IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.5653 OF 2010
with
WRIT PETITION NO.7503 OF 2013

Sodexo SVC India Private Limited. .. Petitioner
Vs
The State of Maharashtra and Others. .. Respondents
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Shri V.V. Tulzapurkar, Senior Advocate along with Shri Prakash Shah, Shri Prasad Paranjape and Shri Arun Jain i/by PDS Legal for the Petitioner in both the Petitions.
Shri V.S. Gokhale, AGP for Respondent No.1 in both the Petitions.
Shri Abhijit Kulkarni along with Shri Manoj Badgujar for Respondent Nos.2 to 4 in WP No.5653 of 2010 and for the Respondent Nos.2 and 3 in WP No.7503 of 2013.
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CORAM : A.S. OKA & A.S. GADKARI, JJ

DATE ON WHICH SUBMISSIONS WERE HEARD : 20TH DECEMBER 2014

DATE ON WHICH JUDGMENT IS PRONOUNCED: 20TH MARCH 2015

JUDGMENT (PER A.S. OKA, J)

. As per the directions of the Apex Court in Special Leave Petition Nos.3746 of 2014 and 3747 of 2014 passed on 19th September 2014, priority is given to the final hearing of these two Petitions. The following questions are involved in both the Petitions.

(i) Whether the Sodexo Meal Vouchers are goods for the purposes of levy of Octroi and LBT ?

(ii) Whether a Municipal Corporation constituted under the Maharashtra Municipal Corporations Act, 1949 is entitled to levy and/or collect Octroi or Local Body Tax (LBT) on Sodexo Meal Vouchers in accordance with the provisions of the Maharashtra Municipal Corporations Act, 1949 and the Rules framed thereunder ?

2. The Petitioner Company is conducting a business of providing pre-printed Sodexo Meal Vouchers (For short "the said Vouchers"). The case made out in the Petitions is that the Petitioner Company enters into a contract with its customers for issuing the said vouchers. The customers of the Petitioner in turn distribute the said vouchers to their employees who are the actual users of the said vouchers. It is stated that the Petitioner Company has contracts with various affiliates such as restaurants, departmental stores, shops, etc. Under the affiliate contracts, the affiliates are required to provide food and other items on presentation of the said vouchers by the users. The affiliates are bound to honour vouchers once presented by the users. The affiliates after receiving the said vouchers, present the same to the

Petitioner Company. On receipt of the vouchers, the Petitioner reimburses the affiliates after deducting service charges.

3. The case made out in the Petition is that the Petitioner Company has obtained certificate of authorization from the Reserve Bank of India under Section 7 of the Payment and Settlement Systems Act, 2007 (for short “the said Act of 2007”) to operate a payment system for issue of meal and gift vouchers in the form of 'paper based vouchers' and 'smart meal cards' with effect from 25th June 2009. In these two Petitions, we are concerned with the paper based vouchers.

4. The learned senior counsel appearing for the Petitioner has made extensive submissions. He invited our attention to the provisions of Pune Municipal Corporation Octroi Rules, 2008 (for short “the Octroi Rules”). He also invited our attention to the Maharashtra Municipal Corporations Act, 1949 (for short “the Municipal Corporations Act”) and the Bombay Provincial Municipal Corporation (LBT) Rules, 2010 (for short “the LBT Rules”). He urged that the said vouchers are payment instructions or payment instruments issued under a payment system operated under the said Act of 2007 as per the authorization received from the Reserve Bank of India. He submitted that under both the Octroi Rules and the LBT Rules, the taxes can be collected on the goods. Though the definition of the goods under the

Municipal Corporations Act does not throw any light, he invited our attention to the definition of the goods under the other enactments. He pointed out that the Octroi or LBT can be levied on the consumption, use or sale of goods within the limits of Municipal Corporations. He urged that the said vouchers are a medium to acquire any article for consumption, use or sale and the said vouchers are not capable of consumption, use or sale by themselves. He submitted that the said vouchers are meant to acquire the goods which can be consumed, used or sold. He urged that the vouchers are only a medium of payment. He submitted that the said vouchers are akin to lottery tickets which are held not to be goods. He relied upon a decision of the Apex Court in the case of *Sunrise Associates v. NCT of Delhi*[1]. He relied upon a decision of the Apex Court in the case of *R.D.Saxena v. Balram Prasad Sharma*[2]. He urged that the said vouchers can be equated with the papers and files in possession of a legal practitioner which were held not to be goods. He placed reliance on a decision of the Apex Court in the case of *Bharat Sanchar Nigam Ltd. and Another v. Union of India and Others*[3]. He pointed out a decision of this Court in the case of *State Bank of India v. Neela Ashok Naik and Another*[4] which holds that the fixed deposit receipts are the goods. He submitted that the fixed deposit receipts by themselves are capable of abstraction, consumption and sale, but the

1 (2006)5 SCC 603
2 (2000)7 SCC 264
3 (2006)3 SCC 1
4 AIR 2000 Bom. 151

said vouchers do not possess such characteristics. He relied upon a decision of the Apex Court in the case of *TATA Consultancy Services v. State of Andhra Pradesh*[5]. He submitted that the said vouchers do not satisfy the tests laid down in Paragraph 81 of the said decision of the Apex Court. He, therefore, urged that neither the LBT nor the Octroi is payable on the said vouchers.

5. The learned counsel appearing for the Pune Municipal Corporation submitted that as far as the Octroi is concerned, an efficacious remedy under Section 406 of the Municipal Corporations Act is available. He relied upon a decision of the Division Bench in the case of *Maharashtra Chamber of Commerce Industries & Agriculture & Others v. State of Maharashtra, through its Secretary & Others*[6] and *Small Scale Interpreneurs Association and Others v. State of Maharashtra and Others*[7]. On merits, he submitted that the said vouchers are capable of use and/or consumption as well as sale within the limits of the Municipal Corporations. He urged that no interference is called for in writ jurisdiction.

6. We have given careful consideration to the submissions. Under Clause 42 of Section 2 of the Municipal Corporations Act, the Octroi has been defined. Clause 42 of Section 2 reads thus:

5 (2005)1 SCC 308
6 2004(1) Bom.C.R. 137
7 2007(3) Bom.C.R. 496

> "2(42). "Octroi" means a cess on the entry of goods into the limits of a city for consumption, use or sale therein; but does not include a cess as defined in clause 6A or Local Body Tax, as defined in clause (31A)."

7. The Local Body Tax has been defined in Clause 33A of Section 2 of the Municipal Corporations Act which reads thus:

> "2(33A). "Local Body Tax" means a tax on the entry of goods into the limits of the City, for consumption, use or sale therein, levied in accordance with the provisions of Chapter XIB, but does not include cess as defined in clause (6A) and octroi as defined in clause (42)."

8. The Cess is defined under Clause (6A) of Section 2 of the Municipal Corporation Act, which reads thus:

> "2(6A) "Cess" means a cess on the entry of goods into the limits of the City for consumption, use or sale therein levied in accordance with the provisions of Chapter XI-A, but does not include octroi as defined in clause (42)."

9. Hence, the LBT or Octroi is payable on the entry of goods into the limits of the City for consumption, use or sale. Thus, the issue which arises in these Petitions is whether the said vouchers are the goods within the meaning of the Municipal Corporations Act which are capable of being consumed, used or sold.

10. As pointed out earlier, the Petitioner has obtained an authorization under Section 7 of the said Act of 2007. The authorization is to operate a payment system for issue of meal and gift vouchers in the form of paper based vouchers. The Petitioner has annexed the application form for the said vouchers. On the reverse side of the said form, the general terms and conditions for meal vouchers have been set out. The Petitioner is described in the said Conditions as Issuer. The affiliate establishment is defined as a restaurant, or a caterer or any eating place or outlet which has signed the application form to provide ready to eat food and beverages to the users of the said vouchers. The customer is defined to mean an organization to which the Petitioner issues vouchers and the "user" is defined to mean an employee of the customer who is in possession of the valid vouchers. The terms and conditions provide that the affiliate establishment shall deliver to a user against the value of the vouchers, ready to eat food and beverages. It is stated that the affiliate establishment has agreed to accept the said vouchers at any time whenever presented by the user as a payment of the price of only ready to eat food and beverages to be served to the user and for no other purposes. The terms and conditions provide that the Petitioner shall redeem all the valid vouchers returned to it by the affiliated establishments by making a payment to the affiliated establishment the value of the vouchers after deducting therefrom the service charges.

Thus, the scheme is that the Petitioner prints the said paper vouchers and sells it to the customers. The customers, in turn, provide the said vouchers to its employees. On presentation of the said vouchers in the restaurants or eating places or outlets, the ready to eat food items and beverages of the face value printed on the said vouchers is delivered to the users. Thus, the said vouchers are used to pay the price of the food items and beverages delivered to the users. On presentation of the said vouchers, the users can acquire the food items and beverages of the face value of the said vouchers.

11. As far as the use or consumption of goods for the purposes of charging Octroi is concerned, the law is laid down by the Apex Court in the case of *Hindustan Coca-Cola Beverage Pvt. Ltd. vs. Sangli Miraj and Kupwad Municipal Corporation and Ors*[8]. The Apex Court in Paragraphs 12 and 14 held thus:

> "12. While arriving at the above conclusion, this Court referred to the Constitution Bench judgment in ***Burmah Shell Oil Storage and Distributing Company of India Limited*** v. ***Belgaum Borough Municipality*** reported at MANU/SC/0314/1962 : AIR 1963 SC 906 where it was dealing with the question whether octroi was leviable on the goods brought within the limits of Belgaum for consumption by Burmah Shell, for re-export and for sale. While interpreting the words found in Entry No. 52 of the State list in the Constitution dealing with taxes on the entry of goods into a local area for

8 (2011)7 SCC 605

consumption, use or sale therein, this Court observed that the two expressions, "use" and "consumption" together connote the bringing in of goods and animals with a view to their retention either for use without using them up or for consumption in a manner which destroys, wastes or uses them up. **This Court observed that this authoritative pronouncement of the Court makes it clear that before a Municipality can impose octroi duty on any commodity, it has to be shown that the commodity concerned was brought within the Municipal limits for consumption, that is, for being totally used up so that it ceases to exist within the Municipal limits or it was to be used for an indefinite period within the Municipal limits so that it ultimately rests within the Municipal limits and does not go out subsequently**, or the commodity concerned must be shown to have been brought within the Municipal limits for the purpose of sale within the said limits.

14. Referring to Burmah Shell's case, this Court held that though the use of the bottles may not amount to its destruction or total using up, but to attract octroi, the bottles must have finally rested within the Municipal limits and not taken out. **This Court concluded that to attract the levy of octroi on the goods brought within the Municipal limits, there must be proof of the fact that the goods got consumed completely within the Municipal limits or were used for an indefinite period in such a way that they come to rest finally and permanently within the Municipal limits or sold within the said limits**.”

(Emphasis added)

12. The said vouchers are capable of being sold by the Petitioner after they are brought into the limits of the City. In fact, going by the scheme narrated above, the said vouchers are sold by the

Petitioner to its customers for value. The customers give the said vouchers to its employees called as users. On presentation of the said vouchers, the users get foods and beverages from the affiliated establishments and the affiliated establishments on presentation of the said vouchers to the Petitioner get the face value of the said vouchers after deducting the service charges. Thus, the said vouchers are capable of being used or sold within the limits of a City.

13. Now coming back to the question whether the said vouchers can be said to be the goods, the learned senior counsel appearing for the Petitioner urged that the vouchers are not capable of consumption, use or sale and the said vouchers are nothing but a medium to acquire any article for consumption. The contention is that the said vouchers by itself are not capable of consumption, use or sale. He relied upon a decision of the Apex Court in the case of *TATA Consultancy Services*. In Paragraph 81 of the said decision, the Apex Court held thus:

> "81. It is not in dispute that when a programme is created it is necessary to encode it, upload the same and thereafter unloaded. Indian law, as noticed by my learned Brother, Variava, J., does not make any distinction between tangible property and intangible property. **A 'goods' may be a tangible property or an intangible one. It would become goods provided it has the attributes thereof having regard to (a) its utility; (b) capable of being bought and sold; and (c) capable of transmitted, transferred, delivered, stored and possessed**. If a software whether customized or non-customized satisfies these

> attributes, the same would be goods. Unlike the American Courts, Supreme Court of India have also not gone into the question of sever ability."

14. Going by the test laid down in Paragraph 81 of the said decision of the Apex Court in the case of *TATA Consultancy Services,* the said vouchers have its utility, the same are capable of being bought or sold and the same are capable of being delivered, stored and possessed. He relied upon a decision of the Apex Court in the case of *Associated Cement Companies Ltd. v. Commissioner of Customs*[9]. The said decision deals with the definition of the word "goods" under the Customs Act, 1962. Paragraph 27 of the said decision reads thus:

> "27. According to Section 12 of the Customs Act, duty is payable on goods imported into India. The word "goods" has been defined in Section 2(22) of the Customs Act and it includes in sub-clause (c) "baggage" and sub-clause (e) "any other kind of movable property". It is clear from mere reading of the said provision that any immovable article brought into India by a passenger as part of his baggage can make him liable to pay customs duty as per the Customs Tariff Act. An item which does not fall within sub-clauses (a), (b), (c) or (d) of Section 2(22) will be regarded as coming under Section 2(22)(e). Even though the definition of the goods purports to be an exclusive one, in effect it is so worded that all tangible movable articles will be the goods for the purposes of the Act by residuary clause 2(22)(e). Whether movable article comes as a part of a baggage, or is imported into the country by any other manner, for the purpose of the Customs Act, the provision of Section 12 would be attracted. Any media whether in the form of books or computer disks or cassettes which contain information technology or ideas would

9 (2001)4 SCC 593

> necessarily be regarded as goods under the aforesaid provisions of the Customs Act. These items are moveable goods and would be covered by Section 2(22)(e) of the Customs Act."

15. Thereafter, he invited our attention to the decision of the Apex Court in the case of *Sunrise Associates*. In the said decision, the issue before the Apex Court was whether the lottery tickets were the goods for the purposes of sales tax laws. The Apex Court observed that the word "goods" for the purposes of sales tax has been uniformly defined meaning thereby all types of movable property. The learned counsel relied upon what is held in Paragraphs 43, 45, 47 and 48 of the said decision which read thus:

> "43. The sale of a ticket does not necessarily involve the sale of goods. For example the purchase of a railway ticket gives the right to a person to travel by railway. It is nothing other than a contract of carriage. The actual ticket is merely evidence of the right to travel. A contract is not property, but only a promise supported by consideration, upon breach of which either a claim for specific performance or damages would lie (**Said** v. **Butt** . Like railway tickets, a ticket to see a cinema or a pawn brokers ticket are memoranda or contracts between the vendors of the ticket and the purchasers. Cases on whether the terms specified on such tickets bind the purchaser are legion. It is sufficient for our purposes to note that tickets are themselves, normally evidence of and in some cases the contract between the buyer of the ticket and its seller. Therefore a lottery ticket can be held to be goods if at all only because it evidences the transfer of a right.

45. The further distinction sought to be drawn in **H. Anraj** between the chance to win and the right to participate in the draw was in our opinion unwarranted. A lottery having been held to be in essence a chance for a prize, the sale of a lottery ticket can only be a sale of that chance. There is no other element. Every right can be. sub-divided into lesser rights. When these lesser rights culminate in a legally recognizable right, it is the latter which defines the right. The right to participate in the draw is a part of the composite right of the chance to win and it does not feature separately in the definition of the word "lottery". It is an implicit part of the chance to win. It is not a different right. The separation is specious since neither of the rights can stand without the other. A draw without a chance to win is meaningless and one cannot claim a prize without participating in the draw. In fact the transfer of the chance to win assumes participation in the draw. The Supreme Court of Appeals of West Virginia, in **West Virginia in State of West Virginia v. John Wassick** , , held that "free plays" which could be won predominantly by chance for consideration by operating multiple coin pinball machines for cash payoffs was a prize and the pinball machine constituted the lottery. This indicates that a draw is merely a method of holding the lottery just as a pinball machine may be a method of holding the lottery and does not constitute a separate right.

47. The authorities considered by the Court in **H. Anraj** do not support the sub division of the chance to win into a further distinct right to participate. The Court sought to draw the distinction between the chance to win and the right to participate by describing the former as a right 'in future' and the latter as "in praesenti". Both the rights are in fact 'in future'. In any event the distinction is immaterial to the question as to whether the subject matter of the transfer is an actionable claim, since an actionable claim may be existent, accruing, conditional or contingent.

> 48. Even if the right to participate is assumed to be a separate right, there is no sale of goods within the meaning of sales tax statutes when that right is transferred. When **H. Anraj** said that the right to participate was a beneficial interest in moveable property, it did not define what that moveable property was. The draw could not and was not suggested to be the moveable property. The only object of the right to participate would be to win the prize. The transfer of the right would thus be of a beneficial interest in movable property not in possession. By this reasoning also a right to participate in a lottery is an actionable claim."

16. The Apex Court observed that the possession of lottery tickets gives a right to participate in the draw. It was observed that it is merely a chance that a person holding a ticket gets a price. Therefore, it was held that the lottery tickets were not the goods but merely an actionable claim. This Court in the case of *State Bank of India v. Neela Ashok Naik* held that the fixed deposit receipts of the bank are the goods which can be pledged as a collateral security. However, the said vouchers have guaranteed utility and value which are capable of being sold.

17. It will be necessary to make a reference to the decision of the Apex Court in the case of *Bharat Sanchar Nigam Limited*. The issue which arose for consideration in the said decision was as regards the nature of transaction by which mobile phone calls are enjoyed. The

question considered was whether it was a sale or service or both. The Apex Court in Paragraph 30 of the said decision held thus:

> “30.....Similarly, the expression "goods" had a very wide and comprehensive meaning and assuming delivery is necessary would include the entire telephone system as well as telephone appliances, instruments, materials, towers, exchanges, etc. The means, namely the electrical or electromagnetic means of energy will also form parts of the goods. It is further submitted that whether in any particular case the telephone system included machines or apparatus fixed to the ground was a question of fact to be decided in an individual case during the assessment proceedings. Countering the submission that the sales would be inter state sales, it is submitted that the situs of the taxable event under the Sales Tax Act would be where the transfer of the right takes place between the service providers and the subscribers. This was also a question which would vary from case to case and would have to be ultimately factually decided by an assessment authority. According to the respondents, apart from the transfer aspect of the transaction being isolated as an independent taxable event from the aspect of service, ultimately the question whether there was any splitting up of a composite transaction was also to be determined during assessment proceedings.”

18. Ultimately, in Paragraph 63, the Apex Court held thus:

> “63. It is clear, electromagnetic waves are neither abstracted nor are they consumed in the sense that they are not extinguished by their user. They are not delivered, stored or possessed. Nor are they marketable. They are merely the medium of communication. What is transmitted is not an electromagnetic wave but the signal through such means. The signals are generated by the subscribers themselves. In telecommunication what is transmitted is the message by means of the telegraph. No part of the telegraph itself is transferable or deliverable to the subscribers.”

19. The test applied by the Apex Court is that the electromagnetic waves are neither abstracted nor the same are consumed in the sense that the same are never extinguished by the user as the same cannot be delivered, stored or possessed. It was held that the same are not marketable. It was held that the electromagnetic wave is the medium of communication.

20. In this case, we are dealing with the printed paper vouchers. As pointed out earlier, the printed vouchers are sold to the customers for the value which is printed on the said vouchers. In turn, the customers hand over them to a user who uses the same for acquiring food and beverages. Even going by the scheme of the Petitioner, the said vouchers are sold by the Petitioner to its customers. Therefore, the said vouchers which are printed on paper are the goods within the meaning of the said Municipal Corporations Act. After the vouchers are brought within the limits of the Municipal Corporations Act, the same are capable of being sold. The said vouchers which are capable of being sold, delivered and possessed have its own utility. The same cannot be equated with a lottery ticket which merely an actionable claim. The said vouchers cannot be equated with electromagnetic waves.

21. The stand taken by the Pune Municipal Corporation in the Writ Petition No.5653 of 2010 is that the said vouchers will fall in the category of printed material which attracts Octroi of 2% in terms of the Octroi Rules. For the reasons recorded above, we are unable to persuade ourselves to take a view that the said vouchers are not the goods for the purposes of levy of LBT and Octroi. The same are the goods which are capable of being used, consumed or sold within the Municipal Corporation limits. Therefore, the challenge in these Petitions by the Petitioner must fail.

22. Before we part with the judgment, we must note here that the issue whether the Petitions can be entertained in view of the availability of the remedy of Appeal has been already decided by the order dated 2nd September 2013 and, therefore, we have not dealt with the said issue.

23. Accordingly, we pass the following order:

ORDER :

(a) The Writ Petitions are rejected. The Rule in both the Petitions is discharged with no orders as to costs;

(b) Interim relief operating in both the Petitions shall continue to operate for a period of two months subject to the Petitioner keeping the bank guarantee alive for a period of three months from today;

(A.S.GADKARI, J) (A.S. OKA, J)