

(2008) 11 UK CK 0007
In the Uttarakhand High Court

Assotech Super Tech (J.V.)

APPELLANT

Vs

State of Uttarakhand

RESPONDENT

Date of Decision : 24-11-2008

Acts Referred:

Constitution of India, 1950 — Article 226, 265

Citation : (2008) 2 UD 547 : (2006) 2 UD 547 : (2010) 27 VST 433

Hon'ble Judges : Prafulla C. Pant, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Prafulla C. Pant, J.—By means of this writ petition, moved under Article 226 of the Constitution of India, the petitioner has sought writ in the nature of certiorari quashing the order dated 17.04.2007 and 16.03.2007 (copies annexure 10 and 11 to the writ petition), issued by Deputy Commissioner, Commercial Tax, Rudrapur. A further mandamus has been sought directing the respondents not to levy or collect tax on civil construction works undertaken by the petitioner. A declaration has also been sought to the effect that civil works undertaken by the petitioner is not liable for payment of tax and that levy and collection of Sales Tax is in violation of Article 265 of the Constitution and provisions of the Uttaranchal Value Added Tax Act, 2005.

2. Heard learned Counsel for the parties and perused the affidavit, counter affidavit, rejoinder affidavit, supplementary affidavit and supplementary counter affidavit, filed by the parties.

3. Brief facts of the case, as narrated in the writ petition are that the petitioner is a partnership firm created under registered partnership deed dated 07.09.2006 between M/s Assotech Contracts (India) Ltd. and M/s Supertech Construction Pvt. Ltd. (Both incorporated under the Companies Act, 1956). The petitioner firm was constituted for the purposes of undertaking Residential Houses Construction Projects (copy of partnership deed is annexed as annexure 1 to the writ petition).

The firm was registered under Uttaranchal Value Added Tax Act, 2005 (for short hereinafter referred as VAT Act, 2005). A copy of registration certificate is annexed as annexure 2 to the writ petition. In pursuance to the joint venture of the firm, the petitioner applied for allotment of land in the State of Uttarakhand through State Industrial Development Corporation of Uttarakhand Ltd. (for short hereinafter referred as SIDCUL). SIDCUL pleased to grant letter of award on 30.05.2006 and 08.06.2006 allotting 50 acres of land in Pantnagar, a copy of allotment letter containing terms and conditions of allotment is annexed as annexure 3 to the writ petition. The allotment letter clearly indicates that petitioner, after allotment, within a specified time, shall prepare residential project for construction of residential flats, which would be subsequently allotted on approved terms and conditions to the prospective buyers. It is alleged by the petitioner that the residential flats constructed by the petitioner would continue to belong to it notwithstanding the allotment and the transfer of property was to take place only of the completed flats by the petitioner. It is further alleged that the petitioner has purchased the land through SIDCUL. The project for construction of the residential flats prepared in terms of the allotment letter, was approved by the SIDCUL vide letter dated 03.11.2006 (copy of which is annexed as annexure 4 to the writ petition). Petitioner issued an advertisement in response to which large number of people applied for allotment of flats/dwelling units to be developed by the petitioner in accordance with the lay out plans sanctioned by SIDCUL. Petitioner is issuing allotment letters to the prospective buyers, a copy of which is annexed as annexure 5 to the writ petition, only to ascertain and bind the applicants as future buyers. Such applicants/prospective buyers have no right, title or interest in the dwelling units allotted to them till the transfer deed is executed in their favour. Petitioner's case is that he is not constructing the dwelling units on behalf of anyone else and the same is undertaken by the petitioner on his own behalf. Referring to the definition of the "works contract" given under VAT Act, 2005, it has been stated in the writ petition that the tax is leviable only if "works contract" is undertaken by a dealer on behalf of someone else. It is further stated since the contract in question is not under any agreement for carrying out building project as such in view of Article 265 of the Constitution of India, tax cannot be levied on the civil works undertaken by the petitioner as the same would be without any authority of law. The respondents, taking shelter of principle contained in M/s K. Raheja Development Corporation v. State of Karnataka 2005 NTN (27) 243, started recovering tax at the rate of 4% by getting the same deducted from the prospective buyers like Parley Biscuits, Bajaj Auto Limited, etc.. On 28.12.2006, the petitioner under mistaken belief both on fact and law, applied for compounding under the compounding scheme dated 08.08.2006. However, later the petitioner sought to withdraw the compounding application, but the same was rejected. It is alleged by the petitioner that he was compelled to move the application for compounding. Referring to judgment and order dated 23.03.2007, passed by Allahabad High Court in Writ Petition No. 997 of 2006, it is pleaded that since the petitioner is the owner of the land, as such tax cannot be collected

from him. Hence the order dated 17.04.2007 (copy annexure 10 to the writ petition), issued by Deputy Commissioner, Commercial Tax, Rudrapur, asking the petitioner to give the details of sale/purchase of the flats for the purposes of collection of compounding fee and order dated 16.03.2007 (copy annexure 11 to the writ petition), whereby the said authority has passed order u/s 35(1) of VAT Act, 2005, directing that the petitioner would be liable to pay 1% of trade tax under compounding scheme, are challenged.

4. In the counter affidavit filed on behalf of the respondents defending the impugned orders it has been stated that the petitioner himself had requested by moving an application to the respondents under compounding scheme, as such order directing the petitioner to deposit 1% of tax deduction at source vide order dated 16.03.2007 is legal. It is further stated that the order dated 17.04.2007, directing the petitioner to furnish the details of sale of the flats is also in consonance with the provisions of law. The respondents have stated in the counter affidavit that the civil construction works undertaken by the petitioner is liable for the payment of sales tax. A copy of the application moved by the petitioner u/s 7(2) of VAT Act, 2005, is annexed as annexure CA-1 to the counter affidavit. In parawise replies, it has been stated that the petitioner is a dealer who is constructing flats as per the plans approved by SIDCUL and is collecting amounts from the prospective buyers. The dealer is getting 95% of the cost of the flats before completion thereof, which clearly indicates that it is a civil works contractor. Relying on the principle of law laid down in *M/s K. Raheja Development Corporation v. State of Karnataka* 2005 NTN (27) 243, it has been stated that the similar works undertaken by a contractor was held by the apex court to be a "works contract". As to the reference of the judgment passed by Allahabad High Court on 23.03.2007 in Writ Petition No. 997 of 2006, it has been stated in the counter affidavit that the facts of said case were different. For the purposes of the present case, it has been stated that as per the terms and conditions of lease deed it is necessary for the petitioner to execute a tripartite sub lease executed between SIDCUL, petitioner and the buyer before the possession of the flat is handed over to the buyer. The petitioner is not allowed to mortgage the flats without prior permission of the SIDCUL (Lessor). Having accepted the compounding scheme and after moving application under the same, the petitioner cannot escape the liability to pay the tax.

5. In the rejoinder affidavit the petitioner has reiterated the facts stated in the writ petition. A supplementary affidavit has been filed on behalf of the petitioner with which a copy of lease deed is annexed as annexure SA-5.

6. This Court has to examine whether the construction work undertaken by the petitioner is "works contract" or not and whether the petitioner is liable to pay the trade tax under VAT Act, 2005, or not. Before further discussions, it is pertinent to mention here certain conditions of the lease deed executed by SIDCUL in favour of the petitioner in respect of land on which the construction in question are being raised. The relevant portions of the lease deed showing the

nature are being reproduced below:

...The State of Uttarakhand has given management rights in the land measuring 172171.521 square meters (42.543 Acres) situated at IIE Pant Nagar, Rudrapur, District Udham Singh Nagar, Uttarakhand in village Jagat Pur Khasra Nos. 61, 62 and in village Bhura Rani Khasra No. 75, 83/1/2, 84/1/2, 85/1/2, 94/1/1 of Tehsil Kichha as per the site plan annexed hereto, to the Lessor, vide G.O. No. 363/XIII-II/373(2)/2003, issued on 23rd May 2007 & another amended G.O. No. 539/373(2)/XIII-II/2003, issued on 19th July 2007 for the purpose of setting up an integrated Industrial Estate which includes development of housing facilities in accordance with building directions or regulations formulated under provisions of GIDCR 2005, as approved by the SIDA or other competent authorities as may be applicable. Further the State Government has authorized SIDCUL to execute lease deeds in favour of allottees vide G.O. No. 1271/VII-1/ID/65-Ind/2005 dated 21.06.2005.

The Lessor (SIDCUL) is authorized on behalf of State Government for leasing out of the land admeasuring about 172171.521 sq. mts in Plot No. A, Portion-I, Housing Sector of the Integrated Industrial Estate (IIE), Pantnagar, Uttarakhand, (the more particularly described in Schedule I hereunder and shown delineated by red colour boundary line on the site layout plan annexed thereto (hereinafter the "Demised Site").

...The Lessor invited bids for the Project vide advertisement dated 27.03.2006. The bid dated 27.04.2006 offered by the Lessee being the highest bid has been accepted by the Lessor vide its Letter of Award, dated 30/05/2006 on the terms and conditions set forth therein....

...(A) TO HOLD the said plot (hereinafter referred to as the demised premises with there appurtenances upto Lessee for the term of 90 (ninety) years commencing from 27.8.2007 (date of signing of lease deed) except and always reserving to the Lessor.

(i) A right to lay water mains, drains, sewerages or electrical wires under or above the demised premises, if deemed necessary by the Lessor in developing the area.

(ii) The Lessor reserves the right to all mines and minerals, claims washing goods, earth oil, queries in over and under the allotted plot and full right and power at the time to do all acts and thing which may be necessary or expedient for the purpose of searching for working and obtaining removing and enjoy the same without providing or leaving and vertical support for the surface of the residential plot or for any building for the time being standing. Thereon provided always that the Lessor shall make reasonable compensation to the Lessee for all damages directly occasioned by the exercise of such rights. To decide the amount of reasonable compensation the decision of the Lessor will be final and binding on the Lessee.

(B) AND THE LESSEE DOTH HEREBY DECLARE AND CONVENANTS WITH LESSOR IN THE MANNER FOLLOWING:

(a) The Lessee has paid Rs. 34,87,334 (Rupees Thirty Four Lacs eighty seven Thousand Three Hundred & Thirty Four only) being 0.5% of the total land premium as one time lease rent before the execution of lease deed (the receipt whereof the Lessor both hereby acknowledge).

(b) Yielding and paying therefore yearly in advance during the said term upto the Lessor in the month of January for each Year. The Yearly lease rent is indicated below:

In case of non-allotment, the Lessee shall pay lease rent @ Rs. 15 per Sq/mtr. (Super area)/Year. In case of allotment, the respective flat owners will pay the lease rent @ Rs. 15/- per square meter (super area)/year. In case of default in payment of advance lease rent, the interest @ 18% per annum compounded at every half year on the overdue amount shall also be payable.

(c) The flat owners/Lessee shall be liable to pay all rates, taxes charges and assessment leviable by whatever name called for every description in respect of the plot of land or building constructed thereon assessed or imposed from time to time.

(d) The Lessee shall use the allotted plot for construction of Group Housing flats. However the allottee/Lessee shall be entitled to allot the dwelling units on sublease basis to its allottees and also provide space for facilities like Roads, Parks etc. as per their requirements convenience with the allotted plot, fulfilling requirements or building by-laws and prevailing and under mentioned terms & Conditions to the Lessor. Further transfer/sub lease shall be governed by the transfer policy of the authority.

(i) Such allottee should be competent to contract as per the prevailing law.

(ii) The permission for the part transfer of plot shall not be granted under any circumstances. The Lessee shall not be entitled to complete transaction for sale, transfer, assign or otherwise of the flats constructed thereon before making payment of the full premium of the plot to the Lessor. However, in case of payment in installment the Lessor will allow to transfer/sale of flats in proportion to the payments received towards land premium.

(e) The permission to transfer the part or the built up space will be granted on the fulfillment of the following conditions:

i) The lease deed of plot has been executed and the Lessee has made upto date payment of the plot premium, interest and one time lease rent.

ii) The Lessee has obtained building completion occupancy certificate from SIDCUL/COMPETENT AUTHORITY

iii) The Sub-Lessee undertakes to put to use the premises for the residential use

only.

(a) Transfer of Plots:

The Transfer of allotted group-housing plot, as a whole will not be allowed under any circumstances. However, individual dwelling unit flat/plot will be transferable with approval of SIDCUL as per the following conditions:

1. Transfer of dwelling Unit will be allowed only after obtaining completion certificate by the developer.

2. First sale/transfer of a flat to an allottee shall be through a tripartite sub lease deed to be executed by Lessor, Lessee and sub-Lessee on the request of the developer in writing.

3. No transfer charges will be payable in case of first sale. (Original Booking). However, on subsequent sale, transfer charges shall be applicable on the prevailing rates as fixed by SIDCUL.

4. Sub-Lessee of the allotted flats on the demised premises shall always be entitled to raise loans and necessary finances to facilitate the purchase of flats on the demised premises from the state, central Government agencies, Housing Board, Banks and financial institutions. Further the sub-Lessee shall also be entitled to mortgage the flats to such financial institutions. The Lessor shall have no objection whatsoever in mortgaging of the flat by sub-Lessee in favour of such lending institutions, subject to the lessor's rights to full and final payment of lease amount.

(g) A preliminary layout plan shall be submitted by Lessee showing the area/location of each allottee and details of Roads/ Parks and other

facilities to be provided within the plot. In case the proposed layout plan required any modifications as per the building by laws at any time the same shall be modified as per building by laws of Lessor at the cost and expenditure of the lessee and the same shall be binding upon the lessee.

(h) The Lessee shall keep minimum 30% of the allotted area open for laying internal development work comprising of site clearance and leveling, construction of Roads, Footpaths, Drains, Culverts, Streets Electrification and lighting, water supply, sewerage and scavenging road site plantation, horticultural, developments of parks, adequate provision of parking space and any other items as may be desired by the Lessor or which are necessary or incidental for proper development of the devised plot according to norms and specifications prescribed from time to time.

(i) The Lessee shall prepare specification of all the internal development works and submit the same for the approval of the Lessor within 21 days from date of execution of the Lease Deed. Permitted FAR is 150% and ground coverage 35% of the total allotted area and height up to 15 meter shall be permissible.

(j) The Lessee will submit an amount equivalent to Rs. 3 lacs per acre as the estimated cost of internal development within 30 days of the sanction of scheme in the form of Bank Guarantee. This guarantee will remain valid for the period till at least 50% of the premium has been deposited by the Lessee. Failure of the Lessee to create the necessary infrastructure within the periods stipulated would tantamount to a default and SIDCUL will have a right but not an obligation to get the infrastructure work done/completed. Any amount incurred by SIDCUL on this work would be debited to the Lessee and would be adjusted against the premium already deposited/to be deposited as having a priority of payment over and above that of the premium and interest due.

(k) The Lessee shall maintain all services in good order and in good shape for a minimum period of five years or the extended period as may be necessitated after the date of completion of internal development works at its own cost. Long-term maintenance of the area, services, and buildings shall be ensured to the satisfaction of Lessor by formulation of resident's society. Thereafter the maintenance function will be delegated to the housing welfare society to be formed by the residents with the help of the Lessee. The Lessee would be free to delegate the maintenance function to a specialised agency for this job, however, ultimate responsibility would rest with the Lessee.

(1) The Lessee/sub-Lessee shall make such arrangement as are necessary for maintenance of the building and common services and if the building is not maintained properly SIDA or any officer authorized by him will have the power to get the maintenance done through the authority and recover the amount so spent from the Lessee/sub-Lessee. The Lessee/sub-Lessee will be individually and severally liable for payment of the maintenance amount. (The rule/regulation of U.P. Flat Ownership Act, 1975 or any other Act/law as are applicable in state or Uttarakhand shall be applicable on Lessee/sub-Lessee).

(m) The dwelling unit/construction on the plot shall be used for residential purpose only. No other activity shall be permitted in the dwelling unit, except building construction for community requirement and essential utilities.

...(u) The Lessee shall be required to complete the construction on the plot within thirty six months from the date of execution of the lease deed as per approved PERT chart, layout plan & get Building Completion Certificate, i.e.

(a) At least 40% of all the dwelling units to be sold as built-up units (to encourage early habitation of the End Users). At least 50% of these 40% to be offered for possession within 1 year.

ii. The Lessee shall be required to complete the construction of group housing flats on the allotted plot as per their approved layout plan and also as per the approved PERT chart & get the part building completion certificate as per sub Clause (i) above issued within one year from the date of start of construction as described in the approved PERT chart.

iii. All services e.g. water supply, drainage, sewerage, roads, electricity etc. to be paced commensurate with offer of possession as stated above, all services to be laid no later than 18 months of the deed.

(iv) Lessee shall be required to submit the PERT chart with break-up of the cumulative project into 10 distinct activities. Each activity comprising of more or less 10% of the total project. In bifurcating these activities, care should be taken that the residential development takes place first and that completion of the entire residential activity is also done in a manner that at each stage certain number of residential dwelling become available for occupation.

(v) In addition every after 6 months from the date of execution of Lease Deed a cumulative assessment of the Project would be carried out and if it is adjudged by the Independent Engineer that the project has failed to achieve at least 50% of the target at this point of time SIDCUL will have the right but not the obligation to terminate the Project due to default of the Lessee.

(vi) The Lessee will reserve 60% of the dwelling units

/ plots for the industries in IIE Pantnagar. In case the 60% is not availed by the industries within six months after the launch of the marketing after execution of lease deed, the developer will be at liberty to sell these flats/plots to any one....

Apart from this, there is a clause at the end of the lease deed which provides that in addition to the specific clause in the lease deed relating to cancellation, SIDCUL/Lessor will be free to exercise its right of cancellation of lease or allotment in the cases enumerated under the head "Termination/Cancellation Conditions".

7. This Court thinks it just and proper to further quote Paras 12, 14 and 17 of the allotment letter, issued in favour of petitioner, which is annexed as annexure 3 to the writ petition:

12. Lease Deed will be done one for the developer & one for the flat/owner.

14. You shall be responsible for implementation of the Project, for which a brief project profile outlining the tie-ups for financial resources and technical expertise to prepare and implement the project successfully shall be submitted within 21 days of issuance of Allotment Letter. It should also contain a brief outline of the project alongwith terms and conditions of the allotment of dwelling units and other building (s) to allottees, and terms and conditions for use/maintenance of built up spaces for community facility.

17. The tripartite sub lease deed for the flat owner shall be executed by SIDCUL on the specific recommendation from you, provided all formalities are complete.

The above-mentioned conditions clearly show that the petitioner has in fact undertaken a work for constructing the residential flats in an industrial area of Uttarakhand, as agreed between it and SIDCUL. As such, it cannot be said that the petitioner is constructing flats on the land purchased by it. As to the

judgment dated 23.03.2007 passed by Allahabad High Court in Writ Petition No. 997 of 2006 Assotech Realty Private Limited v. State of Uttar Pradesh, on behalf of respondents, attention has been drawn of this Court to annexure SCA-1 to the supplementary counter affidavit, which is copy of order passed in appeal (arising out of SLR Nos. CC 11480-11481 of 2007) filed by State of Uttar Pradesh against said order of Allahabad High Court. The apex court vide order dated December 3, 2007, has set aside the judgment of the Allahabad High Court with the following order:

Delay condoned.

Leave granted.

Mrs. Madhu Moolchandani, learned Counsel appears for the caveator.

In our view thorough adjudication was required in this case. Writ petition filed by the appellant against the Order of Assessee was not maintainable. The appellant ought to have filed statutory Appeal against the assessment order. What was the nature of the right conferred on the allottees of the flat, what was the consideration for payment of installment, whether construction by the appellant was on its own account or for the allottees etc. These questions were not capable of being decided in a writ petition.

In the circumstance, we set aside the impugned order with liberty to the appellant assessee to move in appeal before the appellate authority. The appeal shall be filed within a period of thirty days. That appeal shall not be dismissed on the ground of limitation provided it is filed within thirty days from today. In the meantime, for thirty days the status quo as of today shall be maintained.

Appeals are disposed of.

In view of the above quoted order passed by the apex court, the judgment and order passed by the Allahabad High Court on 23.03.2007 in Writ Petition No. 997 of 2006 need not to be discussed or relied as the same stands set aside.

8. Now, this Court has to see whether the principle of law laid down by the apex court in M/s K. Raheja Development Corporation v. State of Karnataka 2005 NTN (27) 243, is applicable to the present case or not. Though in said case, the construction agency was not the owner of the land, the apex court in its para 20 observed as under:

Thus the Appellants are undertaking to build as developers for the prospective purchaser. Such construction/development is to be on payment of a price in various instalments set out in the Agreement. As the Appellants are not the owners they claim a "lien" on the property.

Of course, under clause 7 they have right to terminate the Agreement and to dispose off the unit if a breach is committed by the purchaser.

However, merely having such a clause does not mean that the agreement ceases

to be a works contract within the meaning of the term in the said Act. All that this means is that if there is a termination and that particular unit is not resold but retained by the Appellants, there would be no works contract to that extent. But so long as there is no termination the construction is for and on behalf of purchaser. Therefore, it remains a works contract within the meaning of the term as defined under the said Act. It must be clarified that if the agreement is entered into after the not or unit is already constructed, then there would be no works contract. But so long as the agreement is entered into before the construction is complete it would be a works contract."

The above observations of the apex court clearly show that the nature of work like the one undertaken by the petitioner in the present case is nothing but works contract and he is under agreement with 2005, has admitted that the nature of his work is "works contract" as is apparent from annexure CA-1 to the counter affidavit filed on behalf of respondentsSIDCUL to do said work. Apart from this, what is important in this case is that petitioner himself by filing an application for compounding under the compounding scheme u/s 7(2) of VAT Act, Said fact also gets corroborated from annexure 7 to the writ petition. Last page of annexure 7 of the writ petition is copy of the application filed by the petitioner himself for claiming benefit of compounding scheme to avoid 4% tax and instead thereof agreed to pay 1% tax.

9. Learned Counsel for the petitioner submitted that the petitioner had sought to withdraw the application moved under compounding scheme, but the same was rejected by the tax authorities and as such the petitioner is being compelled to pay the tax. The order of assessment passed under the Act is an appealable order u/s 51 of VAT Act, 2005. Only exceptions are given u/s 56 of said Act. The order dated 20th February 2007, passed u/s 35(1) of VAT Act, 2005, whereby the application of the petitioner to withdraw the application for compounding was rejected, and impugned order dated 16.03.2007 (copy of which is annexed as annexure 11 to the writ petition), are appealable u/s 51 of the Act. Learned Counsel for the petitioner argued that since the imposition of tax is without authority of law, as such the writ petition cannot be thrown on the ground that no appeal is filed before the tax authorities. This Court is unable to agree with learned Counsel for the petitioner for the reason that once it is found that the work undertaken by the petitioner is "works contract" which is defined u/s 2(55) of the VAT Act, 2005, it cannot be said that the respondents have imposed any tax without authority of law. As such, the provision contained in Article 265 of the Constitution of India, referred by the petitioner is of no help to him.

10. For the reasons as discussed above, this writ petition is liable to be dismissed. The same is dismissed.