

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 3358 of 2016

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE M.R. SHAH

Sd/-

and

HONOURABLE MR.JUSTICE B.N. KARIA

Sd/-

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	Yes
2	To be referred to the Reporter or not ?	Yes
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

INDUS TOWERS LIMITED

Versus

STATE OF GUJARAT

Appearance:

MR VENKATRAMAN, SR. ADVOCATE with MR NITIN K MEHTA(3286) with MR ANURAG SOAN for the petitioner(s) No. 1,2

MR KAMAL TRIVEDI, ADVOCATE GENERAL with MS SANGITA VISHEN, ASSISTANT GOVERNMENT PLEADER(1) for the RESPONDENT(s) No. 1,4

MR ANKIT SHAH(6371) for the RESPONDENT(s) No. 3,5

NOTICE SERVED BY DS(5) for the RESPONDENT(s) No. 2

CORAM: HONOURABLE MR.JUSTICE M.R. SHAH

and

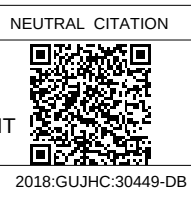
HONOURABLE MR.JUSTICE B.N. KARIA

Date : 06/08/2018

CAV JUDGMENT

(PER : HONOURABLE MR.JUSTICE M.R. SHAH)

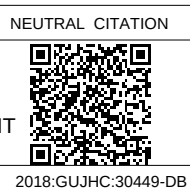
[1.0] By way of this petition under Article 226 of the Constitution of India, the petitioner has prayed for an appropriate writ, direction and order to quash and set aside the impugned show-cause notice issued by the respondent No.3 – Assistant Commissioner of Commercial Tax (3) by



which it is alleged that upon amendment of Clause 2.1.1 of the Master Service Agreement (hereinafter referred to as “MSA”) entered into between the petitioner and various Telecom Operators across Gujarat, the amount of service income received does not remain to be towards providing of the Passive Infrastructure Service and the petitioner is asked to submit the evidence and reasons as to why the amount received by the petitioner should not be considered as the amount of consideration received by the petitioner towards the transfer of right of using petitioners’ goods and as to why tax, interest and penalty under the Gujarat Value Added Tax Act, 2003 (hereinafter referred to as “GVAT Act”) be not imposed on the petitioners. Thus, according to the Department, the gross receipts of the petitioner from providing the Passive Infrastructure Services in Gujarat is subject to VAT under the GVAT Act.

[2.0] The facts leading to the present Special Civil Application and the case on behalf of the petitioners so pleaded in the petition in nut-shell are as under:

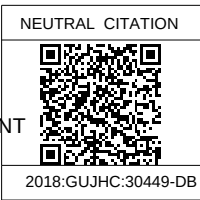
[2.1] That the Passive Infrastructure Assets of Bharti Infratel Limited (hereinafter referred to as “BIL”) were transferred to Bharti Infratel Ventures Limited (hereinafter referred to as “BIVL”) by virtue of scheme of arrangement as approved by the High Court of Delhi vide its order dated 29.03.2011. That the demerger scheme was effective from 01.01.2009. Further, the Passive Infrastructure Assets of Vodafone Essar Gujarat Limited (hereinafter referred to as “VEGL”), now known as Vodafone West Limited (hereinafter referred to as “VWL”) were transferred to Vodafone Essar Infrastructure Limited (hereinafter referred to as “VEIL”) now known as Vodafone Infrastructure Limited (hereinafter referred to as “VIL”), by virtue of the scheme of



arrangement as approved by the High Court of Gujarat vide its order passed in August, 2012. The demerger scheme was effected from 01.04.2009. The Passive Infrastructure Assets of Idea Cellular Limited (hereinafter referred to as “ICL”) were transferred to Idea Cellular Tower Infrastructure Limited (hereinafter referred to as “ICTIL”) by virtue of scheme of arrangement as approved by the High Court of Delhi vide its order dated 03.08.2009. That the said demerger scheme was effective from 01.01.2009. It appears that subsequently, another scheme of arrangement was approved by the High Court of Delhi vide order dated 18.04.2013. The appointed date for such amalgamation was 01.04.2009. According to the petitioners, as per the order dated 18.04.2013, following things happened.

- “1. BVIL merged with Indus Towers by virtue of Scheme of Arrangement between the said companies w.e.f. 01.04.2009.
2. VEIL/VIL also merged with Indus Towers by virtue of Scheme of Arrangement between the said companies w.e.f. 01.04.2009.
3. Even “ICTIL” merged with Indus Towers by virtue of Scheme of Arrangement between the said companies w.e.f. 01.04.2009.”

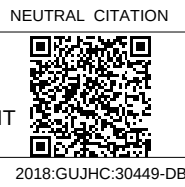
[2.2] According to the petitioners in accordance with the Scheme of Arrangement between BIVL, VEIL/VIL and ICTIL on one hand and the Indus on the other hand, it was agreed that all the assets of the transferor Company whether tangible or intangible in nature, including, actionable claims sundry debtors, receivables, bills credits, loans and advances, shall on and from the appointed date, stand transferred to, and vested in, the transferee company. According to the petitioners by virtue of the High Court approval of the Scheme of Arrangement w.e.f. the appointed date of merger – 01.04.2009, BIVL, VEIL/VIL and ICTIL



ceased to have an independent corporate personality of their own as they got merged into Indus Towers Limited (hereinafter referred to as “ITL”).

[2.3] It is the case on behalf of the petitioners that the petitioner is engaged in providing passive telecommunication infrastructure support services of various telecom operators on a non-exclusive basis for which the petitioner has obtained an IP1 registration from the Department of Telecommunication, Ministry of Communication and Information Technology. According to the petitioner when the telecom operators were at their nascent stage, every telecom operator had to create its own passive infrastructure to deliver telecom services to various subscribers. According to the petitioner it was realized over a period of time that the services arising out of the passive telecommunication infrastructure need not be limited to its use by single telecom operator and therefore, it was found that the passive telecommunication infrastructure, instead of being owned and used by a single telecom operator, can be effectively used by two to four telecom operators simultaneously. It is submitted that therefore, the said concept gave birth to a new type of service in the field of telecommunication services i.e. passive infrastructure services. It is submitted that therefore with the aforesaid object telecom operators as per the outsourcing these services to such service providers including the petitioner.

[2.4] It is the case on behalf of the petitioners that the transaction in question i.e. the revenue under the MSA is governed completely by Finance Act, 1994 and is liable to service tax. That the petitioner has been remitted service tax on the entire transaction to the respondent No.2 – Union of India. Therefore, according to the petitioner the transaction in question thus has already suffered service tax in the hands



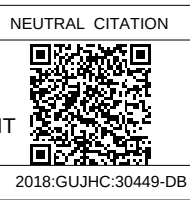
of the the respondent No.2 – Union of India. It is the case on behalf of the petitioners that notwithstanding that Union Taxes are being levied and paid on the transaction in question, VAT authorities are seeking to impose VAT under the GVAT Act on the very same consideration, resulting thus into overlapping dual levy which is clearly prohibited in light of the decision of the Hon’ble Supreme Court in the case of **Bharat Sanchar Nigam Ltd. vs. Union of India** reported in (2006) 145 STC 91 and in the case of **Imagic Creative (P) Ltd. vs. Commissioner of Commercial Tax** reported in 2008(9) S.T.R. 337 (S.C.).

[2.5] It is the case on behalf of the petitioners that the petitioner submitted an application dated 18.09.2007 under Section 80 of the GVAT Act for determination of the disputed questions under the GVAT Act read with the corresponding Rules. According to the petitioners the petitioner raised the following questions for determination.

“(i) Whether in the facts and circumstances the provision of Passive Infrastructure Services by the Applicant to Sharing Operators would tantamount to “transfer of right to use goods” as per Section 2(23) of the Gujarat Value Added Tax Act, 2003 (GVAT Act and therefore become liable to tax under the GVAT Act?

(ii) If the answer to the above is in the affirmative, then how should the sale price as per section 2(24) under GVAT Act be determined and on what basis for the purpose of discharging the liability under GVAT Act?”

According to the petitioners, the said application was decided in favour of the petitioners after accepting the contentions of the assessee vide order dated 29.09.2012. In support of the said submission the petitioners have placed reliance on the decision of the Division Bench of



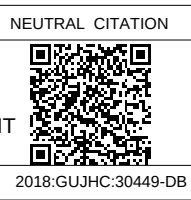
this Court in the case of Nestle India Limited vs. Deputy Commissioner of Commercial Tax & Anr. rendered in Special Civil Application No.15842/2012 and other allied petitions.

[2.6] It is the case on behalf of the petitioners that despite the above, vide the impugned show-cause notice the respondent No.3 has alleged that upon the amendment of Clause 2.1.1 of the MSA entered into between the petitioner and various Telecom Operators across Gujarat, the amount of service income received does not remain to be towards providing of the Passive Infrastructure Service and the petitioner is asked to submit the evidence and reasons as to why the amount received by the petitioner should not be considered as the amount of consideration received by the petitioner towards the transfer of right of using petitioners' goods and as to why tax, interest and penalty under the GVAT Act be not imposed on the petitioners. Therefore, it has been alleged that by the respondent No.3 that the gross receipts of the petitioner from providing the Passive Infrastructure Services in Gujarat is subject to VAT under the GVAT Act, whereas the petitioner has deposited service tax on the entire receipts.

[2.7] It is submitted that the impugned show-cause notice being absolutely illegal, arbitrary and not sustainable under the law, the petitioner has no other alternative remedy other than filing the present petition and therefore, the petitioners have preferred the present Special Civil Application.

[3.0] Shri Venkatraman, learned Counsel has appeared on behalf of the petitioners and Shri Kamal Trivedi, learned Advocate General has appeared on behalf of the respondent State authorities.

[4.0] Shri Venkatraman, learned Counsel appearing on behalf of the



petitioners has vehemently submitted that as such the issue involved in the present petition is squarely covered in favour of the petitioners by the following decisions of three High Courts in the petitioners' own case.

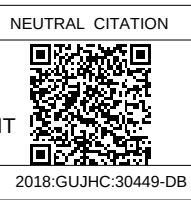
- (1) Division Bench of Karnataka High Court in Indus Towers Ltd. vs. Deputy Commissioner of Commercial Taxes, Bangalore [2012 (285) E.L.T. (Kar.)]
- (2) Division Bench of Delhi High Court in Indus Towers Ltd. vs. Union of India [2014 (35) S.T.R. 459 (Del)]
- (3) Single Bench of Kerala High Court in Indus Towers Ltd. vs. Union of India (Writ Petition Civil No.19506, 19499, 19504, 23023, 31972 and 16248 of 2011)

He has further submitted that even the Division Bench of the Madras High Court in the case of Bharti Industries Limited in the Writ Petition No.13352/2013 has also examined the issue at hand and has ruled in favour of the assessee. Therefore, heavily relying upon the aforesaid decisions, it is requested to allow the present petition.

[4.1] Shri Venkatraman, learned Counsel appearing on behalf of the petitioners has submitted that therefore, the question required to be considered is whether the transaction is a sale or service. It is submitted that for the aforesaid purpose the facts relevant to the provision of services by the petitioners are required to be considered, which are narrated in para 14.1 of the petition as under:

“14.1 That the petitioner renders passive infrastructure support services to several telecom operators viz. Airtel, Vodafone, Idea, Reliance, Aircel, BSNL etc. in 20 states through more than 1,00,000 telecom towers. A brief description of the services is as follows:

A. Description of a telecom site- A telecom site is comprised of



passive infrastructure and active infrastructure (owned by users / telecom operators) as described below:

I. Passive Infrastructure

Every telecom site has following equipments / infrastructure:

A tower made of steel angles, rods etc. with height of 80-120 feet and bolted on foundation either into the ground or on rooftop of a building

A covered shelter to house various equipments owned by the petitioner and telecom operators

An air-conditioner to maintain particular temperature inside the shelter

Supply of electricity current to the air-conditioner and equipments installed inside the shelter and on the tower through

(i) An electricity connection from the power grid, or
(ii) Battery bank (bunch of batteries) to provide instant power back up whenever supply of electricity through the grid is disrupted

(iii) DG set if the power outage is for a longer duration

Power interface unit, to convert ACT current into DC current and also, to inter-connect various equipments inside the shelter with power supply.

II. Active infrastructure (owned by telecom operators and kept / installed at a telecom site owned by the petitioner)

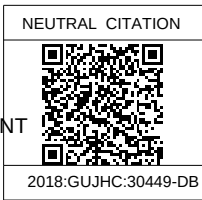
Base Transmission Station (BTS) – kept inside the shelter

Microwave Radios – installed on the tower at a particular height

Antennas – installed on the tower at a particular height

B. The petitioner's Service offering

As part of its standard business offering, the petitioner offers



following package to telecom operators as a bundled service:

(a) Operation and Maintenance services are performed by Indus as per schedule 2 of the MSA Agreement. As per Schedule 2 of MSA Agreement, Indus is responsible for the following activities:

(i) As per clause 2.11 and 2.12, Indus is responsible for ensuring up time of more than 99.95% and if uptime falls below then Indus is liable for penalty.

(ii) As per Clauses of schedule 1 & 2 of MSA Agreement, core activities including operational and maintenance services are:

Space on the tower to install Microwave antennas and other equipment, to receive and transmit signals.

Space inside the shelter for safe keeping and operation of the equipments owned by telecom operators in a dust free, water-proof and heat resistant atmosphere.

24x7x365 power supply at desired current and voltage levels (at -48 DC current level into customers' transmission equipments installed at Indus tower site).

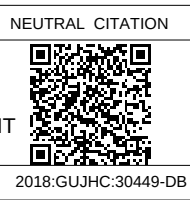
Provision of temperature to be maintained at 30 +/- 5 degrees centigrade

provision and maintenance of fire-alarm system

security services

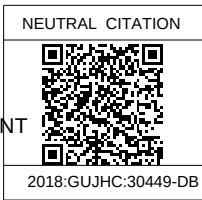
(b) All routine maintenance and upkeep of telecom sites and equipments at tower site like AC, DG, Batteries, PMS etc. are maintained by the petitioner through vendors.

[4.2] Shri Venkatraman, learned Counsel appearing on behalf of the petitioners has also taken us to the relevant clauses of the MSA with the Bharti Airtel Ltd. while explaining the nature of services rendered more particularly Clauses 1.1, 2, 3, 4, 5.2.4, 10.1 and 18.3.



[4.3] It is further submitted by Shri Venkatraman, learned Counsel appearing on behalf of the petitioners that infact the petitioner is already paying the service tax to the Union of India on the aforesaid services being provided by the petitioners. It is submitted that therefore the impugned proposed levy would tantamount to double taxation on the same consideration which is not permissible. It is further submitted by Shri Venkatraman, learned Counsel appearing on behalf of the petitioners that even otherwise in view of the sanction of the Scheme of Merger, the merging entity has ceased to exist and therefore, consequently the transactions between the merging entities and petitioner becomes a nullity. It is submitted that therefore in light of Section 52 of the GVAT Act, the proceedings and the proposed demand are non-maintainable, bad in law and *non est*. Shri Venkatraman, learned Counsel appearing on behalf of the petitioners has challenged the impugned show-cause notice and the proposed demand under the GVAT Act by making following submissions.

1. That the said show-cause notice is arbitrary, illegal, discriminatory, unjust, perverse, ultra vires, beyond jurisdiction, unconstitutional and even otherwise bad in law and on facts.
2. That it is a well settled principle that every sale or purchase of goods taking place within a particular State is subject to the provisions of VAT Law of that State. Further, every State has formulated Legislations to regulate the levy of VAT on sale or purchase of goods.
3. That as per the Section 2(23) of the GVAT Act, “sale” means a sale of goods made within the State for cash or deferred payment or other valuable consideration and includes, - (d) transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash,



deferred payment or other valuable consideration.

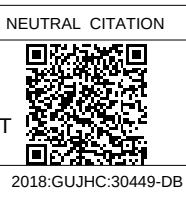
4. That as per section 2(13) of the GVAT Act, “goods” means all kinds of movable property (other than newspapers, actionable claims, electricity, stocks and shares and securities) and includes live stocks, all materials, articles and commodities, and every kind of property (whether as goods or in some other form) involved in the execution of works contract, all intangible commodities and growing crops, grass, standing timber or things attached to or forming part of the land, which are agreed to be served before sale or under the contract of sale.

5. That it can be seen from the definitions that sale includes the transfer of right to use goods for a valuable consideration; whereas goods have been defined as every kind of moveable property. That on a conjoint reading of both the definitions, it can be understood that for any transaction to be considered as sale under Section 2(23)(d) of the GVAT Act, all the following conditions need to be satisfied.

- (i) There is a transfer of right;
- (ii) The right should be for use of any moveable property;
- (iii) The right may be for any purpose; and
- (iv) The right is transferred for a consideration

6. That if all the above conditions are satisfied, the transaction is considered as a sale and is subjected to VAT under the provisions of the GVAT Act.

7. That the term “transfer of right” is not defined under the GVAT Act. Therefore, to understand this term, recourse needs to be taken to various judicial precedents pronounced by various appellate forums from time to time.

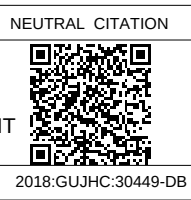


8. That it is a settled law that for a transaction to constitute transfer of right to use goods, there should be goods, for which physical possession, control or dominion and custody should be transferred, without which there cannot be a transaction of transfer of right to use. Further, the transferee should be free to use the goods without any restrictions during the period of transfer. In support of his above submissions, Shri Venkatraman has relied on the decision of the Hon'ble Supreme Court in the case of **Rashtriya Ispat Nigam Limited vs. CTP [1990 (77) STC 182 (AP)]**, approved by Hon'ble Supreme Court in the case of **State of A.P. vs. Rashtriya Ispat Nigam Ltd. [2002 (216) STC 114 (SC)]**.

9. That the test laid down by the Allahabad High Court in the case of **Ahuja Goods Agency vs. State of U.P.** reported in **(1997) 106 STC 540 (All)** was that in addition to transfer of control and possession, there must also be a transfer of custody as the transfer needs to be exclusive in nature. Even the transferor should not be able to use the same during the period of transfer.

10. That the legal position established by judicial precedents can be summarised as under:

- (a) There must be a transfer of effective control and possession of the goods which are subject matter of transfer;
- (b) There must be a transfer of custody of the goods which are subject matter of transfer;
- (c) All the permissions and licenses should be made available to the transferee and should not be in possession of the transferor;
- (d) There must be goods available for delivery;
- (e) There must be a consensus ad idem as to the identity of the goods;



(f) The transferee should have a legal right to use the goods – consequently all legal consequences of such use including any permissions or licenses required should therefore be available to the transferee;

(g) For the period during which the transferee has such legal right, it has to be to 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 license to use the goods; and

(h) 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.

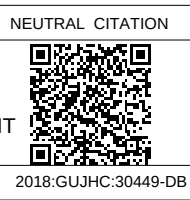
11. That the activity of provision of Passive Infrastructure by the petitioner to the Sharing Operator fails most of the parameters inasmuch as :

(a) The Passive Infrastructure always remains in the possession and control of the petitioner and is only used for the provision of the service to telecom shared operators.

As per Clause 2.1.6 & 2.1.7 of the Agreement, the control, management and possession of the Passive Infrastructure site would always remain with the petitioner. Also, as per Clause 3.1.1 and 5.2.4 of the Agreement, the responsibility of operation and maintenance of the Passive Infrastructure is of the petitioner. Therefore, it can be gleaned that the effective control and possession of the Passive Infrastructure always remains with the petitioner.

(b) The Passive Infrastructure always remains under custody of the petitioner

As per Clause Further 4.1 of the Agreement, access to the Passive



Infrastructure site would always be under the supervision and absolute control of the petitioner. Therefore, it clearly signifies that the custody of the Passive Infrastructure would always be on account of the petitioner.

(c) All the permissions and licenses with respect to the Passive Infrastructure site always remains with the petitioner

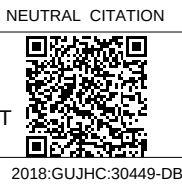
As per Clause 2.6.1 of the Agreement, all the necessary approvals with respect to the Passive Infrastructure are obtained by the petitioner. Further, as the petitioner is registered with the DoT as a Passive Infrastructure provider, all these approvals have to be remained with the petitioner. Therefore, the petitioner never transfers the custody and possession of any license / permissions, as the case may be, to the Sharing Operator.

(d) The petitioner continuously uses the Passive Infrastructure

As per Clause 10.1 of the Agreement, the petitioner continuously uses the Passive Infrastructure for placing hoardings, banners and other advertisements of a third party. Therefore, the parameter laid down above that the transferor cannot use the goods during the period of transfer is also not getting fulfilled.

(e) The petitioner provides the same Passive Infrastructure to more than one Sharing Operator at one time

As per Clause 2.5 and 5.2.3 of the Agreement, the petitioner retains the right to provide the same Passive Infrastructure to more than one Sharing Operator. Further, Schedule 3 of the Agreement, with respect to the consideration clearly provides that the consideration varies depending upon the number of Sharing Operators using the Passive Infrastructure. Accordingly, the test of exclusivity is also not getting satisfied.

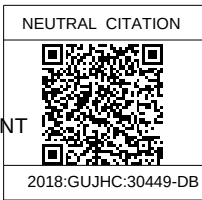


12. That the activity of provision of Passive Infrastructure service clearly falls outside the purview of transfer of right to use goods. The MSA is clearly in the nature of a service contract and there is no transfer of right to use goods is involved. Accordingly, the petitioner is not liable to pay VAT on the consideration received from the Sharing Operators towards provision of Passive Infrastructure Services.

13. That the respondent No.3 failed to note that the telecom operators install their active telecommunication equipment at the site, which is peculiar to the operators' network. The petitioner only provides services such as the battery backup, power plant, security etc. and exclusively maintains such system to meet the obligations under the contract. The Sharing Operators have no right in any manner or interest over the battery backup, power plant, tower and petitioner's other equipment and holds the applicable licenses for its use and operation. Therefore, there are no goods in respect of which right to use is transferred to a third party.

14. That it is apparent from MSA that the petitioner retains the right to grant the right to use Passive Infrastructure to various telecom operators. Several telecom operators share the petitioner's Passive Infrastructure. Such transaction is non-exclusive and, therefore, it cannot be treated as a 'transfer' of right to use goods for the purpose of levying VAT.

15. That the only right of the telecom operators under the MSA is to receive Passive Infrastructure Services by the petitioner. The MSA merely permits access of the Passive Infrastructure to the telecom operators to the extent it is necessary for the proper functioning of the active infrastructure belonging to the telecom operators. Thus, it cannot be said that there is a transfer of right to use the Passive Infrastructure by the



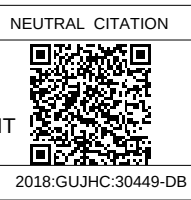
petitioner to telecom operators.

16. That under the MSA the predominant intention of the petitioner is to provide a service, which is further used by the Sharing Operator for providing the telecommunication service to its own customers. That for the purpose of providing the Passive Infrastructure Services, it is a prerequisite for the petitioner to have a Passive Infrastructure ready, which should be of high specific standards and completely uptime. That the Sharing Operator intends to use the entire passive infrastructure as a whole and the individual components are of no use to him. The payment is also made for receiving the entire Passive Infrastructure Service and not for using any individual equipment/component. In view of the above, it is respectfully submitted that as the activity of provision of Passive Infrastructure by the petitioner to the Sharing Operator is a service, the same cannot be covered within the purview of the GVAT Act.

17. That the petitioner has been paying Service tax regularly on the consideration received from the Sharing Operator towards provision of Passive Infrastructure Services.

18. That the Service tax is paid by the petitioner on the revenues under the Master Service Agreement in terms of Section 65(105)(zzzq) of the Finance Act, 1994 (up to 30 June 2012) under the category of 'Support Service of Business or Commerce' and 66B (with effect from 1 July 2012), on the entire consideration received for providing Passive Infrastructure Services to Sharing Operators. This is clear from the bill raised by the petitioner on the cellular operators and also from the returns filed under the Service tax law.

19. That it is a settled legal position that both VAT and Service tax cannot be levied on the same amount. That the reliance is placed on the



decision of the Hon'ble Supreme Court in the case of Imagic Creative (P) Ltd. (Supra). In this matter, Hon'ble Supreme Court held that Service tax and VAT are mutually exclusive. If a particular transaction is taxable under either of the legislation, tax cannot be levied on the same amount under the other Legislation.

20. That the Respondent No.3 committed a fundamental error of jurisdiction in issuing notice under VAT on a transaction that is subject to Service tax. In the present case the transaction being purely of service, could not be brought under the ambit of Article 366(29A) (d) of the Constitution of India. In other words, since under the Union List, the activity undertaken by the petitioner is taxable as a service, no transaction of the petitioner in rendering such services can result in a sale/deemed sale of goods under Article 366(29A) of the Constitution of India. Accordingly, under the Constitution of India, the State of Gujarat does not have any jurisdiction or authority to impose tax on the transaction that qualifies as a service.

21. That the Parliament derives power to levy Service Tax from Entry 92C of List-I of the Seventh Schedule to the Constitution of India and consequently the States are barred from demanding any VAT on such activities as are covered by the said Entry.

22. That Article 246 of the Constitution of India has clearly divided the powers of legislation by the Union Government and the State Governments. In respect of matters enumerated in List I of the Seventh Schedule, it is only the Parliament that has exclusive power to make laws and State Governments cannot make any laws.

23. That the Hon'ble Apex Court in the BSNL's case (supra) has also examined the position as regards taxation of the same transaction under

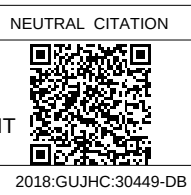
two different headings. The Hon'ble Apex Court in para 83 of its decision has noted the definition of "subscriber" as defined under the Finance Act, 1994 which includes a person to whom any service of a leased circuit has been provided. The Apex Court further in paragraph 84 thereof observed that a telephone service is nothing but a service; that there is no sales element apart from any hand set or other accessory supplied.

24. That the Show Cause Notice also seeks to levy VAT on the transaction undertaken between the petitioner and the Merging Entities under the Indefeasible Right to Use Agreement (I.R.U. Agreement) vide which some towers have been leased to the petitioner is bad in law. Accordingly, the said Show Cause Notice is liable to be set aside in as much as no tax on such transaction was payable in the first place and further the same cannot be recovered from the petitioner under the provisions of the GVAT Act.

25. That in the petitioner's understanding, the relevant section in this respect is Section 52 of the GVAT Act which treats two or more amalgamating companies as distinct companies for all the periods up to the date of the High Court order by virtue of which the Scheme of Arrangement is sanctioned.

26. That without prejudice to contention of non-applicability of Section 52 to the facts of the case as in the facts of the matter the order is not taking effect before the date of the order, Section 52 should be read down to preserve its constitutionality and not encroach upon the rights of the petitioner guaranteed under Articles 14, 19(1)(g), 265 and 300A of the Constitution of India in as much as:

- That the Merging Entities ceased to exist for all purposes after their amalgamation with Indus Towers Ltd. with effect from

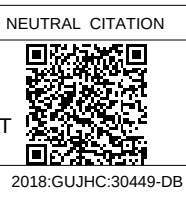


01.04.2009 vide the Hon'ble Delhi High Court's order dated 18.04.2013 ("High Court Order"). In this view of the matter, with effect from 01.04.2009 the inter-se transactions cease to qualify as "sale" for the purposes of GVAT Act. Therefore, such transactions cannot attract any Sales Tax/Value Added Tax on any sale between the Merging Entities and the petitioner;

- That with the approval of merger, the transactions-inter-se between the parties cease to exist. They do not have any nexus with the taxable event i.e. transactions of sale of goods at a money consideration paid or payable as defined under the Sales Act. Even in this view of the matter, the deeming fiction cannot be extended to levy tax on a transaction which is not sale.
- That the deeming fiction of a provision of any law (in the present case, Section 52 of the GVAT Act) cannot be extended to such a degree whereby a non-existent entity can be issued a notice/instruction after its successful amalgamation with another entity. Therefore, incorporation of such a provision which revives the existence of a corporate which has lost its personality is beyond the Legislative competence of the State Legislature.
- This legislative action of the State is also direct encroachment to an area (i.e. Companies Law) which is the exclusive domain of the piece of the Union. Accordingly, this colourable piece of legislation is liable to be read down.

27. That in the present case, pursuant to the Order dated 18.04.2013 passed by the Hon'ble Delhi High Court:

- The Merging Entities ceased to exist with effect from 01.04.2009
- All the inter-se transactions between the Merging Entities and the petitioner, ipso facto stood cancelled and disregarded as



provided under Clause 2.1.2.12 of the Scheme of Arrangement

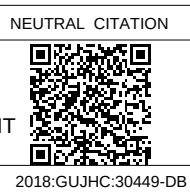
- Further, all rights, liabilities or obligations between such companies stood cancelled/ discharged in the records of the petitioner Company.
- Consequently, the books of accounts of the petitioner Company were re-drawn and all such transactions were cancelled

28. That given the above, the inter-se transactions between the Merging Entities and the petitioner, ceased to qualify as “sale” in terms of Section 2(23) of the GVAT Act. Further, no sale price was payable towards the cancelled transactions and therefore, there was no valuable consideration with respect to these transactions for the purpose of “sale price” and “taxable turnover” defined under Section 2(24) and 2(30) respectively, of the GVAT Act.

29. That in view of the above, Section 52 of the GVAT Act deeming a transaction to be “sale” which in effect does not have any attributes of sale should be read down and it may be held that the same should not apply in the facts and circumstances of the present case.

30. That Section 52 of the GVAT Act if not read down, then, it would not have an impact of levying tax on an incidence that has no linkage with the taxing event. The petitioner submits that under the Constitution of India, a State is not permitted to levy VAT on a transaction that is not a sale. A transaction which is not a sale cannot be deemed to be sale for the purposes of taxation. In this view of the matter, Section 52 cannot be given effect beyond the competence of state as it stands in that case, it would be beyond the powers conferred under Entry 54 of List II of the Constitution of India.

31. That Section 52 is required to be read down so as to not be in

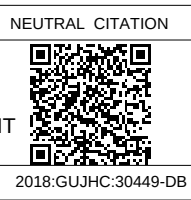


defiance of a High Court Order procured under section 391-394 of the Companies Act, 1956 whereby the existence of Transferor Companies cease to exist.

32. That in this regard, it is further submitted that the juristic personality of a company flows from the Companies Act. Once a High Court in exercise of its power under Section 391 of the Companies Act declares the effective date of merger, the identity of the merged company gets destroyed completely with effect from the said date. The Registrar of Companies as a procedural act merely records the transactions in his register from a date subsequent to the Court order. However, such a recording on a subsequent date neither vitiates the operation of the High Court order nor can it revive the existence of the merged companies till such date of recording in the register.

33. That the matter relating to winding up is a matter falling exclusively in Entries 43 and 44 of List I and under Entries 43 and 44, the Companies Act has been enacted by the Parliament providing for winding of companies along with their incorporation and regulation. No law affecting winding up can be enacted by a State legislature. If any provision affects the winding of company, then such a provision would fall within the exclusive domain of the Parliament and if any law is enacted by the State Legislature in any way, touching the winding up of any company, then such a law would be beyond the competence of the State legislature. Even in this view of the matter, the scope of Section 52 cannot be extended to undo an act that falls within the exclusive domain of the Parliament.

34. That in light of above, a state legislature cannot deem artificial existence of the Merged Entities for any purpose whatsoever and even in this view of the matter, Section 52 of the GVAT Act is required to be



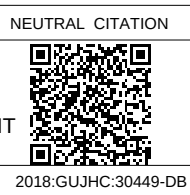
read down so as to not encroach upon the exclusive domain of the Parliament conferred by Entries 43 and 44 of the List I.

35. That Section 52 of the GVAT Act cannot be given a meaning so as to transgresses the limits of the power of state legislature into the exclusive domain of the central legislation i.e., the Companies Act, 1956.

36. That the matter of emergence of a company and its dissolution are exclusively governed by the Companies Act, 1956. A company is formed and incorporated under the Companies Act. Similarly, it comes to an end by various mechanisms prescribed under the Companies Act i.e. voluntary or compulsory winding up or through the process followed under Section 391 to 394 of the Companies Act. In case of a winding up, the proceedings are undertaken by an Official Liquidator whereas proceedings under Sections 391 to 394 of the Companies Act are undertaken through the Court process. All such matters are decided under the central legislation in the light of powers conferred under the union list. Therefore, a state government cannot nullify an action undertaken under the central law.

37. That in view of the above, Section 52 of the GVAT Act seeking reversal of an action undertaken under the union law i.e. Companies Act, 1956 is a colourable piece of legislation and needs to be read down to preserve its constitutionality.

38. That in any event and without prejudice to other contentions, the scheme of amalgamation of the Merging Entities was sanctioned by the Hon'ble Delhi High Court and therefore, Section 52 of the GVAT Act does not and cannot bind the sanction of the scheme of amalgamation in the present matter.



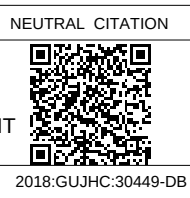
39. That when the Delhi High Court has sanctioned the amalgamation, in conformity with the provisions of the Companies Act, on 18.04.2013 to be effective from the appointed date i.e. 01.04.2009, the amalgamation has said to have taken effect from 01.04.2009 for all purposes and all acts.

Making above submissions and relying upon above decisions of three High Courts referred to herein above and other decisions referred to in the petition, it is requested to allow the present petition.

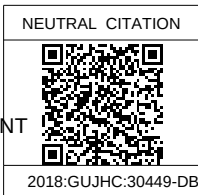
[5.0] Present petition is vehemently opposed by Shri Kamal Trivedi, learned Advocate General appearing on behalf of the respondent State Authorities.

Shri Trivedi, learned Advocate General appearing on behalf of the respondent State Authorities has submitted that as the present petition is against the show-cause notice only, the same may not be entertained at this stage.

[5.1] Shri Trivedi, learned Advocate General has submitted that for determining as to whether the transaction in question arrived at between the petitioner and the sharing operators, is transferring any right in favour of sharing operators or not, it is necessary to analyze the contract in its entirety and reasonably inasmuch as the 'intention of parties to the contract' is the real test for arriving to a conclusion as to whether they intended to create a lease or to mere grant license in favour of other party. It is submitted that on perusal of various clauses of the contract between the petitioner and the sharing operators to be clearly discernible that undoubtedly it is not a simple case, wherein merely a license of ingress and egress and/or access to passive infrastructure is being granted / issued by the petitioner Company in favour of the sharing operators. It is submitted but on the contrary, it is indeed



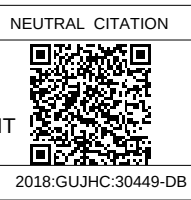
creating bundle of rights in favour of the Sharing Operators over the passive infrastructure of the petitioner company. It is submitted that the same is not only permitting “right to use” the passive infrastructure but indeed it is “transferring the right to use” the passive infrastructure. In support of his above submissions, Shri Trivedi, learned Advocate General has heavily relied upon the clauses 4.2.1, 5.2.1, 7.1.2, 11, 21.1, 3.2, Schedule 6 Clauses 3 and 2.2. It is submitted that in terms of the aforesaid clauses it would be abundantly clear that the petitioner company has transferred the right to use the passive infrastructure in favour of the Sharing Operators. It is submitted that clause 4.2.1 permits the petitioner company to relocate the Sharing Operator’s equipment to an alternative site only after providing 45 days prior written notice to the sharing operators. In addition to this, Clause 5.2.1 read with Clause 21.1.1 restrict the petitioner company to create any encumbrance and to assign, novate or otherwise transfer any of its right or obligation under the said contract to any person without the prior written consent of other party. In this regard, it is humbly submitted that if the parties to the contract intended that by reason of such a contract, merely a license would be created, then in that case, such terms could not have been inserted in the said contract. Clause 11 of the said contract also specifically stipulates the situations wherein either party may terminate the said contract. In this regard, it is humbly submitted that it is settled legal position that a license can be revoked at any time at the pleasure of the licensor whereas, in the present case, there is no right, whatsoever in nature, to the petitioner company to revoke and/or terminate the said contract at its own pleasure. In fact, as per Clause 3 of the Schedule 6 to the contract, it is specifically provided that if in case the petitioner company ceases its operations with respect to any site, the right to operate such sites shall be transferred to the sharing operators to maintain the business continuity of the sharing operators at such site.



Clause 7.1.2 of the said contract further reveals that any taxes, excluding income-base taxes, that arise in relation to provision, establishment, installation, operation and/or maintenance of the passive infrastructure or any part thereof at the site shall be payable by the sharing operators to the petitioner company in addition to the charges relating to that site. The aforesaid clauses of the indenture in question clearly show that a bundle of rights have been conferred upon the sharing operators by the petitioner company.

In support of his above submissions, Shri Trivedi, learned Advocate General has heavily relied upon the decision of the Hon'ble Supreme Court in the case of **Pradeep Oil Corporation vs. Municipal Corporation of Delhi & Anr.** reported in (2011) 5 SCC 270 wherein in similar set of clauses, the Hon'ble Supreme Court has categorically held that mere description of the grant in question is not decisive. It is submitted that after considering clauses in detail the Hon'ble Supreme Court has held that the indenture in question was a lease, which created bundle of rights in favour of appellant therein and thus, the appellant, though designated as a licensee in indenture, was held liable to pay property tax on the property therein.

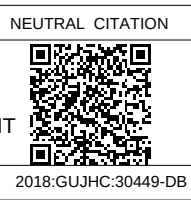
[5.2] It is further submitted by Shri Trivedi, learned Advocate General appearing on behalf of the respondent State Authorities that so far as the reliance placed by the petitioner company on Clause 2.1.7 of the contract in question is concerned, it is totally misplaced inasmuch as it is settled principle of law that mere discussion of grant in question is neither be regarded as conclusive nor determinative. It is submitted that even the example of the airline canvassed by the petitioner company is also not applicable to the facts of the present case inasmuch as in such case, neither the airline operator is restricted from assigning, mortgaging, etc. the said seat without prior permission of the customer



nor the customer has any right to operate and/or use the seat allocated to him / her even after the airline operator ceases its operation.

[5.3] It is further submitted by Shri Trivedi, learned Advocate General appearing on behalf of the respondent State Authorities that even the reliance placed by the petitioner on the decisions of the High Court of Karnataka, Delhi, Kerala and Madhya Pradesh is also totally misplaced inasmuch as admittedly and undisputedly, there are various clauses of the contract which were either not brought to the notice of the High Courts or though brought to the notice, they were not considered and/or discussed in the said judgments.

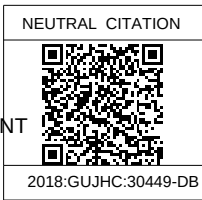
[5.4] It is further submitted by Shri Trivedi, learned Advocate General appearing on behalf of the respondent State Authorities that various clauses in the instant cases which were admittedly not before the High Court of Karnataka for consideration are clauses 4.2.1, 4.2.2, 4.2.3, 5.2.1, 5.2.3, 7.1.2, 11.1, 11.2, 11.2.1 to 11.2.3, 21.1.1, 21.1.2, 2.5.3. It is submitted that therefore the decision of the Karnataka High Court shall not be applicable to the facts of the case on hand. It is submitted that similarly the judgments delivered by the High Courts of Delhi, Kerala and Madhya Pradesh which are relied upon by the learned Counsel appearing on behalf of the petitioner also shall not be applicable to the facts of the case on hand more particularly when the relevant clauses which are there in the present contract were not before the aforesaid High Courts. It is submitted that as such other High Courts have followed the judgment of the Karnataka High Court. It is therefore submitted that the transaction between the petitioner company and the sharing operators fulfill all the ingredients and conditions for qualifying as transfer as held by the Hon'ble Supreme Court in the case of **BSNL vs. Union of India** reported in (2006) 3 SCC 1 i.e. when there are goods



available for delivery, there is consensus ad idem as to identity of the goods, transferee has legal right to use the goods which right is to the exclusion of the transferor and lastly, the owner cannot again transfer the same right to the other entities. It is submitted that in other words, it can be said that the contract in question provides effective control as well as exclusive possession in favour of the sharing operators and therefore, the same would fall within the purview of the provisions of Section 2(23)(d) of the GVAT Act.

[5.5] Now, so far as the submission on behalf of the petitioner that as the petitioner is also paying the service tax on the same consideration, there cannot be any tax levied under the GVAT Act and there shall be double taxation on the same transaction is concerned, it is submitted by Shri Trivedi, learned Advocate General appearing on behalf of the respondent State Authorities that both the eventuality are different and under different statutory provisions. It is submitted that once it is established that the transaction is not mere “right to use” but is a “transfer of right to use”, then in that case, in terms of section 65(105) (zzzzj) of the Finance Act, 1994, the transaction in question ceases to be ‘service’ and therefore, such a transaction is liable to be taxed under the GVAT Act.

[5.6] It is further submitted by Shri Trivedi, learned Advocate General appearing on behalf of the respondent State Authorities that considering various clauses of the agreement – MSA, the transactions in question can be said to be “sale” as provided under Section 2(23)(d) of the GVAT Act. It is vehemently submitted by Shri Trivedi, learned Advocate General appearing on behalf of the respondent State Authorities that for the purpose whether the transaction can be said to be and/or considered to be “sale” under the provisions of section 2(23)(d) of the GVAT Act, the



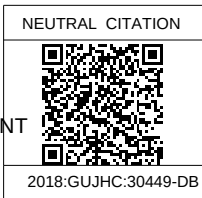
following conditions are required to be satisfied.

- “(a) There must be goods available for delivery.
- (b) There must be a consensus ad idem between the parties as to the identity of the goods.
- (c) The transferee should have a legal right to use the goods and consequently, all legal consequences of such use including any permission or licenses required should therefore be available to the transferee.
- (d) For the period during which the transferee has such legal rights, it has to be to the exclusion to the transferor – this is the necessary concomitant of plain language of the statute, i.e. a transfer of right to use and not merely a license 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 right to others.”

[5.7] It is submitted that considering various clauses of MSA dated 07.03.2009 and amended supplementary agreements, all the aforesaid conditions are specified and therefore, the transaction in question can be said to be “sale” as defined under Section 2(23)(d) of the GVAT Act.

[5.8] It is submitted that vide supplementary agreement various important clauses of the original MSA have been amended including the definition of “Passive Infrastructure”; “Site Access Availability”. It is submitted that on perusal of the said amendments it is discernible that by way of such amendments, the petitioner Company has agreed to providing passive telecommunication infrastructure to the telecom operators so as to facilitate them to install and operate the requisite equipments to provide the telecommunication services. It is submitted that the said infrastructure be provided to the telecom operators on “use

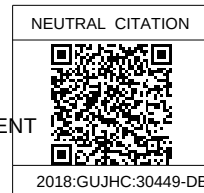
only basis” for installation, operation and maintenance etc. of the active infrastructure of the telecom operator. It is submitted that thus the petitioner Company grants the right to the telecom operator to enter the concerned site for installing the necessary equipments *qua* machineries owned by it at such site as may be required by it as well as also grants the right to operate and maintain the same. It is further submitted by Shri Trivedi, learned Advocate General appearing on behalf of the respondent State Authorities that as per the said agreement – MSA, firstly the telecom operators are to provide forecast of their requirement for passive infrastructure to the petitioner Company. That pursuant to the said forecast, within a period of three weeks, the petitioner Company would identify the location depending upon the latitude and longitude of possible sites and provide three options to that telecom operator with its comments, suggestions and / or its plans for meeting the telecom operator’s passive infrastructure requirement. It is submitted that thereafter, amongst the said three options received from the petitioner Company, the telecom operator shall issue a service order for a new site or an existing site in form specified in Schedule-5 to the said MSA. It is submitted that the said service order shall specifically include all the technical requirements of the telecom operator, with a permission to share is given by the telecom operators as well as estimate of the rent that the telecom operators will be payable depending upon the said requirements. It is submitted that thereafter, within a period of one week from the date of receipt of service order, the petitioner Company shall confirm in writing to the telecom operator as to whether the petitioner Company has accepted or rejected the said service order. However, it is specifically stipulated that petitioner Company shall use its best endeavors to acquire a new site or provide for sharing at an existing site, as the case may be to the telecom operator. It is submitted that despite the said efforts, if the petitioner Company believes that they would not be able to acquire or provide a site, as required, to the



telecom operator, then in that eventuality, they shall inform the telecom operator in writing along with reasons as soon as possible. It is submitted that otherwise, the petitioner Company would issue a Ready of Installation notice to the telecom operator confirming the Site Access Availability in respect of such site, pursuant to which, within a period of seven days from the receipt of RFI notice the telecom operator shall inspect the site provided by the petitioner Company and respond about the same to the petitioner Company. It is submitted that in case of any defects in the site provided by the petitioner Company, the telecom operator shall notify the same to the petitioner Company and the same shall be rectified by the petitioner Company within a period of 30 days from the date of receipt of such notification of the said defects. It is submitted that finally, after rectifying the defects, if any, the petitioner Company and the telecom operator would execute a service contract in respect of such site provided by the petitioner Company and the telecom operator shall be charged for the same from the charge effective date.

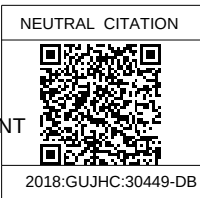
[5.9] It is further submitted by Shri Trivedi, learned Advocate General appearing on behalf of the respondent State Authorities that as per the said agreement, the charges payable by that sharing operator in respect of each site provided by the petitioner Company shall be determined in accordance with schedule 3 to the MSA. It is further submitted that on perusal of the said schedule 3, it is discernible that the charges payable by any sharing operator depends upon the number of operators sharing a site as well as the number of radio antenna on the tower, number of MW antenna on the tower, height of antenna on the tower, weight of the tower etc. It is submitted that thus it appears that the rent collected by the petitioner Company from the telecom operator completely depends upon the requirements of individual telecom operator and would change accordingly.

[5.10] It is submitted that therefore, the telecom operator has the



freedom as well as choice of selecting the manner and time and nature of use and enjoyment of the passive infrastructure starting from time of entering into the contract. It is submitted that telecom operator has also the freedom to increase the power of access by increasing the number of antenna, height and weight on the tower, power consumption etc. over and above the standard configuration specified in clause-1 of Schedule-1, subject to payment of extra charges. It is submitted that once the telecom operator is permitted to use passive infrastructure, as per his requirement to allotment of a space in the tower at a particular height, direction or other equipments, it appears that the petitioner Company does not have freedom to allot the same height, direction or other equipments to any other new telecom operator in the same tower. It is submitted that the new telecom operator has to select some other height or direction on the same tower or selected another site. It is submitted that in case for any reason the petitioner Company ceases to operate any site, then such site has to be transferred to the said telecom operator for operation of such sites. It is submitted that thus the telecom operator appears to have the effective control over the manner, time and nature of use of the Passive Infrastructure by the virtue of its “right to use” acquired through the contract, subject to the conditions of MSA.

[5.11] It is further submitted by Shri Trivedi, learned Advocate General appearing on behalf of the respondent State Authorities that the petitioner Company does not appear to have the effective control over the manner, time and nature of use of a specified access to passive infrastructure allotted to a particular operator. It is submitted that once contract is executed with regard to access to the passive infrastructure, the petitioner Company does not appear to be free to either self use and/or to allot the same to any other telecom operator or to revoke the access granted to a telecom operator, save and except as provided under the contract. It is submitted that however, only on termination of the contract, the petitioner Company re-acquires the allotted access and is



free to allot the same to any other operator if it is suitable for them. It is submitted that therefore, though the petitioner company can allot use of passive infrastructure to more than one operators, it appears that they would not be free to change the specified allotted use to a particular telecom operator.

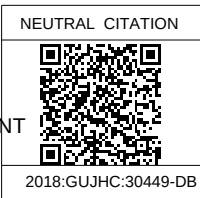
[5.12] It is submitted that therefore respective telecom operators appear to have possession as well as effective control of the specified access of the passive infrastructure and that too even in a situation where the petitioner Company ceases to operate. Thus, the concerned respective telecom operator appear to have exclusive right to use the allotted access, even if the petitioner Company ceases to operate.

[5.13] It is submitted that therefore the transaction in question can be said to be “sale” within the ambit of section 2(23)(d) of the GVAT Act. It is submitted that once the same can be said to be “sale” within the ambit of section 2(23)(d) of the GVAT Act, the same is liable to be taxed under the GVAT Act and therefore, the eventuality to pay the tax would arise. It is submitted that therefore merely because the petitioner may be paying the service tax on the services rendered by them, which may be under the other provisions of the Statute, it cannot be said to be double taxation as contended on behalf of the petitioner.

[5.14] It is further submitted by Shri Trivedi, learned Advocate General appearing on behalf of the respondent State Authorities that even on merits also the demand sought to be recovered from the petitioner Company for the transaction undertaken between the merging entities and the petitioner Company is permissible under the provisions of section 52 of the GVAT Act. It is submitted that the said section specifically provides that in a situation where two or more Companies are mortgaged by an order of Court or the Central Government and that the order is to take effect from the date earlier to the date of the order,

then in that case, any transactions of sale and/or purchase of any goods undertaken between such companies shall be included in the turn over of sale or purchase of the respective companies and shall be assessed to tax accordingly. It is submitted that therefore the submission on behalf of the petitioners that transactions undertaken between the merging Company and the petitioner Company would not be assessed to tax under the provisions of the GVAT Act, has no substance. It is submitted that to avoid pilferage of tax, the State legislature has consciously provided such a provision in the GVAT Act. It is submitted that the State Government is very much empowered under the provisions of the GVAT Act to assess the transactions undertaken between the petitioner Company and the merging Company. It is submitted that therefore it cannot be said that by the aforesaid the State Government has tried to act contrary to the provisions of the Central Act / Companies Act and/or the order passed by the High Courts sanctioned in the Scheme of Arrangement / Merger. It is submitted that if the submission on behalf of the petitioner is accepted in that case there shall not be any tax liability either by merging Company and/or petitioner Company as a successor during the period between the date from which the Scheme of Merger is sanctioned and the actual date of order passed by the concerned High Court accepting the Scheme of Arrangement / Merger as the case may be. It is the case on behalf of the petitioner that as on sanction of the Scheme of Amalgamation and/or the merger, the merging company would not be in existence and therefore, the liability to pay the tax of such merging Company would not be there and on the other hand it is the case on behalf of the petitioner that even the petitioner Company who is a successor also shall not be liable to pay the tax. Meaning thereby there shall be and there may be zero tax liability which cannot be the intention of any legislature.

[5.15] It is further submitted by Shri Trivedi, learned Advocate General appearing on behalf of the respondent State Authorities that

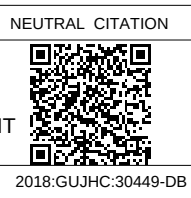


looking to the activity of providing Passive Infrastructure to the sharing operators, the same is liable for payment of VAT, because it is a transfer of right to use. It is submitted that therefore the transaction in question can be said to be “deemed sale” under Article 366(29A)(d) of the Constitution of India. Now, so far as the submission on behalf of the petitioner that in view of earlier determination order passed under Section 80 of the GVAT Act, which was in favour of the petitioner, thereafter it would not be open for the Department again to issue show-cause notice is concerned, it is submitted by Shri Trivedi, learned Advocate General appearing on behalf of the respondent State Authorities that when the earlier determination order was issued, the same was based on the MSA between infrastructure provider and the sharing operator. It is submitted that thereafter there are amendments in the MSA as effected from July 2012 and therefore, there are changed circumstances and therefore, it is always open for the Department to issue show-cause notice.

Making above submissions and heavily relying upon the decision of the Hon’ble Supreme Court in the case of BSNL (Supra), it is requested to dismiss the present petition.

[6.0] Heard learned Counsel appearing on behalf of the respective parties at length.

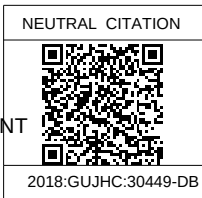
The short question which is posed for consideration of this Court is **whether the transaction between the petitioner and the sharing operators under the MSA as amended from time to time can be said to be “sale” within the ambit of Section 2(23)(d) of the GVAT Act or not? and whether on such transaction to be considered as “transfer of right to use goods”, the petitioner Company is liable to pay the VAT under the provisions of the GVAT Act or not?** Number of other submissions recorded herein above are also raised. However, the main question is **whether the transactions under reference can be said to be and/or considered as “transfer of right to use goods” as**



contemplated under Section 2(23)(d) of the GVAT Act or in the nature of “service contract” (as contended on behalf of the petitioner)?

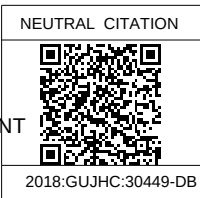
[6.1] To appreciate and consider whether the transaction in question can be said to be and/or considered as “transfer of right to use goods” as contemplated under the provisions of section 2(23)(d) of the GVAT Act, relevant provisions of the MSA as amended by supplementary agreements effected from July 2012 are required to be considered in its true spirit and as a whole which are as under:

- “(a) “Passive Telecommunication Infrastructure means any infrastructure located at Site including but not limited to the tower, shelter, diesel generator sets, air conditioners and electrical and civil works to facilitate the sharing operators to install and operate the requisite equipment to provide telecommunication services.”
- (b) “Site Access Availability in relation to a Site, means the availability of services to the Sharing Operator through the Passive Telecommunication Infrastructure at the Site.”
- (c) “2.1.1. Indus shall provide Site Access Availability to the Sharing Operator on “use-only basis” for installation, operation and maintenance etc. of its Active Infrastructure in accordance with the terms and conditions of this Agreement.”
- (d) “2.1.3 Indus shall ensure that each Site is capable of accommodating Sharing Operator Equipment in accordance with the standard configuration set out in paragraph 1 of Schedule 1 (Site Access Availability). Any additional requirements shall be specified by the Sharing Operators in the Service Order.”
- (e) “2.5 Non-Exclusive
Indus retains the right to provide Site Access Availability to other telecommunications operators and the Sharing Operator retains the right to seek passive



infrastructure services from other passive infrastructure providers.”

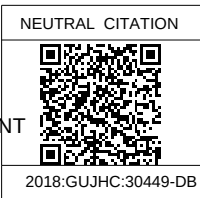
- (f) “3.1 The Sharing Operator may, by written notice to Indus, designate any Site utilised by the Sharing Operator as a “Strategic Site” if it reasonably believes that such Site is a hub or nodal Site: (a) of strategic importance to its network evolution plan or network expansion; and (b) any outage at such Site will result in outages at other States utilised by the Sharing Operator.”
- (g) “3.1.2 The Sharing Operator shall be responsible for the operation and maintenance of all Sharing Operator Equipment. In order to conduct such operation and maintenance activities, the Sharing Operator shall have the right to replace, repair, add or otherwise modify the Sharing Operator Equipment or any portion thereof and the frequencies over which such Sharing Operator Equipment operates. The Sharing Operator shall be provided access to the Sites in accordance with paragraph 2.9 of Schedule 2 (Operation and Maintenance Services), unless otherwise specified in the relevant Service Contract, for the purpose of carrying out such operation and maintenance activities and Indus shall provide to the Sharing Operator the necessary means of access for the purpose of ingress and egress from each Site. Provided, however, that only authorized employees of the Sharing Operator or its properly authorized sub-contractors shall be allowed such access to the Sites.”
- (h) “3.2 Indus shall not provide Passive Infrastructure services to other operators on any Strategic Site without the prior written consent of the Sharing Operator.”
- (i) “3.3 There shall be no planned Indus Downtimes permitted in respect of Strategic Sites except with the consent of the Sharing Operator. The expected Operation and Maintenance Service Level in relation to Uptime of Strategic Sites in each Circle for each month is 99.99% across all Strategic Sites in that Circle.”
- (j) “4.2 Relocation of Sharing Operator Equipment
4.2.1 Indus, acting reasonably, shall have the right, at any time during the term of the Service Contract in



respect of a Site, with 45 days prior written notice, to require the Sharing Operator to relocate all Sharing Operator Equipment at such Site to an alternative Site (“Relocation”), subject to the reasonable technical satisfaction of the Sharing Operator. Relocation may also occur due to the acquisition of a Site by a competent Government Authority in India. In the event of Relocation and the Sharing Operator agreeing to such Relocation, the applicable Service Contract shall, following the removal of the last of the Sharing Operator Equipment from the original Site, immediately terminate and the Parties shall simultaneously execute a new Service Contract in relation to the new Site. The terms of the new Service Contract shall be determined in accordance with the provisions of this Agreement, provided that:

- (i) the term of the new Service Contract shall be the remaining term of the original Service Contract;
- (ii) the Sharing Operator shall not be subject to Charges greater than the Charges applicable under the original Service Contract; and
- (iii) the other provisions of the new Service Contract shall be materially equivalent to those of the original Service Contract.

4.2.2 The Sharing Operator shall be entitled to refuse Relocation if the alternative Site is not to its reasonable technical satisfaction or if the terms of the new Service Contract do not comply with sub-clause (i), (ii) or (iii) of Clause 4.2.1 above. If the Sharing Operator refuses Relocation, the Service Contract in respect of the existing Site shall be deemed to terminate upon the expiration of the 45 day notice period specified in Clause 4.2.1 above and the Sharing Operator shall, in each case, remove all Sharing Operator Equipment at the Site within 15 days of such termination, or such other time period as the Parties, acting reasonably, may agree. If the Sharing Operator fails to remove the Sharing Operator Equipment within such time period, Indus shall not be responsible in any manner whatsoever for the Sharing Operator Equipment at such Site.



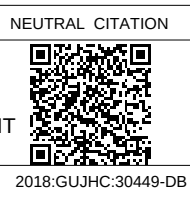
4.2.3 If the Sharing Operator refuses Relocation where the alternative Site is not to its reasonable technical satisfaction or where the terms of the new Service Contract do not comply with sub-clause (i), (ii) or (iii) of Clause 4.2.1 above, on termination of the original Service Contract no Exit Amount shall be payable by the Sharing Operator.”

- (k) “5.2 Indus Warranties and Covenants
Indus covenants, warrants and represents that it -
5.2.1 shall not create any encumbrances on any Site that restricts Site Access Availability.

5.2.3 shall not, and shall procure that any other operators on the Site do not, cause any damage or install any equipment that is of a type or frequency which will cause harmful interference or physical obstruction to any Sharing Operator Equipment existing at the Site at the time of such installation.”

- (l) “7.1.2 Any taxes, excluding income-based Taxes (including but not limited to corporate income tax), that arise in relation to the provision, establishment, installation, operation and/or maintenance of Passive Infrastructure or any part thereof at a Site to the Sharing Operator by shall be payable by the Sharing Operator to Indus in addition to the Charges relating to that Site. If there are multiple operators at the relevant Site, such Taxes are in the nature of one-off payments, if any new operator subsequently avails the Passive Infrastructure at a Site in respect of which such one-time payments have been borne and are not recoverable in whole or in part by the existing operator(s) at the Site, such new operator shall make a pro-rata payment in relation to such non-recoverable amount and each existing operator shall receive a pro rata payment for such non-recoverable amount paid by it in relation to such one-time Taxes. Indus shall provide a valid invoice that complies with all requirements imposed by the relevant taxation authorities in respect of such Taxes.”

- (m) “11 Term and Termination
11.1 Term
Neither Party shall have the right to terminate the



Agreement, except as set out in this Clause 11. The Parties shall review and discuss the terms and conditions of this Agreement on an annual basis, commencing from the first anniversary of the Effective Date.

11.2 Termination by either Party

Either Party may terminate this Agreement by written notice to the other Party at any time following:

11.2.1 the expiry or termination of all applicable Service Contracts;

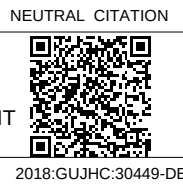
11.2.2 the occurrence of an Insolvency Event in respect of the other Party; or

11.2.3 a change of Law or notification of any Government Authority (which has not been stayed by a court of law or by a competent authority within 30 days of its occurrence) which necessarily renders the existence or performance of this Agreement void or invalid.”

(n) “21.1.1 Subject to Clause 21.1.2, neither Party shall assign, novate or otherwise transfer any of its right or obligation under the said contract to any person without the prior written consent of other party, such consent not to be unreasonably withheld or delayed.”

21.1.2 Either party shall be entitled to assign or novate any or all of its rights and obligations under this Agreement to any of its Group Companies without the other Party’s consent and the Parties will enter into such documents as are reasonably necessary for this purpose.”

(o) “2.5 For purposes of calculating the Uptime in relation to a Site, any planned Indus Downtime for repairs and maintenance and any Sharing Operator Downtime shall be excluded. Where Indus proposes to conduct any repairs and maintenance at a Site that may cause Indus Downtime, Indus shall submit a written request to the Sharing Operator in respect of such planned Indus Downtime. The Sharing Operator shall respond in writing to such request within two (2) Business Days granting or refusing permission to Indus. The Sharing Operator may



withhold permission where it believes that it is commercially reasonable for Indus to conduct the proposed repairs and maintenance without any Indus Downtime. Where the Sharing Operator does not respond within such time period, permission shall be deemed to be granted to Indus. Indus shall, on a best efforts basis, schedule such planned Indus Downtime for a time convenient to all operators at the Site. If the operators are unable to agree on a convenient time for such Indus Downtime, Indus commencement of any planned Indus Downtime, Indus shall inform the Sharing Operator's NOC of such planned Indus Downtime."

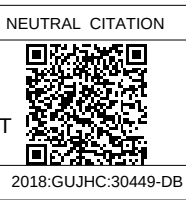
(p) "3. Sharing Operators Right to Operate

Where Indus, for any reason, is required to cease its operations with respect to any Site, the right to operate such Site shall be transferred to an operator at that Site in order to maintain the business continuity of the operator(s) at such Site, provided that such operator fulfills all the obligations required in relation to the operation of the Site. In respect of shared Sites, the right to operate the Site shall be offered to the operators at that Site in chronological order of receipt of their Service Orders in respect of that Site and shall be transferred to the operator who accepts such right."

(q) "2.2 In Clause 1.1 (Definitions) of the Master Service Agreement, after the definition of "Micro Sites" and before the definition of "New Sites", the following definition shall be, and is hereby, inserted:

"New Geography Site" means any Site at which the Sharing Operator shall be the sole operator and which, at the time the Sharing Operator raises a Service Order on Indus for such Site, it not located within a radius of 8.5 kilometers (aerial distance) of any other Site, excluding such other Sites at which the Sharing Operator is the sole operator. A Site shall cease to be a New Geography Site upon any other operator commencing the utilization of the Passive Infrastructure at such Site.

[6.2] Considering the working relationship between the petitioner and



the sharing operators as so stated in para 4 of the further affidavit reveals as follows:

“(i) The infrastructure provider (i.e. petitioner No.1 herein) allocates a specific height of its tower as required by the Sharing Operators and provides facilities for the mounting of the active infrastructure at that height.

(ii) Thereafter a network survey or call survey is carried out by a team of the Sharing Operators and it is determined as to whether the height is suitable and if required the height is accordingly adjusted on the tower.

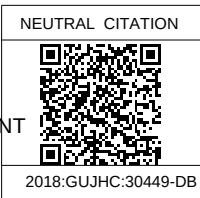
(iii) Usually, equipments that constitute the active infrastructure are not manufactured by the Sharing Operators, but they are manufactured by other Original Equipment Manufacturer.

(iv) The active infrastructure includes base terminal station equipment, associated antennae, backhaul connectivity to the sharing operator’s work and other requisite equipment and associated civil and electrical works required to provide telecommunication services by the sharing operator at a telecommunication site other than passive infrastructure.

(v) The maintenance of such equipments, thus requires frequent interventions from the representatives of OEMs.

(vi) Thus, the access to the specific height at the tower is granted not only to the Sharing Operators, but also to such other sub-contractors on behalf of the Sharing Operators.

(vii) It may thus be noted that the right to access to a specific height on a tower is restricted to the discretion of the Sharing Operators, to the exclusion of all other individuals. Hence, it may be safely surmised that the right is in effect a transfer of right to use with specific height on the tower.

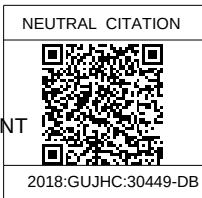


(viii) The aforesaid relationship between the Infrastructure Provider and the Sharing Operators has been formalized and legalized vide contracts having been arrived at between the parties.

(ix) The schedule of charges is available in the 4th Supplementary Agreement between the petitioner No.1 and Vodafone Cellular Limited. The amount of final charge payable is also on functioning of the height at which antennae are installed. Thus, it can again safely be inferred that the height at which the antennae are to be installed is determined mutually by the Infrastructure Provider and the Sharing Operators according to the operational convenience of the Sharing Operators that once that height is determined and the antennae are mounted, thereafter the Sharing Operator acquires exclusive control of that specific height on the tower, wherefrom it runs its active infrastructure and it maintains the same with assistance of required external agencies.”

[6.3] To consider any transaction as a “sale” under the provisions of Section 2(23)(d) of the GVAT Act, transaction must fall within the following criteria.

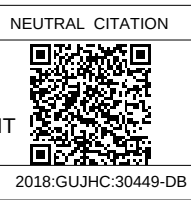
- “(a) There must be goods available for delivery.
- (b) There must be a consensus ad idem between the parties as to the identity of the goods.
- (ci) The transferee should have a legal right to use the goods and consequently, all legal consequences of such use including any permission or licenses required should therefore be available to the transferee.
- (d) For the period during which the transferee has such legal rights, it has to be to the exclusion to the transferor – this



is the necessary concomitant of plain language of the statute, i.e. a transfer of right to use and not merely a license 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 right to others.”

[6.4] Thus, on perusal of the MSA as amended from time to time it can be seen that the petitioner Company has agreed to provide passive telecommunication infrastructure to the telecom operator so as to facilitate them to install and operate requisite equipments to provide telecommunication services. The said infrastructure would be provided to the telecom operator on “use only basis” for installation, operation and maintenance etc. of the active infrastructure of a telecom operator. It also appears that the petitioner Company grants the right to the telecom operator to enter the concerned site for installing necessary equipments, machineries owned by it at such site as may be required by it as well as also grants the right to operate and maintain the same. Considering various clauses of the MSA as amended from time to time reproduced herein above, it can be said that the telecom operator can be said to have effective control over the manner, time and nature of use of passive infrastructure by virtue of its “right to use goods” acquired through such contract. Even the telecom operator has right to select the particular height, direction or other equipments. The petitioner Company does not have any freedom to allot the same height, direction on the same tower. Thus, once a particular placed is allotted by way of passive infrastructure, to any telecom operator, the said telecom operator can be said to be in exclusive domain and/or possession and/or use of such passive infrastructure by virtue of its “right to use” acquired through the contract subject to the conditions of MSA as amended from



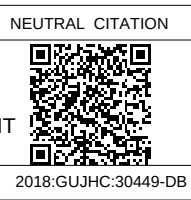
time to time once it is allotted to the petitioner Company does not appear to have the effective control over the manner, time and nature of use of a specified access to passive infrastructure allotted to a particular operator. Therefore, the transaction in question between the petitioner Company and the respective telecom operators pursuant to the respective MSA as amended from time to time cannot be said to be in the nature of “service contract” as contended on behalf of the petitioner. The same can be considered as “right to use goods” as contemplated under the provisions of section 2(23)(d) of the GVAT Act and therefore, they can be said to be “deemed sale” liable to be taxed under the provisions of the GVAT Act.

[6.5] Now, so far as the reliance placed upon the decisions of the four High Courts heavily relied upon by the learned Counsel appearing on behalf of the petitioners is concerned, with respect and for the reasons stated herein above, we are not in agreement with the view taken by the High Courts in the aforesaid decisions. Even otherwise it is required to be noted that the Karnataka High Court which is the lead judgment, which has been followed by other High Courts did not have an occasion to consider the amended clauses and/or other clauses which are there in the present MSA amended from time to time. There is an amendment in the definition of “Passive Telecom Infrastructure”; “Site Access Availability”, which was not there before the Karnataka High Court. Even the Clause 3.1.2 which was there in the present MSA as amended from time to time has not been considered by the Karnataka High Court. Under the circumstances, for the reasons stated above, we are not in agreement with the view taken by the aforesaid four High Courts in the case of Indus Towers Ltd. (Supra).

[6.6] It is next contended on behalf of the petitioners that as the

petitioner is paying the service tax, the impugned demand of tax under the GVAT Act would be double taxation is concerned, the aforesaid has no substance. The liability to pay service tax under the Service Tax Act imposed by the Union of India is on different eventuality and circumstances and the liability to pay VAT would be different and distinct under the different statute and GVAT Act. The State Legislature has competence to levy VAT on the sales within the ambit of section 2(23)(d) of the GVAT Act. In the case of **Federation of Hotel & Restaurant vs. Union of India** reported in (1989) 3 SCC 634. While applying “aspects” doctrine the Hon’ble Supreme Court has specifically observed and held that the “subjects which in one aspect and for one purpose fall within the power of a particular legislature may in another aspect and for another purpose fall within another legislative power”. It is further observed that “there might be overlapping, but the overlapping must be in law. The same transaction may involve two or more taxable events in its different aspects. But the fact that there is overlapping does not distract from the distinctiveness of the aspects”. Therefore, the submission on behalf of the petitioners that the liability to pay the tax under the GVAT Act would be double taxation on the same consideration / transaction, cannot be accepted. Therefore, in the facts and circumstances of the case, the decision of the Hon’ble Supreme Court in the case of BSNL (Supra) relied upon by the learned Counsel appearing on behalf of the petitioners as regards the taxation on the same transaction under two different headings shall not be applicable to the facts of the case on hand.

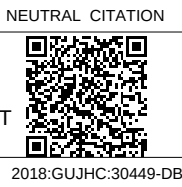
[6.7] Now, so far as the submission on behalf of the petitioners that in view of earlier determination order under Section 80 GVAT Act, the present show-cause notice shall not be maintainable and reliance placed upon the decision of the Division Bench of this Court in the case of



Nestle India Limited (Supra) is concerned, at the outset it is required to be noted that there are changed circumstances after the earlier determination order is passed. Some important clauses in the original MSA have been amended which goes to the root of the matter. Even now Article 366(29A) of the Constitution of India is required to be considered which has been introduced / inserted by way of 46th amendment. Therefore, earlier determination order cannot be a bar to issue fresh show-cause notice in view of the changed circumstances.

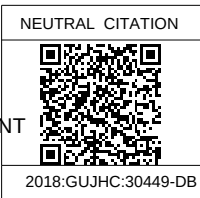
[6.8] Now, so far as the submission on behalf of the petitioners that section 52 of the GVAT Act is beyond the legislative competence is concerned, the aforesaid has no substance. With respect to the sale / deemed sale to impose sales tax / value added tax within the State, the State has got the power to make laws.

[6.9] Now, so far as the submission on behalf of the petitioners that section 52 of the GVAT Act which treats two or more amalgamating companies as distinct companies for all the periods up to the date of the High Court order by virtue of which the Scheme of Arrangement is sanctioned is beyond the legislative competence and/or the same could be in conflict with the provisions of the Companies Act enacted by the Union of India is concerned, the same has no substance. At the outset it is required to be noted that as such *vires* of section 52 of the GVAT Act are not under challenge. Secondly, what is provided under Section 52 of the GVAT Act is with respect to the taxability events under the GVAT Act and it cannot be said to be in conflict with any of the provisions of the Companies Act. Section 52 of the GVAT Act is to avoid the pilferage of the tax. If submission on behalf of the petitioners is accepted, in that case, there shall not be any tax liability either of the merging company and/or of the petitioner Company during the interregnum period i.e.



between the order of the Court and giving effect to such amalgamation from the date earlier to the date of the order. In other words, there shall be zero liability which is not permissible and/or which cannot be the intention of the legislature. Considering section 52(1) of the GVAT Act, only for the purpose of tax liability during the aforesaid period the liability to pay the tax would be continued. On bare perusal of section 52, the intention of the legislature can be culled out i.e. to avoid pilferage of tax. Section 52 of the GVAT Act shall be considered and restricted to an for the purpose of GVAT Act only and for no any other purpose. Therefore, considering section 52 of the GVAT Act, the decision of the Delhi High Court relied upon by the learned Counsel appearing on behalf of the petitioners that the merging entities ceases to exist after their amalgamation with Indus Towers Ltd. - petitioner herein with effect from 01.04.2009 will not come in the way of the Department in assessing the tax during the interregnum period and the transactions of sale and purchase by the respective merging entities, taken place during the period from 01.04.2009 till the order of the High Court sanctioning the Scheme of Arrangement etc. On the similar reasons other decisions relied upon by the learned Counsel appearing on behalf of the petitioners in support of his case that once the merging entities ceases to exist, for all purposes after their amalgamation with the petitioner with effect from 01.04.2009, shall not be applicable to the facts of the case on hand more particularly considering section 52 of the GVAT Act.

[7.0] In view of the above and for the reasons stated above, the impugned show-cause notice cannot be said to be wholly without jurisdiction and/or without authority under the law. If there are any other contentions, that may be submitted before the Appropriate Authority, as the present petition is against the show-cause notice, which was challenged on the grounds stated herein above, which have been



dealt with by us as herein above.

[8.0] In view of the above and for the reasons stated herein above, present Special Civil Application fails and the same deserves to be dismissed and is, accordingly, dismissed. Notice is discharged. Ad-interim relief granted earlier stands vacated forthwith. In the facts and circumstances of the case, there shall be no order as to costs.

Sd/-
(M.R. SHAH, J.)

Sd/-
(B.N. KARIA, J.)

FURTHER ORDER

At this stage, Shri Mehta, learned Advocate appearing on behalf of the petitioners prays to continue the ad-interim relief granted earlier so as to enable the petitioners to approach the Hon'ble Supreme Court.

In the facts and circumstances of the case, ad-interim relief granted earlier, which has been continued earlier, is directed to be continued till 10.09.2018.

Sd/-
(M.R. SHAH, J.)

Sd/-
(B.N. KARIA, J.)

Ajay**