IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07.08.2020

CORAM

THE HONOURABLE DR. JUSTICE ANITA SUMANTH

W.P. No.32408 of 2019
and WMP.No.32727 of 2019

M/S.Orchid Designs Pvt. Ltd.,
Rep. by its Director
No. 3 Muthial Reddy Street,
Alandur, Chennai 600 016. .. Petitioner

Vs.

1.The Commissioner of Commercial Taxes,
Ezhilagam, Chepauk, Chennai 600 005.

2. The Assistant Commissioner (CT),
Alandur Assessment Circle,
Alandur, Chennai 600 016.

3. The Commercial Tax Officer,
Alandur Assessment Circle,
Alandur, Chennai 600 016. .. Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying to Writ of Certiorari to call for the records of the third respondent and to quash the order passed by the third respondent in TNGST 084296 / 2005-06 dated 17.10.2019 and direct the second respondent to pass fresh orders as per the direction of the Madras High Court in W.P. No.10938 of 2009 dated 03.01.2019 by following the judicial decision of the Supreme Court of India in (2014) 71 VST 1 (SC) after providing an opportunity of personal hearing to the petitioner in this case.

For Petitioner : Mr.C.Baktha Siromoni

For Respondents : Mr. Mohammed Shaffiq, Spl.G.P.

ORDER

The petitioner challenges an order dated 17.10.2019 disposing an application for rectification of an error under Section 84 of the Tamil Nadu Value Added Tax Act, 2006 (in short 'Act').

2. The petitioner is a dealer in modular kitchens and states that it was being assessed as a works contractor under the Tamil Nadu General Sales Tax Act, 1959 (in short 'TNGST Act'). Based on the judgment of a three Judge Bench of the Supreme Court in State of Andhra Pradesh V. Kone Elevators (India) Limited (140 STC 22), the assessment of the petitioner for the period 2005-06 was completed holding that the transactions engaged in were taxable as sales and not works contract. The assessment was challenged before this Court in W.P.No.10938 of 2009.

3. Pending writ petition, a Constitution Bench of the Supreme Court rendered judgment on the issue of taxability of sale/works contract in Kone Elevator (India) Pvt. Ltd. V. State of Tamil Nadu (71 VST 1). Four Judges rendered the majority view setting down parameters as to when a transaction was to be construed as a works contract and the minority view was that the transaction in that case constituted a sale. The assessments were remanded to the file of the Assessing Authority to apply the parameters set out therein and determine the nature of the transaction afresh. The conclusions by the majority are as follows:

....

> 63. Considered on the touchstone of the aforesaid two Constitution Bench decisions, we are of the convinced opinion that the principles stated in Larsen and Toubro (supra) as reproduced by us hereinabove, do correctly enunciate the legal position. Therefore, "the dominant nature test" or "overwhelming component test" or "the degree of labour and service test" are really not applicable. If the contract is a composite one which falls under the definition of works contracts as engrafted under clause (29A)(b) of Article 366 of the Constitution, the incidental part as regards labour and

service pales into total insignificance for the purpose of determining the nature of the contract.

64. Coming back to Kone Elevators (supra), it is perceivable that the three-Judge Bench has referred to the statutory provisions of the 1957 Act and thereafter referred to the decision in Hindustan Shipyard Ltd. (supra), and has further taken note of the customers' obligation to do the civil construction and the time schedule for delivery and thereafter proceeded to state about the major component facet and how the skill and labour employed for converting the main components into the end product was only incidental and arrived at the conclusion that it was a contract for sale. The principal logic applied, i.e., the incidental facet of labour and service, according to us, is not correct. It may be noted here that in all the cases that have been brought before us, there is a composite contract for the purchase and installation of the lift. The price quoted is a composite one for both. As has been held by the High Court of Bombay in Otis Elevator (supra), various technical aspects go into the installation of the lift. There has to be a safety device. In certain States, it is controlled by the legislative enactment and the rules. In certain States, it is not, but the fact remains that a lift is installed on certain norms and parameters keeping in view numerous factors. The installation requires considerable skill and experience. The labour and service element is obvious. What has been taken note of in Kone Elevators (supra) is that the company had brochures for various types of lifts and one is required to place order, regard being had to the building, and also make certain preparatory work. But it is not in dispute that the preparatory work has to be done taking into consideration as to how the lift is going to be attached to the building. The nature of the contracts clearly exposit that they are contracts for supply and installation of the lift where labour and service element is involved. Individually manufactured goods such as lift car, motors, ropes, rails, etc. are the components of the lift which are eventually installed at the site for the lift to operate in the building. In constitutional terms, it is transfer either in goods or some other form. In fact, after the goods are assembled and installed with

skill and labour at the site, it becomes a permanent fixture of the building. Involvement of the skill has been elaborately dealt with by the High Court of Bombay in Otis Elevator (supra) and the factual position is undisputable and irrespective of whether installation is regulated by statutory law or not, the result would be the same. We may hasten to add that this position is stated in respect of a composite contract which requires the contractor to install a lift in a building. It is necessary to state here that if there are two contracts, namely, purchase of the components of the lift from a dealer, it would be a contract for sale and similarly, if separate contract is entered into for installation, that would be a contract for labour and service. But, a pregnant one, once there is a composite contract for supply and installation, it has to be treated as a works contract, for it is not a sale of goods/chattel simpliciter. It is not chattel sold as chattel or, for that matter, a chattel being attached to another chattel. Therefore, it would not be appropriate to term it as a contract for sale on the bedrock that the components are brought to the site, i.e., building, and prepared for delivery. The conclusion, as has been reached in Kone Elevators (supra), is based on the bedrock of incidental service for delivery. It would not be legally correct to make such a distinction in respect of lift, for the contract itself profoundly speaks of obligation to supply goods and materials as well as installation of the lift which obviously conveys performance of labour and service. Hence, the fundamental characteristics of works contract are satisfied. Thus analysed, we conclude and hold that the decision rendered in Kone Elevators (supra) does not correctly lay down the law and it is, accordingly, overruled.

65. Ordinarily, after so stating, we would have directed the matter to be listed before the appropriate Division Bench. However, it is not necessary to do so in this batch of cases inasmuch as the writ petitions have been filed either against the show-cause notices where cases have been reopened or against the orders of assessment framed by the assessing officers and civil appeals filed against certain assessment orders or affirmation thereof which are based on the decision of the three-Judge Bench

> in Kone Elevators case. Considering the factual matrix, we direct that the show-cause notices, which have been issued by taking recourse to reopening of assessment, shall stand quashed. The assessment orders which have been framed and are under assail before this Court are set aside. It is necessary to state here that where the assessments have been framed and have attained finality and are not pending in appeal, they shall be treated to have been closed, and where the assessments are challenged in appeal or revision, the same shall be decided in accordance with the decision rendered by us.

4. In the first round of litigation, the learned Single Judge, referring to the judgment in the case of Kone Elevator (India) (supra) set aside the assessment and remanded the matter to the file of the Assessing Officer in the following terms:

> 2.The issue involved in this writ petition is as to whether the transaction made by the petitioner Company has to be treated as Works Contract or Direct Sale.
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> 3.When this writ petition was taken up for hearing, the learned counsel for the petitioner has submitted that the impugned order of assessment was passed by the respondent relying upon the judgment of the Hon'ble Supreme Court in State of Andhra Pradesh vs. Kone Elevators (India) Limited, reported in (2005) 140 STC 22 (SC); that the said issue was subsequently taken up by the Hon'ble Supreme Court itself and a judgment was passed in Kone Elevator India Pvt.Ltd. vs. State of Tamil Nadu and others, reported in (2014) 71 VST 1 (SC), in which it has been categorically held that the manufacture, supply and installation of Lifts / Elevators comes under the definition of Sale and not Works Contract.. The transaction that is involved in the present case is with regard to the contract for designing, supplying and installing Modern Kitchens / Wardrobes. The scope of work undertaken by the petitioner includes measurement of the kitchen area, preparation of design regarding the type of module according to the space available, alterations in civil work, manufacture and supply of panels and shelves and erection and commissioning at the work site. The learned counsel for the petitioner has submitted that since the transactions involved in the present case and in the judgment of the

Hon’ble Supreme Court in (2014) 71 VST 1 (SC), relate to supply of materials and labour, the said judgment of the Hon’ble Supreme Court is squarely applicable to the present case. Stating so, he prayed for quashing the impugned order and to remit the matter to the respondent for passing fresh order, in the light of the decision of the Hon’ble Supreme Court in (2014) 71 VST 1 (SC).

4.The learned counsel for the respondent fairly conceded the prayer of the petitioner.

5.This Court has perused the above judgments of the Hon'ble Supreme Court and is of the view that the issue involved in the present writ petition is squarely covered by the decision of the Hon'ble Supreme Court in (2014) 71 VST 1 (SC), wherein the Hon'ble Supreme Court remitted the matter to the authorities with a direction to look into the contract entered into between the parties and thereafter decide the nature of the transactions. Hence the impugned assessment order is set aside and the matter is remitted to the respondent for passing fresh order in the light of the judgment of the Hon'ble Supreme Court in (2014) 71 VST 1 (SC), within a period of six weeks from the date of receipt of a copy of this order.

6.The writ petition is disposed of accordingly. No costs. Consequently, the connected miscellaneous petition is closed.

(emphasis supplied)

5. Clearly what has been done is a remittal of the assessment to the file of the Assessing Officer with a direction to redo the assessment in the light of the guidelines set out by the Supreme Court in Kone Elevator (India) Pvt. Ltd. V. State of Tamil Nadu (71 VST 1), the contract and other documentation inter se the parties and the terms of the contracts that governed the transactions.

6. In compliance thereof, a pre-assessment was issued to the petitioner wherein the Assessing Authority proposed to complete the assessment based on the findings of the minority judgment in Kone Elevator (India) Pvt. Ltd. V. State of Tamil Nadu (71 VST 1). Since the Officer referred specifically to paragraph 140 of the judgment, the petitioner objected to the notice, pointing out that what had been referred to in the

notice was the minority view and not the majority view. It is relevant to note that no evidence was produced, by way of contracts or other documentation to support the petitioners' case that the transactions constituted works contract only. Notwithstanding the objections, an order of assessment came to be passed on 04.09.2019, wherein the objections of the petitioner were rejected, the Authority coming to the conclusion that the transaction in question constituted a sale.

7. An application for rectification was filed by the petitioner that also came to be rejected on 17.10.2019, which order is impugned in this writ petition.

8. The issue canvassed before me relates to the interpretation of the contract as well as other documents entered into inter se the petitioner and its customers which do not appear to even be part of the record of the assessing officer. It is only upon such examination that one could conclude as to whether the transaction is question would constitute a works contract or a direct sale. The Assessing Authority, in the present case, has come to the conclusion that the transaction is a sale and the sole argument advanced by learned counsel for the petitioner is that, in coming to this conclusion, what has been applied is the minority view in the Kone Elevator (India) Pvt. Ltd (supra) and not the majority view.

9. What the petitioner appears to imply is that the conclusion of the Assessing Authority to the effect that the transaction constitutes a 'sale' is not correct as it is based upon the minority view in preference over the majority view. In my view, this submission of the petitioner is misconceived. The issue that was before the Constitution Bench was whether the manufacture, supply and installation of lifts are to be treated as a contract for sale or works contract. The majority view, on an appreciation of the contract entered into by the parties in that case, was that the transaction was for sale and service that constituted a works contract. Upon an appreciation of the contract, the learned single Judge came to the conclusion constituted a sale. What is thus clear is that in order to appreciate the transaction inter se the parties, the contract and other relevant documentation as well as the intention of the parties have to be examined and analysed thoroughly. This exercise can only be undertaken by the authorities and not in a Writ Petition.

10. The only point repeatedly canvassed both before the Authorities as well as before this Court is that the judgment of the Hon'ble Supreme Court (majority view) must be applied to the transaction in issue. This cannot be accepted for the mere asking. It is for the petitioner to establish its case and produce enough factual particulars to support the conclusion that the nature of the transaction is a works contract and not a sale. This exercise has not been undertaken. In the absence of any supporting material (contracts, invoices etc.), the conclusion of the authority was that the transactions in issue cannot simply be compared to, or equated with the transaction of supply of lifts by Kone Elevators.

11. The petitioner may not agree with the conclusion that the Assessing Authority has arrived at. However, it is not for this Court sitting in writ jurisdiction to review the materials relating to the transactions engaged in by the petitioner and come to its own view and it is thus only appropriate that the petitioner approach the appellate authority by way of appeal.

12. The impugned order might well be erroneous in conclusion, but that is a matter to be decided in appeal on appreciation of evidence and no error in law has been pointed out to warrant intervention in the impugned order, under Article 226 of the Constitution of India.

13. Thus while expressing no view whatsoever on merits, that is, whether the transactions in issue are liable to be classified as 'works contract' or 'sale', I am not of the view that this is a fit matter for interference under Article 226 of the Constitution of India and permit the petitioner to file a statutory appeal. An appeal, if filed within a period of four weeks from today, will be entertained by the first Appellate Authority without reference to any limitation, but subject to all other statutory conditions. The Appellate Authority will examine the contracts entered into by the parties as well as all/any other relevant information supplied, test the transaction in the light of the principles laid down by the Constitution Bench in Kone Elevator (India) Pvt. Ltd. V. State of Tamil Nadu (71 VST 1) and pass final orders, in accordance with law, after hearing the petitioner.

14. This writ petition is disposed as above. Consequently, connected miscellaneous petition is closed. No costs.

Sd/-
Assistant Registrar

/true copy/
Sub Asst. Registrar

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To
1.The Commissioner of Commercial Taxes,
Ezhilagam, Chepauk, Chennai 600 005.

2. The Assistant Commissioner (CT),
Alandur Assessment Circle,
Alandur, Chennai 600 016.

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