All India Judges Association and Ors. v. Union of India and Ors. reported in (2006) 10 SCC 484 wherein the Supreme Court had occasion to find fault with the attitude of the High Court not to entertain a writ petition solely on the ground of availability of statutory remedies, when the petitioners had raised legal questions which were required to be resolved by the High Court etc.

5. In the first instance I find this submission could have been accepted if this Court could have finally resolved the matter by examining the pure legal question but it appears that for answering the legal question, mixed issues of facts and law are required to be examined farther and in a matter of this nature where the nature of the transaction involved depends more on the terms between the petitioner and its subscribers, and the factual state of affairs that exist based on such terms between the parties, these are all matters which are required to be examined by the authorities under the Act and it is only on examination of the nature of the transaction what actually takes place pursuant to the transaction in the light of the terms of the contract a decision can be rendered. It may be that the assessing authority might have erred in some aspects, but that in itself cannot be a ground to bypass the appellate remedies and invoke the writ jurisdiction of this Court.

6. If once the law is declared it is only the question of application of that law which can be called in aid even before the appellate authority. But the decision of the Supreme Court rendered in the case of Bharat Sanchar Nigam Ltd., being one in the context of a transaction between a provider of mobile service i.e., mobile phone connection and the subscriber and the present transaction being one in the nature of a service rendered by the petitioners to its subscribers for the purpose of transferring data through a system known as optic fibre cables etc., I am of the view that there is scope and need for further examination of disputed facts. This position is obvious from a reading of paragraph 1 of the judgment of the Supreme Court which reads as under:

The principal question to be decided in these matters is the nature of transaction by which mobile phone connections are enjoyed. Is it a sale or is it a service or is both? If it is a sale, then the States are legislatively competent to levy sales tax on the transactions under Entry 54 List II of the Seventh Schedule to the Constitution. If it is a service then the Central Government alone can levy service tax under Entry 97, List I (or Entry 92-C of List I after 2003). And if the nature of the transaction partakes of the character of both sale and service, then the moot question would be whether both legislative authorities could levy their separate taxes together or only one of them.

7. While examining the issues that arose in this context, the Supreme Court framed the following five points for its determination:

(A) What are ''goods'' in telecommunication for the purposes of Article 366(29-A)(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 sales? 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 lives service tax?

8. Ultimately the five points determined are answered as under:

(A) Goods do not include electromagnetic waves or radio frequencies for the purpose of Article 366(29-A)(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 discernible 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.

9. But what is of significance and to be noticed in that case was while the issues arose in the context of providing mobile service connection to the subscribers and the stand of the State was that it was a transaction which was liable to tax in terms of Article 366(29A)(d) and the Supreme Court examined the issue only in that context, in the present situation the examination on facts relevant for both Articles 366(29A)(b) and 366(29A)(d) appear to be involved.

10. But what is of further significance is that the answer to point B wherein the Supreme Court answered this issue without considering the answer to the previous question by giving a definite answer that there could be situations when

the transfer of right to use goods also can be taxed. That means even in a case where it is in the nature of right to use goods i.e., in the form of lease, there was scope for levy of some tax depending upon the facts. Further while answering this point when the Supreme Court expressly states that the nature of transaction involved in providing telephone connection may be composite in nature and can involve both service and sales, this question was in the context of the constitutional definition under Article 366(29A)(d) and in the context of examination of the nature of transaction by the providers of mobile phone services. The Supreme Court declared, while answering question C that while the Central Government could levy tax on the service part of the transaction, the State Government could levy tax on the sales part. That again is a matter which can be finalised only on the examination of the nature of the contract, the nature of service and what transpires while providing the service etc.,. While question D was not answered, the emphatic answer regarding the jurisdiction of the States for the purpose of levying tax on the service part was answered against the State Government; that no part of service can be subjected to levy of taxes by the State authorities.

11. The law declared very clearly indicates that there can be occasions to levy taxes even in situations where it is only one of lease of some goods or components depending on the situation. Even while the service is a composite service and the contract is a composite contract involving both the areas of goods and rendering of service that may also have some scope for levy of tax for the state authorities insofar as the transfer of goods in the service contract is concerned and that can be a situation covered by Article 366(29-A)(d). When such is the law declared and a situation of this nature did not necessarily arise before the Supreme Court, I am of the view that the scope for levying tax under the state sales tax enactment depends on the nature of the transaction, the terms of contract and what all elements are involved in providing the service while executing the contract.

12. It is for this reason I am not inclined to examine the merits or otherwise of the order passed by the assessing authority as it involves an examination of the facts etc which is essentially the function of an appellate authority.

13. In the absence of all basic facts while this Court will be handicapped in examining the questions of law that would arise and in answering the issues that may arise, it is not desirable to lay down law or declare the law even without having full particulars of facts or before the factual aspects are finally settled, particularly in an area where developments are still taking place and the emerging trends are still to settle down and a declaration of law can have application in a large number of cases. It is very important that the correct legal position I stated after a proper examination of all aspects of the matter.

14. It is for this reason, I am extremely reluctant to examine the question that may arise if this writ petition is entertained as against the assessment order, as I am of the definite view the answer that may be given will not be an answer on a

comprehensive consideration of all issues that can arise in the matter.

15. It is also for this reason that I am not inclined to examine the matter in writ jurisdiction, though this Court while exercising writ jurisdiction is definitely enabled to do so even in terms of the law declared by the Supreme Court in the Union of India v. State of Haryana.

16. Sri. Sridharan, learned Sr. counsel for the petitioner has also urged one another aspect and that is in respect of the entire value of the transaction the Union Government having levied service tax and that tax having been paid by the petitioner and in respect of the very transaction and value the state authorities also seeking to levy sales tax in which event, there is an area of over lapping.

17. It is a matter to be urged before the Appellate Authority so that if the petitioner is inclined to contend as to what part of the value of the contract represents the service part and what part can represent the goods part it can be put forth before the authorities and can be agitated if the fact situation is as contended by the learned Counsel for the petitioner. If the entire contract represents only service it is open to them to so contend before the authorities, but the mere fact that the Central Government has collected service tax in respect of the entire value of the contract by itself cannot be a determining factor to hold that it does not contain any goods on the sale of which sales tax can be levied by the State legislature. Sales tax on that part of the contract involving an element of transfer of goods is in respect of that part of the contract involving transfer of some goods as the State Government is always competent to levy tax on sale of goods and whether any such goods is available or not being a question of fact in any given case and such question of fact being the basis for levy of tax by the authorities, it is not necessary to examine such question at this stage directly in writ jurisdiction on such aspects. Even if the authorities are not correct on law it may be corrected as and when the matter is brought before the constitutional court in a manner provided under the Act itself.

18. Therefore, I am not inclined to entertain the writ petition. It is open to the petitioner to avail of the statutory remedy of appeal.

19. Sri. Sridharan, learned Counsel submits that the initial period of 30 days for filing the appeal is over and as the petitioner was prosecuting the matter before this Court and notice had been issued to the respondents, it is just and necessary this Court should direct the appellate authority to condone the delay if any in filing the appeal.

20. Observations and legal position explored in the course of passing this order is only for the purpose of examining the question of availability of a statutory remedy to the petitioner and as to whether the Court should nevertheless examine the matter in writ jurisdiction. These observations are not any part of determining any legal question that may arise in the case and therefore the appellate authority should examine the appeal on its merits without being

influenced by any observation made in the course of this order but by only following the law as declared by the Supreme Court. All contentions of parties are left open.

21. It is open to the petitioner to bring this aspect to the notice of the appellate authority for the purpose of condoning the delay, if any, in preferring the appeal and seek for suitable relief in accordance with law. The appellate authority should definitely take note of such development in considering such application.

22. This writ petition is dismissed.

