

Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

**SALES TAX REFERENCE NO. 5 OF 2009
IN
REFERENCE APPLICATION NO. 72 OF 2005**

The Commissioner of Sales Tax
Maharashtra State, 8th floor,
Vikrikar Bhavan, Mazgaon,
Sardar Balwantsingh Dhodi Marg,
Mumbai – 400 010.

... Applicant

Vs.

Ms/. General Cranes
Near Pitroda Automobiles Works,
T.J. Road, Shivadi,
Mumbai – 400 015.

... Respondent

Ms. Uma Palsuledesai, AGP for the applicant.

Mrs. N.R. Badheka a/w. Parth Badheka, Advocate for the respondent.

CORAM: **B.R. GAVAI & A.S. GADKARI, JJ.**
DATE : **21st April , 2015**

JUDGMENT (Per B.R. GAVAI, J.)

The learned Tribunal has referred the following two questions for our adjudication:

- (i) Whether on the facts and in the circumstances of the case, the Tribunal is justified in law in holding that the respondent is not a “dealer” within the meaning of the term as defined under section 2(4) of the “Maharashtra Sales on transfer of right to use any goods for any purpose Act, 1985” (hereinafter called as the Lease Act)?
- (ii) Whether on the facts and in the circumstances of the case, the Tribunal is justified in law in holding the transaction indicated by a Bill No. 0-1-1/90 dated 27/7/90 for an amount of Rs.1,62,500/- is not a “sale” as defined under section 2(10) of the “Lease Act” and thereby, inter alia, holding that it is not liable to tax?

2. The facts, in brief, giving rise to the present Reference are as under:

The respondent is registered under the Lease Act and is engaged in carrying on the business of hiring of cranes. The respondent had filed an Application under section 8 of the Lease Act for determination of question as to whether he would fall under the term of "dealer" under the Maharashtra Sales Tax on the Transfer of Right to use any goods for any purpose Act, 1985 (hereinafter referred to as the 'Lease Act') along with Section 52 of the Bombay Sales Tax Act, 1959. The Additional Commissioner while dealing with the said Application held that the respondents would fall within the definition of a 'dealer' and as such, the transaction entered into by him with M/s. Offshore Hook-Up & Construction Services (I) Pvt. Ltd. would be governed by the provisions of the said Act and as such taxable. Being aggrieved thereby, an Appeal came to be preferred. The learned Tribunal reversed the finding of the learned Additional Commissioner and held that the transaction entered into between the respondent and M/s. Offshore Hook-Up & Construction Services (I) Pvt. Ltd. would not amount to sale as defined under section 2(10) of the Lease Act.

3. The learned counsel for the revenue has submitted that the learned Tribunal has grossly erred in holding that the respondent was not a dealer within the meaning of Section 2(4) of the Lease Act and that the

transaction entered by the respondent/assessee with Offshore Hook-Up & Construction Services (I) Pvt. Ltd. did not come within the meaning of sale as defined as under 2(10) of the Lease Act. The learned counsel submitted that, the perusal of terms and conditions entered into between the respondent/assessee and Offshore Hook-Up & Construction Services (I) Pvt. Ltd. would clearly reveal that after the vehicle was given on hire to the contractor, the entire control remains with the contractor and the respondent/assessee ceases to have any sort of control over the crane in question. The learned counsel, therefore, submitted that as such the transaction squarely fell within the meaning of 'sale' as defined under the Lease Act and the respondent/assessee was a dealer as defined under section 2(4) of the Lease Act.

4. Ms. Badheka, the learned counsel for the respondent submitted that the learned Tribunal has rightly held that the respondent/assessee was not a dealer and the transaction was not a sale as defined as per the provisions of the Lease Act. The learned counsel submitted that the view taken by the learned Tribunal is in consonance with the view taken by the Apex Court in the cases of **State of Andhra Pradesh & Anr. vs. Rashtriya Ispat Nigam Ltd., reported in 126 STC 114 (SC)** and **Bharat Sanchar Nigam Ltd. & Anr. vs. Union of India & Others, reported in 145 STC 1 (SC)**. The learned counsel has relied on the judgment of

various High Courts to point out that in similar circumstances, these Courts have held that the transactions which were like the transaction entered into by the respondent/assessee were not covered by the term "Transfer of the right to use goods". The learned counsel submitted that effective control and possession were never transferred. The learned counsel, therefore, submitted that the view taken by the learned Tribunal is in accordance with law and as such, Reference needs to be answered accordingly.

5. The answer to the second question referred to us would be wholly dependent on the answer to question no.1. If we hold that the view of learned Tribunal that respondent is not a "dealer" as per the provisions of Section 2(4) of the Lease Act, the transaction as referred to in question no. 2 will have to be held as not taxable. However, if we hold that respondent is a dealer as defined under section 2(4) of the Lease Act, the transaction will have to be held taxable. We, therefore, proceed to decide question no. 1.

6. For appreciating the rival controversy, it will be necessary to refer to the definition of term 'dealer' as per Section 2(4) of the Lease Act.

"dealer" means any person who whether for commission, remuneration or otherwise transfer the right to use any goods for any purpose (whether or not for a specified period) cash, deferred payment or other valuable consideration and includes the State

Government or the Central Government which so transfers the right to use goods and also society, club or Association of persons which so transfers the right to use such goods to its members.”

7. The term 'Sale' is defined under section 2(10) of the Lease Act as under:

“Sale” means the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash deferred payment or any other valuable consideration and the word 'Sell' with all its grammatical varieties and cognate expressions shall be construed accordingly.”

8. The aforesaid provision, therefore, makes it amply clear that for a person to come within the definition of 'dealer', he is required to transfer the right to use any goods for any purpose. It could, thus, be seen that the right to use any goods for any purpose is essential so as to bring the person within the ambit of dealer as defined in the said Act. Consequently, for the transaction to be a sale within the meaning of the said Act, what is essential is transfer of right to use any goods for any purpose. The learned Tribunal has reproduced the terms of quotation as given by the Respondent to Offshore Hook-Up & Construction Services (I) Pvt. Ltd. and the terms of acceptance by the said Offshore Hook-Up & Construction Services (I) Pvt. Ltd., which are as under:

“To,

M/s. Offshore Hook-Up & Constructions Service (I) Pvt. Ltd.
3065, Vasant Vihar,
Dr. C.G. Road, Chembur,
Mumbai – 400 074.

Attn. Mr. Rakesh Silaichla

Sub: Quotation for Hire of Mobile Cranes with 140 ft. Boom

Dear Sir

As per our discussion with you at your office on 20.6.90 regarding the above Crane for the job at ONGC Uran, we hereby give you the rates.

The Crane will be supplied with 140 ft. Boom

Rate:

- | | |
|------------------------|---------------|
| 1. For 10 days of Hire | Rs.2,00,000/- |
| 2. For 15 days of Hire | Rs.2,50,000/- |
| 3. For 30 days of Hire | Rs.3,00,000/- |

The above were the rates which we had given to you at your office. Then as per your request on telephone today, we agreed to hire out the crane to you for 20 days at the rate of 15 days, i.e. for 20 days Rs.2,50,000/-.

Terms

- (i) You will supply one small crane for extension of Boom and dismantle of Boom when required.
- (ii) The working hours of the Crane will be one shift of 12 hours.
- (iii) Driver, cleaner, diesel and oil will be ours.
- (iv) Transportation of accessories will be ours.
- (v) The period of hire will start from the time of crane reaches your site (Boom extension and dismantling will be taken at working day.
- (vi) Overtime will be calculated on pro rata basis.
- (vii) Working of crane in excess of 20 days will be calculated on pro-rata.
- (viii) You will give us 2 days notice to mobilize our crane from Bombay.

Payment

1. 1,00,000/- will be paid as advance with work order.
2. Balance amount will be paid on the date of release of crane (on 21st day from the date of reaching site)

Awaiting a favourable reply soon.

Thanking you,

Yours faithfully,

For General Cranes.

And Acceptance letter dated 22.06.1990 by M/s. Offshore Hook-Up & Construction Services (India) Pvt. Ltd,

“Ref: OHCS/GNB/30346/90/695 dated June 22, 1990

M/s. General Cranes,
Near Pitroda Automobile works,
T.J. Road, Sewree, Bombay-400 015.

ATTN. MR. D.J. PITRADO

Gentleman,

Sub: Hire of 75 Tonnes Capacity Mobile Crane with 140 ft. Boom

With reference to your quotation dated 21.06.1990 OHCS is pleased to hire your crane on the following terms and conditions:

1. Shift timing will be from 7.00 am to 7.00 p.m.
2. Diesel will be supplied by you.
3. Overtime working of crane after 7.00 p.m. will be charges on pro-rata basis.
4. Breakdown of equipment will be deducted on pro-rata basis.
5. To & fro travelling charges will be to your account.
6. Minimum period of contract will be 20 days at a stretch any extension to be calculated on a pro-rata basis.
7. Advance payment of Rs.1,00,000/- (Rupees One Lakh only) will be made after crane reaches the

worksite at Uran LPG Plant.

8. Roads for working condition of crane will be adequate.
9. Hire charges will commence only from when the boom is assembled and crane is ready for operation and will cease on written demobilization orders or 20 (twenty) days of operation which is latter.
10. Hire charges shall be Rs.2,50,000/- (Rupees Two Lakhs fifty thousand only) for 20 (twenty) days 12 (twelve) hours shift/day on a lump-sum basis for crane, crane operators and riggers.

You are required to carry the following valid documents in original to the work site and submit copies of the same immediately at our office.

1. Fitness Certificate.
2. Insurance papers.
3. Tax Certificate.
4. Loading Certificate.
5. Tax and Registration book.

In addition, your crane is to have the following:

1. Spark arrestor for both engines.
2. Radiation Caps.
3. Fuse box covers.
4. Starter Cover.
5. Lockable Diesel Tank Caps.
6. Battery Cover.
7. All lights i.e. Dim/Full headlights, back lights, boom lights in working conditions.

You are requested to mobilize your crane immediately to have it operational at our Uran LPG Plant site by or before 25th June, 1990.

Thanking you,

Yours faithfully,
For OHCS (I) Pvt. Ltd.
sd/-
RAKESH SILAICHIA
ADMN. MANAGER"

9. What would amount to transfer a right to use any goods for any purpose has been construed by the Apex Court in the case of **State of Andhra Pradesh vs. Rashtriya Ispat Nigam Ltd.** (*supra*). The facts in the present case are almost similar with the facts in the case that fell for consideration before their Lordships of the Apex Court. In the said case, the respondent was lending highly sophisticated and valuable imported machinery to the contractors engaged in the execution of the project work on specified hire charges. The machinery was given in the possession of the contractor and he was responsible for any loss or damage to it. The High Court held that the said transaction would not fall within the meaning of 'Transfer of right to use any goods'. Upholding the reasoning given by the High Court, the Apex Court observed thus:

“The High Court after scrutiny and close examination of the clauses contained in the agreement and looking to the agreement as a whole, in order to determine the nature of the transaction, concluded that the transactions between the respondent and contractors did not involve transfer of right to use the machinery in favour of the contractors and in the absence of satisfying the essential requirement of section 5-E of the Act, i.e., transfer of right to use machinery, the hire charges collected by the respondent from the contractors were not exigible to sales tax. On a careful reading and analysis of the various clauses contained in the agreement and, in particular, looking to clauses 1, 5, 7, 13 and 14, it becomes clear that the transaction did not involve transfer of right to use the machinery in favour of contractors. The High Court was right in arriving at such a conclusion. In the impugned order, it is stated and rightly so in our opinion, that the effective control of the machinery even while the machinery was in use of the contractor was that of the respondent-company, the contractor was not free to make use of the machinery for the works other than the project work of the respondent or move it out during the period the machinery was in

his use; the condition that the contractor would be responsible for the custody of the machinery while it was on the site did not militate against respondent's possession and control of the machinery. It may also be noticed that even the Appellate Deputy Commissioner, Kakinada, in the order dated November 15, 1999 in regard to assessment years 1986-87 and 1987-88 held that under the terms and conditions of the agreement there was no transfer of right to use the machinery in favour of the contractor. Although it cannot be said that the appellant was estopped from contending otherwise in regard to assessment year 1988-89, it is an additional factor and circumstance, which supports the stand of the respondent."

10. The said judgment of the Apex Court fell for consideration before the Larger Bench consisting of three Hon'ble Judges of the Apex Court in the case of **Bharat Sanchar Nigam Ltd. & Anr. vs. Union of India & Ors., reported in (2006) 145 STC 91(SC)**. The Apex Court has considered the said judgment in paragraph 76, which reads thus:

"76. In *State of Andhra Pradesh vs. Rashtriya Ispat Nigam Ltd.* (2002) 3 SCC 314, it was claimed by the sales tax authorities that the transaction by which the owner of certain machinery had made them available to the contractors was a sale. The Court rejected the submission saying that :

".... the transaction did not involve transfer of right to use the machinery in favour of contractors The effective control of the machinery even while the machinery was in use of the contractor was that of the respondent-company, the contractor was not free to make use of the machinery for the works other than the project work of the respondent.."

11. After considering the various judgments, the Apex Court has laid down as to what would constitute a transaction to come within the ambit of 'the transfer of the right to use the goods'. It will be appropriate to refer to

paragraph 98 of the judgment of the Apex Court in **Bharat Sanchar Nigam Ltd. & Anr. vs. Union of India & Ors.** (*supra*) -

“98. 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- consequently all legal consequences of such use including any permissions or licences 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 – this is the necessary concomitant of the plain language of the statute – 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.”

12. In the judgment, it has been held that to constitute a transaction for the transfer of the right to use the goods, it is necessary that there must be a consensus ad idem as to the identity of the goods. It is further necessary that the transferee should have a legal right to use the goods, all legal consequences of such use including any permissions or licences required therefor should be available to the transferee and for the period during which the transferee has such legal right, it has to be and to the exclusion of the transferor. The Apex Court held that this is concomitant to the licence to use the goods. The another condition that has been laid down is that 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. It would thus be seen that unless all the requirements are transferred, the transaction will not come within the meaning of "Transfer of the rights to use any goods".

13. Though Ms. Badheka has relied on the judgments of various High Courts and also of Tribunals, we do not find it necessary to refer to all of them. It will be sufficient to refer to some of the judgments of High Courts. In the case of **Commissioner, VAT, Trade and Taxes Department vs. International Travel House Ltd., reported in (2009) 25 VST 653 (Delhi)**, the Delhi High Court has considered as to whether the contract between the respondent/assessee and M/s. NDPL for hiring of Maruti Omni cabs amounted to transfer of right to use any goods so as to come within the definition of 'Sale' as provided under the Delhi Value Added Tax Act, 2004. After considering the terms and conditions of contract and considering the judgment of the Apex Court in the case of **Bharat Sanchar Nigam Ltd. & Anr. vs. Union of India & Ors. (supra)** has observed thus:

"12. That takes us to the question that whether the contract in question is at all a contract of sale of goods as envisaged in Article 366(29-A)(d) inasmuch as there is transfer of the right to use for whatever period by S.T. Appeal No. 10/2009 Page 14 the respondent to NDPL. In order to determine whether there is a transfer of the right to use goods so as to make contracts one of sale under Article 366(29-A)(d) on the point of law both the parties are unanimous that the test is of effective control and possession with respect to the goods. In this behalf, both the parties have relied upon the tests of sale as specified by Dr.

A.R. Lakshmanan, J. Appearing in paragraph 97 of the BSNL"s case which reads as under:-

"97. 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--consequently all legal consequences of such use including any permissions or licences required therefore 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--this is the necessary concomitant of the plain language of the statute 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."

Sub-paras (b) and (c) of para 97 are important with reference to the facts of the case to determine as to whether or not there is a sale by virtue of transfer of right to use goods as envisaged in Article 366(29-A)(d). The S.T. Appeal No. 10/2009 Page 15 admitted position which emerges is that the transferee, namely NDPL, has not been made available the legal consequence of the legal right to use the goods viz. the permissions and licences with respect to the goods. In the present case, the permissions and licences with respect to the Cabs are not available to the transferee and remained in control and possession of the respondent. It is the Driver of the vehicle who keeps in his custody and control the permissions and licences with respect to the Maruti Omni Cabs or the said permissions and licences remained in possession of the respondent. These are never transferred to M/s. NDPL. It, therefore, cannot be said that there is a sale of goods by transfer of right to use goods inasmuch a necessary ingredient of the sale being the transfer of right to use the goods is absent, namely, ingredient as stated in para 97(c) of the BSNL"s case. The judgments which were cited during the

course of arguments, namely, State of A.P. v. Rashtriya Ispat Nigam Ltd., (2002) 3 SCC 314 and Aggarwal Bros. V. State of Haryana, (1999) 9 SCC 182 have been duly explained by the Supreme Court in BSNL"s case. The crucial factor in this regard differentiating the two cases was the intention to transfer the right to use. Whereas in the case of Rashtriya Ispat Nigam Ltd., there was no intention to transfer the right to use, in the case of Aggarwal Bros. it was found that there was an intention to transfer the right to use. In the present case, the judgment of Aggarwal Bros. does S.T. Appeal No. 10/2009 Page 16 not help the appellant inasmuch as there is no intention to transfer the right to use the goods because the licences and permissions with respect to the goods, namely, the Maruti Omni Cabs remained always in the effective control and possession of the respondent and not NDPL. "

It can thus be seen that in the said judgment, the Court took a view that since the permissions and licences with respect to the cabs are not available to the transferee and the cabs remained in control and possession of the respondent/assessee, there was no element of transfer of right to use the goods.

14. Again, the Gauhati High Court in the case of **Indian Oil Corporation Ltd. vs. Commissioner of Taxes, Assam & Ors., reported in (2009) 22 VST 70** had an occasion to consider a similar provision under the Assam General Sales Tax Act. In the said case, the petitioner-company, which was engaged in the business of sale and supply of petroleum products inside as well as outside the State of Assam, had hired trucks for delivery of petroleum to its dealers and in the course of its business, it entered into agreement with contractors as regards hiring of

trucks/tankers. Notice was issued to the petitioner directing to deduct tax under section 27(a) of the Assam General Sales Tax Act on payment of hire charges to the contractors who were owners of the vehicles hired by the petitioner-company. The petitioner was also issued subsequent communication and also show cause notice. The petitioner approached the Assam High Court challenging the jurisdiction to issue notice. The petition was resisted on the ground that act of hiring vehicles by the petitioner-company amounted to transfer of the right to constitute the lease and, therefore, not eligible to tax under the Act. It was contended that the transfer of right to use the vehicle constitute "sale" within the definition of the ambit of "sale" as embodied in section 2(33) of the Assam Act. After considering the various judgments of the Apex Court, the Division Bench observed that:

"It is, therefore, clear that in order to constitute a transfer of right to use goods, there must be parting with the possession of the goods for the limited period of its use in favour of the lessee by the lessor. The effective control of the goods must not remain with the owner, but must stand transferred to the lessee for the use by the latter at his will and it is this transfer of the effective control of the goods, which attracts sales tax."

15. After taking into consideration the various clauses of contract entered between the assessee and the owners of the vehicles, the Division Bench held that there was no transfer of right to use so as to term the said as within the meaning the said Act to make it taxable. The Court, therefore, found that show cause notice issued was without

jurisdiction and as such, allowed the petition, setting aside the show cause notice.

16. As already discussed hereinabove, the learned Tribunal has extensively reproduced the terms of contract which are also been reproduced by us hereinabove. Perusal of the terms of contract would reveal that as per the contract, the driver, cleaner, diesel and oil was to be provided by the respondent. So also, transportation of accessories was to be done by the respondent. It can further be seen that there is no provision in the contract that the legal consequences such as permissions or licences were to be transferred to the transferee. The ultimate control over the crane retained with the respondent. We find that the learned Tribunal, applying the judgment of Apex Court, has rightly construed that the transaction which were entered into by the respondent with Offshore Hook Up & Construction Services (I) Pvt. Ltd. would not fall within the meaning of Lease Act and the respondent was not a dealer within the meaning of definition of Section 2(4) of the Lease Act.

17. In so far as the reliance placed by the learned counsel appearing on behalf of the respondent on the judgment of the Division Bench of Punjab and Haryana High Court in the case of **Harbans Lal & Anr. vs. State of Haryana, reported in (1993) 88 STC 357** is concerned, the said judgment

is prior to the judgment of the Apex Court in the case of **State of Andhra Pradesh & Anr. (supra)** and so also the judgment of a Bench consisting of three Hon'ble Judges of Apex Court in the case of **Bharat Sanchar Nigam Ltd. & Anr. vs. Union of India & Ors. (supra)**. With great respect to the view taken by the Punjab and Haryana High Court, we are bound by the view taken by the Apex Court and as such, will be required to follow the law laid down therein.

18. In the result, the Reference is answered as under:

- (i) The learned Tribunal has correctly held that the respondent is not a dealer within the meaning of the term as defined under section 2(4) of the Maharashtra Sales on transfer of right to use any goods for any purpose Act, 1985.
- (ii) Consequently, the transaction mentioned in the said question will have to be treated as not a sale as defined under section 2(10) of the Lease Act.

(A.S. GADKARI, J.)

(B.R. GAVAI, J.)