
(2017) 01 AHC CK 0296

In the Allahabad High Court

Case No : Sales/Trade Tax Revision No. 2 and 3 of 2017

M/S Supertech Ltd.

APPELLANT

Vs

The Commissioner, Commercial Tax

RESPONDENT

Date of Decision : 06-01-2017

Acts Referred:

Citation : (2017) 95 UPTC 176

Hon'ble Judges : Ashwani Kumar Mishra, J.

Bench : Single Bench

Advocate : Sri. Rakesh Ranjan Agarwal, Senior Advocate Assisted by Sri Suyash Agarwal, Advocate, for the Applicant; C.S.C, for the Opposite Party

Final Decision : Disposed Off

Judgement

Ashwani Kumar Mishra, J.—These two revisions have been filed under Section 58 of the U.P. Value Added Tax Act, 2008, arising out of assessment proceedings for the year 2010-11 and 2011-12. The assessee company is a developer/builder, which has raised constructions of flats upon the land owned by it, with the object of ultimately transferring it to prospective buyers. The assessee has also entered into a contract for transfer of constructed flats/buildings, and various amount from the allottees have been received. The department has treated raising of construction by the revisionist as amounting to a works contract, and in respect of goods utilized for construction of flats, the assessee has been held liable to payment of tax. The department as well as the Tribunal for the purposes of coming to such conclusion have relied upon judgment of the Apex Court in K. Raheja Development Corporation v. State of Karnataka, reported in 2005 (5) SCC 162, as well as judgment in M/S. Larsen and Toubro Limited and another v. State of Karnataka and another, reported in 2013 U.P.T.C. 1277. The Tribunal while affirming demand of tax from the assessee has virtually followed the aforesaid two judgments, in order to hold the revisionist liable to payment of tax.

2. Sri R.R. Agarwal, learned Senior Counsel assisted by Sri Suyash Agarwal for

the revisionist, contends that the facts/transaction, which was subject matter of consideration by the Apex Court in the cases of K. Raheja Development Corporation (supra) and M/S. Larsen and Toubro Limited (supra) were quite distinct, inasmuch as the ownership of the land, over which constructions were being raised, was retained by the owners, and the builders had entered into a tripartite builders' agreement for the purposes of raising construction with the object of transferring it to the prospective buyers. In the facts of these two cases, it is also noticed that rights in the land were also transferred to the prospective buyers. It is in that context that the Hon''ble Supreme Court has been pleased to hold that the contract for raising construction with object of transferring it to the ultimate purchaser constituted a works contract, so as to attract liability of tax. However, in the facts of the present case, the builder is the owner of land itself, and no rights are created in favour of the prospective buyers, merely on account of transfer of land. It is stated that the terms of allotment letters have been extensively adduced before the Tribunal, but they have not been taken note of it. It is also stated that by virtue of law laid down by the Apex Court in Suraj Lamp and Industries Private Limited (2) through Director v. State of Haryana and another, reported in 2012 (1) SCC 656, it is settled that transfer of immovable property can only be by way of registered transfer deed. It is stated that such aspects have clearly been omitted from consideration by Tribunal. Learned counsel further submits that facts and circumstances relating to the transaction between the parties have not been given due consideration by the Tribunal, and there is an apparent failure on part of Tribunal to deal with issues raised and pressed before it, which renders the order unsustainable. Learned counsel submits that Tribunal is the highest authority under the Act, which can go into the issues of fact and law, and was expected to deal with all submissions urged before it, and the failure on its part to specifically dealt with the arguments urged amounts to failure to exercise jurisdiction vested in it by law.

3. Learned Standing Counsel appearing for the State has advanced arguments in order to justify the order of Tribunal. It is stated that in the facts and circumstances of the present case, a works contract had come into existence, and the goods and materials used in connection with such contract were liable to be taxed, in accordance with law.

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

5. The order of Tribunal notices the contentions raised on behalf of assessee, and by the order under challenge holds the assessee liable to payment of tax. The entire discussion and finding contained in the order runs into three paragraphs. Order of Tribunal proceeds on the assumption that the matter in dispute stands concluded by the judgment of Apex Court in K. Raheja Development Corporation (supra) as well as in M/S. Larsen and Toubro Limited (supra). It is on such assumption that the Tribunal has proceeded to hold that in the facts and

circumstances of the present case, a works contract had been awarded for raising of construction, which would entail liability of payment of interest in respect of goods and materials used for raising of construction. Second paragraph deals with payment of higher tax on account of alleged profits to be earned on account of transfer of such constructions. In the last paragraph, the Tribunal holds that there was no contract for sale of Earth, and therefore, levy of tax on such count has been held to be bad.

6. The facts, which have given rise to passing of the judgment by the Hon"ble Supreme Court in K. Raheja Development Corporation (supra), have been noticed in paragraph-2 of the judgment, which reads as under:-

"2. Briefly stated, the facts are as follows:

The Appellants carry on the business of real estate development and allied contracts. They are having their Office at Bangalore. They enter into development Agreements with owners of lands. Thereafter they get plans sanctioned. After approval of the plans they construct residential apartments and/or commercial complexes. In most cases before they construct the residential apartments and/or commercial complexes they enter into Agreements of Sale with intended purchasers. The Agreements would provide that on completion of the construction the residential apartments or the commercial complex would be handed over to the purchasers who would get an undivided interest in the land also. The owners of the land would then transfer the ownership directly to the society which is being formed under the Karnataka Ownership Flats (Regulation of Promotion of Construction, Sales, Management and Transfer) Act, 1972."

7. In the facts of the present case, it is to be noticed that the ownership of land is with the builder itself, and there is no development agreement entered into by the builders with the owners of the land. This is a material circumstance, which has completely been omitted from consideration by the Tribunal, while passing the order impugned. The question as to whether a works contract had been awarded, and that the goods and materials were utilized for the purposes, is essentially a question of fact, which would depend upon the nature of transaction, resorted to between the parties. The assessee in the facts of the present case had alleged that it was the owner of the land, and that the constructions were raised by it, and at the stage of raising of such construction, no right is created in prospective purchaser either over the land or the constructions. Various clauses of the agreement entered into by the builder with the allottee were referred to before the Tribunal. This Court finds that the Tribunal has not examined to any of the clauses of agreement, nor the nature of transaction itself has been commented upon, in order to return a finding that a works contract had come into existence. The Tribunal being the highest Court of fact was expected to have examined the nature of transaction itself, only after analysing the clauses of agreement entered into between the assessee and prospective allottee, a finding of works contract could have been returned. It is to be noticed that there existed difference in the facts of the present case viz-a-

viz K. Raheja Development Corporation (supra) and M/S. Larsen and Toubro Limited (supra). It was also observed therein that rights were also created in respect of immovable property in favour of the allottees. In the facts of the present case, the revisionist's plea is that no right in the immovable property is created in favour of allottee, and it was otherwise impermissible in view of the ratio of law laid down by the Apex Court in Suraj Lamp and Industries Private Limited (2) through Director (supra). All such issues have not been adverted to by the Tribunal. Law is settled that being the highest forum having right to investigate facts, the Tribunal was expected to have examined the nature of transaction before returning a finding with regard to existence of works contract or consequential liability of payment of tax in respect of the goods utilized for the purposes. The cursory manner in which the issues have been dealt with by the Tribunal, is not liable to be sustained.

8. It seems that Tribunal did not deal with the factual issues relating to transaction itself, as it was under the belief that the ratio of law laid down in K. Raheja Development Corporation (supra) as well as M/S. Larsen and Toubro Limited (supra) were clearly apparent. The distinction in fact have not been noticed, though it was apparent and had been pressed. In such circumstances, the Tribunal has failed to discharge the obligation imposed upon it by law of dealing with the factual issues raised and pressed before it, and therefore the order of Tribunal cannot be sustained. Since the Tribunal has not gone into factual issues in correct perspective, as such, the findings returned by it on the different issues are not liable to be sustained. It is clarified that this Court has not adjudicated the issues on merits, and any observations made in this order is not to be construed as an expression of opinion on the respective claim of parties on merits. All issues of fact and law are left open to be considered by the Tribunal.

9. In view of the aforesaid discussions, the order of Tribunal dated 27.10.2016, passed in Second Appeal Nos.172 of 2016, and 216 of 2016, are not liable to be sustained, and are set aside. The Tribunal shall proceed to reconsider the matter, in light of the observations made above, after affording opportunity of hearing to the parties concerned, at the earliest possible, preferably within a period of four months from the date of presentation of certified copy of this order.

10. Both the revisions, accordingly, stand disposed of.