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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**
**ORDINARY ORIGINAL CIVIL JURISDICTION**
**MAHARASHTRA VALUE ADDED TAX APPEAL NO. 46 OF 2017**

M/s. Stressed Assets Stabilization Fund … Appellant
vs.
The State of Maharashtra … Respondent

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M/s. Nikita Badheka i/b. Mr. Parth Badheka for the Appellant.
Ms. Jyoti Chavan, AGP for the Respondent.

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**CORAM : A.S. OKA & A.K. MENON, JJ.**
**DATE : 22nd NOVEMBER, 2017**

**ORAL JUDGMENT (Per A.S. Oka, J.)**

1. Appeal was admitted by order dated 3rd October, 2017 and was immediately fixed for hearing. The question of law is set out in clause 1 of the order dated 3rd October, 2017. Clause 2 deals with another issue arising in the Appeal.

2. Apart from the aforesaid question of law which is already formulated, during the course of hearing on the last date, we had indicated to the learned Counsel appearing for the parties that the following additional substantial question of law also arises for consideration:

> *"Whether after constituting a Bench of three members in terms of Sub-Section (6) of Section 11 of the Maharashtra Value Added Tax Act, 2002 the learned President of the Maharashtra Sales Tax Tribunal*

*could have passed an order that reference to a Bench of three members was unwarranted and whether the learned President could have alone disposed of the Appeal on merits?"*

3. It is the aforesaid question which goes to the root of the matter. For deciding the said question, a brief reference to the facts of the case will be necessary. An Appeal preferred by the present appellant was placed before a Bench of two learned members of the Maharashtra Sales Tax Tribunal at Mumbai. The judgment was pronounced on 4th June, 2015. The said judgment shows that there was a difference of opinion between the two members of the Bench as regards giving prospective effect to the order of determination dated 28th March, 2014 passed under Section 56 of the Maharashtra Value Added Tax Act, 2002 (for short "the said Act of 2002"). Therefore, the Bench proceeded to refer the question to the learned President for an appropriate action as per provision of Sub Section (6) of Section 11 of the said Act of 2002 read with Regulation no. 28 of the Bombay Sales Tax Tribunal Regulations, 1960 (for short "the said Regulations").

4. It appears from the roznama of the proceeding of the Appeal which is forwarded by the Tribunal, that in terms of the said order of the Bench, a larger Bench consisting of the learned President and two other members was constituted by the learned President. The roznama shows that on 1st September, 2016 hearing of the Appeal before the larger Bench was completed and the Appeal was closed for orders. There is a further roznama

dated 5th December, 2016. The said roznama is written and signed only by the learned President. It records that it is brought to the notice of the appellant and the respondent that the Appeal cannot be referred to a Bench consisting of three members. It is further observed that it could be decided by a third Judge only as there is no dis-agreement between two Benches of the Tribunal. It further records that the Appeal was adjourned for delivery of judgment. Thereafter, the learned President on 7th December, 2016 proceeded to deliver the judgment which is impugned in this Appeal.

5. We must note here that considering the averments made in paragraph 5 of the Memorandum of this Appeal, we had called for a report from the learned President of the said Tribunal on factual aspects. Accordingly, a report is received. The report records that the roznama order of 5th December, 2016 signed by him is not correctly reproduced in paragraph 5 of the Memorandum of Appeal. Learned President states that the word “not” appearing in the original roznama order between the words “there is” and “disagreement” does not appear in paragraph 5 of the Memorandum of Appeal.

6. Apart from merits of the Appeal, the learned Counsel appearing for the appellant invited our attention to sub-section (6) of Section 11 of the said Act of 2002 read with Regulation no. 28 of the said Regulations. Her submission is that after the Bench of three members had fully heard the Appeal, the same

could have been decided only by the said Bench and not by the learned President. The learned AGP appearing for the respondent supported the impugned judgment and order. The learned AGP contended that the learned President was a part of the Bench which had fully heard the Appeal.

7. We have already referred to the judgment and order delivered by the Bench of two members of the said Tribunal. The question formulated by the said Bench was referred to the learned President for taking appropriate action under Sub-Section 6 of Section 11 of the said Act of 2002 read with Regulation no. 28 of the said Regulations. Roznama shows that on the basis of the said reference, the learned President constituted a Bench of three members which was presided by himself and that the Appeal was fully heard by the said Bench on 1st September, 2016 and was closed for orders.

8. At this stage, we must make a reference to Regulation no. 28 of the said Regulations which reads thus :

> *"28. **Procedure where members of a Bench differ :** - <u>Where the members of a Bench are equally divided</u>, subject to the provisions of sub-section (6) of section 21, the President, if he was not one of the members of the Bench, may himself hear on the point or points on which the members of the Bench differ or <u>if he is of the opinion that the case involves a substantial point of law may refer it for hearing to one or more other members of the Tribunal, including himself when not a member of the original Bench.</u>"* *(underlines supplied)*

Regulation no. 28 lays down the procedure to be followed where members a Bench of the said Tribunal are equally divided. The said Regulation is crystal clear. When it is reported to the learned President that members of Bench are equally divided, if he is not one of the members of the Bench, he may himself hear the issue on which there is a disagreement. If he is of the opinion that the case involves a substantial point of law, it is open for him to refer the question for hearing to one or more than one member of the Tribunal, including himself when he is not a member of the original Bench. Thus, there are two options open to the learned President when two members constituting a Bench differ. One of the two opinions is that, if according to him, the difference of opinion is on a substantial point of law, he can refer the question for hearing to one or more other members of the Tribunal. Therefore, in a contingency, when he is satisfied that the issue involves a substantial point of law, he can even refer the issue to a Bench of three members. As reflected from the roznama in this case, the learned President adopted the said course and accordingly, a Bench of three members presided over by the learned President himself heard the Appeal finally and closed the same for judgment.

9. In the present case, the roznama shows that though after hearing the case fully, judgment was reserved by a Bench of three members, on 5th December, 2016, the Appeal was placed only before the learned President. In his order recorded in the roznama, the learned President has stated that

both the parties have been informed that the Appeal cannot be referred to a Bench consisting of three members. After the Bench of three members had fully heard the Appeal, only the said Bench could have come to the conclusion that the reference made to the said Bench of three members was unwarranted. Even in the report submitted by the learned President, he has not stated that even the other two members constituting the Bench of three members passed a similar order. The roznama shows that on 5th December, 2016, the Appeal was placed only before the learned President and the Roznama order was signed only by the learned President. Thus, the order that the reference was unwarranted has been passed only by one of the three members forming a part of the Bench of three members. Moreover, the parties were not heard on the question whether the reference to a larger Bench was unwarranted. It is for this reason that the order dated 5th December, 2016 passed by the learned President is completely illegal.

10. It is also necessary to add here that even assuming that the said order was legal, the propriety required that the learned President ought to have fixed the Appeal for fresh hearing before him as the hearing conducted earlier was before a Bench of three members.

11. Hence the order dated 5th December, 2016 will have to be held as completely illegal and consequently the judgment and order dated 7th December, 2016 delivered by the learned President will have to be set aside.

12. Therefore, we have no option but to remand the Appeal for consideration of the same Bench of three Hon'ble Judges. As the submission on merits were heard by the Bench more than one year back, the Appeal will have to be re-heard by the said Bench constituted earlier. We are not expressing any opinion on the question whether Bench of three members can come to the conclusion that the reference was unwarranted. The Bench is free to decide the issue in accordance with law.

13. We must clarify here that what we have decided by this judgment is a legal issue. Hence, we must hasten to clarify that the findings recorded by us should not be treated as any reflection on the learned President of the Tribunal.

14. It is not necessary for us to go into the merits of the first question formulated by us.

15. Accordingly, the Appeal is disposed of by passing the following order :

(a) The impugned judgment and order dated 7th December, 2016 in VAT Appeal No. 23 of 2014 is hereby set aside and the said Appeal is restored to the file of the Maharashtra Sales Tax Tribunal;

(b) The said Appeal shall be placed before the same larger Bench which heard the Appeal on 1st September, 2016;

(c) The Appeal shall be heard afresh by the same Bench in accordance with law in the light of the observations made in the judgment and order;

(d) We make it clear that we have made no adjudication on the merits of the controversy in the Appeal which is restored to the file of the Tribunal and all questions in that behalf are kept open;

(e) Appeal is partly allowed in above terms with no order as to costs;

(f) The report submitted by the learned President shall be kept on record of this Appeal in a sealed envelope. The registry shall immediately transmit the record of the Appeal back to the Tribunal.

**(A.K. MENON, J.)** **(A.S. OKA, J.)**