

(1994) 09 BOM CK 0028

In the Bombay High Court

Case No : Letters Patent Appeal No. 100 of 1994 in First Appeal No. 729 of 1993
In B.C.C. Suit No. 6026 of 1992

Tata Press Limited and another

APPELLANT

Vs

Mahanagar Telephone Nigam Limited and another

RESPONDENT

Date of Decision : 08-09-1994

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100, 101
Constitution of India, 1950 — Article 14, 19(1)
Telegraph Act, 1885 — Section 7
Telegraph Rules, 1951 — Rule 2, 452, 458, 459

Citation : AIR 1995 Bom 107 : (1995) 1 MhLj 220

Hon'ble Judges : A.M. Bhattacharjee, C.J; V.P. Tipnis, J

Bench : Division Bench

Advocate : F.S. Nariman, Aspi Chinoy, Mrs. Zia Mody, Ms Shameela Chinoy, Nihar mody and Christopher D'Souza, instructed by Wadia Gandhi and Co, for the Appellant; K.K. Venugopal, Sri Counsel, Ms. S.I. Shah, Arun Jetley, Arjun Sikhri, Vijay Narayan and Ms. S.I. Shah, for the Respondent

Judgement

A. M. Bhattacharjee, C. J.

1. The main question involved in this case is whether the "Tata Press Yellow Pages" is a "List of Telephone Subscribers" or a "Telephone Directory" within meaning of Rule 458 of the Indian Telegraph Rules, 1951. An affirmative answer will warrant dismissal of this appeal, whereas a negative answer will lead us to allow the appeal and set aside the impugned judgment assailed therein.

2. In this very Court Room, about four decades ago an appeal was heard by the Division Bench presided over by Chief Justice Chagla. The case related to gold-topped fountain pens and the Customs had contended that gold-topped fountain pens were gold, nevertheless, and, therefore, duty was to be levied upon them, not as fountain pens, but as gold. The duty on the latter was very much higher than on the former. Chief Justice Chagla requested the Advocate-General to hand up to him a specimen of the gold-topped fountain pen which the Customs had

adjudged as gold and the learned Chief Justice took the pen in his hand and asked the Advocate-General as to what he would call the object which the Chief Justice was holding in his hand. The Advocate-General had to reply that the Chief Justice was holding a fountain pen and to that the learned Chief Justice said that that was the whole of the case and would conclude the matter. The appeal was accordingly disposed of by the learned Chief Justice, who was not at all required to go into the intricacies of the Customs Act, into such fine points as 10 what is gold and what is not, and so on and "so forth interminably. (See *Roses* in December, by M.C. Chagla, 1990 Edition pages 158-159).

3. We have heard very interesting arguments advanced by Mr. Nariman appearing for the appellants, Tata Press Ltd., Mr. Venugopal appearing for Respondent No. 1, Mahanagar Telephone Nigam Ltd., and Mr. Jetley appearing for Respondent No. 2, Union of India. As usual, a large number of precedents have been piled up along with a number of Law Lexicons in order to understand the denotation and connotation of the expressions "List of Telephone Subscribers" and "Telephone Directory". The two expressions, not having been defined in the Indian Telegraph Act and the Rules made thereunder, we would have to go by the plain meaning of these plain English words. We have reminded ourselves of the classic observations of Justice Vivian Bose in *The Seksaria Cotton Mills Ltd. Vs. The State of Bombay*, to the following effect:

"..... the more learned their advisers were in the law the more puzzled they would be as to what advice to give, for its is not till one is learned in the law that subtleties of thought and bewilderment arise at the meaning of plain English words which any ordinary man of average intelligence, not versed in the law, would have no difficulty in understanding."

We, however, have not felt much difficulty in understanding the import of the aforesaid expressions. May, be, we are not that learned in law, and, therefore, do not suffer from any amblyopia, which, according to Justice Vivian Bose, is generated by legal learning. We think that after examining carefully and meaningfully the impugned book published by the Appellants under the caption "Tata Press Yellow Pages" we would be in a position to decide whether it is a "Telephone Directory" or a "List of Telephone Subscribers", shorn of all forensic logomachy and legal abracadabra.

4. Rule 458 of the Indian Telegraph Rules is as hereunder:--

"Publishing of Telephone Directory.--Except with the permission of the Telegraph Authority no person shall publish any list of telephone subscribers."

There should be no doubt that a publication in order to amount to a contravention of the Rule, as quoted above, must in substance be a "list of telephone subscribers", for it is the substance that must count and must outweigh and take precedence over mere appearance. Before restraining the defendant Tata Press Ltd. from publishing or circulating or in any way dealing with the Tata Press Yellow Pages, we have to be satisfied that in substance and in

effect the same is a "list of telephone subscribers" or a "telephone directory". The case at hand involves questions, not so much of law, but rather of semantics and common sense.

5. The expression "subscriber" has been defined in Rule 2(pp) to mean a person to whom a telephone service has been provided by means of an installation under these Rules or under an agreement. "The definition of the expression "Call" as in Rule 2(a) is apt to create some confusion as the expression has been defined to mean "a conversation between two or more subscribers". Would not a conversation between two or more persons, who are not subscribers, through a telephone line amount to a "call"? be that as it may, the definition of the expression "subscriber" being as noted above, "a List of Telephone Subscribers" would obviously mean a list of persons to whom telephone services have been provided by means of an installation under the Telegraph Rules or under an agreement. Suppose we, in this High Court, print or publish a Book containing a list of our Judges and officers containing their names, designations, departments they are attached to, their office as well as residential addresses and also their telephone numbers in the office as well as in their residence. Or, suppose, a bar Association or a Medical Association prints or publishes a Book containing the names of their members, their specialisation, address of their offices, chambers and residences along with their respective telephone numbers. We are inclined to think that such Books as aforesaid may not amount to "a list of subscribers" if the dominant purpose for such publication is not to notify the telephone numbers only, but mainly to notify who these persons are along with their designations and/or qualifications or specialisations and addresses at which they would be available during as well as after office hours and the telephone numbers published in such Books would be there only to provide a fuller and more complete picture. The High Court or the Bar Association or the Medical Association in such cases may not be proceeded against for violation of Rule 458 of the Indian Telegraph Rules, for publishing such books if (the primary object thereof is not to provide the telephone numbers only, but, may be, the telephone numbers also along with various other relevant matters. If in such books as aforesaid, the names of such officers or members, who are not subscribers of telephones, are also published, the same would further go to show that such books would not be "a list of subscribers".

6. Mr. Nariman, the learned counsel appearing on behalf of the Appellants, has contended that the Tata Press Yellow Pages are a compilation made on the basis of advertisements given by businessmen, traders and professionals and the names of persons or concerns carrying on such business, trade or profession have been included in the publication and while the telephone numbers of those who are subscribers have been noted, there are several entries relating to persons/ concerns without such telephone numbers. It has been urged by Mr. Nariman that if a list of lawyers is to be compiled, the criterion for inclusion in such list would only be whether the concerned person is a lawyer and no person who is not a lawyer would be included in such a list. Mr. Nariman has urged that

the fact that most of the lawyers might be having telephone numbers and their telephone numbers are noted in the list cannot alter the character of the list and make the same to amount to a list of telephone subscribers, particularly when the names of lawyers who have no telephone numbers are also included therein.

7. We have given our best and very serious considerations to the arguments advanced by Mr. Nariman. As we have already indicated, we will have to scrutinise and examine the publication Tara Press Yellow Pages and would have to come to our conclusion as to whether the same is a Telephone Directory or a List of Telephone Subscribers from the point of view of the main object and the dominant purpose of the publication. The fact that has weighed with us most is that even though there are some features which may distinguish the Tata Press Yellow Pages from a mere Telephone Directory or a mere List of Telephone Subscribers, the publication would nevertheless be of little or no use if the telephone numbers printed therein are omitted or deleted. It may be that the Tata Press Yellow Pages may not be a Telephone Directory or a List of Telephone Subscribers only, but we are nevertheless of the clear view that the same is a Telephone Directory or a List of Telephone Subscribers also.

8. We would proceed to note hereunder some of the features of the Tata Press Yellow Pages which make the same more akin to a Telephone Directory as published by the Respondent No. 1:--

(a) At page XXXV the Appellants themselves have labelled this Publication as a "Directory" and has declared in clause (2) under the heading TERMS and CONDITIONS" that "Tata Press Ltd. agrees to exercise reasonable care that the listing is correctly printed in each directory issue".

(b) If we look to the pages from Pages VI to IX printed under the caption "HELP Lines" we would find that the telephone numbers of Emergency Police Stations in Bombay, Thane and New Bombay, Fire Service Stations, Ambulances, Air India. Indian Airlines, various Bombay Municipal Services, the Dairies, the Day and Night Chemist Shops, Doordarshan and Akashwani, various Electric Supply Stations, various Eye Banks and Eye Hospitals, various Gas Supplies, Hospitals, Police stations, the various Newspapers and other Press Media, Railway Enquiries, Roadways Enquiries, Telephone Services, Trunk Manual, Tourist Enquiry, Whether Enquiry, Home Guards, Bombay University, Maharashtra State Board of Secondary and Higher Secondary Education, Collector of Bombay, Income Tax Officer etc., are printed in a manner akin to that in which those are printed in the Telephone Directory of Respondent No. 1.

(c) All the STD Codes and ISD Codes are also printed at page X and page XV in a manner those are printed in the Telephone Directory of Respondent No. 1.

(d) Telephone numbers of the Ministers and the various Departments of the Government of Maharashtra are printed at page XXIV which are also usually done in the Telephone Directories published by Respondent No. 1.

(e) Various Postal Pin Codes printed at page XXVI are also published as those are done in a Telephone Directory published by Respondent No. I.

(f) The Logo of the receiver of a telephone is also printed in all the pages from he beginning to page L and also in other pages, e.g. page 111 etc.

9. It is true that the prohibition against publication without permission of the Telegraph Authority, as contained in Rule 458 of the Indian Telegraph Rules, is against the publication of "any list of telephone subscribers". Under Rule 452 of the Indian Telegraph Rules, "a copy of telephone directory shall be supplied free of charge for each telephone, extension or party line, rented by the subscriber". Since every subscriber is entitled, as a matter of right, to a telephone directory containing the list of telephone subscribers and their telephone numbers free of charge, any publication of a mere telephone directory or a mere list of telephone subscribers, without more, would be entirely useless from a commercial point of view as no one would be interested in purchasing the same, since such a one would be available to all the telephone subscribers free of charge. It must be noted in this context that Rule 459 of the Indian Telegraph Rules empowers the Telegraph Authority to publish or allow the publication of advertisements in the body of the Telephone Directory and, therefore, a Telephone Directory would not cease to be so merely because advertisements are also published therein. We must not read with provisions of Rule 458 in a way to render the prohibition contained therein to be otherwise useless, and, therefore, reading the provisions of Rules 452, 458 and 459 together, we will have to hold that even if a Telephone Directory or List of Telephone Subscribers contain advertisements, may be in large numbers, publication thereof would nevertheless come within prohibition of Rule 458 as in such a case the publication, even though not merely a Telephone Directory or a List of Telephone Subscribers, is also nevertheless such a Telephone Directory or List of Telephone Subscribers.

10. We accordingly hold that the publication Tata Press Yellow Pages is also, or is nevertheless, a Telephone Directory containing in a list of telephone subscribers, even if it contains something more or something less than a mere Telephone Directory. The publication would have little or no utility if the names of the telephone subscribers and their numbers are excluded therefrom and, therefore, in substance, this is a Telephone Directory or a List of Telephone Subscribers within the meaning of Rule 458 of the Indian Telephone Rules.

11. Before the learned single Judge it was argued on behalf of the appellants that Rule 458 of the Indian Telegraph Rules is void as it imposes unreasonable restriction on the fundamental right conferred by Art. 19(1)(g) of the Constitution. Before us, however, Mr. Nariman has made it clear that he is not pressing that point in this appeal before us.

12. Mr. Nariman has, however, urged before us that Rule 458 of the Indian Telegraph Rules is void as it imposes unreasonable restriction on the right of freedom of speech and expression as conferred by Art. 19(1)(a). But as will

appear from the judgment under appeal (para 32), this point has also been expressly given up, by the learned Counsel appearing for the appellants. In the Written Notes submitted before us on behalf of the appellants, the said ground also does not appear to have been pressed.

13. Before us, however, Mr. Nariman has urged that in publishing the Tata Press Yellow Pages, the appellants are exercising its right to freedom of speech and expression as guaranteed by Article 19(1)(a) and that the restriction imposed by Rule 458 of the Indian Telegraph Rules imposes unreasonable restrictions beyond the limits permissible under clause (2) of Article 19. The inter-relation between Article 19(1)(a) and Article 19(1)(g), i.e. right to freedom of speech and expression and the right to carry on any occupation, trade or business, has been dealt with by the Supreme Court in a series of decisions, as will appear from, to cite a few, *Hamdard Dawakhana and Another*, *Kalipada Deb and Another*, *Lakshman Shripati Itpure @ Lakshman Shripati Impore and A.B. Choudhri and Another Vs. The Union of India (UOI) and Others*, *Sakal Papers (P) Ltd. and Others Vs. The Union of India (UOI)*, *Bennett Coleman and Co. and Others Vs. Union of India (UOI) and Others*, *Indian Express Newspapers*, etc. Assuming that, notwithstanding *Hamdard Dawakhana* (supra), the right to make commercial speech or commercial advertisement is also a right to freedom of speech and expression as guaranteed by Article 19(1)(a), we are afraid that the Tata Yellow Pages cannot be regarded as such commercial speech or commercial expression of advertisement, as the publication appears us to be all commerce and no speech, or atleast overwhelmingly a project of commerce or trade by the appellants, in its pith and substance and, therefore, to be an exercise of a right conferred by Article 19(1)(g). It is very much a publication made by the appellants solely for commercial purposes so far the appellants are concerned. And if this is the exercise of the right to carry on any occupation, trade or business, then, while the appellants have such a right under Article 19(1)(g), the respondents have also the undisputed right to exclude, completely or partially, any other person from exercising such right under Article 19(6). As already noted, before us, Mr. Nariman has expressly given up his contention that Rule 458 of the Indian Telegraph Rules in any way violates the right of the appellants under Article 19(1)(g).

14. The learned trial Judge held Rule 458 not to be violative of Article 14 of the Constitution. Before us, Mr. Nariman has also not urged that the same is violative of the provisions of Article 14. But at one stage of the arguments, we thought that since Rule 458 provides that the "Telegraph Authority may grant permission to any person to publish any list of telephone subscribers", but there is nothing in the Rules or anywhere else to indicate as to how, to whom and under what circumstances, terms or conditions such a permission may be granted or withheld, such an absolute power may appear to be unreasonable and thus violative of the provisions of Article 14 on the ground of being unreasonable. But since this point has not been pressed before us by Mr. Nariman, the same need not detain us.

15. One word more before we conclude. This is after all a Second Appeal, even though under Clause 15 of the Letters Patent, and not u/s 100 of the Code of Civil Procedure. Mr. Nariman has, therefore, argued mainly relying on the decision of the Supreme Court in *Smt. Asha Devi Vs. Dukhi Sao and Another*, which in its turn has relied on an unreported decision of a five-Judge Bench of the Supreme Court, that we have the same power which the learned single Judge had as the first appellate Court in respect of both question of fact and question of law and that it is thus open to us to review all findings of fact also in this Second Appeal. The position appears to us to be somewhat analogous. If a First Appeal is heard by a Court subordinate to the High Court, the High Court in Second Appeal can intervene only when there is a substantial question of law within the meaning of Section 100 of the Code of Civil Procedure. But if we are to govern ourselves, as we must, by the decision of the Supreme Court in *Asha Devi* (supra) and the decision of the five-Judge Bench referred to therein, we will have to hold that the questions of fact are not a prohibited area for us as they are in a Second Appeal governed by Section 100 of the Code of Civil Procedure. A combined reading of Section 100 and Section 101 of the Code of Civil Procedure, providing the grounds for Second Appeal and providing further that no Second Appeal can be entertained on any other ground, will make it clear that facts are almost a no-entry zone for the Second Appellate Court. If that is so when the High Court is considering the First Appellate judgment rendered by a subordinate Court, then one would have thought that the same should also be a fortiori the position when the High Court is sitting in appeal over a judgment rendered by a Judge of that very High Court sitting singly. But since we are to govern ourselves by the law declared in *Smt. Asha Devi Vs. Dukhi Sao and Another*, we must agree with Mr. Nariman that we are entitled to go into all the findings of facts. We have thus examined and scrutinised the publication in question afresh and have come to the conclusion that the same is in pith and substance a Telephone Directory or a List of Telephone Subscribers within the meaning of Rule 458 of the Indian Telegraph Rules. We have not referred to the oral evidence on record to which detailed reference has been made by the trial Judge as well as by the learned single Judge. The learned single Judge has held that even on a consideration of the oral evidence on record, the publication appears to be a Telephone Directory or a List of Telephone Subscribers. We agree and we only add that a proper examination of the publication in question has also led us to the very same conclusion and that being so, oral evidence on the point may pale into somewhat insignificance. We have reminded ourselves of the famous dictum of Jmutavahana in *Dayabhaga* that "Vachana Satenabi Vastu Nanyatha Karana Sakte" -- a fact cannot be altered by a hundred words.

16. We accordingly dismiss the appeal with costs to the respondents.

17. Stay to continue for four weeks from today.

Appeal dismissed.