

IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN BENCH
AT JAIPUR.

D.B. Special Appeal (writ) No. 1308/2016

B.S.N.L. vs. State of Rajasthan & Ors.

D.B. Special Appeal (writ) No. 1309/2016

B.S.N.L. vs. State of Rajasthan & Ors.

D.B. Special Appeal (Writ) No. 1310/2016

B.S.N.L. vs. State of Rajasthan & Ors.

D.B. Special Appeal (writ) No. 1311/2016

B.S.N.L. vs. State of Rajasthan & Ors.

D.B. Special Appeal (Writ) No. 1312/2016

B.S.N.L. vs. State of Rajasthan & Ors.

REORDER :::: 30.09

DATE OF ORDER ::: 30.09.2016

HON'BLE MR. JUSTICE K.S. JHAVERI
HON'BLE MR. JUSTICE BANWARI LAL SHARMA

Mr. Mohan Parasaran Senior Advocate with
Mr. Jai Kishan Yogi
Mr. Sanjiv Pandey for the appellant.

1. By way of these appeals, the appellant has assailed the judgment and order of the learned single Judge whereby the learned single Judge has relegated the appellant to go before the appellate authority.

2. Learned counsel for the appellant has relied upon decision in the case of **BSNL vs. Union of India** reported in 2006 (3) SCC 1; more particularly para 61, 65, 67, 108 & 116 which are reproduced as under:-

"61. We will proceed on the basis that incorporeal rights may be goods for the purposes of levying sales tax. Assuming it to be so, the question is whether these electromagnetic waves can fulfill the criteria laid down in Tata consultancy for goods. In our opinion the question must be answered in the negative. Electromagnetic waves have been described in David Gilles

& Roger Marshal: Telecommunications Law : Butterworths:-

"1.14. Electromagnetic waves travel through free space from one point to another but can be channelled through wave guides which may be metallic cables, optical fibres or even simple tubes. All electromagnetic waves are susceptible to interference from one another and unrelated electrical energy can distort or destroy the information they carry. To reduce these problems they have been organised within the spectrum into bands of frequencies or wavelengths for the transmission of particular types of services and information."

65. We cannot anticipate what may be achieved by scientific and technological advances in future. No one has argued that at present electromagnetic waves are abstractable or are capable of delivery. It would, therefore, appear that an electro-magnetic wave (or radio frequency as contended by one of the counsel for the respondents), does not fulfill the parameters applied by the Supreme Court in **Tata Consultancy** for determining whether they are goods, right to use of which would be a sale for the purpose of Article 366(29-A)(d).

67. Had the learned Judges limited their observations to the telephone instruments we could have had no quarrel with the opinion stated. But they have in a subsequent portion of their judgment clarified there that a telephone connection along with all other accessories to the telephone exchange with or without instruments are goods within the meaning of Section 2(d) of the U.P. Act. The essence of the "goods" therefore, according to the learned Judges, lay in the entire system. To arrive at this conclusion, the reliance on the two cited judgments was in apposite. It was the sale and purpose of electricity which was being considered in those cases. The goods was the electrical energy. What the customers were being charged for was not the medium that was being used to transfer the electricity, but the electrical energy itself. In the case of telecommunications on the other hand, if the decision in State of U.P. v. Union of India and the respondent's submission are correct, the customers are not to be charged for what is being transferred through the medium but the use of the medium itself. Additionally, in State of A.P. v. National Thermal Power Corpn. the issue before the Constitution Bench was not whether electricity was goods for the purposes of sales tax but the suits of the sale of electricity.

108. 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.

116. 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 are 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."

3. In view of the above observations, learned counsel for the appellant contended that the assessment order passed by the authorities is in contravention of the law laid down by the Supreme Court and they ought not to have been relegated to alternative remedy being a public undertaking. The liability which is described in the appeal memo as per the assessment year comes to Rs. 27,42,91,428/- which come around 3,00,00000/- (three crores) to be deposited.

4. He has contended that in view of the decision, the assessment order is contrary to decision laid down by the Supreme Court.

5. Learned Single Judge has not entertained the writ petitions as to assessment order. Intra-court appeal has limited jurisdiction and the contention raised by the appellant *prima facie* since to be in

consonance with the provisions of law. Nonetheless exercise of powers under Article 226 against the show cause notice is different thing but learned Single Judge has declined to exercise his jurisdiction under Article 226 & 227 of Constitution of India against which these appeals have been preferred.

6. In our view, the view taken by the learned Single Judge is not probable though he could have entertained the writ petitions but even once he has exercised the power and declined to exercise discretion, it will not be appropriate for us to exercise appellate jurisdiction nevertheless, we are of the opinion that the contention raised by the appellant requires serious consideration and the assessment made is *prima facie* against the decision and observations of the Supreme Court as observed in above paragraphs.

7. The observations are made by the learned Single Judge that the appeal is filed within one month from the day of receipt of the certified copy of this order. In our opinion, the observations made are in favour of the appellant nevertheless if an application is moved for waiver of the pre-deposit, looking to the government concern, we hope that the appellate authority will consider the appeal on merits.

8. We have passed this order in absence of the respondents. If they are aggrieved by this order, they can approach this Court by review after serving copy to the counsel for the appellant.

9. The appeals are disposed off. No order as to costs.

10. The stay applications are also disposed off.

11. A copy of this judgment be placed in each file.

(Banwari Lal Sharma), J. (K.S. Jhaveri), J.

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