

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06.10.2017

CORAM

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
AND
THE HONOURABLE MR.JUSTICE R.SURESH KUMAR

W.A.No.1018 of 2017

M/s. Navasakthi Township
Developers Private Limited,
Rep. By its Managing Director,
East Coast Road (Puducherry -
Cuddalore Road),
Periyakattupalayam Village,
Ariyanuppam Post,
Puducherry - 605 007. ... Appellant

vs

The Commissioner of Central
Excise & Service Tax,
Post Box No.104,
Gouber Avenue,
Puducherry - 605 001. ... Respondent

Prayer : The appeal filed under Clause 15 of the Letters Patent Act, to set aside the order of the learned Judge dated 19.07.2017, passed in W.P.No.18354 of 2017. Writ petition filed under Article 226 of the constitution of India, praying to issue a writ of certiorari, calling for the records of the case in impugned order in Original No.27 & 28/2017 (C) (ST) C.No.V./ST/15/162/2014-ST.ADJ dated 24.04.2017 passed by the respondent and to quash the said order in Original.

For Appellant : Mr.T.Ramesh

For Respondent : Mr.R.Hemalatha

Standing Counsel

JUDGEMENT

(Judgment of the Court was delivered by R.SURESH KUMAR,J.)

This appeal has been preferred against the order passed by the learned Judge in W.P.No.18354 of 2017 dated 19.7.2017.

2. The very minimum facts which are required to be noticed for the disposal of this appeal are as follows:

(i) The appellant is an assessee and having the service tax registration number for providing services under the taxable category of "construction of residential complex".

(ii) Based on the intelligence gathered by the respondent/revenue, show cause notice dated 07.09.2012 was issued to the appellant / assessee pertaining to the period 2008-09 to 2011-12 for making a demand of service tax of Rs.5,41,01,083/- (Rupees Five Crore Forty One Lakh One Thousand and Eighty Three only) with interest and penalty.

(iii) In response, the appellant / assessee had sent reply to the show cause notice on 25.2.2013. Thereafter, personal hearing was given on 26.2.2013.

(iv) After analysing the input gathered by the revenue and the reply given by the appellant / assessee, final Order-in-Original in Revenue No.06 of 2013 dated 31.5.2013 was passed by the Adjudicating Authority.

(v) Consequent upon the passing of Order-in-Original, another show cause notice dated 13.2.2015 was also issued to the appellant / assessee for the period from 01.01.2013 to 31.3.2014.

(vi) The subsequent show cause notice also was replied by the appellant / assessee on 28.9.2015, pursuant to which personal hearing was held on 29.9.2015.

(vii) Consequently, final Order-in-Original was passed by the Adjudicating Authority on 18.1.2016.

(viii) In both the final Orders-in-Original, the demand made in the show cause notice along with interest and penalty had been confirmed.

(ix) Against the said two Orders-in-Original dated 31.5.2013 and 18.1.2016, two writ petitions were filed in W.P.Nos.23556 of 2013 and 14795 of 2016 by the appellant / assessee.

(x) Both those writ petitions were disposed of on 20.6.2016 whereby both the Orders-in-Original were set aside and the matters were remanded to the Adjudicating Authority for de nova consideration.

(xi) Pursuant to the said directive issued by this Court, after notice, again personal hearing was held on 10.4.2017 and the appellant/petitioner had given written submissions once again. The said written submissions given in detail has been considered and ultimately, by order dated 24.4.2017, the Adjudicating Authority passed Order-in-Original pursuant to

both show cause notices. In the said Order-in-Original, i.e., the impugned order, the demand in respect of both show cause notices have been confirmed along with interest. However, insofar as the penalty is concerned, it was imposed only in respect of second show cause notice i.e., dated 13.2.2015. Assailing the said Order-in-Original passed by the Adjudicating Authority, dated 24.4.2017, the appellants filed writ petition aforesaid in W.P.No.18354 of 2017 seeking for a writ of certiorari to call for the records of the said impugned order dated 24.4.2017 and quash the same.

(xii) The learned Judge on hearing the learned counsel appearing for the assessee as well as the revenue has dismissed the said writ petition on the ground of maintainability by the impugned Judgment dated 19.7.2017. Aggrieved over the said order, the present appeal has been filed.

3. Mr.T.Ramesh, the learned counsel appearing for the appellant/assessee on the said ground of maintainability on which the writ petition was dismissed by the learned Judge in the impugned order, has submitted that, the dwelling houses constructed by the appellant company is not an apartment or multiplex construction, instead they are individual houses or units for which construction agreement is entered upon between the appellant company with the prospective owner of the house concerned and therefore, the findings of the Adjudicating Authority that the entire project is only a residential complex and therefore, it attracts levy of service tax in terms of Section 65 (91 a) of Chapter V of Finance Act 1994, is completely erroneous.

4. On this basis, the learned counsel appearing for the petitioner would submit that, it is a fact that individual houses were constructed in a separately demarcated area/plot and therefore, each building/house/unit shall be construed only as an individual house. Therefore, the service, if at all rendered for construction of such individual houses shall not be taken into account, as a service rendered for residential complex, and therefore, the learned counsel for the petitioner would submit that the petitioner cannot be subjected to levy of service tax on the taxable category of construction of "residential complex".

5. On the strength of these factors, the learned counsel for the petitioner would submit, that the assessment made and the demand confirmed through the impugned order, i.e, the Order-in-Original passed by the Adjudicating Authority is against the concerned provisions of Finance Act and therefore, on that score, the writ petition filed by the appellant herein, is very well maintainable. Therefore, the learned counsel would state

that the reasoning given by the learned Judge in dismissing the writ petition that the appellant should have approached the appellate forum for filing a statutory appeal i.e, before the Tribunal / CESTAT, under the provisions of the Act, is also erroneous.

6. Per contra, Mrs. R.Hemalatha, the learned standing counsel appearing for the respondent / revenue would submit that under Section 65(91 a) of Chapter V of the Finance Act, 1994, which in fact has been extracted in the Order-in-Original, the term, 'residential complex' has been defined which reads thus:

" In terms of Section 65(91a) of Chapter V of the Finance Act, 1994,

"residential complex" means any complex comprising of-

(i) a building or buildings, having more than twelve residential units;

(ii) a common area; and

(iii) any one or more of facilities or services such as park, lift, parking space, community hall, common water supply or effluent treatment system, located within a premises and the layout of such premises is approved by an authority under any law for the time being in force, but does not include a complex which is constructed by a person directly engaging any other person for designing or planning of the layout, and the construction of such complex is intended for personal use as residence by such person."

7. Since the term residential complex means any complex of a building or buildings having more than twelve residential units, if a residential building / apartment having more than twelve units or if a residential area consisting of more than twelve residential units or buildings even individually, in both way that shall be construed as residential complex, thereby, it attracts the levy of service tax.

8. The learned standing counsel would further state that this has been exhaustively discussed and decided on facts by the Adjudicating Authority in the Order-in-Original that the construction made by the appellant company can definitely be construed as residential complex.

9. The learned standing counsel would also state that, on facts it was found that the entire project developed as a complex by the appellant / assessee was consisting of 416 numbers of individual houses within a common layout for which approval was obtained from the concerned authority and all the individual buyers were provided with various common facilities.

10. Therefore, the learned standing counsel would state that in view of the factual findings, the assessment made as confirmed in the Order-in-Original which was impugned before the writ Court, is fully justifiable and therefore, the appellant cannot make out a case that too for invocation of Article 226 of the Constitution of India for issuance of writ, before this Court.

11. Though we have heard the learned respective counsel on the aforesaid aspects, we are not inclined to dwell with those factual matrices and the claim and counter claim on the merits of the issue, as we propose to dispose this writ petition on the only ground of maintainability.

12. Whatever be the merits claimed by the learned counsel appearing for the appellant and the counter claim made by the learned standing counsel appearing for the respondent, as has been rightly observed by the learned Judge, those are factual issues which can very well be adjudicated further by statutory appellate forum, i.e., the Tribunal, namely, CESTAT under the provisions of the Act.

13. In this regard, if we notice the reasoning given by the learned Judge in the order impugned, one can find that all the issues raised by the appellant side, namely, whether the construction made by the appellant company is to be construed within the meaning of residential complex or not and whether the extended period for issuance of show cause notice was justifiable or not and also the liability of the appellant / assessee, to pay service tax with interest and penalty as demanded by the assessee are all the matters of fact. Since the Appellate Tribunal is the final fact finding authority under the Act, as has been held by the learned Judge in the impugned Judgment, those aspects can very well be agitated by the appellant before the said Tribunal by preferring statutory appeal.

14. The law is well settled that when factual findings are to be assailed where, effective alternative statutory appellate remedy is available, the same cannot be by-passed by invoking the extraordinary jurisdiction of the High Court under Article 226 of the Constitution of India.

15. Therefore, we are of the considered view that the reasoning given by the learned Judge, only on the ground of maintainability to dismiss the writ petition with the liberty to the appellant / assessee to approach the CESTAT, is fully justifiable.

16. In view of the above said facts and circumstances, we are not inclined to entertain this appeal. Therefore, we dismiss the same at the threshold. However, there shall be no orders as to costs.

Sd/-
Assistant Registrar(CS-II)

//True Copy//

Sub Assistant Registrar

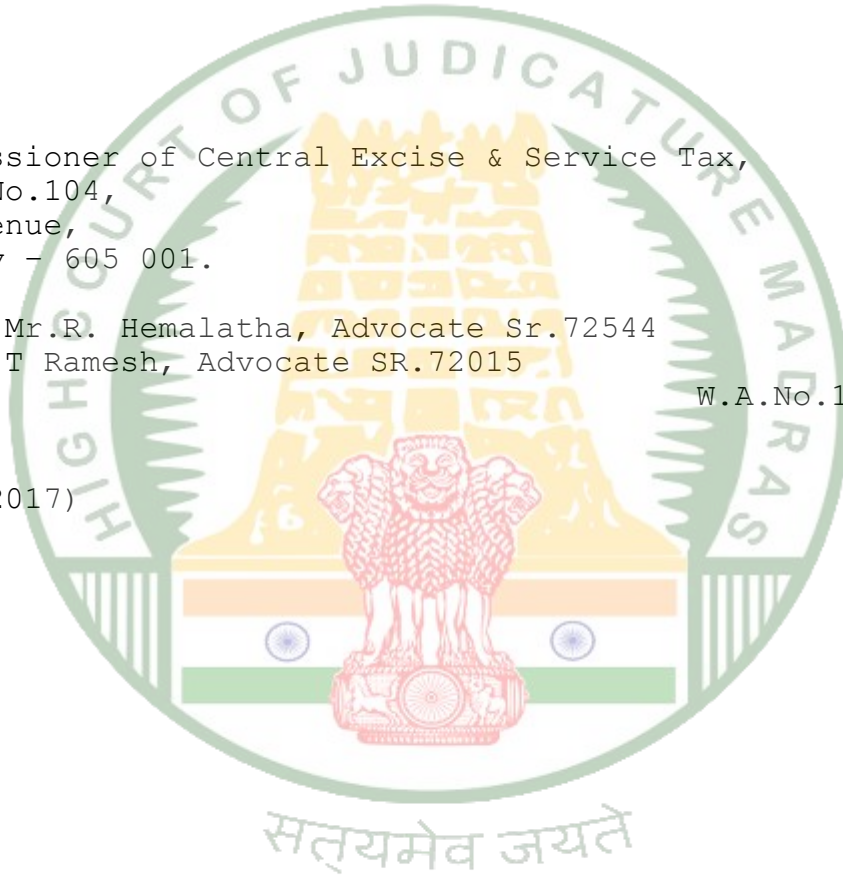
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To

The Commissioner of Central Excise & Service Tax,
Post Box No.104,
Gouber Avenue,
Puducherry - 605 001.

+ 1 cc to Mr.R. Hemalatha, Advocate Sr.72544
+ 1 cc to T Ramesh, Advocate SR.72015

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MN(CO)
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