
(2016) 09 AHC CK 0280
In the Allahabad High Court
Case No : Civil Misc. Writ Tax No. 848 of 2015

Vodafone Mobile Services Ltd.

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 19-09-2016

Acts Referred:

Constitution of India, 1950 — Article 226

Uttar Pradesh Municipal Corporation Act, 1959 — Section 192(b)

Citation : (2017) 2 ADJ 432 : (2017) 2 AILLJ 273 : (2016) 4 UPLBEC 3334

Hon'ble Judges : Sudhir Agarwal, J.

Bench : Single Bench

Advocate : C.S.C, Lal Sahab Yadav, S.P.Singh, S.M. Shukla, Advocates, for the Respondent; Ashish Mishra, S.D. Singh, Advocates, for the Petitioner

Final Decision : Allowed

Judgement

Dr. Kaushal Jayendra Thaker, J. - Heard Sri S.D. Singh, learned Senior Advocate assisted by Sri Ashish Mishra, Advocate for petitioner and learned Standing Counsel as well as Sri S.M. Shukla, Advocate for respondents.

2. This writ petition, under Article 226 of the Constitution, is directed against demand of advertisement tax vide bill dated 28.08.2009, issued by authorised person to whom right to collection of advertisement tax was granted by Ghaziabad Nagar Nigam (hereinafter referred to as the "GNN") vide work order dated 16.09.2008, on the ground that petitioner is not liable to pay such tax under Section 192 of U.P. Municipal Corporation Act, 1959 (hereinafter referred to as the "Act, 1959").

3. Earlier petitioner came to this Court challenging aforesaid orders in Writ Petition No. 94 of 2010 which was disposed of vide order dated 24.02.2015 directing GNN to decide objection made by petitioner. Now this objection has been rejected by Municipal Commissioner, GNN vide order dated 31.08.2014 and same is also under challenge in this writ petition.

4. Petitioner M/s Vodafone Mobile Service Limited (hereinafter referred to as the "Company") is engaged in the business of telecommunication. It is a licensed service provider in State of U.P. by virtue of a licence granted by Government of India, Ministry of Communications and IT, Department of Telecommunication under the provisions of Indian Telegraph Act, 1885 (hereinafter referred to as the "Act, 1885") to set up and operate Unified Access Services in licensed service area. The services cover connection, carriage, transmission and delivery of voice and/or non-voice messages over licensee's network in designated service area and includes provision of all types of access thereto.

5. For the purpose of distributing SIM cards, recharge coupons and other products to subscribers, various retail shops have been authorised by providing said items though they are not as such agents of petitioner Company. These shops simply distribute SIM cards and sale of recharge coupons of petitioner Company and other telecom operators, collect bills and recharge mobiles etc. They also provide information to prospective consumers about nature of their business. For giving information about nature of their business, these shops places hoardings like, name plates outside their shops so that consumers may know that they are dealing with telecom companies and their services. In many a case though one retail shop is distributing SIM Cards of more than one Company but it displays name of one or more Companies of its own choice. Purpose of such hoarding/sign board etc. is only to inform customers about nature of business being carried out in such retail outlet. These retail outlets thus are only to distribute items like SIM cards, recharge coupons etc. but so far as service is concerned that it is provided only by Telecom Company.

6. In order to collect advertisement tax, GNN auctioned right to collect tax to private persons and through work order dated 07.09.2008 authorised collection of advertisement tax to a private person. Pursuant to said authorisation a bill demanding advertisement tax was issued to petitioner on 16.09.2008 which was challenged before this Court in Writ Petition No. 94 of 2010 but this Court found that dispute also involve certain investigation into facts as to who is displaying advertisement, where is displaying and in what manner it is being displayed and whether it would be exempted under exceptions provided under Section 192 of Act, 1959 and hence directed petitioner to file objection before Competent Authority, who was directed to decide such representation, if made, within a month from the date of order. Petitioner filed objection before Municipal Commissioner, GNN on 25.03.2015 and the same has now been rejected vide order dated 31.08.2015, hence this writ petition.

7. It is contended that for display or hoardings, exhibited or fixed, by retail outlets, outside their shops, in any form whether electronic display or sign board etc., no tax is payable being exempted under proviso (b) of Section 192 of Act, 1959, therefore, demand of advertisement tax is patently illegal.

8. Section 192 of Act, 1959 reads as under:

"192. Tax on advertisement: Where a Corporation imposes a tax mentioned in clause (h) of subsection (2) of Section 172, every person who erects, exhibits, fixes or retains upon or over any land, building, wall, hoarding or structure any advertisement or who displays any advertisement to public view in any manner whatsoever, in any place whether public or private, shall pay on every advertisement which is so erected, exhibited, fixed, retained or displayed to public view, a tax calculated at such rates and in such manner and subject to such exemptions as may be provided by the Act or rules made thereunder:

Provided that no tax shall be levied under this section on any advertisement or a notice

(a) of public meetings, or

(b) of an election to any legislative body or the Corporation, or

(c) of a candidature in respect of such an election: Provided also that no such tax shall be levied on any advertisement which is not a sky sign and which

(a) is exhibited within the window of any building, or

(b) relates to the trade or business carried on within the land or building upon or over which advertisement is exhibited, or to any sale or letting of such land or building or any effects therein or to any sale, entertainment or meeting to be held upon or in the same, or

(c) relates to the name of the land or building upon or over which the advertisement is exhibited, or the name of the owner or occupier of such land or building, or

(d) relates to the business of any railway administration, or

(e) is exhibited within any railway station or upon any wall or other property of a railway administration except any portion of the surface of such wall or property fronting any street.

Explanation 1. - The word "structure" in this section shall include any movable board on wheels used as an advertisement or an advertisement medium.

Explanation 2 - "Public place" shall, for the purpose of this section mean any place which is open to the use and enjoyment of the public, whether it is actually used or enjoyed by the public or not."

(emphasis added)

9. It provides for levy of tax calculated at such rates and in such manner and subject to such exceptions as may be provided by Act or Rules made thereunder. Broadly, advertisement tax is permissible to be levied on every person who erects, exhibits, fixes or retains upon or over any land, building, wall, hoardings or an structure in advertisement; or who displays any advertisement to public view in any manner whatsoever in any place, whether public or private.

10. There are two provisos to Section 192 which provide kinds of advertisement or notices which are beyond the ambit of advertisement tax under Section 192 Act, 1959. First proviso says that no tax shall be levied on any advertisement or a notice which is, (a) of a public meetings; (b) or of an election to any legislative body or Corporation; or, (c) of a candidature in respect of such an election. Second proviso is wider in its approach. It provides that no tax shall be levied on any advertisement which is not a sky sign and (a) if it is exhibited within the window of any building; (b) it relates to the trade or business carried on within the land or building upon or over which advertisement is exhibited, or to any sale or letting of any such land or building or any effects therein or to any sale, entertainment or meetings to be held upon or in the same; (c) it relates to name of land or building upon or over which advertisement is exhibited, or name of owner or occupier of such building; (d) it relates to business of any railway administration; and, (e) it is exhibited within any railway station or upon any wall or other property of a railway administration except any portion of surface of such wall or property fronting any street.

11. There are two explanations also which for the time being we are not discussing since there is no dispute with regard to their interpretation and have no impact on the issue raised in this petition.

12. Respondent-GNN was supposed to decide, whether the kind of advertisement, being subjected to advertisement tax by issuing demand notice to petitioner is one which is exempted under proviso or not. In this regard it was expected to make a factual inquiry and investigation but it has opted shortcut by refraining itself from applying its mind. It appears that sitting in a cozy office, Municipal Commissioner has chosen to decide factual dispute instead of taking pains to find out whether tax being demanded from petitioner is actually payable or not and whether conditions exempted under proviso, are attracted in this case or not.

13. This approach shows that probably demand of advertisement has been made without any pains to find out, whether activity of petitioner is taxable under Section 192 and whether it includes certain activity which comes within the purview of exempted categories. In a mechanical and blind manner, without any application of mind, demand of advertisement tax has been raised and even when this Court asked Competent Authority to make investigation into facts and thereafter decide question, whether advertisement tax as demanded is leviable or not, in a cursory, abrupt and unseasoned manner, Municipal Commissioner has chosen to decide this issue by simply quoting Section 192 and thereafter recording its conclusion that tax is payable by every person who exhibits or displays any advertisement, whether it is private or public. There is no investigation of facts, whether demanded tax is actually leviable and the nature of advertisement comes within the ambit of exempted categories under second proviso or not.

14. We really find disappointed in the manner in which Municipal Commissioner

has decided matter inasmuch as petitioner has tried to seek exemption under second proviso, clause (b) but there is no application of mind by Municipal Commissioner in this regard. In these circumstances, we have no option but to decide issue in the light of pleadings and material placed before us.

15. For our purposes, suffice it to mention that Municipal Commissioner has admitted that different shops in commercial establishment, are sales center of petitioner Company, engaged in commercial activities and displaying/exhibiting sign boards/hoardings advertising Company's name of which, they are engaged in business, and this is within the definition of advertisement.

16. GNN has filed a counter affidavit in which it has admitted in para 4 that retail shops are not agents rather vendors which are selling SIM, connections and recharge coupons of different telecommunications. These vendors are displaying advertisement of petitioner Company and that apart they are also dealing in product of other companies. It is said that retail shops or such vendors cannot be said to be a place where shop owner is working solely for petitioner Company and displaying name of petitioner Company to allow customers to know nature of business carried out in said retail shop. It is also said in para 5 of counter affidavit that retail shops are not direct agents of Company and they are free to display any hoarding, therefore, advertisement/display by said retail shops of petitioner Company is not protected under Section 192, second proviso, clause (b).

17. From the stand taken in counter affidavit we find that as per understanding of Municipal Commissioner if retail shop is not exclusively dealing in a particular service but engaged in different products, and out of that if it opts to advertise one or more of telecom service, such advertisement is not protected under Section 192, second proviso, clause (b).

18. We attempted to find in second proviso, clause (b) of Section 192 of Act, 1959, whether it has used anywhere the words "sale" or "one trade" or "business" but failed. When called upon, learned counsel appearing for GNN also fairly stated that there is nothing of such sort in second proviso, clause (b) to restrict its operation in respect to an advertisement carried out by an owner or occupant of a shop engaged in a particular trade or business or his a retail outlet of only one product.

19. Language of second proviso, clause (b) is very wide. If advertisement exhibited relates to trade or business carried on within the land or building upon or over which advertisement is exhibited, it is exempted from advertisement tax under Section 192. In order to come within the ambit of clause (b) it is suffice to show that advertisement relates to a trade or business carried out in building or within the land whether it is entire business or part thereof is irrelevant. It is admitted by respondent-GNN that retail shops are engaged in business or trade of Vodafone Service Provider since they are selling Vodafone SIM cards, recharge coupons etc.

20. We can have a better illustration to find out the real intention of legislature in making provision like second proviso, clause (b). If one is running a glossary shop, he must be dealing with items of hundreds and thousands companies/brands. The items may vary from needle to spices, pulses, cosmetics and a variety of different household items. The person dealing in such business may choose to display one or more name(s) out of several brand items, and display name(s) of such commodities or brands which he finds, would augment his business provided he is actually dealing in trade and business of items of such brands. Such display or advertisement by glossary shop would be within the ambit of exemption of second proviso, clause (b).

21. Similarly a retail shop which we commonly known as mobile retail shop, if deals with one or more Service Providers, it may display names of all such Service Providers or one whose sale dominates its business. It is trade sense and choice of occupant of such place over which none else can have any control. It is not the case of GNN that for display and advertisement of petitioner Company's name, such retail outlets are provided extra facility and payments and this display is under a separate contract unrelated to trade or business being carried out in said retail shop.

22. Assumption on the part of GNN that only such retail shop would be excluded who are engaged solely in business of selling SIMS, recharge coupons etc. of only one Company and not more than that, is neither founded on the language of Section 192, second proviso, clause (b) nor there is any express or implicit self contained guidance to confine scope of clause (b) to such exclusivity as assumed by Municipal Commissioner. In fact this assumption can be justified only if we read certain words in clause (b) of second proviso and not by simple reading of the existing provision.

23. Addition or omission of even a single or more word in a legislation is neither permissible nor is otherwise valid when provision is amply clear, unambiguous and convey its intention in a simplistic way. Attempt on the part of Municipal Commissioner is within the mischief of casus omissus.

24. With respect to principles of interpretation of statutes in such matters, a Division Bench of this Court in *Surendra v. State of U.P. and others* 2007 (6) AWC 6229 has observed as under: "Where the language of statute is clear and unambiguous there is no room for reading or interpreting statute in a manner, which may add a few words therein on the assumption that the legislature has left a vacuum need to be bridged by judicial interpretation. It is not the function of the Court to read something in the provision of law, which is not there, or find out a way of obviating the difficulties in enforcing the law howsoever meritorious the intention of the legislature might be."

25. A Constitution Bench in *Behram Khurshed Pesikaka v. State of Bombay* AIR 1955 SC 123, rejecting to interpret a law on the supposed difficulty of prosecution in improving the case, observed as under:

"The difficulty in the way of the prosecution proving its case need not deflect the Court from arriving at a correct conclusion. If these difficulties are genuinely felt it would be for the legislature to step in and amend the law. It would not be the function of the Court to read something in the provisions of the law, which is not there, or to find out a way of obviating the difficulties in enforcing the law howsoever meritorious the intentions of the Legislature might be. (Para 17)

26. It is settled principle of interpretation, where the words used are clear and unambiguous, Court is bound to construe them in their ordinary sense and it is not the function of Court to add words or expression for supposed assumption of what would have been the intention of legislature. Court is not entitled to go beyond so as to supply an omission as if to play the role of a political reformer or counsel to the legislature. A Constitution Bench in *Dadi Jagannadham v. Jammulu Ramulu and others* AIR 2001 SC 2699, in para 13, observed as under:

"The settled principles of interpretation are that the Court must proceed on the assumption that the legislature did not make a mistake and that it did what it intended to do. The Court must, as far as possible, adopt a construction which will carry out the obvious intention of the legislature. Undoubtedly if there is a defect or an omission in the words used by the legislature, the Court would not go to its aid to correct or make up the deficiency. The Court could not add words to a statute or read words into it which are not there, especially when the literal reading produces an intelligible result. The Court cannot aid the legislature's defective phrasing of an Act, or add and mend, and, by construction, make up deficiencies which are there."

27. The Cardinal rule of construction is to find out intention of legislature in the words used by legislature itself. Court, in order to find out intention of the statute framing authority must look into the statute itself without any assistance from any other external factor unless there is some doubt or ambiguity in the construction of statute itself. It would be appropriate to remind in the words of Lord Brougham in *Robert Wigram Crawford v. Richard Spooner*, 4 MIA 179 (187) (PC):

"..if the legislature did intend that which it has not expressed clearly; much more, if the Legislature intended some thing very different; if the Legislature intended pretty nearly the opposite of what is said, it is not for judges to invent something, which they do not meet within the words of the text (aiding their construction of the text always, of course, by the context)."

28. In *S. Gurmej Singh v. Sardar Pratap Singh Kairon* AIR 1960 SC 122, it was held that the Courts are not to keep busy themselves with "supposed intention" or with "the policy underlying the statue but must construe statute from plain meaning of the words used therein. In *Aron Soloman v. A. Soloman & Co. Ltd.* (1897) AC 22 (38) (HL) 5 Lord Watson observed" In a court of law or equity, what the Legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express

words or by reasonable and necessary implication." The aforesaid passage has been quoted with approval in *R.L.Arora v. State of Uttar Pradesh*, AIR 1964 SC 1230 (1244), *Shahdara (Delhi) Saharanpur Light Railway Co. Ltd. v. Workers Union* AIR 1969 SC 513 (759), *Hansraj Gordhandas v. H.H. Dave* AIR 1970 SC 755 (759), *Sri Umed v. Raj Singh* AIR 1975 SC 43 (63/64), *Commissioner of Sales Tax, U.P. v. Super Cotton Bowl Refilling Works* AIR 1989 SC 922 (930), *State of Madhya Pradesh v. G.S.Ball and Flour Mills* AIR 1991 SC 772 (785) and *Harbhajan Singh v. Press Council of India* AIR 2002 SC 1351 (1356).

29. We are aware that the rules of the interpretation are not rules of codified laws and are not to be followed like rules enacted by legislature for interpretation of an Act, as observed in *Superintendent and Remembrance of Legal Affairs, West Bengal v. Corporation of Calcutta* AIR 1967 SC 997. The principles of interpretation serve only as a guide. A *casus omissus* cannot be supplied by Court. There is no presumption that a *casus omissus* exists and any endeavour to twist language of a simple legislation, permitting Court to add or ignore one or more words should be avoided so as not to create a *casus omissus* where there is none. It would be appropriate to recollect observations of Devlin, L.J. in *Gladstone v. Bower* (1960) 3 All ER 353 (CA), "The Court will always allow the intention of a statute to override the defects of working but the Court's ability to do so is limited by recognised canons of interpretation. The Court may, for example, prefer an alternative construction, which is less well fitted to the words but better fitted to the intention of the Act. But here, there is no alternative construction; it is simply a case of something being overlooked. We cannot legislate for *casus omissus*."

30. In *Bangalore Water Supply and Sewerage Board v. A. Rajappa and others*, AIR 1978 SC 548 (561), quoting with approval the following observation of Lord Simonds in *Magor & St. Mellons R.D.C. v. Newport Corporation*, (1951) 2 All ER 839 (841), Court said:

"The duty of the Court is to interpret the words that the Legislature has used. Those words may be ambiguous, but, even if they are, the power and duty of the Court to travel outside them on a voyage of discovery are strictly limited."

31. It would be appropriate at this stage to remind another principle that though a Court cannot supply a real *casus omissus*, it is equally evident that it should not interpret a statute so as to create *casus omissus* when there is really none. In *Vemareddy Kumaraswamy Reddy and another v. State of Andhra Pradesh* 2006(2) SCC 670, Court reiterated that while interpreting a provision, Court only interprets law and cannot legislate. If a provision of law is misused and subject to the abuse of process of law, it is for the legislature to amend, modify or repeal it if deemed necessary. The legislative *casus omissus* can and should not be supplied by judicial interpretative process.

32. As we have already discussed since there is no assumption that legislature has left something and we must read some words therein, hence assumption on

the part of Municipal Commissioner of reading certain words, as is evident from its reply given in para 4 of counter affidavit, is clearly misconceived and shows a total misinterpretation of Section 192, second proviso, clause (b), hence cannot be accepted.

33. In the result, writ petition is allowed. Impugned order dated 31.08.2015 is hereby quashed. Respondents are restrained from demanding advertisement tax on the advertisement which are affixed and displayed on retail shops conducting business of petitioner Company and displaying petitioner's name in view of exemption provided in second proviso, clause (b) of Section 192 of Act, 1959.

34. Petitioner shall also be entitled to costs, which we quantify to Rs. 10,000/.