IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 29.08.2017

CORAM

THE HONOURABLE MR.JUSTICE R. SUBRAMANIAN

A.S.No.413 of 2011
and
M.P.No.1/2011

1.Union of India,
Rep.by its Chief Secretary,
Govt.of Puducherry,
Puducherry.

2.The Secretary,
Department of Finance & Taxation,
Govt. of Puducherry,
Puducherry.

3.The Commissioner,
Commercial Tax Officer,
100 Feet Road, Ellapillaichavady,
Puducherry-605 005.

4.The Commercial Tax Officer,
Govt.of Puducherry,
Room No.24, Commercial Complex,
100 Feet Road, Ellapillaichavady,
Puducherry-605 005. ..Appellants/Defendants

..Vs..

Bharat Sanchar Nigam Limited,
A Govt.of India Enterprise,
Rep.by its General Manager,
Puducherry. .. Respondent/Plaintiff

Prayer:- Appeal filed Under Section 96 of Civil Procedure Code against the Judgement and Decree dated 26.10.2010 made in O.S.No.67/2007 on the file of the Court of the II Additional District Judge at Puducherry.

For Appellants : Mr.J.Kumaran

For Respondent : Mr.Prithvi Chopda

JUDGEMENT

This appeal is by the defendants in O.S.No.67/2007 on the file of the II Additional District Judge at Purudhcerry.

2.The said suit was filed by the plaintiff/respondent herein viz., Bharat Sanchar Nigam Limited seeking refund of a sum of Rs.5,35,643/- [Rupees Five Lakhs Thirty Five thousand Six Hundred and Forty Three Only] with subsequent interest at 12% p.a., representing the Sales Tax collected by the appellants for the sale of SIM Cards and activation charges for the mobile phone services provided by them. According to the plaintiff, they are a Government organisation engaged in providing mobile phone services. In the course of its business, it provides SIM Cards to its customers who avail its Telecommunication Services and also collect activation charges from them. While so, the appellants demanded Sales Tax on the value of the SIM Cards and activation charges. Though, according to the respondent/plaintiff, such tax is not payable by them as per the judgement of the Hon'ble Supreme Court. However, they had paid the tax under protest before pronouncement of the judgement by the Hon'ble Supreme Court. Finally, the Hon'ble Supreme Court in Bharat Sanchar Nigam Limited and Another -Vs- Union of India and Others reported in 2006 3 SCC 1 had held that no Sales Tax is payable for sale of SIM Cards or activation charges collected by the respondent/plaintiff. In view of the said judgement, the plaintiff had made several requests to the defendants seeking refund of the tax collected. Since the defendants did not come forward to refund the tax, the plaintiff had filed the above suit for recovery of a sum of Rs.5,35,643/- [Rupees Five Lakhs Thirty Five thousand Six Hundred and Forty Three Only] which includes interest on the sum of Rs.3,97,050/- [Rupees Three Lakhs Ninety Seven thousand and Fifty Only] paid as Sales Tax for the period from 2002 to 2005.

3.The suit was resisted by the defendants/appellants contending that the suit is not maintainable in view of Section 55 of Pondicherry General Sales Tax Act, 1967 and Section 69 of the Puducherry Value Added Tax Act, 2007. It was further contended that the Supreme Court had not finally held that the sale of SIM Cards would not attract Sales Tax. It had only left it open to be decided by the concerned authority. Therefore, according to the defendants, they have the right to assess and determine whether the sale of SIM Cards would attract Sales Tax.

4.It was also further contended that a sum of Rs.3,97,050/- [Rupees Three Lakhs Ninety Seven thousand and Fifty Only] represents not only the Sales Tax payable on the sale of SIM Cards or the activation charges collected, but also sale of other materials. Therefore, the said factual issue can only be decided by the authorised Assessing Officers empowered to decide the said question under the Pondicherry General Sales Tax Act, 1967.

5.On the above pleadings, the learned trial Judge framed the following issues:

1.Whether the plaintiff is entitled for suit claim?

2.To what relief the parties are entitled ?

6.P.W-1-Joint Telecommunication Officer was examined on behalf of the plaintiff and Ex.A-1 to Ex.A-23 were marked on the side of the plaintiff. D.W-1 viz., Commercial Tax Officer was examined on the side of the defendants and Ex.B-1 was marked.

7.On consideration of the oral and documentary evidence, the learned trial Judge concluded that the suit is not barred under the provision of either Section 55 of the Pondicherry General Sales Tax, 1967 or under Section 69 of the Puducherry Value Added Tax Act, 2007. The Hon'ble Supreme Court in Bharat Sanchar Nigam Limited and Another ..V.. Union of India and Others reported in 2006 3 SCC 1 had infact concluded that the sale of SIM Cards does not attract Sales Tax as it is only a service. The learned trial Judge took note of the fact that there is no dispute regarding the quantum of Rs.3,97,050/- [Rupees Three Lakhs Ninety Seven thousand and Fifty Only] was paid as Sales Tax on the value of the SIM Cards sold and the activation charges. Upon the above conclusion, the learned trial Judge granted a decree as prayed for. Aggrieved, the defendants are on appeal.

8.I have heard Mr.J.Kumaran, learned Government Advocate, Puducherry appearing for the appellants, and Mr.Prithvi Chopda, learned counsel appearing for the respondent.

9.Mr.J.Kumaran, learned Government Advocate for the appellants would contend that the trial Court erred in concluding that the Hon'ble Supreme Court has finally laid down that no Sales Tax is payable on the value of the SIM Cards and the activation charges. Referring to Para 87 of the judgement in Bharat Sanchar Nigam Limited and Another -Vs- Union of India and Others reported in 2006 3 SCC 1, the learned counsel would contend that the Hon'ble Supreme Court has only laid down the guidelines and directed the Sales Tax Authorities to decide the question on the basis of the observations made therein. Therefore, according to the learned counsel, it is for the Sales Tax Authorities to decide as to whether the production of SIM Cards by the respondent would amount to sales or service.

10.Per contra, Mr.Prithvi Chopda, learned counsel appearing for the respondent would contend that the Hon'ble Supreme Court categorically pronounced that if it is the sale of SIM Cards and activation charges they are only in the nature of service provided by the respondent, and it would not amount to sale. Referring to Para 84 of the same judgement, the learned counsel would contend that provision of SIM Cards has been held to be a service. The learned counsel would also lay a considerable stress on the following observation of the Hon'ble Supreme Court in Para 84 .

> "...................But having said that, it is sufficient for the purposes of this judgement to find, as we do, that a telephone service is nothing but a service. There is no sales element apart from the obvious one relating to the handset, if any. That and any other accessory supplied by the service provider in our opinion remain to be taxed under the State sales tax laws. We have given the reasons earlier why we have reached this conclusion".

11.In view of the above categorical pronouncement of the Hon'ble Supreme Court, Mr.Prithvi Chopda would contend that there is nothing to be decided by the Assessing Officer under the respective State Sales Tax Laws. He would also rely upon Para 92 of the judgement, where the questions formulated by the Hon'ble Supreme Court have been answered as follows:-

> "92.For the reasons aforesaid, we answer the questions formulated by us earlier in the following manner:
>
> (A) Goods do not include electromagnetic waves or radio frequencies for the purpose of Article 366 (29-A)(d). The goods in telecommunication are limited to the handsets supplied by the service provider. As far as the SIM cards are concerned, the issue is left for determination by the assessing authorities.
>
> (B) There may be a transfer of right to use goods as defined in answer to the previous question by giving a telephone connection.
>
> (C) The nature of the transaction involved in providing the telephone

connection may be a composite contract of service and sale. It is possible for the State to tax the sale element provided there is a discernible sale and only to the extent relatable to such sale.

(D) The issue is left unanswered.

(E) The 'aspect theory' would not apply to enable the value of the services to be included in the sale of goods or the price of goods in the value of the service."

12.In the light of the rival submissions, the following point arise for determination in this appeal:-

1.Whether the trial Court was right in concluding that the provision of SIM Cards and collection of activation charges was only a service and would not attract Sales tax under the Pondicherry General Sales Tax, 1967 ?

13.There is not much of dispute on the facts. The plaintiff is averred in the plaint that a sum of Rs.3,97,050/- [Rupees Three Lakhs Ninety Seven Thousand and Fifty Only] has been paid as Sales Tax on the value of the SIM Cards and the activation charges collected during the years 2002 to 2005. There is no dispute on the quantum as well as the fact that the said amount was collected as Sales Tax towards the value of the SIM Cards and activation charges. In fact, in Ex.A-3, the plaintiff had very clearly stated that a sum of Rs.3,97,050/- [Rupees Three Lakhs Ninety Seven Thousand and Fifty Only] represents the total Sales Tax paid for the sale of SIM Cards and activation charges for the period from 01.04.2003 to 20.08.2005 under protest. This claim of the plaintiff has never been disputed or denied by the defendants/appellants. In view of the same, I do not think there is any dispute as to whether a sum of Rs.3,97,050/- [Rupees Three Lakhs Ninety Seven Thousand and Fifty Only] claimed by the plaintiff as Sales Tax paid on the value of the SIM Cards and activation charges.

14.Mr.Prithvi Chopda, learned counsel for the respondent would apart from relying upon the judgement of the Hon'ble Supreme Court in Bharat Sanchar Nigam Limited and Another .Vs. Union of India and Others reported in 2006 3 SCC 1 would also invite my attention to the judgement of the Hon'ble Supreme Court in Idea Mobile Communication Limited .Vs. Commissioner of Central Excise & Customs., Cochin reported in 2011 [23] S.T.R 433 wherein also a similar claim for payment of Sales Tax for the SIM Cards provided by the Idea Mobile Communication Limited was considered and had finally, following the judgement of the Hon'ble Supreme Court reported in 2006 3

SCC 1, it was concluded that no Sales Tax can be levied on the value of the SIM Cards and activation charges. The same view has been expressed by the Andhra Pradesh High Court in State of Andhra Pradesh .Vs. Bharat Sanchar Nigam Ltd., reported in 2012 (25) S.T.R. 321 . In view of the categorical pronouncement by the Hon'ble Supreme Court in "para 92" of the judgement in Bharat Sanchar Nigam Limited and Another ..Vs.. Union of India and Others reported in 2006 3 SCC 1. I am of the considered opinion, the question as to whether the State can levy Sales Tax on the value of the SIM Cards and activation charges collected by the respondent/plaintiff has been finally decided by the Hon'ble Supreme Court holding that the same is a kind of service, and there is no element of sale involved. Hence, I do not see any merit in the appeal and the point framed is answered against the appellants.

15.However, it is found that the plaintiff had claimed a sum of Rs.5,35,643/- [Rupees Five Lakhs Thirty Five Thousand Six Hundred and Forty Three Only] in the plaint. The said amount includes interest at 12% on the actual tax paid up to the date of filing of the suit viz., 01.11.2007.

16.The trial Court while decreeing the suit has concluded in paragraph 19 as follows:

> "19.In the result, the suit is decreed with costs and the defendants are directed to pay a sum of Rs.5,35,643/-[Rupees Five Lakhs Thirty Five Thousand Six Hundred and Forty Three Only] jointly and severally with subsequent interest at the rate of 6% p.a., on the principal amount of Rs.5,35,643/- from the date of filing of the suit till the date of realization".

17.The sum of Rs.5,35,643/- [Rupees Five Lakhs Thirty Five Thousand Six Hundred and Forty Three Only] claimed by the plaintiff includes the interest up to 01.11.2007. The suit has been filed on 24.08.2007. Therefore, the trial Court was in error in granting interest on Rs.5,35,643/- [Rupees Five Lakhs Thirty Five Thousand Six Hundred and Forty Three Only] from the date of the suit till date of realization. Actually interest should have been granted, subsequent to the suit only on the sum of principal amount viz., Rs.3,97,050 [Rupees Three Lakhs Ninety Seven thousand Fifty Only]. Therefore, the judgement of the trial Court require modification on the question of interest alone.

18.In view of the above conclusion the decree of the Trial Court is modified as follows:-

The suit is decreed with costs. The defendants are directed to pay a sum of Rs.5,35,643/- [Rupees Five Lakhs Thirty Five Thousand Six Hundred and Forty Three Only] jointly and severally with subsequent interest at 6% p.a., on the principal amount of Rs.3,97,050 [Rupees Three Lakhs Ninety Seven thousand Fifty Only] from the date of filing of the suit till date of realisation.

19.In fine, the appeal is partly allowed and the judgement and decree of the trial Court are modified as above. The appellants shall also pay costs on the appeal to the respondents. Consequently, the connected Miscellaneous Petition is closed.

MEMORANDUM OF COSTS

AS NO.413 OF 2011

Respondent(Plaintiff) Costs

	Rs. p
Stamp for Vakalatnam	10.00
Advocate's fee [certificate not received]	
Translation and Printing/Typing charges	162.00
To be paid to the Appellants/Defendants	

	172.00
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to the Respondents(Plaintiff)

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

KP

To
1. II Additional District Court,
   II Additional District Judge,
   Puducherry.

2. TheChief Secretary, Unior of India,
   Govt.of Puducherry,
   Puducherry.

3.Bharat Sanchar Nigam Limited,
A Govt.of India Enterprise,
Rep.by its General Manager,
Puducherry.

4.The Commissioner,
Commercial Tax Officer,
100 Feet Road, Ellapillaichavady,
Puducherry-605 005.

5.The Commercial Tax Officer,
Govt.of Puducherry,
Room No.24, Commercial Complex,
100 Feet Road, Ellapillaichavady,
Puducherry-605 005.

6.The Secretary,
Department of Finance & Taxation,
Govt. of Puducherry,
Puducherry.

Copy to

7.The Section Officer,
V.R.Section,
Madras.

+1cc to Mr.S.DURAIRAJ, Advocate, S.R.No. 63088
+1cc to the Government Pleader, S.R.No. 62214/17

A.S.No.413 of 2011

SR(CO)
TR(18/01/2018)