$~92-94

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% ***Judgment delivered on: 12.12.2024***

\+ W.P.(C) 13211/2024

M/S BHARTI AIRTEL LIMITED .....Petitioner

Through: Mr. Sujit Ghosh, Sr. Adv. with Mr. Kumar Visalaksh, Mr. Udit Jain and Ms. Akansha Dikshit, Advs.

versus

COMMISSIONER, CGST APPEALS-1 DELHI .....Respondent

Through: Mr. Anurag Ojha, SSC with Mr. Subham Kumar, Mr. Dipak Raj and Mr. Kumar Abhishek, Advs.

93

\+ W.P.(C) 14710/2024 & CM APPL. 61806/2024 (Interim Stay)

INDUS TOWERS LIMITED .....Petitioner

Through: Mr. V. Lakshmikumaran, Mr. Yogendra Aldak and Mr. Sumit Khadaria, Advs.

versus

UNION OF INDIA & ORS. .....Respondents

Through: Mr. Mukul Singh, CGSC with Ms. Ira Singh and Mr. Aryan Dhaka, Advs. for R-1.

94

\+ W.P.(C) 16477/2024 & CM APPL. 69485/2024 (Interim Stay)

ELEVAR DIGITEL INFRASTRUCTURE PVT LTD (EARLIER KNOWN AS ATC TELECOM INFRASTRUCTURE PVT LTD) .....Petitioner

Through: Mr. V. Lakshmikumaran, Mr. Yogendra Aldak and Mr. Sumit Khadaria, Advs.

versus

UNION OF INDIA & ORS. .....Respondents

Through: Ms. Avshreya Pratap Singh, SPC with Mr. Abhigyan Siddhant, GP, Mr. Anurag Sahay and Mr. Rohit Kumar, Advs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE GIRISH KATHPALIA

J U D G M E N T

YASHWANT VARMA, J. (Oral)

CM APPL. 55156/2024 (Ex.) in W.P.(C) 13211/2024

Allowed, subject to all just exceptions.

Application stands disposed of.

CM APPL. 73112/2024 (Amendment) in W.P.(C) 13211/2024

Bearing in mind the disclosures made in the application, it is allowed.

Application stands disposed of.

W.P.(C) 13211/2024
W.P.(C) 14710/2024 & CM APPL. 61806/2024 (Interim Stay)
W.P.(C) 16477/2024 & CM APPL. 69485/2024 (Interim Stay)

1. These three writ petitions assail the proceedings drawn by the respondents under the **Central Goods and Services Tax Act, 2017**[1]

[1] CGST Act

and essentially question the characterization of telecommunication towers as immovable property and thus falling within the ambit of Section 17(5) of the CGST Act and being illegible for input tax credit.

2. While Bharti Airtel assails the validity of an Order-in-Original dated 24 March 2023 as affirmed in appeal in terms of the order dated 31 May 2024 passed by the Commissioner of Central Tax Appeals-1, the writ petitions preferred by **Indus Towers Limited**[2] and **Elevar Digitel Infrastructure Pvt Ltd**[3], impugn **Show Cause Notices**[4] laying similar allegations.

3. For purposes of brevity, we propose to take note of the salient facts as they obtain in the writ petition preferred by Indus Towers. The impugned SCN under Section 74 of the CGST Act raises a demand of tax along with interest and penalty for the period 01 July 2017 to 31 March 2024 relating pan India to 48 **Goods and Services Tax**[5] registrations of the writ petitioner. Indus Towers explains that it is engaged in the business of providing passive infrastructure services to telecommunication service providers.

4. As was noticed in the prefatory parts of this decision, the impugned SCNs' seek to deny input tax credit on inputs and input services used for setting up passive infrastructure on the ground that the same were used in the construction of telecommunication towers and consequently falling within the ambit of clause (d) of Section 17(5) of the CGST Act. The relevant part of Section 17 is extracted hereinbelow:-

---

[2] W.P. (C) 14710/2024
[3] W.P. (C) 16477/2024
[4] SCNs
[5] GST

"17. Apportionment of credit and blocked credits.

xxxx xxxx xxxx

(5) Notwithstanding anything contained in sub-section (1) of Section 16 and sub-section (1) of Section 18, input tax credit shall not be available in respect of the following, namely:—

(a) motor vehicles for transportation of persons having approved seating capacity of not more than thirteen persons (including the driver), except when they are used for making the following taxable supplies, namely:—

(A) further supply of such motor vehicles; or

(B) transportation of passengers; or

(C) imparting training on driving such motor vehicles;

(aa) vessels and aircraft except when they are used—

(i) for making the following taxable supplies, namely:—

(A) further supply of such vessels or aircraft; or

(B) transportation of passengers; or

(C) imparting training on navigating such vessels; or

(D) imparting training on flying such aircraft;

(ii) for transportation of goods;

(ab) services of general insurance, servicing, repair and maintenance in so far as they relate to motor vehicles, vessels or aircraft referred to in clause (a) or clause (aa):

Provided that the input tax credit in respect of such services shall be available—

(i) where the motor vehicles, vessels or aircraft referred to in clause (a) or clause (aa) are used for the purposes specified therein;

(ii) where received by a taxable person engaged—

(I) in the manufacture of such motor vehicles, vessels or aircraft; or

(II) in the supply of general insurance services in respect of such motor vehicles, vessels or aircraft insured by him;

(b) the following supply of goods or services or both—

(i) food and beverages, outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, leasing, renting or hiring of motor vehicles, vessels or aircraft referred to in clause (a) or clause (aa) except when used for the purposes specified therein, life insurance and health insurance:

Provided that the input tax credit in respect of such goods or services or both shall be available where an inward supply of such goods or services or both is used by a registered person for making an outward taxable supply of the same category of goods or services or both or as an element of a taxable composite or mixed supply;

(ii) membership of a club, health and fitness centre; and

(iii) travel benefits extended to employees on vacation such as leave or home travel concession:

Provided that the input tax credit in respect of such goods or services or both shall be available, where it is obligatory for an employer to provide the same to its employees under any law for the time being in force.]

(c) works contract services when supplied for construction of an immovable property (other than plant and machinery) except where it is an input service for further supply of works contract service;

(d) goods or services or both received by a taxable person for construction of an immovable property (other than plant or machinery) on his own account including when such goods or services or both are used in the course or furtherance of business.

Explanation.—For the purposes of clauses (c) and (d), the expression "construction" includes re-construction, renovation, additions or alterations or repairs, to the extent of capitalisation, to the said immovable property;

(e) goods or services or both on which tax has been paid under Section 10;

(f) goods or services or both received by a non-resident taxable person except on goods imported by him;

(fa) goods or services or both received by a taxable person, which are used or intended to be used for activities relating to his obligations under corporate social responsibility referred to in Section 135 of the Companies Act, 2013 (18 of 2013);

(g) goods or services or both used for personal consumption;

(h) goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples; and

> (i) any tax paid in accordance with the provisions of Section 74 in respect of any period up to Financial Year 2023-24.

xxxx xxxx xxxx

Explanation.—For the purposes of this Chapter and Chapter VI, the expression "plant and machinery" means apparatus, equipment, and machinery fixed to earth by foundation or structural support that are used for making outward supply of goods or services or both and includes such foundation and structural supports but excludes—

> (i) land, building or any other civil structures;
>
> (ii) telecommunication towers; and
>
> (iii) pipelines laid outside the factory premises."

5. The assertion of the writ petitioners is that telecommunication towers are moveable items of essential equipment used in telecommunications which can be dismantled at site and thus capable of being moved. It is explained that it is only the concrete structure on which those telecommunication towers are placed which could be treated as an immovable element of that equipment whereas the steel/metal structures are capable of being shifted to other locations. It

is asserted that the errection of those towers on a concrete base is essentially for the purposes of according stability to the towers and that in itself would not detract from their basic characteristic of being items of equipment which are principally moveable. In view of the above, they would contend that the assumption that the installation of these towers results in the establishment of an immovable structure is misconceived.

6. According to the writ petitioners, the question of whether telecommunication towers are liable to be treated as immovable property is no longer *res integra* and stands conclusively settled in light of the recent decision rendered by the Supreme Court in **Bharti Airtel Ltd vs. Commissioner of Central Excise, Pune**[6]**.** It was pointed out that *Bharti Airtel*, in fact, affirms the view that was taken by this Court in **Vodafone Mobile Services Limited vs. Commissioner of Service Tax, Delhi**[7], albeit in the context of Rule 2 of the **Cenvat Credit Rules, 2004**[8]. It was submitted that telecom towers, as the Supreme Court in *Bharti Airtel* holds, are intrinsically moveable items and were liable to be treated as capital goods entitled to be viewed as inputs under Rule 2(k) of the 2004 Rules.

7. Both Mr. Lakshmikumaran, learned counsel as well as Mr. Ghosh, learned senior counsel, who appeared for the writ petitioners had submitted that *Bharti Airtel* has in unequivocal terms held that these towers cannot be viewed as constituting immovable property. It is on this basis that the petitioners call upon this Court to quash the orders and the notices impugned.

---

[6] 2024 SCC OnLine SC 3374
[7] 2018 SCC OnLine Del 12302
[8] 2004 Rules

8. While the conclusions rendered in *Bharti Airtel* as well as by this Court in *Vodafone Mobile Services* is not questioned by the respondents, they would seek to distinguish those decisions essentially in light of the Explanation which stands appended at the end of Section 17 of the CGST Act and the exclusion of telecommunication towers specifically in terms thereof.

9. However, and on hearing learned counsels for respective sides, we find ourselves unable to sustain that argument for reasons which follow.

10. The Supreme Court in *Bharti Airtel* was principally concerned with whether mobile service providers who pay excise duties on various items of infrastructure including the erection of mobile towers and peripherals would be entitled to avail the benefit of the 2004 Rules. The High Courts, as the Supreme Court noted, had taken divergent views with the Bombay High Court having ruled against the Mobile Service Providers [“MSPs”]. Our Court, however, had held to the contrary.

11. While examining the principal question which arose, the Supreme Court firstly took note of the judgment rendered in *Vodafone Mobile Services* by this Court and which had found that it would be incorrect to characterize mobile towers as immovable property since they would not satisfy the test of permanency or be liable to viewed as something attached to the earth. This becomes evident from a reading of Paras 10.9.1 and 10.9.2 of *Bharti Airtel* and which are extracted hereinbelow:-

> “**10.9.1.** As regards the first issue as to whether towers, shelters and accessories used by the Assessee for providing business support

services were immovable property or not, the Delhi High Court, after examining the relevant statutory provisions under Section 3(36) of the General Clauses Act, 1897 and Section 3 of the Transfer of Property Act, 1882, elaborately discussed the concept of immovable property, referring to a number of decisions including in *Commissioner of Central Excise, Ahmedabad* v. *Solid and Correct Engineering Works*, (2010) 5 SCC 122; *Sirpur Paper Mills Ltd.* v. *Collector of Central Excise, Hyderabad*, (1998) 1 SCC 400; *Narne Tulaman Manufacturers Pvt. Ltd. Hyderabad* v. *Collector of Central Excise, Hyderabad*, (1989) 1 SCC 172; *Quality Steel Tubes (P) Ltd.* v. *Collector of Central Excise, U.P.*, (1995) 2 SCC 372 1995 and *Mittal Engineering Works (P) Ltd.* v. *Collector of Central Excise, Meerut*, (1997) 1 SCC 203; *Triveni Engineering & Indus Ltd.* v. *Commissioner of Central Excise*, (2000) 7 SCC 29 and other decisions rendered by the Delhi High Court, and applied the permanency test to come to the definitive finding that the entire tower and shelter are fabricated in the factories of the respective manufacturers and thereafter, are supplied in CKD condition to the mobile service providers. It was held that these are merely fastened to the civil foundation to make these wobble free and stable. It was also held that tower and PFB can be unbolted and reassembled without any damage and relocated to a new site. These are thus not permanently annexed to the earth for the beneficial enjoyment of the land of the owner as observed in para 37 of the decision of the Delhi High Court which is reproduced below:

> *"37. On an application of the above tests to the cases at hand, this Court sees no difficulty in holding that the manufacture of the plants in question do not constitute annexation and hence cannot be termed as immovable property for the following reasons:*
>
> *(i) The plants in question are not per se immovable property.*
>
> *(ii) Such plants cannot be said to be "attached to the earth" within the meaning of that expression as defined in Section 3 of the Transfer of Property Act.*
>
> *(iii) The fixing of the plants to a foundation is meant only to give stability to the plant and keep its operation vibration free.*
>
> *(iv) The setting up of the plant itself is not intended to be permanent at a given place. The plant can be moved and is indeed moved after the road construction or repair project for which it is set up is completed."*

It was thus held that these are not immovable properties as held by the Tribunal.

10.9.2. Having held that these are not immovable but moveable, the Delhi High Court went on to examine the second issue as to whether the Assessee is entitled to claim CENVAT Credit on the tower and PFB either as "capital goods" or as "inputs" in terms of Rule 2(a)(A)(i) or Rule 2(k) of the CENVAT Rules, and whether these would qualify as accessories within the meaning of Rule 2(a)(A)(iii)."

12. The Supreme Court after reviewing past precedents rendered in the context of what would constitute immovable property, identified the following precepts which would govern:-

"**11.8.1.** We may summarise some of the principles applied by the Courts in the decisions referred to above to determine the nature of the property as follows:

1. **Nature of annexation:** <u>This test ascertains how firmly a property is attached to the earth. If the property is so attached that it cannot be removed or relocated without causing damage to it, it is an indication that it is immovable</u>.

2. **Object of annexation** : <u>If the attachment is for the permanent beneficial enjoyment of the land, the property is to be classified as immovable. Conversely, if the attachment is merely to facilitate the use of the item itself, it is to be treated as movable, even if the attachment is to an immovable property</u>.

3. **Intendment of the parties:** <u>The intention behind the attachment, whether express or implied, can be determinative of the nature of the property. If the parties intend that the property in issue is for permanent addition to the immovable property, it will be treated as immovable. If the attachment is not meant to be permanent, it indicates that it is movable</u>.

4. **Functionality Test:** <u>If the article is fixed to the ground to enhance the operational efficacy of the article and for making it stable and wobble free, it is an indication that such fixation is for the benefit of the article, such the property is movable</u>.

5. **Permanency Test:** <u>If the property can be dismantled and relocated without any damage, the attachment cannot be said to be permanent but temporary and it can be considered to be movable</u>.

6. **Marketability Test:** If the property, even if attached to the earth or to an immovable property, can be removed and sold in the market, it can be said to be movable."

13. It proceeded further to negate the contention of the Revenue that mobile towers would qualify the test of *"attached to the earth"* in the following terms:-

> "**11.9.** The plea of the Revenue is that the items in issue are attached to the earth, fixed permanently and not marketable, hence immovable, as also accepted by the Bombay High Court.
>
> **11.9.1.** What is "attached to the earth" to make it an immovable property would have to possess any of the three attributes as specified under Section 3 of the Transfer of Property of Act, namely,
>
> (a) rooted in the earth, as in the case of trees and shrubs;
>
> (b) imbedded in the earth, as in the case of walls or buildings; or
>
> (c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached:
>
> **11.9.2.** The present items in issue are not the ones which are rooted in the earth as in the case of trees and shrubs [sub-clause (a)]. Therefore, the next consideration will be whether these are embedded in the earth, as in the case of walls or buildings [sub-clause (b)], or whether these are attached to what is so embedded for the permanent beneficial enjoyment of that to which these are attached to the earth [sub-clause (c)]. The attachment of tower to the earth/building, however, does not partake of the character of walls or buildings imbedded in the earth.
>
> **11.9.3.** <u>It is on the tower that the antennas are mounted and affixed at proper height, to make these stable. Since the antennas are used for receiving and sending radio signals, these need to be attached at a certain height, and these are required to be stable and wobble-free. It is not in dispute that the mobile tower is attached and fastened to the earth or building to provide stability to the same and to make antennas unshakable due to wind, rain or any other external force</u>(s).

11.9.4. The mobile tower is bought and brought in the CKD or SKD form from the manufacturers and same is installed at the site by assembling the parts which also consists of MS angles and channels. The tower, after being assembled and fixed to the earth or a building can be dismantled without any change in the nature of the tower, and the tower can be removed and shifted to any other location as per the needs and requirements of the service provider and also can be re-sold in the market in the same form and hence both, the functionality and marketability tests as applied in the aforesaid cases of *Solid and Correct Engineering* (supra), *Triveni Engineering*(supra) and *Sirpur Paper Mills Ltd.* (supra) can be said to be fulfilled in the present case.

11.9.5. The tower is brought to the site in CKD or SKD form and assembled at the site. If it is to be dismantled, it only involves unbolting of the nuts and bolts. Dismantling the tower may entail some damages, but such damages will be on the cables which may be required to be stripped of but no damage is caused to the tower. If one says that there may be some damage caused, it will be with reference to the BTS which consists of the antenna, connected by cables and other electrical equipment. But there is no damage to the tower per se. Similarly, in case of PFB, there is no damage to it, though damage may be caused to the wiring or cables connecting the various parts of the Base Transceiver System (BTS) or the Base Station Sub-System (BSS).

11.9.6. The tower which is affixed to the earth and thus appears to be immovable, can be dismantled from the existing site and re-assembled without causing any change in its character. It can be moved to any other place and also sold in the market. These attributes negate the permanency test, which is a characteristic of immovable property. The tower when fixed to the earth or the building or the civil foundation by nuts and bolts does not get assimilated with the earth or building permanently. Such affixing is only for the purpose of maintaining stability of the tower and keep it wobble free so that the antenna which is hoisted on it can receive and transmit the electromagnetic signals effectively and without any disturbance. Affixing of the tower to the earth or building is not for the permanent beneficial enjoyment of the land or building, but to make it stable for effective functioning of the antenna for seamless rendering of mobile services by the service provider to the consumers/subscribers. Same is the case with prefabricated buildings (PFB).

11.9.7. If we thus apply the functionality test, it can be stated that the attachment of tower to the earth/building is not for the benefit of the land or the building but for better functioning of the antenna which is fixed on the tower. Thus, based on functionality test it can

be said that tower is a movable property, as also held in *Municipal Corporation of Greater Bombay*(supra).

11.9.8. These items are not embedded in the earth as in the case of walls or buildings so as to fall under clause (b) of the definition of "attached to the earth" as provided under Section 3 of the Transfer of Property of Act.

Neither do these items fall under clause (c) of the definition of "attached to the earth" and nor are these intended to be for permanent beneficial enjoyment of the building or land to which these are attached.

In this regard, it may be apposite herein to mention what was stated in *Solid & Correct Engg. Works* (supra) as follows:—

> ***"25.*** *It is evident from the above that the expression "attached to the earth" has three distinct dimensions viz. (a) rooted in the earth as in the case of trees and shrubs, (b) imbedded in the earth as in the case of walls or buildings, or (c) attached to what is imbedded for the permanent beneficial enjoyment of that to which it is attached. Attachment of the plant in question with the help of nuts and bolts to a foundation not more than 1½ ft deep intended to provide stability to the working of the plant and prevent vibration/wobble free operation does not qualify for being described as attached to the earth under any one of the three clauses extracted above. That is because attachment of the plant to the foundation is not comparable or synonymous to trees and shrubs rooted in earth. It is also not synonymous to imbedding in earth of the plant as in the case of walls and buildings, for the obvious reason that a building imbedded in the earth is permanent and cannot be detached without demolition. Imbedding of a wall in the earth is also in no way comparable to attachment of a plant to a foundation meant only to provide stability to the plant especially because the attachment is not permanent and what is attached can be easily detached from the foundation. So also the attachment of the plant to the foundation at which it rests does not fall in the third category, for an attachment to fall in that category it must be for permanent beneficial enjoyment of that to which the plant is attached. It is nobody's case that the attachment of the plant to the foundation is meant for permanent beneficial enjoyment of either the foundation or the land in which the same is imbedded."* "

14. The Supreme Court ultimately came to render the following conclusions :-

> "**11.9.9.** Applying the tests of ***permanency***, ***intendment, functionality*** and ***marketability***, it is quite clearly evident that these items are not immovable but movable within the meaning of Section 3 of the Transfer of Property Act, read with Section 3 (36) of the General Clause Act.
>
> If we consider the nature of annexation of the tower to the earth, it is seen that the annexation is not for permanent annexation to the land or the building as the tower can be removed or relocated without causing damage to it.
>
> It is also to be noted that the attachment of the tower to the building or the land is not for the permanent enjoyment of the building or the land.
>
> Further, the tower is fixed to the land or building for enhancing the operational efficacy and proper functioning of the antenna which is fixed on the tower by making it stable and wobble free.
>
> The fact that the tower, if required can be removed, dismantled in the CKD and SKD and sold in the market is not disputed.
>
> Application of the tests evolved and discussed above on these items clearly points to the movability as opposed to immovability of these items. We are, thus, of the view that mobile towers and PFBs are movable properties and hence, "goods".
>
> xxxx xxxx xxxx
>
> **11.11.12.** We, therefore, agree with the conclusion arrived at by the Delhi High Court that towers and shelters (PFBs) support the BTS/antenna for effective transmission of mobile signals and thus enhance their efficiency and since these articles are components/accessories of BTS/antenna which are admittedly "capital goods" falling under Chapter 85 within sub-clause (i) of Rule 2(a)(A) of CENVAT Rules, these items consequently are covered by the definition of "capital goods" within the meaning of sub-clause (iii) read with sub-clause (i) of Rule 2(a)(A) of CENVAT Rules. Further, since these are used for providing output service, i.e., mobile telecommunication service, and since these are "capital goods" received in the premises of the provider of output service as contemplated under Rule 3(1)(i), the Assessees would be entitled to CENVAT credit on the excise duties paid on these goods.

xxxx xxxx xxxx

11.12.6. Having held that the tower and pre-fabricated buildings (PFBs) are "goods" and not immovable property and since these goods are used for providing mobile telecommunication services, the inescapable conclusion is that they would also qualify as "inputs" under Rule 2(k) for the purpose of credit benefits under the CENVAT Rules.

xxxx xxxx xxxx

11.13. For the foregoing reasons, we agree with the conclusions arrived at by the Delhi High Court and uphold the judgment rendered by it in *Vodafone* (supra) and dismiss the connected appeals being CA No. 5032-5035 of 2021, CA No. 5039-5040 of 2021, CA No. 5038 of 2021, CA No. 5036-5037 of 2021, CA No. 62 of 2022. "

15. It is thus apparent that in *Bharti Airtel*, the Supreme Court has conclusively held that telecommunication towers cannot be construed as being immovable property. While arriving at that conclusion, the Supreme Court had reaffirmed the concept of immovable property as was lucidly explained in **Commissioner of Central Excise, Ahmedabad vs. Solid and Correct Engineering Works & Others.**[9] and where it had held as follows:-

"**29.** The Indian law has developed on similar lines and the mode of annexation and object of annexation have been applied as relevant tests in this country also. There are cases where machinery installed by a monthly tenant was held to be movable property as in cases where the lease itself contemplated the removal of the machinery by the tenant at the end of the tenancy. The mode of annexation has been similarly given considerable significance by the courts in this country in order to be treated as fixture. Attachment to the earth must be as defined in Section 3 of the Transfer of Property Act. For instance a hut is an immovable property, even if it is sold with the option to pull it down. A mortgage of the superstructure of a house though expressed to be exclusive of the land beneath, creates an interest in immovable

[9] (2010) 5 SCC 122

property, for it is permanently attached to the ground on which it is built.

30. The courts in this country have applied the test whether the annexation is with the object of permanent beneficial enjoyment of the land or building. Machinery for metal shaping and electroplating which was attached by bolts to special concrete bases and could not be easily removed, was not treated to be a part of structure or the soil beneath it, as the attachment was not for mere beneficial enjoyment of either the soil or concrete. Attachment in order to qualify the expression attached to the earth, must be for the beneficial attachment of that to which it is attached. Doors, windows and shutters of a house are attached to the house, which is imbedded in the earth. They are attached to the house which is imbedded in the earth for the beneficial enjoyment of the house. They have no separate existence from the house. Articles attached that do not form part of the house such as window blinds, and sashes, and ornamental articles such as glasses and tapestry fixed by the tenant, are not affixtures.

31. Applying the above tests to the case at hand, we have no difficulty in holding that the manufacture of the plants in question do not constitute annexation hence cannot be termed as immovable property for the following reasons:

(*i*) The plants in question are not *per se* immovable property.

(*ii*) Such plants cannot be said to be "attached to the earth" within the meaning of that expression as defined in Section 3 of the Transfer of Property Act.

(*iii*) The fixing of the plants to a foundation is meant only to give stability to the plant and keep its operation vibration free.

(*iv*) The setting up of the plant itself is not intended to be permanent at a given place. The plant can be moved and is indeed moved after the road construction or repair project for which it is set up is completed.

32. We may, at this stage, refer to the decisions of this Court which were relied upon by learned counsel for the parties in support of their respective cases.

33. In *Sirpur Paper Mills Ltd.* [(1998) 1 SCC 400] this Court was dealing with a near similar situation as in the present case. The question there was whether the paper machine assembled at site mainly with the help of components bought from the market was dutiable under the Central Excise Act, 1944. The argument advanced on behalf of the assessee was that since the machine was

embedded in a concrete base the same was immovable property even when the embedding was meant only to provide a wobble free operation of the machine. Repelling that contention this Court held that just because the machine was attached to earth for a more efficient working and operation the same did not per se become immovable property.

34. The Court observed: (*Sirpur Paper Mills Ltd. case* [(1998) 1 SCC 400] , SCC p. 402, para 5)

> "*5.* Apart from this finding of fact made by the Tribunal, the point advanced on behalf of the appellant, that whatever is embedded in earth must be treated as immovable property is basically not sound. For example, a factory owner or a householder may purchase a water pump and fix it on a cement base for operational efficiency and also for security. That will not make the water pump an item of immovable property. Some of the components of the water pump may even be assembled on site. That too will not make any difference to the principle. The test is whether the paper-making machine can be sold in the market. The Tribunal has found as a fact that it can be sold. In view of that finding, we are unable to uphold the contention of the appellant that the machine must be treated as a part of the immovable property of the Company. Just because a plant and machinery are fixed in the earth for better functioning, it does not automatically become an immovable property.""

16. Tested on the aforesaid precepts, it becomes apparent that the stand taken by the respondents, namely, of telecommunication towers being liable to be viewed as immovable property is rendered wholly untenable. As the Supreme Court held in *Bharti Airtel*, telecommunication towers would clearly not qualify the five fundamental precepts which define an immoveable property. It was found that they neither qualify the test of permanency nor can they be said to be "attached to the earth". Mobile towers, it was held, could be dismantled and moved and that they were never erected with an intent of conferring permanency. Their placement on concrete bases was only to enable those towers to overcome the vagaries of nature.

Therefore, there cannot possibly be a doubt with respect to telecommunication towers being moveable property.

17. Turning then to the provisions of Section 17(5) itself, it is pertinent to note that the said provision sets out various goods and services which would stand exorcised from Section 16(1) and thus not liable to be taken into consideration for the purposes of availing input tax credit. Amongst the various goods and services which find mention in sub-section (5) are those received by a taxable person for construction of an immovable property. Clause (d) of Section 17(5), also excludes from immovable property "plant or machinery". The expression "plant and machinery" has been defined by the Explanation appearing in Section 17(5) to mean apparatus, equipment and machinery fixed to earth by foundation or structural support. However, it specifically excludes telecommunication towers from the ambit of the expression "plant and machinery".

18. In our considered opinion, the specific exclusion of telecommunication towers from the scope of the phrase "plant and machinery" would not lead one to conclude that the statute contemplates or envisages telecommunication towers to be immovable property. Telecommunication towers would in any event have to qualify as immovable property as a pre-condition to fall within the ambit of clause (d) of Section 17(5). Their exclusion from the expression "plant and machinery" would not result in it being concomitantly held that they constitute articles which are immoveable.

19. The decision in *Vodafone Mobile Services* as well as *Bharti Airtel*, though rendered in the context of the 2004 Rules, have on application of the generic principles which would apply to the concept

of immovable property, have in explicit terms come to conclude that telecommunication towers are liable to be treated as movable. In view of the aforesaid, we have no hesitation in coming to the conclusion that telecommunication towers would not fall within the ambit of Section 17(5)(d) of the CGST Act. The denial of input tax credit, consequently, would not sustain.

20. We, accordingly, and for all the aforesaid reasons, allow W.P.(C) 13211/2024 and quash the impugned orders dated 24 March 2023 and 31 May 2024.

21. Since the SCNs impugned in W.P.(C) 14710/2024 and W.P.(C) 16477/2024 proceed on a wholly untenable premise of mobile towers being immovable property, we find ourselves unable to sustain those notices also.

22. We, consequently, allow the aforenoted two writ petitions and quash the impugned SCN No. 67/2024-25 [W.P.(C) 14710/2024] and SCN No. 68/2024-25 [W.P.(C) 16477/2024], both dated 25 July 2024.

YASHWANT VARMA, J.

GIRISH KATHPALIA, J.

DECEMBER 12, 2024/RW