IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE ANTONY DOMINIC
&
THE HONOURABLE MR. JUSTICE DAMA SESHADRI NAIDU

WEDNESDAY, THE 7TH DAY OF SEPTEMBER 2016/16TH BHADRA, 1938

WP(C).No. 16670 of 2006 (H)

PETITIONER:

THE BHARAT SANCHAR NIGAM LTD.
KOTTAYAM, REPRESENTED BY ITS GENERAL MANAGER.

BY ADV. SRI.K.RAMAKUMAR, SC, BSNL

RESPONDENTS:

1. THE SECRETARY TO GOVT.
   DEPARTMENT OF LOCAL SELF GOVERNMENT,
   GOVERNMENT OF KERALA, THIRUVANANTHAPURAM.
2. THE DIRECTOR OF PANCHAYATS,
   THIRUVANANTHAPURAM.
3. THE CHEMPU GRAMA PANCHAYAT,
   REPRESENTED BY ITS SECRETARY, CHEMPU P.O.,KOTTAYAM

R, BY GOVERNMENT PLEADER SRI.MOHAMED RAFIQ
R3 BY ADV. SRI.V.G.ARUN
R3 BY ADV. SRI.T.R.HARIKUMAR
R3 BY ADV. SRI.S.RADHAKRISHNAN
R3 BY SRI.P.R HARIKUMAR SC

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 07-09-2016, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

WPC No.16670/2006

APPENDIX

PETITIONER'S EXHIBITS:

EXT.P1 TRUE COPY OF THE NOTICE ISSUED BY R3.

EXT.P2 TRUE COPY OF THE LETTER DTD.22.2.2005 ADDRESSED TO R3 BY THE PETITIONER.

EXT.P3 TRUE COPY OF THE DEMAND NOTICE DTD.30.11.2005 ISSUED BY R3.

EXT.P4 TRUE COPY OF THE COMMUNICATION DATED 13.12.2005 RECEIVED BY THE PETITIONER FROM R3.

EXT.P5 TRUE COPY OF THE DEMAND NOTICE DTD.26.12.2005 ISSUED BY R3.

EXT.P6 TRUE COPY OF THE LETTER DTD.27.1.2006 ADDRESSED TO R3 BY THE PETITIONER.

EXT.P7 TRUE COPY OF THE COMMUNICATION RECEIVED BY THE PETITIONER FROM R3.

EXT.P8 TRUE COPY OF THE LETTER DTD.24.3.2006 ADDRESSED BY THE EPTITIONER BEFORE R3.

EXT.P9 TRUE COPY OF THE LETTER DTD.15.5.2006 RECEIVED BY THE PETITIONER FROM R3.

EXT.P10. TRUE COPY OF THE RR DEMAND NOTICE DATED.15.5.2006 RECEIVED BY THE PETITIONER FROM R3.

RESPONDENT'S EXHIBITS:

EXT.R1a TRUE COPY OF THE RECEIPT NO.20 DTD.21.2.2006.

EXT.R1(b) TRUE COPY OF THE LETTER DATED NIL. ISSUED BY THE PETITIONER.

EXT.R3(a) TRUE COPY OF THE RECEIPT NO.20 IN BOOK NO. 26251 DTD.21.2.2006.

EXT.R3(b) A TRUE COPY OF THE LETTER ISSUED BY THE BSNL AND A RECEIPT.

TRUE COPY

P.S.TO JUDGE

css/

C.R.

Antony Dominic & Dama Seshadri Naidu, JJ.

WPC No.16670 of 2006

Dated this the 7th day of September, 2016

JUDGMENT

Antony Dominic, J.

Chempu Grama Panchayat issued notices to Bharat Sanchar Nigam Ltd.(BSNL for short), a Government company as defined under the Companies Act, which is engaged in providing telecom services, demanding profession tax. Thereupon BSNL has filed this writ petition for a declaration that it is not liable to pay profession tax to any one of the Panchayats in the State of Kerala merely because its telephone exchanges are functioning within the Panchayat areas. When the writ petition came up for consideration, the counsel for the petitioner placed reliance on the judgment of this Court in **Indira** v **Kunhimangalam Grama Panchayat** (2012 (4) KLT 914) and contended that since BSNL is not transacting any business as defined in Rule 2(c) of the Kerala Panchayat Raj (Profession Tax) Rules, 1996 (hereinafter referred to as the 'Rules' for short), it is not liable to be taxed.

2. The learned Single Judge doubted its correctness of the judgment in Indira (supra) and order dated 28.6.2016 was passed referring the writ petition to be heard by a Division Bench. It is, accordingly that this case is listed before us.

3. We heard the learned senior counsel for the petitioner, learned Senior Government Pleader appearing for respondents 1 and 2 and learned standing counsel appearing for the third respondent Panchayat.

4. Before we deal with the case of BSNL, we shall proceed to answer the reference made by the learned single judge with regard to the correctness of the judgment in Indira's case. Indira (supra) was a case in which the Kunhimangalam Grama Panchayat had filed a complaint before the JFCM, Payyannur alleging that the Accounts Officer, BSNL had failed to pay profession tax for the assessment year 2006-2007 which was assessed taking into account the total business turn over of the two telephone exchanges situated within the limits of that Grama Panchayat. BSNL contended that it is a company owned by the Government of India, providing basic telephone services, mobile service connection, internet connection and other allied services through its telephone exchanges and towers constructed by it. It

was also contended that the BSNL was not doing any business but only rendered service to its subscribers and that it was not engaged in buying, making, manufacturing, exporting or importing in the telephone exchanges within the jurisdiction of the Panchayat. According to BSNL for the services rendered, it was only collecting service charges and that such activities carried on by it were not covered by the provisions of the rules attracting levy of profession tax.

5. Dealing with these contentions, and referring to the provisions of the Rules and the judgment of the Apex Court in **Bharat Sanchar Nigam Ltd. and another** v **Union of India and others** (2006)3 SCC 1), a learned Single Judge of this Court held thus:

> “If it is a case where the SIM Cards and other telephone apparatus or goods are sold from the Telephone Exchange itself and if BSNL solicits the citizens to have BSNL connections or is otherwise dealing with goods, then certainly it can be said that the BSNL 'transacts business' within the meaning of Rule 2(c), referred to earlier. Therefore, the prime question would be whether in a particular Telephone Exchange SIM Cards and/or other goods are sold, in which case it can be held that the BSNL transacts business. If so, they would be liable to pay Profession Tax as enjoined under S.204 of the Kerala Panchayat Raj Act, 1994. That would actually be a question of fact which has to be decided depending on the materials produced before the Magistrate at the trial. Therefore, whether, in the Telephone Exchanges in

> Kunhimangalam Grama Panchayat, the SIM Cards or other goods are being sold or dealt with are to be gone into at the time of trial. As such, I find no reason to quash the proceedings invoking S.482 of Cr.P.C.

6. A reading of paragraph-13 of the judgment shows that the principle laid down by this Court is that only in cases where BSNL sells SIM cards and other telephone apparatus or goods from the Telephone exchanges itself or if BSNL solicits citizens to have BSNL connections or is otherwise dealing with goods, then only BSNL can be said to 'transacts business' within the meaning of Rule 2(c), attracting the levy of profession tax.

7. Section 204 of the Kerala Panchayat Raj Act provides for levy of profession tax. As per Section 204(1)(i), profession tax, subject to such rules as may be prescribed, shall be levied every half year in every village panchayat area as per sub section (1), on every company which transacts business in such Panchayat area for not less than sixty days in the aggregate in that half year. This provision reads thus:

> **204. Profession Tax**. — (1) The profession tax shall, subject to such rules as may be prescribed be levied every half year in every Village Panchayat area on, —
>
> (i) every company which transacts business in such Panchayat area for not less than sixty days in the aggregate in that half year ;

8. In exercise of its power under Section 204 read with Section 254 of the Kerala Panchayat Raj Act, the Government of Kerala have made the Rules. Rule 2(c) which defines the expression 'transacts business' and Rule 4, a deeming provision, being relevant, are extracted for reference;

> 2(c) 'Transacts Business' means the doing of acts or business of whatever nature whether isolated or not, such as soliciting, obtaining or transmitting orders or buying, making, manufacturing, exporting, importing, receiving, transmitting or otherwise dealing with goods.
>
> 4. **Transaction of business and exercise of a profession**.- A company shall be deemed to have transacted business and a person shall be deemed to have exercised a profession, art or calling or held an appointment within a Village Panchayat area if such company or person or persons has an office or place of employment within such Village Panchayat area.

9. A reading of 2(c) shows that the expression 'transacts business' means the doing of acts or business of whatever nature whether isolated or not such as soliciting, obtaining or transmitting orders or buying, making, manufacturing, exporting, importing, receiving, transmitting or otherwise dealing with goods. Reading of this provision itself show that doing of acts or business of whatever nature whether isolated or not itself would come within the scope of the expression

'transacts business'. Even apart from that, in view of Rule 4, the vires of which is not under challenge, a company, like BSNL, shall be deemed to have transacted business within a panchayat area, if that company has an office, within the panchayat area.

10. The argument that since the BSNL is not soliciting, obtaining or transmitting orders or buying, making, manufacturing, exporting, importing, receiving, transmitting or otherwise dealing with goods and that therefore, its activities do not qualify to attract the expression “transacts business”, according to us, is only to be rejected for the reason that the phrase 'such as', as is well known, is used for the purpose of introducing more examples of the same type and the usage of that expression, does not in any manner suggest that the definition is exhaustive. Therefore, for the mere reason that certain examples of activities have been stated in Rule 2(c), we cannot accept the contention that Rule 2(c) is an exhaustive one. Even otherwise, having regard to the provisions of Rule-4, a deeming provision, BSNL, being a company which is maintaining telephone exchanges within the jurisdiction of the Panchayats in the State shall be deemed to have transacted business for the purposes of section 204 of the Kerala Panchayat Raj Act.

Therefore, on the interpretation of the Rule itself, we cannot accept the view taken in Indira's case that unless the BSNL is carrying on any one of the activities mentioned in Rule 2(c), the provisions of Section 204 are not attracted.

11. Even apart from this, we find that the language of Rule 125 of the Travancore Cochin Panchayat Rules, 1951 framed under the Travancore-Cochin Panchayat Act are exactly similar to the language of Rule 4. The said rule read as under:

> Rule 125. "A company or person shall be deemed to have transacted business and a person shall be deemed to have exercised a profession, or, calling or held an appointment within a Panchayat area if such company or person has an office or place of employment within such Panchayat area".

12. In **Verandarapally Panchayat** v **Cochin Malabar Estates Ltd.** (AIR 1967 Kerala 175), it was contended before a Division Bench of this Court that since the sale or purchase of rubber was not effected in the office of the petitioner therein, its activities did not qualify to be transacting of business as provided in Rule 123 of the Travancore-Cochin Panchayat Rules, 1951, the language of which is similar to Section 204 of the Kerala Panchayat Raj Act. Relying on Rule 125 (supra) the contention was repelled by this Court holding thus:

"Rule 125 of the Panchayat Rules is a deeming provision

> and when it is proved that a company has an office within a Panchayat area, a company shall be deemed to have transacted business. It is not necessary to find out the nature of the business that is transacted in the office in the Panchayat area. In the case before us, the plaintiff did not contend that they have no office in the Panchayat area, their only contention was that in that office no transactions of sales or purchases are concluded. In our view, this is absolutely irrelevant to satisfy Rule 125 of the Travancore Panchayat Rules.

13. Though this judgment is a complete answer to the case of the petitioner, the judgment in Indira's case (supra) was rendered without noticing the Division Bench judgment in **Varandarapally Panchayat** v **Cochin Malabar Estates Ltd.** (supra). Therefore, Indira's case was decided by the learned single judge without referring to the binding precedent in Varandarappally Panchayat's case (supra) and is per incuriam.

14. There is yet another reason for us to disagree with the view taken in Indira's case. In Indira's case, the learned judge has placed reliance on the principles laid down in the judgment in **BSNL** v **Union of India** (2006)3 SCC page 1). The principal question which arose for decision in that case was regarding the nature of transaction by which mobile phone connections were enjoyed, whether it is sale or service or both. In the above background, the Apex Court framed the following

issues.

> (A) What are "goods in telecommunication for the purposes of Article 366(29-A(d)?
>
> (B) Is there any transfer of any right to use any goods by providing access or telephone connection by the telephone service provider to a subscriber?
>
> (C) Is the nature of the transaction involved in providing telephone connection a composite contract of service and sale? If so, is it possible for the States to tax the sale element?
>
> (D) If the providing of a telephone connection involves sale, is such sale an inter-State one?
>
> (E) Would the "aspect theory" be applicable to the transaction enabling the States to levy sales tax on the same transaction in respect of which the Union Government levies service tax?

15. The aforesaid issues were considered at length and were answered in paragraph-92 of the judgment thus:

> 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."

From the issues that arose in the case itself, it is obvious that the issues raised and answered by the Apex Court are totally unrelated to those which were relevant in Indira's case and therefore, the learned single judge erred in placing reliance on the principles laid down in BSNL case.

16. For all the aforesaid reasons, we are satisfied that the judgment in **Indira v Kunhimangalam Grama Panchayat** (2012(4) KLT 914) does not lay down the law correctly and is therefore overruled.

17. Turning now to the facts of the case, admittedly, BSNL, the petitioner herein, a Government company, is maintaining telephone exchanges within the jurisdiction of the various panchayats in the rate. Therefore, irrespective of whether its activities come within any one of those enumerated in 2(c) of the Rules or not, in view of the deeming provision contained in Rule-4 of the Rules, BSNL shall be deemed to

transact business attracting levy of tax under Section 204 of the Kerala Panchayat Raj Act. Therefore, the contention that it is not transacting any business and therefore, is not liable for profession tax under Section 204 of the Kerala Panchayat Raj Act is plainly untenable.

Therefore, the writ petition is only to be dismissed and we do so.

sd/- Antony Dominic, Judge

sd/-Dama Seshadri Naidu, Judge

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P.S.TO JUDGE