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(2017) 01 AHC CK 0185

In the Allahabad High Court

Case No : Trade Tax Revision No. 225 of 2016

M/S Roma Builder And Promoters Pvt. Ltd. APPELLANT

Vs

Commissioner Commercial Tax RESPONDENT

Date of Decision : 09-01-2017

Acts Referred:

Citation : (2017) 95 UPTC 308

Hon'ble Judges : Ashwani Kumar Mishra, J.

Bench : Single Bench

Advocate : Vivek Pratap Singh, Bharat Ji Agrawal and Shweta Singh Rana, Advocates, for the Applicant; C.S.C, for the Opposite Party

Final Decision : Disposed Off

Judgement

Ashwani Kumar Mishra, J.—The revisionist before this Court claims itself to be a builder and promoter, and is aggrieved by the orders passed by the authorities under the U.P. VAT Act, 2008, in so far as penalty has been imposed upon it under Section 54(1)(7) of the VAT Act, for not securing registration under Section 18(1) of the Act, although the revisionist was performing works contract w.e.f. May, 2013 onwards.

2. Facts, giving rise to filing of the present revision, are that the revisionist is a company, registered under the provisions of Indian Companies Act, 1956, and is engaged in the business of development and sale of residential flats. It transpires that in respect of certain plot of land, which belonged to other persons, a builder''s agreement was executed between them, which permitted revisionist to undertake work of constructions of flats. Such agreement is said to have been executed in the facts of the present case on 21.6.2012, which was followed with subsequent supplementary agreements. The revisionist pursuant to this agreement came in possession over the land. The revisionist also advertised sale of flats and received money from prospective purchasers. It is not in dispute that allotment letters were issued by the revisionist in May, 2013, and pursuant to such allotment letter, it received instalments from the prospective purchasers.

The revisionist thereafter proceeded to raise constructions, and after completing the construction, it has been transferred to the prospective purchasers. The department initiated proceedings against the revisionist on the premise that revisionist had entered into a works contract, pursuant to which constructions had been raised, and in respect of building material utilized for construction, the revisionist was liable to pay tax. It was also held that since the work performed by the revisionist amounted to a works contract, as such, registration under Section 18(1) was warranted before the revisionist could execute words contract. Since the registration has not been obtained, as such, penalty proceedings have been initiated, resulting in passing of the order under challenge. The Tribunal has recorded that registration has been obtained by the revisionist w.e.f. 15th March, 2014, whereas construction work was undertaken pursuant to a works contract executed w.e.f. May, 2013 itself, as such, in respect of such activity undertaken during the period of 11 months, the company is liable to pay penalty amounting to Rs.31,900/-. This order has been affirmed in appeal and revision. Thus aggrieved, the revisionist has filed the present revision.

3. Learned counsel for the revisionist contends that construction work was undertaken by the company out of its own funds, and the funds received from the prospective purchasers was not utilized. Under the Uttar Pradesh Apartment (Promotion of Construction, Ownership and Maintenance) Act, 2010, since the transfer cannot be effected, except by way of a registered conveyance deed, as such, mere entering into an agreement would not invite liability of payment of tax upon the company. The provisions contained under Sections 2(d), 13 and 31 of the Act of 2010 have been relied upon, in order to contend that demand raised by the VAT Authorities is contrary to law.

4. Per contra, learned Standing Counsel submits that in view of the authoritative pronouncement of law made by the Apex Court in K. Raheja Development Corporation v. State of Karnataka, reported in 2005 (5) SCC 162, the transaction undertaken by the revisionist comes within the ambit of a works contract, and as such, the assessee was required to have got itself registered, and the transaction was also liable to payment of tax. A subsequent decision of the Apex Court in M/S. Larsen and Toubro Limited and another v. State of Karnataka and another, reported in 2013 U.P.T.C. 1277, is also relied upon.

5. I have heard learned counsel for the parties, and have perused the materials brought on record.

6. It is admitted to the revisionist that it is not the owner of land, and has merely entered in a builder''s agreement with owners of the land for raising constructions. It is not in dispute that revisionist has advertized, and has received application from the prospective purchasers for sale of flats. Pursuant to such agreement, revisionist has also received various amount towards instalments. From the materials brought on record, it is apparent that revisionist has merely entered into a works contract, inasmuch as amount which it had received, is being utilized for the purpose of raising construction of flats. The

goods and materials, which are utilized for performing the works contract is liable to payment of tax under the U.P. VAT Act, 2008.

Section 18(1) of the Act provides as under:-

"18. Voluntary Registration.- (1) On January 1, 2008, a dealer, who is otherwise not liable to pay tax, and if such dealer either carries on business or intends to carry on business, may apply at any time on or after January 1, 2008 for issue of registration certificate in the form and manner prescribed under subsection (2) of section 17 along with proof of deposit of fee prescribed under that sub-section."

7. In the facts of the present case, a finding has been returned by the authorities that dealer is carrying on business pursuant to works contract since May, 2013, without a valid registration obtained for the purposes. It is on such count that the authorities have proceeded to levy penalty under Section 54(1)(7) of the Act. Section 2(m) of the Act defines goods, which would include the goods utilized for the purposes of raising of constructions. In such circumstances, the authorities have taken the view that the act on part of assessee not to get itself registered before undertaking such activity invites levy of penalty. Learned counsel for the revisionist has relied upon the provisions of the Uttar Pradesh Apartment (Promotion of Construction, Ownership and Maintenance) Act, 2010. This Act has been enacted for the protection of apartment owners, and apparently has no applicability in the matter relating to payment of tax upon goods utilized pursuant to works contract. The argument advanced by the learned counsel with reference to provisions contained under the Act of 2010 is apparently misconceived, as it has no applicability in the facts and circumstances of the present case. Learned counsel further contends that the constructions have been raised by it from its own funds, and therefore, it cannot be treated to be a works contract. This contention is not liable to be accepted, inasmuch as it is not in dispute that dealer had entered into agreement with prospective purchasers, and had received various amounts in the form of instalments for the purposes of raising of construction. It was in the similar facts and circumstances that the issue had arisen between the Hon''ble Supreme Court, and after noticing the nature of transactions, the Apex Court was pleased to hold that dealers were undertaking work of development on behalf of prospective purchasers. Paragraphs 19 and 20 of the judgment in K. Raheja Development Corporation (supra) is apposite for our purposes, and therefore, is reproduced hereinafter:-

"19. To consider whether the Appellants are executing works contract one needs to look at a typical Agreement entered into with the purchaser. The relevant clauses are clauses (q), (r) of the recitals and clauses 1, 5(c) and 7, which read as follows:

"(q) (i) Construction of the said multi-storeyed building;

(ii) Sale of the units in the aforesaid multistoreyed building to different persons in whose favour ultimately a Deed of Conveyance would be obtained by the Holders, directly from the Vendors, of an undivided fractional interest in the said land (i.e. the area of 5910.17 sq. metres described in the First Schedule hereunder written) and such owner of units would own, on ownership basis, the respective units on condition that an Agreement would be entered into between the Holders on the one hand and the persons (desiring to acquire on ownership basis an unit in such multi-storeyed building) on the other hand and it would be an essential, integral and basic concept, term and condition of the proposed transaction (which would be by way of a package deal not capable of being segregated or separated or terminated one without the corresponding effect on the other) that K. Raheja Development Corporation as the Land-holder would agree to sell to such persons an undivided fractional interest in the said land described in the First Schedule hereunder written on condition that they i.e. M/s K. Raheja Development Corporation as Developers on behalf of and as Developers of such person would construct for, as a unit ultimately to belong to such person a unit or units that would be so mutually selected and settled by and between K. Raheja Development Corporation and the person concerned.

(r) The Prospective Purchaser is interested in acquiring ownership rights in respect of unit/s Nos. 1101 on the eleventh floor/s of the said multistoreyed building named ''Raheja Towers'' and also car parking space/s No./s nil in the basement/ground floor of the said building (hereinafter referred to as ''the said Unit'')"

* * * *

1. As and by way of a package deal :

(a) K. Raheja Development Corporation, (as Holders) agree to sell to the Prospective Purchaser an undivided 0.42% share, right, title and interest in the said land described in the First Schedule hereunder written (with no right to the Prospective Purchaser to claim any separate sub-division and/or right to exclusive possession of any portion of the said land) for a lump sum agreed and quantified consideration of Rs.3,25,000/- (Rupees three lacs twenty five thousand only) to be paid by the Prospective Purchaser to the Holders at the time and in the manner stated in Clause 2 hereof;

(b) K. Raheja Development Corporation, (as Developers) agree to build the said building named ''Raheja Towers'', having the specifications and amenities therein set out in the Second Schedule hereunder written and as Developers for the prospective Purchaser, the Developers shall build for and as unit/s to belong to the Prospective Purchaser, the said premises (details whereof are set out in the Third Schedule hereunder written) for a lump sum agreed and quantified consideration of Rs. 5,07,000/- (Rupees five lacs seven thousand only) to be paid by the Prospective Purchaser to the Developers at the time and in the manner set out in Clause 3 hereof. The said premises shall have the amenities set out in the Fourth Schedule hereunder written.

* * * *

5. The undermentioned terms and provisions are express conditions to be observed, performed and fulfilled by the Prospective Purchaser, on the basis of which this Agreement has been entered into by the Holders/Developers and the due and proper fulfilment whereof are to be conditions precedent to any title being created and / or being capable of being documented by the Prospective Purchaser in the aforesaid fractional interest in the land described in the First Schedule hereunder written and/or in the said premises:

(a)-(b) * * *

(c) The overall control and management of the project and the development and completion of the said building shall be with the Developers and furthermore the Developers are and shall continue to be in possession of the said land and building and shall be entitled to a lien thereon and that the Prospective Purchaser shall not be entitled to claim or demand from the Holders possession of any portion of the said land or to claim or demand from the Developers possession of the said premises unless and until the Prospective Purchaser has paid in full through the Holders the full consideration money payable to the Holders under Clause 2 above and the full consideration money payable to the Developers under Clause 3 above.

* * * *

7. If the Prospective Purchaser commits default in payment of any of the instalments of consideration aforesaid on their respective due dates (time being the essence of the contract) and/or in observing and performing any of the terms and conditions of this Agreement, the Holders/Developers shall be at liberty, after giving 15 days notice specifying the breach and if the same remains not rectified within that time, to terminate this Agreement, in which event, a sum equivalent to 10% of the amounts that may till then have been paid by the Prospective Purchaser to the Holders and the Developers respectively shall stand forfeited. The Holders and the Developers shall, however, on such termination, refund to the Prospective Purchaser the balance amounts of the instalments of part payment, if any, which may have till then been paid by the Prospective Purchaser to the Holders and the Developers respectively but without any further amount by way of interest or otherwise. On the Holder/Developers terminating this Agreement under this Clause, they shall be at liberty to dispose off the said Unit/s and the said fractional interest in the land to any other person as they deem fit, at such price as they may determine and the Prospective Purchaser shall not be entitled to question such sale, disposal or to claim any amount from them."

(emphasis supplied)

20. 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 flat 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."

8. The case of the revisionist is substantially similar to the facts occurring in K. Raheja Development Corporation (supra), inasmuch as the transaction undertaken by the dealer is similar on facts. Once it is found that revisionist was engaged in the construction activity pursuant to works contract, without any valid registration, the imposition of penalty cannot be said to be bad in law.

9. The revision, consequently, lacks merit, and is consigned to records.

