(2011) 07 AHC CK 0339

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No''s. 18101 of 2009, 37004 of 2011, 66476 of 2008, 37178, 37007, 37008, 37010, 37014, 37015, 37018, 37020, 37023, 37024, 37026, 37029, 37032, 37034, 37036, 37039, 37042, 37045, 37047, 37049 of 2011, 66478 of 2008, 58335,

Vodafone Essar Mobile Services Ltd.	APPELLANT
Vs	
State of U.P. and Others	RESPONDENT

Date of Decision : 28-07-2011

Acts Referred:

Easements Act, 1882 — Section 52
Stamp Act, 1899 — Article 35, 2(16), 29, 31, 33
Telegraph Act, 1885 — Section 10, 4, 4(2)
Transfer of Property Act, 1882 — Section 105

Citation : (2012) 1 AWC 627 : (2012) 1 CivCC 174 : (2011) 114 RD 605

Hon'ble Judges : Arun Tandon, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Arun Tandon, J.—This bunch of 515 writ petitions (except one) has been filed by various Companies who have obtained license u/s 4(2) of the Indian Telegraph Act, 1885 to provide Unified Access Services in Delhi and NCR region-service area. To put it simply the petitioner Companies have been granted license to provide various telecoms facilities to the subscribers under the said license. The licensee have been given permission to connect, carry, transmit and deliver voice and/or non-voice messages over licensee''s network in the designated service area and includes provision of all types of access.

2. According to the petitioners to effectively operate their license granted under the Telegraph Act they become entitled to set up telecoms towers, antenna etc. at different places. The rights so claimed are stated to be pari materia to the rights of the Central Government as conferred under the Indian Telegraph Act specifically Section 10 in respect of installation of transmission lines and other equipments.

3. In furtherance to the rights so conferred upon the petitioner companies under the license, they have entered into agreements with various property owners through out the State for establishing Antenna, towers, generators with prefabricated shed, as well as other facilities.

4. The agreement executed between the petitioner companies and the owners of the property is the subject matter of issue in all these petitions. Petitioners allege that only a limited right to use the immovable property in a particular manner has been granted. While according to the authorities under the Indian Stamp Act the deed executed answers the description of lease. The dispute led to exercise of power under Sections 33 and 47-A of the Indian Stamp Act by the Assistant Commissioner, Stamps/Additional District Magistrate. The imposition of stamp duty and penalty there under was challenged by the petitioners by way of appeal u/s 56(1) A of the Indian Stamp Act, 1899 which appeals have also been dismissed. Hence these petitions.

5. It has not been disputed that most of the legal issues as raised in these petitions were subject matter of consideration by the High Court earlier in Writ Petition No. 42784 of 2008 (M/s Tata Teleservices Limited v. State of UP. and Others). Single Judge of this Court. After considering the various issues raised on behalf of the service providers like the petitioners, this Court held that the deed in question answered the description of lease. The document was covered within the definition of ''lease'' u/s 2(16) of the Indian Stamp Act and therefore chargeable to stamp duty under Article 35 of Schedule 1-B of the Indian Stamp Act.

6. This Court has been informed by the counsel for the petitioner that the judgment of the learned Single Judge of this Court in the case of Tata Teleservices Ltd. (supra) has been challenged before the Supreme Court by means of Special Leave to Appeal (Civil) No. 24052 of 2008 wherein an interim order was granted by Apex Court on 20.4.2009 which reads as follows:

Having heard learned counsel, we direct the petitioner.--Tata Teleservices Limited to move the Commissioner of Stamps within a period of two weeks, enclosing a sample document in original, seeking opinion of the Commissioner u/s 31 of the Stamp Act. The Commissioner will decide the matter within four weeks therefrom.

Since the petitioner has taken a fair stand, we are of the view that, at this stage, no coercive steps for recovery of penalty, including demand, shall be taken.

The Commissioner shall decide the matter uninfluenced by impugned order of the High Court as well as the Circular issued by the Commissioner (Admn.).

Needless to add that the petitioner will move the Commissioner without prejudice to its rights and contentions.

I. A. is disposed of accordingly.

7. A statement has been made at the bar that now leave has been granted and

the proceedings have been converted into Civil Appeal No. 24052 of 2008. The matter is still to be heard by the Supreme Court finally. Counsel for the petitioner however, fairly stated that Supreme Court has not stayed the operation of the judgment of the Single Judge of this Court.

8. Giving due regard to the interim order of the Supreme Court this Court informed, the petitioners that they are at liberty to pray for a similar order from the Court i.e. liberty to approach the Commissioner u/s 31 of the Stamp Act at the first instance. This offer has not been accepted. The matter has been argued at length after making a statement that the information of the proceedings before the Apex Court may not be treated to be a request for adjournment.

9. I have heard Sri Bharatji Agarwal Senior Advocate assisted by Sri Ashish Mishra, Advocate and Sri Alok Mishra, Advocate on behalf of M/s Vodphone Mobile Services and Idea Cellular Ltd. Sri Alok Mishra, Advocate was heard on behalf of Bharti Telecom Ltd. On behalf of BSNL Sri Kanderpa Narain Mishra, Advocate and Subodh Kumar, Advocate have been heard, Sri Anupam Kulshrestra, Advocate appeared on behalf of Rajni Garg in Writ Petition No. 59734 of 2009. On behalf of the State respondents submissions have been made by Sri Sanjay Goswami, Addl. Chief Standing Counsel.

10. Sri Bharatji Agarwal Senior Advocate has also filed written submissions which have been taken on record.

11. In order to notice the facts relevant for deciding this bunch of petitions the counsels for the parties have divided the petitions into 5 broad groups namely:

(a) Petitions by Vodaphone Essar Mobile Services Ltd.

(b) Petitions by M/s Idea Cellular Ltd.

(c) Petitions by Bharti Telecom Ltd.

(d) Petitions by BSNL and

(e) Petition by Rajni Garg.

The Court will deal with these group of petitions serially.

(a) Petitions by Vodaphone Essar Services Ltd.

Copy of one of the deeds executed in favour of the petitioner Company has been enclosed as Annexure-2 to the writ petition No. 18101 of 2009. All other deeds are stated to be similar.

On behalf of the petitioner it is contended that under the deed executed between the petitioner Company and the respondent No. 4 owner of the property, it is categorically recorded that same is only a license which has been granted for the use of the terrace/land without any exclusive possession of the property being delivered. It is stated that from simple reading of the various clauses of the agreement specifically Clause No. 2, 3, 6, 8, 9, 10, 11, 15, 17, 18, 19 and 30 it is apparently clear that only a right to use the part of the terrace/land which is subject matter of the agreement has been conferred upon the Company. It has not been put to any exclusive possession thereof. Such use of a immovable property for limited purpose would answer the description of a ''license'' and not of a ''lease''. The rights conferred under the deed in their case are different from that of the deed subject matter in the case of Tata Teleservices Ltd. Therefore the judgment in that case would have no application. According to petitioner the owner of the property has permitted the petitioner Company to use the terrace for installation of a tower, a power generator with a pre-fabricated shed and other equipments with no right over the immovable property. He explains that unless exclusive possession of the property is delivered the transfer will not answer the description of a lease. In support of the contention that exclusive possession of the demised property has not been given under the agreement, he refers to Clause 18 of the deed where under a right to visit the terrace has been reserved for himself by the owner of the property. For the purpose a duplicate key is to be prepared one of which is to be retained by the petitioner and the other by the owner. He specifically refers to the following recitals contained in various clauses of the deed which read as follows:

3. The Licensee shall have the right to erect and install a temporary prefabricated shed on the Terrace of the said property adjacent to its tower for antennae admeasuring 12ft.x 16ft. Approximately. The Licensee shall also be entitled to erect and install a standby/back-up generator of 20 KW power rating on the Terrace. The Licensee shall also have the right to erect and install a temporary pre-fabricated shed admeasuring approximately 12'' x 15'' on the Terrace for the purpose of inter alia, housing the generator.

10. The Licensee shall apply for, obtain and install its requirement of power directly from DVB/concerned electricity authorities in its name or in the name of any nominee or any other person or authority. The Licensor(s) shall execute a No Objection Certificate or such other document as may be required by the Licensee to apply for, obtain and install the power supply/ connection. The Licensor(s) shall for the aforesaid purpose allow the employees/workers of DVB/concerned electricity authorities or any other agency to carry out the work of installation of the electric meters or any other necessary equipment, such as generator and antenna etc. at such places which are technically necessary. The Licensee shall have the right to install necessary cables, and wires equipment for the purpose of transmitting the power supply from meters to its antenna other equipments and generators as per agreed drawings.

11. The Licensor(s) shall ensure twenty four hours a day access to the Licensee, its employees, agents, associates, security guards etc. to the building and terrace and further ensure that access is not denied to the Licensee, its employees, agents associates, security guards etc. At any time including Sundays, National and other holidays and night time.

17. The Licensor(s) shall not during the currency of this license install, cause, or

allow to be installed on the licensed premises or any other part of the building any communication facilities/equipment, the placement or operation of which, in the judgment of the Licensee, may interfere with the working of the licensee''s antenna, equipment or generator. The Licensor(s) shall provide all cooperation and support in this matter to the Licensee when some representation is to be made to the Local/State Authorities etc.

18. Duplicate set of keys for access to the Terrace as well as for gaining entry into the Terrace shall be given by the Licensor(s) to the Licensee. The Licensor(s) shall not alter or suffer to be altered the existing locking devices for which the said keys are handed over to it without prior permission of the licensee.

23. In the event the Licensor(s) transfers and conveys the property to a third party, such transfer/conveyance shall be subject to this agreement and shall recognize and accept the right(s) of the licensee herein and upon the transfer/ conveyance having been completed, the transferee shall step into the shoes of the Licensor 9s) herein and all the rights and liabilities of the Licensor(s) shall automatically devolve on the transferee. Provided however the Licensor(s) shall not transfer the property for a period of 2 years from the date of commencement of this license deed, without the written consent of the Licensee.

24. The Licensee shall be entitled to install any additional equipment goods etc. and shall also be entitled to remove any/all its equipment, goods et. At any time in its sole discretion without any let, hindrance or objection from the Licensor(s) including in the circumstances of the Agreement having been terminated/ determinate by the Licensee.

25. On the expiry of the term of this Agreement or its earlier determination in accordance with the terms and conditions of this Agreement, the Licensee shall remove and/or cause to be removed its antenna equipment and generator from the licensed premises and shall vacate the licensed premise.

30. Nothing herein contained shall be construed as creating any tenancy or sub-tenancy in favour of the Licensee or its officers and/or employees in or over or upon the Terrace or any part thereof other than the right of use hereby granted or as entitling the Licensee to the exclusive possession of the Terrace. It is the express intention of the parties hereto that this Agreement shall be a mere license and the Licensor(s) shall always be deemed to be in possession thereof.

12. Reliance has been placed upon the judgments of the Supreme Court in the cases of Associated Hotels of India Ltd. Vs. R.N. Kapoor, Rajbir Kaur and Another Vs. S. Chokesiri and Co., Gopal Saran Vs. Satyanarayana, C.M. Beena and Another Vs. P.N. Ramachandra Rao, and Delta International Limited Vs. Shyam Sundar Ganeriwalla and Another,

13. In addition to the said plea it has been submitted that in the appeal as filed before the Commissioner u/s 56(1-A) of the Stamp Act, various clauses of the agreements were specifically relied in support of the plea that only a license has

been granted and not a lease. But such objections of the petitioners have not been considered. Because of non-consideration of the issues raised, the order impugned passed in appeal cannot be sustained. He clarifies that appeal u/s 56(1 -A) is maintainable both on issues of fact as well as on issues of law. Therefore in the fact of the case this Court may set aside the appellate order and remand the matter for rehearing of the appeal.

14. He then submits that since the original deed was not produced before the authorities under the Indian Stamp Act they had no authority of law to levy any Stamp Duty. For the proposition he has placed reliance upon the judgment of a Single Judge of this Court in the case of in Somdutt Builders Ltd. Vs. State of U.P. and Others,

15. The other legal contentions as were raised in the case of M/s Tata Teleservices Ltd. v. State of U.P. (supra) have again been reiterated before this Court.

16. Lastly it is contended that absolutely no reasons have been disclosed which could justify the imposition of penalty in the facts of the case. The only reason recorded in the impugned orders for the purpose is that since there has been violation of Section 33 of the Indian Stamp Act the power to impose penalty flows automatically.

17. Sri Sanjay Goswami, Addl. Chief Standing Counsel on behalf of the State disputes the correctness of the contentions so raised on behalf of the petitioner. At the very outset he submits that all issues raised in these petitions stand answered against the petitioners under the judgment of this Court in the case of Tata Teleservices Ltd. which judgment has not been stayed by the Supreme Court till date. He therefore, submits that this Court may follow the law so laid down and may proceed to dismiss the writ petitions.

18. With regard to the plea that rights conferred upon the petitioner under the deed in question are distinguishable viz-a-viz the one which was subject of consideration before the Single Judge in the case of Tata Teleservices Ltd, he explains that only different words have been used in the deed while the real intention and purpose of the agreement is one and the same.

19. He points out that mere use of the word ''license'', ''license fee'', etc in various clauses of the agreement would not necessarily mean that only a license has been granted. The deed is a ''lease'' within the meaning of Section 2(16) of the Indian Stamp Act.

20. According to the Addl. Chief Standing Counsel the Supreme Court in its recent judgment in the case of State of Uttarakahand and Others v. Harpal Singh Rawat, JT 2011 (2) 481 has laid down that definition of ''lease'' u/s 2(16) of the Indian Stamp Act is in 2 parts and includes documents which may not be otherwise ''lease'' within the meaning of Section 105 of the Transfer of Property Act. He refers to paragraphs 7 and 8 of the said judgment wherein after re-

producing the definition of ''lease'' u/s 2(16) of the Indian Stamp Act the Supreme Court has gone on to hold that the definition of ''lease'' u/s 2(16) of the Indian Stamp Act is wider and even if a transaction may not amount to a lease u/s 105 of the Transfer of Property Act, the same may nonetheless be a lease for the purpose of the Indian Stamp Act. He submits that exclusive possession of the demised property flows from a bare reading of the terms of the deed where under right to install tower, generator with pre-fabricated shed and other facilities has been conferred. The property cannot be used except for the said purpose. Petitioner Company has been put in exclusive possession of the property for the purposes of installation of the tower, generator and shed etc. The base size of the tower to be installed has been disclosed as 12ft. X 16ft, which will work out to 192 sq.ft. The size of pre-fabricated shed to be installed over the generator has been shown as 12ft.x 15ft. Which in turn would work out to 145 sq.ft. He clarifies that this part of the property cannot be put to any other use by any other person except the petitioner Company so long as the agreement subsists. On the expiry of the term of the agreement, antenna, generator etc. have to be removed, which would mean that the premises has to be vacated by the Company on the expiry of the term of the agreement.

21. He also refers to Clauses 23, 25, and 28 of the agreement where under it has been provided that if the owner decides to transfers/convey the property to any third person then such subsequent transfer/conveyance will be subject to this agreement and would be binding upon the subsequent transferee. Under clause 25 petitioner Company has been given a right to permit the use of the facilities by other Telecoms operators. He submits that such rights in the Company under the deed, lead to only one conclusion that lease hold rights have been granted. Such rights to not exist in the case of license. He refers to the provisions of Easement Act for the purpose.

22. Sri Goswami contends that irrespective of the aforesaid clauses which lead to a conclusion that lease rights have been granted, it cannot be disputed that under the document in writing petitioner company has been given a right to occupy immovable property for consideration in terms of money payable. This right to occupy immovable property on payment of money by a deed in writing would fall within the definition of ''lease'' as provided u/s 2(16) of the Indian Stamp Act, as explained by the Supreme Court in the case of State of Uttranchal (supra).

23. In rejoinder Sri Bharatji Agarwal, Senior Counsel again drew the attention of the Court to various clauses of the agreement. He placed reliance upon the judgment of the Apex Court in the Union of India (UOI) and Others Vs. Dhanwanti Devi and Others, for the preposition that a Judgment of the Court has to be read in the context, it has been delivered and in the light of the issues under consideration. He submits that intention of the parties is the determining factor as to whether the document is a lease or license and for the preposition he refers to the judgment of the Supreme Court in Delta International Limited Vs.

Shyam Sundar Ganeriwalla and Another,

(b) Writ Petition by Idea Cellular Ltd.

Copy of one of the deeds executed between the petitioner Company and the owner of the property has been brought on record as Annexure-1 to writ petition No. 66476 of 2008. All other deeds are stated to be similar.

The agreement contains an opening recital that license is being granted for the use of the land in favour of the Company which in turn has been licensed to provide Cellular Mobile Services. Clause 5 of the deed provides that the term of the agreement would commence from the date of physical occupation of the property. The period shall be ten years with a further right to renew the same for a period of five years each time (reference- Clause 6). The consideration to be charged has been provided for under the deed itself with a provision of enhancement after every three years (Clause -7). According to the counsel for the petitioner from a reading of the Clause-10 alongwith clause 11 it is clear that exclusive possession of the property has not been delivered to the Company. Clause-24 of the agreement which is pari materia to Clause -30 of the agreement in the case of Vodafone quoted above contains a specific recital that no tenancy or sub-tenancy is being created nor the Company will be entitled to exclusive possession. With reference to the said recitals in the deed the legal contentions as raised in the Writ Petition of Vodafone have been reiterated.

24. In reply Sri Goswami refers to clause -5 of the agreement which shows that the possession had to be delivered and lease would commence from the date of taking over of physical possession only. With reference to clause -11 he submits that a right has been conferred upon the petitioner Company to allow the use of the premises and facilities to other Cellular operators. He also refers to clause -19 of the agreement which provides that in case the owner sells or transfers his rights over the property then such transfer will be subject to the terms and conditions of this agreement. Clause -25 of the agreement provides that in case the owner desires to construct upon the demised land then he shall provide suitable alternative accommodation to the satisfaction of the Company for installation of its pre-fabricated shed, generator etc. Such rights do not exist in a licensee under the Easement Act. He submits that on a reading of the agreement as a whole it is apparently clear that lease rights have been granted qua the land in question. Mere use of the word license'' and ''license fee'' in various clauses will not result in the document be held to be mere a license when real purpose is to grant lease rights.

25. He then submits that on simple reading of the agreement no reasonable man can dispute that a right to occupy an immovable property for consideration in terms of money has been conferred in writing. Such a deed in writing would fall within the four corners of Section 2 (16) of the Indian Stamp Act. Even if it is accepted for the sake of argument that the deed is strictly not in accordance with Section 105 of the Transfer of Property Act it will still answer the description of

''lease'' within the meaning of the word u/s 2(16) of the Indian Stamp Act.

The other contention raised as in the case of Vodafone have been replied in the same manner by the learned standing counsel.

(c) Writ Petition of Bharti Telecom:

Copy of the lease deed executed in favour of the Company has been brought on record. The deed according to the counsel for the petitioner namely Shri Ashish Mishra is similar to the one which was subject matter of consideration in the case of Vodafone and, therefore, the arguments advanced by Shri Bharatji Agrawal, Senior Advocate have been adopted by him.

(d) Writ Petition of BSNL

Copy of the deed executed, both in respect of open piece of land and terrace have been brought on record of this group of writ petitions. The deed has been described as lease deed and from the opening recitals of the deed it is apparently clear that the property has been leased out on consideration of rent on the conditions mentioned in the deed itself.

26. Counsel for the BSNL could not dispute that the facts of their case are similar to the one subject matter of the judgment of this Court in the case of Tata Tele Services (Supra). He has only reiterated the pleas which had been raised in the case of Tata Tele Services.

27. He however contends that under Clause 4 of the lease deeds it has been agreed between the petitioner company and the owner of the property that the document shall be got registered by the lessor at his own cost.

28. In view of the aforesaid clause, he submits that the liability to pay the stamp duty u/s 29 of the Indian Stamp Act would fall upon the lessor and not upon the Company. The objection so raised despite being noticed by the Commissioner has not been considered. Therefore, the order of the Commissioner is unsustainable in the eyes of law. He clarifies that Clause 4 clearly stipulates that the liability for payment of the Stamp duty shall be of the lessor. This clearly shifts the liability of payment of stamp duty upon the lessor as per Secton 29 of the Indian Stamp Act.

29. Shri Goswami counsel for the State points out that since in the facts of the case the lease deeds as executed between the BSNL and the owners of the property are more or less similar as in the case of Tata Tele Services Ltd. (supra), all legal issues stand answered against the petitioner therein. There is no reasons for this Court to take any different view.

30. He explains that Clause 4 of the agreement has been read by the stamp authorities to mean that only registration fee is to be paid by the lessor. There is no agreement qua payment of stamp duty by lessor.

31. Shri Subodh Kumar who has also appeared on behalf of BSNL (in writ petition

No. 38157 of 2010 and similar writs) submitted that the lease deed in that case was executed on 1.5.1999 while the notice u/s 33/47-A was issued on 1.2.2004 which was beyond the prescribed period of four years, therefore, hit by Section 33(5). He further submits that there has been wrongful calculation qua the rate of stamp duty payable under the orders impugned.

32. Shri Goswami in reply points out that u/s 33 proviso, a power has been conferred to examine the deeds even after four years of the execution with the sanction of the Government. Petitioner did not raise any such issue qua proceedings being beyond four years and, therefore, barred by Section 33 before the stamp authorities. He participated in the proceedings without any objection in that regard. He cannot be permitted to challenge the order of the authorities on the grounds not raised before the authorities below.

33. He then explains that if there has been some wrongful calculation, petitioner is always at liberty to make an application before the first authority and if such application is filed, the concerned authority shall take appropriate action in the matter.

(e) Writ Petition by Rajni Garg

34. Writ Petition No. 59734 of 2009 has been filed by a private person namely Rajni Garg with the allegation that in terms of Section 29 of the Indian Stamp Act, the liability to pay the stamp duty is upon the lessee in the facts of the case BSNL. Such issue was raised before the Commissioner in the Appeal. The Commissioner noticed the said objection but has not adjudicated upon the same. He wrongly held that there was no error in the order of the Assistant Commissioner (Stamps), Mahamaya Nagar.

35. Shri Goswami however with reference to the order passed by the Assistant Commissioner submits that under Clause 29 of the lease deed it was provided that the document shall be presented for registration by the lessor and shall be registered at his cost. The issue of liability for payment of stamp duty should have been examined by the Commissioner with reference to the same. However from the appellate order it is clear that such issue has not been dealt with.

36. Shri Mishra has put in appearance on behalf of BSNL and has supported the order passed by the stamp authorities.

37. It is specifically recorded that no other counsel has appeared in the connected matters nor any other plea has been raised in addition to those as have been noticed herein above.

38. This Court may now record the legal principles on which the controversy raised in this bunch of writ petitions is to be adjudicated.

39. It has been settled by the Supreme Court of India that the use of particular words like ''license'' or ''lease'' in a deed will not be conclusive qua the exact nature of the transaction. The following have to be taken into consideration for

examining the exact nature/intent of the document:

(a) substance of the document must be preferred to the form;

(b) the real test is the intention of the parties-whether they intended to create a lease or a license;

(c) if the document creates an interest in the property, it is a lease; but, if it only permits another to make use of the property, of which the legal possession continues with the owner, it is a license; and

(d) if under the document a party gets exclusive possession of the property, prima facie, he is considered to be a tenant; but circumstances may be established which negative the intention to create a lease.

40. The legal principle so enunciated by the Supreme Court in the case of Associated Hotels of India Ltd. Vs. R.N. Kapoor, hold the field on the subject even today.

41. This Court may only refer to the judgments, which have followed the law so explained by the Supreme Court in the matter of examination of the issue as to whether a particular document is lease or a license. Gopal Saran v. Satyanarayana, (1989) 3 SCC 361 (Para 20); Corporation of The Corporation of Calicut Vs. K. Sreenivasan, Delta International Limited Vs. Shyam Sundar Ganeriwalla and Another, Tata Tele Services Ltd. v. State of U.P. and Others W.P. No. 42784/2006 decided on 26.8.2008, C.M. Beena and Another Vs. P.N. Ramachandra Rao,

42. The legal position with regard to a document being lease or not within the definition of the term under the provision Section 2(16) of the Indian Stamp Act viz-a-viz the provision of Section 105 of the Transfer of Property Act has been a subject matter of consideration in a recent judgment of the Supreme Court in the case of State of Uttarakhand and Others Vs. Harpal Singh Rawat, The Supreme Court, after noticing the definition of lease as contained in Section 2(16) of the Indian Stamp Act, in para 8 of its judgment has laid down as follows:

8. The definition of ''lease'' contained in Section 2(16) consists of two parts. The first part is applicable to any lease with respect to immovable property. The second part, which is inclusive, applies to various kinds of instruments by which a title, or other rights may be conferred upon the lessee for a specified period in respect of immovable property or otherwise. The use of the words "includes also" implies that the definition of lease contained in Section 2(16)(c) is very wide and even if the transaction does not amount to a lease u/s 105 of the Transfer of property Act, the same may nonetheless be a lease for the purpose of the Act.

43. In view of the said judgment of the Supreme Court it cannot be disputed now that a particular document, which may not answer the description of lease strictly in terms of Section 105 of the Transfer of Property Act, could still be a ''lease'' u/s 2(16) of the Indian Stamp Act, and therefore chargeable with stamp

duty under Article 35 Schedule 1-B of the Indian Stamp Act.

44. The judgment relied upon by the counsel for the petitioner in the case of Rajbir Kaur and Another Vs. S. Chokesiri and Co., which laid down that for a lease exclusive possession is a condition precedent, was with reference to the issue as to whether a particular document was a lease or not u/s 105 of the Transfer of Property Act.

45. The Apex Court in the case of CM. Beena (supra) has explained the distinction between a ''lease'' contemplated by Section 105 of the Transfer of Property Act and ''license'' u/s 52 of the Easements Act, 1882. The judgment in the case of Gopal Saran v. Satyanarayana (supra) dealt with an issue as to whether the agreement between the parties could be said to be a lease in terms of the provisions of the Rajasthan Premises (Control of Rent and Eviction) Act, 1950.

46. I am of the considered opinion that in view of the pronouncement of the Hon''ble Supreme Court in the case of State of Uttarakhand v. Harpal Singh Rawat (supra) the controversy stands narrowed down in the facts of the case. It is to be examined as to whether the document executed between the parties satisfies the requirement of Section 2(16) of the Indian Stamp Act so as to be held a ''lease'' for the purposes of levy of stamp duty under Article 35 Schedule 1 -B of the Indian Stamp Act or not.

47. The plea, that the petitioners have been granted a license u/s 4 of the Indian Telegraph Act and therefore the rights, which they acquire in respect of the property subject matter of the deed, would also be in the nature of license, has only been stated to be rejected by this Court. Whatever rights accrue in favour of the petitioner because of grant of license by Central Government under the Indian Telegraph Act are absolutely immaterial so far as the rights which flow from the deed executed between a private person and petitioner company are concerned. The rights, which vest under the deed, flow from the terms and conditions contained therein, the same cannot be controlled by the condition of license granted by the Government of India in favour of the petitioner company.

48. In the said legal background this Court may now refer to the various clauses of the document executed between the parties, the rights which flow therefrom specifically in respect of first two groups of writ petitions, as, according to the counsel for the petitioner company in those cases, from a reading of the various clauses it is clear that only a license to use the property was granted. For the same reason it has been contended that the judgment of this Court in the case of Tata Teleservices Ltd. (supra) is clearly distinguishable. While according to the State lease hold rights have been created.

Writ Petitions of Vodafone Essar South Ltd.

49. The document executed between the parties subject matter of the petitions by Vodafone is enclosed as Annexure-2 to Writ Petition No. 18101 of 2009. Under

Clause 3 of the deed the area, which is to be used for installation of the tower for antennae and for installation of standby/back-up generator with a temporary prefabricated shed, has specifically been disclosed as 12''x16'' and 12''x 15'' respectively. This demarcation of area for a particular purpose necessarily means that the possession of the said part of the property has been transferred to the petitioner company exclusively for that purpose only. This transfer of right, to occupy the immovable property, to the petitioner company is on payment of consideration as disclosed in the deed itself. The term, for which such occupancy rights have been conferred, is also provided under clause 8 of the deed.

50. This Court finds that the petitioner company has been conferred a right under Clause 23 of the deed, which reads as follows:

23. In the event the Licensor(s) transfers and conveys the property to a third party, such transfer/conveyance shall be subject to this agreement and shall recognize and accept the right(s) of the licensee herein and upon the transfer/ conveyance having been completed, the transferee shall step into the shoes of the Licensor(s) herein and all the rights and liabilities of the Licensor(s) shall automatically devolve on the transferee. Provided however the Licensor(s) shall not transfer the property for a period of 2 years from the date of commencement of this license deed, without the written consent of the Licensee.

51. From the aforesaid, it is apparently clear that the owner of the property has been restrained from transferring the property for two years at the first instance. In case the property is transferred subsequent thereto, the subsequent transfer deed so executed would operate subject to the present agreement between the petitioner company and the owner of the property. Meaning thereby that the subsequent transferee would also be bound by this agreement.

52. Under Clause 25 the petitioner company has been given a right to permit the use of the property by other Telecom operators with a further right to install their own equipment. In the opinion of the Court, the aforesaid rights are not vested in a mere licensee.

53. On reading of the deed as a who e, this Court finds that the parties clearly intended to create lease hold rights in favour of the company.

54. In any view of the matter right to occupy the immovable property on payment of consideration by a document in writing do satisfy the requirements of ''lease'' as contemplated by Section 2(16)(b) of the Indian Stamp Act. This logically leads to a conclusion that the document becomes chargeable to stamp duty under Article 35 Schedule 1-B of the Indian Stamp Act.

55. This Court records that in the facts of the case the intention of the parties was to create a ''lease''. Even otherwise a right to occupy immovable property on payment of consideration by a document in writing has been conferred. The document is therefore within the definition of ''lease'' provided by Section 2(16) of the Indian Stamp Act, chargeable with stamp duty under Article 35 Schedule 1-

B of the Indian Stamp Act.

56. The contention of the petitioner, that since the original document had not been produced and therefore no stamp duty could be levied, also does not appeal to the Court. The plea so raised has to be rejected for the reasons, which have been recorded in the judgment of Tata Teleservices Limited, with which I am in respectful agreement.

57. In addition thereto it may be recorded that the judgment in the case of Som Dutt Builders Ltd. (supra), which has been heavily relied upon by the petitioner, does not take into consideration Sections 33(4) and 33(5) of the Indian Stamp Act, which contemplate a situation where the Collector can insist upon the party to produce a document executed. In case the document is not so produced, even after issuance of notice u/s 33(4), the Collector may proceed to determine the stamp duty in absence thereof u/s 33(5) read with Section 40 of the Indian Stamp Act.

Writ Petition of Idea Cellular Limited

58. The deed executed between the parties has been brought on record as Annexure-1 to the Writ Petition No. 66476 of 2008. The opening paragraph of the deed record that a right to use the property is being granted for installation of towers, generator set with pre-fabricated shed, receiver room, guard room etc. on consideration of payment of money. This Court finds that under Clause 5 the period of the rights conferred commences from the date of physical occupation. The term has been provided as 10 years with a right of renewal for a period of 5 years at a time. Under Clause 11 a right has been conferred upon the petitioner company to share the premises with any of its associates/subsidiary companies or with any other cellular operators/Basic Telephone Operators/Unified Access License Holders.

59. Under Clause 19 it is provided that any subsequent transfer of the property by the owner shall be bound by the terms and conditions of the present agreement and a letter shall be issued by the subsequent purchaser in favour of the petitioner company confirming that terms agreed upon under this deed shall be binding on him also.

60. Clause 25 of the agreement contemplates that if the owner proposes to raise construction over the land subject matter of agreement, he shall give six months'' prior notice in writing to the company and shall provide to the company a suitable alternative land to its satisfaction for installation of its pre-fabricated shed and for construction of a pacca room.

61. Standing Counsel is justified in contending that from the aforesaid conditions, which can never be applicable in case of a mere license, it is clear that the intention of the parties is to create a lease and not a mere license. Even otherwise the document squarely answers the description of lease covered by Section 2(16)(b) of the Indian Stamp Act, chargeable to stamp duty under Article

35 Schedule 1-B of the Indian Stamp Act.

62. The contention on behalf of the company, that since exclusive possession of the property has not been delivered as is clear from reading of Clause 24, it is to be presumed that only a license has been granted, has no substance. The deed has to be read as a whole, various clauses are not to be read in isolation. The intention of the parties is to be gathered and mere use of words like license, license fee will not be conclusive.

63. From the recital in the deed that the company will have a right to construct a generator room, equipment room, receiving station, tower etc., it is established beyond doubt that the demised premises cannot be used by any other person except the company. The deed, on being read as a whole, clearly establishes that the petitioner has been given exclusive possession of the property to that extent.

64. In any view of the matter the written deed confers a right to occupy an immovable property on payment of consideration. This in itself is sufficient to bring the deed within the meaning of lease u/s 2(16) of the Indian Stamp Act, so as to make it chargeable to stamp duty under Article 35 of Schedule I- B of the Indian Stamp Act. The Apex Court in the case of State of Uttarkhand (supra) has explained that even if a deed may not strictly be held to be a ''lease'' u/s 105 of the Transfer of Property Act, it can still be a ''lease'' within the meaning of Section 2(16) of the Indian Stamp Act.

65. A common ground has been pressed by Sri Bhart Ji Agrawal on behalf of the petitioners Vodafone and Idea Cellular Ltd., namely that all the contentions, as noticed above, were raised before the Commissioner in appeal u/s 56(1-A). The Commissioner should have examined the matter in light of the objections so raised. Since he has failed to do so, this Court may set aside the order and remand the matter to be considered by the Commissioner afresh. It is contended that this Court may not itself enter into the aforesaid issues.

66. Standing Counsel in reply submits that the basic issue is qua determination of the real intention of the parties on reading of the deed as a whole. What can be done by the Commissioner on remand can be done by this Court, as all the necessary material is already on record.

67. It is no doubt true that the order of the Commissioner does not deal with large number of objections raised by the petitioner with reference to deed in question but he has specifically held that the deed in fact is a lease covered by the definition of the term u/s 2(16) of the Stamp Act. Therefore, chargeable to duty under Article 35 of Schedule I-B of the Indian Stamp Act.

68. The basic issue involved and which has been canvassed in the facts of these cases before this Court is as to whether the deed in question is a ''lease'' or ''license''. The Supreme Court of India has repeatedly held that the document has to be read as a whole so as to gather the intention of the parties to the deed. Such exercise can always be undertaken by this Court itself instead of

remanding the matter to the Commissioner for the purpose, specifically when the entire material is available before the Court and parties have addressed the Court on the aforesaid aspect in detail. It is in this background that the Court decided to examine itself as to whether the document in fact is a license or a lease.

69. Ample opportunity has been afforded to the petitioners to establish the case as pleaded. The plea of remand is more technical than substantive in nature. Technical objection, as raised, also does not have much substance.

Writ Petitions of Bharti Telecom

70. Writ petitions filed by Bharti Telecommunication have been argued by Sri Ashish Mishra, Advocate. He submits that the submissions made by Sri Bhart Ji Agrawal, Senior Advocate in the case of Vodafone may be treated as those pressed in these petitions also.

71. The said contentions have already been dealt with here in above by the Court.

Writ Petitions of Bharat Sanchar Nigam Limited (BSNL)

72. On behalf of BSNL it is canvased before this Court that there was Clause 4 in the lease deed executed between the Lessor and the company (Ref.- deed enclosed as Annexure-3 to Writ Petition No. 28746 of 2009), which provided as follows:

4. The lessor hereby further convent with the lessee that this documents shall be presented for registration by the lessor and registered at the cost of the lessor.

73. According to the counsel for the BSNL, such clause tantamount to an agreement between the parties to the deed, that stamp duty shall be payable by the owner of the property. It is an ''agreement to the contrary'' as contemplated by Section 29 of the Indian Stamp Act, which determines the person by whom the stamp duty is payable.

74. Section 29(c) of the Indian Stamp Act, relevant for the purpose, reads as follows:

29. Duty by whom payable-In the absence of an agreement to the contrary, the expense of providing the proper stamp shall be borne:

(c) in the case of conveyance (including a re-conveyance of mortgaged property)- by the grantee; in the case of a lease or agreement to lease- by the lessee or intended lessee:

75. From a reading of the above clause of the agreement relied upon by the counsel for the BSNL, it is apparently clear that there is an agreement between the parties that the document shall be presented by the lessor for registration and registered at the cost of the lessor. What has been agreed upon is that the deed shall be got registered by the lessor at his cost.

76. The Commissioner (Appeal) in the facts of the case has held that only registration fee was agreed to be paid by the lessor and not the stamp duty. The conclusion so arrived at cannot be said to be perverse in the facts of the case.

77. The clause cannot be necessarily read to suggest that an agreement has been entered between the contracting parties that stamp duty shall be payable to the State by the lessor. The clause confers a right in the lessee to adjust/recover the amount paid towards registration from the lessor.

78. No final opinion on the aforesaid aspect of matter can be recorded by this Court in view of the fact that the petitioner, for the reasons best known to it, has not impleaded the owner of the property as one of the respondents in this petition. For the said reason, this Court may not examine the said plea any further.

79. This Court may even otherwise record that u/s 40 of the Indian Stamp Act if stamp duty has been paid by a person other than from whom it was payable, then there is a right conferred upon the said person to get a certificate issued from the Collector concerned for recovery of the money from the person liable for the stamp duty under the Indian Stamp Act.

80. In the totality of the circumstances on record and having regard to the provisions of Section 40 of the Indian Stamp Act, it is left open to the petitioner to take recourse to Section 40, as may be advised, for recovery of the stamp duty, if permissible under the terms and conditions of the agreement, from the Lessor.

Writ Petition Nos. 38157/10, 37959/10, 38155/10, 37955/10, 37950/10, 37946/10, 38159/10, 38156/10, 37667/10, 37669/10 and 37678/10 filed by BSNL

81. Two additional grounds have been pressed, for challenging the impugned orders demanding the stamp duty, by Sri Subodh Kumar, Advocate in the said writ petitions, namely (a) that the deed was executed more than four years prior to the issuance of the notice u/s 33 of the Indian Stamp Act. Therefore, the proceedings are hit by Section 33(5), and (b) that the stamp duty has been demanded in terms of the amendment effected by Act No. 38 of 2001, which was enforced w. e. f. 28th May, 2000. This amendment had no application in the facts of the case, as the deed was executed in the year 1999.

82. So far as the first contention raised on behalf of the petitioner is concerned, this Court made a pointed query to the counsel for the petitioner to inform the Court as to whether any such plea was raised before the first authority or before the appellate authority. The answer given is in negative. Suffice is to record that Section 33 (5) second proviso provides for a power upon the State Government to permit the exercise of power u/s 33 even after expiry of the period of four years. The petitioners had no where stated either before the authorities below or before this Court that such power had not been exercised by the State

Government. In absence of any material plea being raised, neither any finding has been returned or any reply has been submitted in the counter-affidavit.

83. This Court is of the opinion that the issue necessarily requires consideration of facts qua exercise of power by the State Government to permit the proceedings to be taken even after expiry of four years. The order of the authorities below cannot be permitted to be challenged on the ground not canvased before it, specifically when it requires examination of facts.

84. In view of the aforesaid, the first contention raised by the counsel for the petitioner is repelled.

85. So far as the demand of stamp duty in terms of amended provisions as per U.P. Act No. 38 of 2001 is concerned, counsel for the State has fairly stated that if such is the factual situation, the petitioner can always make an application for correction of the amount of duty demanded, before the Collector Stamps. In case such application is filed, the Collector shall proceed to consider the aforesaid objection and will pass a reasoned order in a time bound manner on the said limited issue.

86. Accordingly, in respect of the rate of duty to be levied, right is conferred upon the petitioner of these writ petitions to file an application before the Collector Stamp, pointing out that the provision of U.P. Act No. 38 of 2001 will not be applicable in the facts of the case and for recalculation of the amount of stamp duty payable, within four weeks from today alongwith certified copy of this order. If such application is made, the Collector shall examine the aforesaid aspect of the matter and shall re-determine the stamp duty payable on the document in accordance with law within four weeks thereafter.

87. The orders impugned in these petitions shall abide by the orders to be passed by the Collector, as indicated above.

Writ petition of Rajni Garg

88. This takes the Court to the writ petition filed by a private individual, namely Smt. Rajni Garg. The agreement entered into between Smt. Rajni Garg and BSNL contains following stipulation:

The lessor hereby further convenient with the lessee that his document shall be presented for registration by the lessor and registered at the cost of the lessor.

89. This according to the petitioner only provides that registration of the deed shall be got done by the lessor at his cost, which would mean that registration fee was to be paid by the lessor. The clause has no bearing on the issue of payment of stamp duty under the Indian Stamp Act.

90. This clause has not at all been considered by the Assistant Commissioner Stamp in his order dated 20.7.2009. Similarly, the Commissioner, even after noticing the aforesaid objection of the petitioner, has not recorded any finding either accepting the plea raised or rejecting the same while deciding her appeal

u/s 56(1-A) of the Indian Stamp Act.

91. This Court in the case of BSNL (Writ Petition No. 28746 of 2009) itself has found that this clause may not be necessarily read as an agreement whereunder the liability to pay stamp duty can be said to have been shifted upon the Lessor. The clause can also read to mean that the lessee is bound to make the payment of registration fee under the Indian Registration Act only, which has nothing to do with the stamp duty payable u/s 29(1)(c). In the alternative the lessee may recover the amount so spent, from the lessor u/s 40 of the Indian Stamp Act.

92. For the aforesaid reasons the orders impugned in the present writ petition cannot be legally sustained. The same are hereby set aside. The Assistant Commissioner Stamp is directed to reconsider the objections of the petitioner with regard to her liability to pay the stamp duty on the document in question afresh after affording opportunity to BSNL, preferably within eight weeks from the date a certified copy of this order is filed before him.

93. In all the writ petitions of this bunch one common question has been raised, namely that the levy of the penalty, in the facts of the case is unjustified, in any case excessive.

94. It is contended that absolutely no facts were concealed in the document, as was entered into between the parties. Every citizen has a right to draw a deed so as to save the levy of stamp duty. Such exercise, even if not found to be legally correct, cannot lead to a conclusion that the assessee mala finely wanted to evade the tax. It is further contended that absolutely no reasons have been recorded in the orders justifying the quantum of penalty, which in the facts of large number of writ petitions, is of a like amount to the deficiency in stamp duty found and in certain cases to the extent of 400%.

95. Counsel for the petitioner rightly submits that there may be a discretion with the Additional Commissioner Stamp to levy penalty if he finds that the document has been insufficiently stamped, but he must disclose reasons for coming to a conclusion as to why in the facts of that case it is necessary to impose the penalty, including the quantification of the amount mentioned in the order. This has not been done in the facts of the present case.

96. Standing Counsel except for repeating what is stated in the orders could not successfully rebut the contention so raised on behalf of the petitioners.

97. This Court is in agreement with what has been stated above by the counsel for the petitioners. The Court would have normally remanded the matter to the Commissioner for re-determination of the amount of penalty, which should be fair and just.

98. However, the counsels for the petitioners and the Standing Counsel agreed that this Court may itself determine the fair amount of penalty to be levied having regard to the facts on record.

99. This Court finds that in the deeds in question specific area, which was subject matter of transfer, the purpose for which it was to be occupied and the amount of consideration alongwith the other terms and conditions have specifically been disclosed. There is no concealment of facts. The Court feels that it would be just and proper to reduce the penalty to 25% of the total deficiency of stamp duty noticed in each case. This rate of penalty, in the facts of the case, in the opinion of the Court would be fair, just and equitable.

100. In cases where the penalty in fact imposed is less than 25% of the deficiency of stamp duty noticed, the same shall not be interfered with and it will continue to be the same irrespective of the directions issued above. In all other cases it shall stand reduced to 25% of the total deficiency of stamp duty noticed in the orders impugned.

101. In view of the conclusions arrived by this Court:

(a) All the writ petitions filed by Vodafone Essar Mobile Services Ltd. are disposed of by affirming the demand of stamp duty with reduced penalty, as indicated above.

(b) All the writ petitions filed by M/s Idea Cellular Ltd. are disposed of by affirming the demand of stamp duty with reduced penalty, as indicated above.

(c) All the writ petitions filed by Bharti Telecom Ltd. are disposed of by affirming the demand of stamp duty with reduced penalty, as indicated above.

(d) All the writ petitions filed by BSNL, except as provided under, are disposed of by affirming the demand of stamp duty with reduced penalty, as indicated above. Writ Petition Nos. 38157/10, 37959/10, 38155/10, 37955/10, 37950/10, 37946/10, 38159/10, 38156/10, 37667/10, 37669/10 and 37678/10 are disposed of with liberty to make an application before the first authority for re-determination of the stamp duty, as indicated in this order.

(e) writ petition filed by Smt. Rajni Garg is allowed. Impugned orders are quashed. Let the first appellate authority decide the matter afresh in light of the observations made above.

102. All petitions stand decided accordingly.

