

CASE NO.:
Writ Petition (civil) 183 of 2003

PETITIONER:
Bharat Sanchar Nigam Ltd. & Anr.

RESPONDENT:
Union of India & Ors.

DATE OF JUDGMENT: 02/03/2006

BENCH:
Dr. AR. Lakshmanan

JUDGMENT:
J U D G M E N T
WITH

C.A. No. 2408/2002, 3329-3330/02
WP (C) Nos. 227,223,372, 450/03, 468/05
C.A. Nos. 5337-5338/01, 4278-4288/02,
W.P. (C) No. 144-45/04, 149/04, 162/05,
C.A. Nos. 6323-25/99, 2517-2518/04, 3086/04, 2471/05
Dr. AR. Lakshmanan, J.

I had the privilege of perusing the judgment proposed by my learned Sister - Hon'ble Mrs. Justice Ruma Pal. While respectfully concurring with the conclusion arrived by the learned Judge, I would like to add the following few paragraphs:-

The principal issue that arises in this batch of cases relate to the imposition of sales tax in the light of Article 366(29A) clause (d) on different activities carried on by telecommunication service provider.

The petitioner \026 Bharat Sanchar Nigam Ltd. (for short 'BSNL') Is a licensee under the Indian Telegraph Act, 1885. The licence of the petitioner is obtained from the Government of India which is the same as the licence given also to various private telecom operators which entitles the BSNL to carry the activity of operating telegraph limited to the scope of telecommunication facilities.

The entire infrastructure/instruments/appliances and exchange are in the physical control and possession of the petitioner at all times and there is neither any physical transfer of such goods nor any transfer of right to use such equipment or apparatuses.

To constitute a transaction for the transfer of the right to use the goods the transaction must have the following attributes:

- a. There must be goods available for delivery;
- b. There must be a consensus ad idem as to the identity of the goods;
- c. The transferee should have a legal right to use the goods \026 consequently all legal consequences of such use including any permissions or licenses required therefor should be available to the transferee;
- d. For the period during which the transferee has such legal right, it has to be the exclusion to the transferor \026 this is the necessary concomitant of the plain language of the statute \026 viz. a "transfer of the right to use" and not merely a licence to use the goods;
- e. Having transferred the right to use the goods during the period for which it is to be transferred, the owner cannot again transfer the same rights to others.

In my opinion, none of these attributes are present in the relationship between a telecom service provider and a consumer of such services. On the contrary, the transaction is a transaction of rendition of service.

PRE-ENACTING HISTORY

In the present case, the history as it prevailed before 46th Amendment is as follows:

The liability to sales tax of the goods involved in composite works contract fell for determination before this Court in *The State of Madras vs. Gannon Dunkerley & Co., (Madras) Ltd.* \026 [1959] SCR 379. This Court ruled at page 413 \026 "If the words 'sale of goods' have to be interpreted in their legal sense, that sense can only be what it has in the law relating to sale of goods."

Since this judgment has been elaborately considered in the main judgment, I am not reproducing the verdict of this Court occurring at page nos. 413, 425, 426 & 427. The same Constitution Bench in *Mithan Lal vs. The State of Delhi* and Another \026 [1959] SCR 445 at 451 ruled that \026 "It would, therefore, be competent to Parliament to impose tax on the supply of materials in building contracts and to impose it under the name of sales tax, as has been done by the Parliament of the Commonwealth of Australia or by the Legislatures of the American States."

ENACTING HISTORY:

As to the meaning of 'enacting history', we can usefully refer to page no. 520 of the Fourth Edition of Francis Bennion *Statutory Interpretation*.

"The enacting history of an Act is the surrounding corpus of public knowledge relative to its introduction into Parliament as a Bill, subsequent progress through and ultimate passing by, Parliament. In particular it is the extrinsic material assumed to be within the contemplation of Parliament when it passed the Act. A text constituting an item of its enacting history may or may not be expressly mentioned in the Act. If inspected, it is unlikely to be self-explanatory. On the contrary it will probably require skilled evaluation."

The Statement of Objects and Reasons appended to the Constitution (Forty-sixth Amendment) Bill 1981 is part of enacting history.

The Statement of Objects and Reasons for the 46th Amendment is, inter alia, as follows:

"By a series of subsequent decisions, the Supreme Court has, on the basis of the decision in *Gannon Dunkerley's* case held various other transactions which resemble, in substance, transaction by way of sales, to be not liable to sales tax. As a result of these decisions, a transaction, in order to be subject to the levy of sales tax under entry 92A of the Union List or entry 54 of the State List, should have the following ingredients, namely, parties competent to contract, mutual assent and transfer of property in goods from one of the parties to the contract to the other party thereto for a price.

This position has resulted in scope for avoidance of tax in various ways. An example of this is the practice of inter-State consignment transfers, i.e. transfer of goods from head office of a principal in one State to a branch or agent in another State or vice versa or transfer of goods on consignment account, to avoid the payment of sales tax on inter-State sales under the Central Sales Tax Act. While in the case of a works contract, if the contract, treats the sale of material separately from the cost of the labour, the sale of materials would be taxable but in the case of an indivisible works contract, it is not possible to levy sales tax on the transfer of property in the goods involved in the execution of such contract as it has been held that there is no sale of the materials as such and the property in them does not pass as movables."

The Parliament had to intervene as the power to levy tax on goods involved in works contract should appropriately be vested in the State legislatures as was pointed out in *Gannon and Dunkerly & Co.*, the passages quoted hereinabove. There were 5 transactions in which, following the principles laid down in *Gannon Dunkerly & Co.* relating to works contract, this Court ruled that those transactions are not exigible to sales tax under various State enactments. The Parliament, therefore, in exercise of its constituent power, by 46th Amendment, introduced Article 366 (29A). The Statement of Objects and Reasons has fully set out the circumstances under which 46th Amendment was necessitated.

The Amendment introduced fiction by which six instances of transactions were treated as deemed sale of goods and that the said definition as to deemed sales will have to be read in every provision of the Constitution wherever the phrase 'tax on sale or purchase of goods' occurs. This definition changed the law declared in the ruling in *Gannon Dunkerly & Co.* only with regard to those transactions of deemed sales. In

other respects, law declared by this Court is not neutralized. Each one of the sub-clauses of Article 366(29A) introduced by the 46th Amendment was a result of ruling of this Court which was sought to be neutralized or modified. Sub clause (a) is the outcome of *New India Sugar Mills vs. Commnr. Of Sales Tax* \026 14 STC 316 = 1963 Suppl. 2 SCR 459 and *Vishnu Agencies vs. Commissioner of Sales tax* \026 AIR 1978 SC 449. Sub clause (b) is the result of *Gannon Dunerly & Co.* \026 1959 SCR 379. Sub clause (c) is the result of *K.L. Johar and Company vs. C.T.O.* \026 1965 (2) SCR 112. Sub clause (d) is consequent to *A.V. Meiyappan vs. CIT* \026 20 STC 115 (Madras High Court). Sub clause (e) is the result of *Jt. Commercial Tax Officer vs. YMIA* \026 1970 (1) SCC 462. Sub clause (f) is the result of *Northern India Caters (India) Ltd. Vs. Lt. Governor of Delhi* \026 1978 (4) SCC 36 and *State of H.P. vs. Associated Hotels of India Ltd.* 29 STC 474 = 1972 (1) SCC 472.

In the background of the above, the history prevailing at the time of the 46th Amendment and pre-enacting history as seen in the Statement of Objects and Reasons, Article 366 (29A) has to be interpreted. Each fiction by which those six transactions which are not otherwise sales are deemed to be sales independently operates only in that sub clause.

While the true scope of the amendment may be appreciated by overall reading of the entirety of Article 366 (29A), deemed sale under each particular sub clause has to be determined only within the parameters of the provisions in that sub clause. One sub clause cannot be projected into another sub clause and fiction upon fiction is not permissible. As to the interpretation of fiction, particularly in the sales tax legislation

, the principle has been authoritatively laid down in the *Bengal Immunity Company Ltd. Vs. State of Bihar and Others* \026 1955 (2) SCR 603 at 647.

"The operative provisions of the several parts of Article 286, namely, clause (1)(a), clause (1)(b), clause (2) and clause (3) are manifestly intended to deal with different topics and, therefore, one cannot be projected or read into another." (S.R. Das, J.)

We can also see page nos. 720 and 721 (P.N. Bhagwati, J.)

NATURE OF TRANSACTION IN THE PRESENT CASE:

The contract between the telecom service provider and the subscriber is merely to receive, transmit and deliver messages of the subscriber through a complex system of fibre optics, satellite and cables.

Briefly, the subscriber originates/generates his voice message through the handset. The transmitter in the handset converts the voice into radio waves within the frequency band allotted to the Petitioners. The radio waves are transmitted to the switching apparatus in the local exchange and thereafter after verifying the authenticity of the subscriber; the message is transmitted to the telephone exchange of the called party and then to the nearest Base Transceiver Station (BTS). The BTS transmits the signal to the receiver apparatus of the called subscriber, which converts the signals into voice, which the subscriber can hear.

The modern legislature makes laws to govern a society, which is fast-moving. It is aware of the changing concepts of the emerging times. The law adapts itself to social, economic, political, scientific and other revolutionary changes. Traditionally, a contract for carriage of goods or passengers is by roadways, railways, airways and waterways. This is associated with carriage of tangible goods. Such a carrier has no right over the goods of the customer and does not effect transfer of right to use any goods used by the carrier for goods. On this analogy, the Petitioners carry messages. They are only carriers and have neither property in the message nor effects any transfer to the subscriber. The advancement of technology should be so absorbed in the interpretation that this method of carriage of message should also be understood as carriage of goods and not a transfer of a right to use goods, if any.

The licence clearly manifests that it is one for providing telecommunication service and not for supply of any goods or transfer of right to use any goods. It expressly prohibits transfer or assignment. The integrity of licence cannot be broken into pieces nor can the telecommunication service rendered by them be so mutilated. Not only this position flows from the terms of contract, this also flows from Section 4 of the Indian Telegraph Act which provides for grant of licence on such conditions and in

consideration of such payments as it thinks fit, to any person "to establish, maintain or work at telegraph". The integrity of establishing, maintaining and working is not to be mutilated.

Clause 9 clearly interdicts the licensee provided that licensee will not assign or transfer his rights in any manner whatsoever under the licence to third party. It is impossible to contend that the right to use goods, assuming without conceding that they are goods, which are essential for the rendition of service can never be a transaction or transfer of right to use goods. Nor can the contract between subscribers and licensee viz. service provider be interpreted as involving transfer of right to use goods.

Gannon Dunkerly declared that a transaction of sale of goods has to be under a contract i.e. it is consensual.

Section 4 of the Telegraph Act maintains the integrity of subject-matter of the licence viz, "establish, maintain or work a telegraph". Therefore, the transaction of service is composite one not capable of disintegrated. Except in sub-clause (a) in all other sub clauses the transactions are contractual. There is no scope for importing any doctrine of statutory agency of the service provider. Except in the case of sub clause (a) where the transfer otherwise than in pursuance of contract of property in any goods is deemed to be sale in each one of the other sub clauses the transaction is consensual. The contrast between sub Article (a) and all other sub clauses clearly manifests that the transaction involved in the present dispute are contractual. The fiction operates to deem what is not otherwise a sale of goods as a sale of goods i.e. even the transfer of a right to use goods is deemed to be a sale of the goods.

It is not possible to interpret the contract between the service provider and the subscriber that the consensus was to mutilate the integrity of contract as a transfer of right to use goods and rendering service. Such a mutilation is not possible except in the case of deemed sale falling under sub clause (b). Nor can the service element be disregarded and the entirety of the transaction be treated as a sale of goods (even when it is assumed that there is any goods at all involved) except when it falls under sub clause (f). This will also result in an anomaly of the entire payment by the subscriber to the service provider being for alleged transfer of a right to use goods and no payment at all for service. The licence granted by the Central Government fixes the tariff rates and all are for services.

Sale of Goods Act, comprehends two elements, one is a sale and the other is delivery of goods. 20th Century Finance Corporation Limited vs. State of Maharashtra \026 2000 (6) SCC 12 at 44, ruled that

"(c) where the goods are available for the transfer of right to use the taxable event on the transfer of right to use any goods is on the transfer which results in right to use and the situs of sale would be the place where the contract is executed and not where the goods are located for use.

(d) In cases where goods are not in existence or where there is an oral or implied transfer of the right to use goods, such transactions may be effected by the delivery of the goods. In such cases the taxable event would be on the delivery of goods."

It is, therefore, unnecessary to deal with the question of delivery of possession which is related only to situs and not to subject-matter of taxation which is a transfer of right to use goods. In the present case, as no goods element are involved, the transaction is purely one of service. There is no transfer of right to use the goods at all

I am, therefore, of the view that the imposition of sales tax on any facilities of the telecommunication services is untenable in law.