

A.F.R.

Neutral Citation No. - 2024:AHC-LKO:3335

Court No. - 5**Case :-** SALES/TRADE TAX REVISION No. - 39 of 2018**Revisionist :-** M/S Rajansh Marble House Gomti Nagar Lko.Throu Proprietor**Opposite Party :-** The Commissioner Commercial Tax U.P.Lucknow And Another**Counsel for Revisionist :-** Rajesh Kumar Shukla Dr.**Counsel for Opposite Party :-** C.S.C.**Hon'ble Abdul Moin,J.**

1. Heard Dr R. K. Shukla, learned counsel for the revisionist and Shri Sanjay Sarin, learned counsel for the respondents no.1 and 2.

2. The instant revision has been filed raising a challenge to judgement and order dated 19.03.2018 passed by learned Commercial Tax Tribunal, Lucknow, U.P. to the extent it relates to Second Appeal No. 68 of 2017 (A.Y. 2011-12) filed by the revisionist. Substantial questions of law have been set forth in the revision.

3. This Court vide the order dated 03.05.2018 had admitted the revision on two substantial questions of law namely:

"(1) Whether, the judgement & order dated 19.3.2018 passed by learned Commercial Tax Tribunal in Second Appeal No. 68 of 2017 (2011-12) is vitiated due to non-compliance of the mandatory provisions laid down under Rule 63(5) of the U.P. V.A.T. Rules, 2008 read with Section 57(8) of the U.P. V.A.T. Act, 2008.

(5) the principle of best judgement assessment can be resorted to on the basis of presumption and surmises, without any material on record."

4. The Court heard learned counsel for the revisionist on the first substantial question of law which is:

"(1) Whether, the judgement & order dated 19.3.2018 passed by learned Commercial Tax Tribunal in Second Appeal No. 68 of 2017 (2011-12) is vitiated due to non-compliance of the mandatory provisions laid down under Rule 63(5) of the U.P.

V.A.T. Rules, 2008 read with Section 57(8) of the U.P. V.A.T. Act, 2008."

- 5.** Learned counsel for the revisionist contends that Section 57(8) of the U.P. V.A.T. Act, 2008 (hereinafter referred to as the Act 2008) provides that the Tribunal may, if it has not already dismissed the appeal under Section 57(7) of the Act 2008, after calling for and examining relevant records and after giving the parties reasonable opportunities of being heard or as the case may be after following the procedures prescribed under Section 57(5) (a) confirm the order, (b) set aside the order and (c) order such amount of tax to be refunded.
- 6.** Section 56(5) of the Act, 2008 provides the manner and procedure of summary disposal of appeal to be as may be prescribed.
- 7.** Rule 63(5) of the U.P. V.A.T. Rules, 2008 (hereinafter referred to as the Rules, 2008) provides that a judgement and appeal shall be in writing and shall state (a) the points for determination, (b) the decision thereon and (c) the reason for such decision.
- 8.** Placing reliance on the judgement of this Court in the case of **Ved Ram Vs Harish Chandra and another, 2005 (23) LCD 604** the contention of learned counsel for the revisionist is that the provisions of Rule 63(5) of the Rules, 2008 are akin to Order 41 Rule 31 Code of Civil Procedure, 1908 which have been held to be mandatory by this Court in the case of **Ved Ram (Supra)**.
- 9.** Drawing attention of this Court towards the judgment of learned Tribunal, a copy of which is annexure 1 to the revision, the argument of learned counsel for the revisionist is that learned Tribunal has neither indicated the points for determination nor given any decision after noting the said points for determination or the reasons for such decision and consequently the impugned judgement would be against mandatory provisions of Section 57(8) read with 57(5) of the Act, 2008 and Rule 63(5) of the Rules 2008.

10. On the other hand, Shri Sanjay Sarin, learned Additional Chief Standing Counsel has supported the judgement and order passed by learned Tribunal.

11. Heard learned counsels for the parties and perused the record.

12. From a perusal of record it emerges that the appeal filed by the revisionist namely Second Appeal No. 68 of 2017 for the Assessment Year 2011-12 has been dismissed by learned Tribunal vide its judgement and order dated 19.03.2018.

13. As per the learned counsel for the petitioner, the provisions of Section 57(8), Section 57(5) of the Act, 2008 and Rule 63(5) of the Rules 2008 the judgment of learned Tribunal in appeal has to state the points for determination, the decision thereon and the reason for such decision.

14. For the sake of convenience, the provisions of Section 57 of the Act, 2008 are reproduced below:

*"57. **Tribunal.**-(1) There shall be [a Tribunal to be known as Commercial Tax Tribunal] consisting of such members including a President as the State Government may, from time to time, deem it necessary to appoint from amongst-*

(a) the persons who are qualified to be the judge of the High Court;

(b) the persons belonging to the Uttar Pradesh Trade Tax Services or the Uttar Pradesh Commercial Tax Services who hold or have held a post not below the rank of Joint Commissioner.

Provided that-

(i) where the Tribunal consists of one or more persons who is or are member or members of the U.P. Higher Judicial Service, then he or senior most amongst them shall be appointed as the President;

(ii) no person shall be appointed from amongst the advocate unless-

(A) *he has paid Income Tax on his income from his legal profession in each of ten consecutive years preceding such appointment;*

(B) *he has attained the age of fifty years on the date of appointment;*

(C) *such Members from amongst Advocates shall be appointed for a term of three years from the date of appointment or till he attains the age of 60 years whichever is earlier.*

(2) *The State Government may prescribe such other qualification or conditions for the appointment of the President and the other members of the Tribunal as it may deem fit.*

(3) *The provisions of Rule 56 of the U.P. Fundamental Rules shall continue to apply to every member of the Tribunal including the President whether appointed under the erstwhile Act or under this Act on or after the date of the commencement of this Act, as they apply to any other Government servant.*

(4) *Any person aggrieved by [an order passed under Section 42, Section 55] Section 56, a decision under Section 59 or a direction under the proviso of sub-section (7) of Section 48 may, within ninety days from the date of service of the copy of such order, decision or direction on him, prefer an appeal to the Tribunal.*

Provided that where order passed by the appellate authority under Section 55 is an order in respect of demand of any security, not being security demanded for release of goods seized under any provisions of this Act, appeal under this section may be filed only after furnishing security, fixed by the appellate authority under section 55:

Provided further that where the disputed amount of tax, fee or penalty does not exceed two thousand rupees and no question of law is involved, the appellant may, at his option, request the Tribunal in writing for summary disposal of his appeal, whereupon the Tribunal may decide the appeal accordingly.

Explanation. - *For the purposes of this sub-section, the expression 'any person' in relation to any order passed by an authority other than the Commissioner includes the*

Commissioner and, in relation to any order passed by the Commissioner includes the State Government;

(5) The manner and procedure of summary disposal of appeal shall be such as may be prescribed.

(6) Section 5 of the Limitation Act, 1963 shall apply to appeals or other applications under this section.

(7) The Tribunal may at any stage, after giving the appellant a reasonable opportunity of being heard, dismiss the appeal.

(8) The Tribunal may, if it has not already dismissed the appeal under sub-section (7), after calling for and examining the relevant records, and after giving the parties a reasonable opportunity of being heard or, as the case may be, after following the procedure prescribed under sub-section (5):

(a) confirm, cancel or vary such order, or

(b) set aside the order and direct the assessing or appellate or revising authority or the Commissioner as the case may be, to pass a fresh order after such further enquiry, if any, as may be specified, or

(c) order such amount of tax, fee or penalty or other money as may have been realized in excess of the due amount to be refunded according to the provisions of this Act.

(9) Where an appeal under this section has been filed, the Tribunal may, on the application of the appellant moved along with the memorandum of such appeal after giving the parties a reasonable opportunity of being heard, stay the operation of the order appealed against or the recovery of the disputed amount of any tax, fee or penalty payable, or refund of the amount due, or proceeding for re-assessment under the order appealed against till the disposal of the appeal:

Provided that-

(i) where appellate authority under section 55 has set aside an order of assessment or penalty and has remanded the case to the assessing authority, for decision afresh, and the appellant under this section is a person other than the Commissioner or the State Government, for the purpose of this section, disputed amount of tax or penalty shall be deemed to be the same

which had been before appellate authority under section 55; and

(ii) subject to the provision under sub clause (i) where order appealed against does not involve any dispute about quantum of tax, fee or penalty, on the application of the appellant the Tribunal may stay the operation of such order till the disposal of appeal subject to such conditions including a condition of furnishing of a security in cash within the time allowed;

Provided further that-

(a) no application for stay of recovery of any disputed amount of tax, fee or penalty shall be entertained unless the applicant has furnished satisfactory proof of the payment of not less than one third of such disputed amount in addition to the amount required to be deposited under sub-section (3) of Section 55.

(b) the Tribunal may, for special and adequate reasons to be recorded in writing, waive or relax the requirement of clause (a) regarding payment of the one-third of such disputed amount.

(10) Where the Tribunal passes an order under this section for the stay of recovery of any tax, fee or penalty or for the stay of the operation of any order appealed against and such order of the Tribunal results in the stay of recovery of any tax, fee or penalty, such stay order of the Tribunal shall not remain in force for more than thirty days unless the appellant furnishes adequate security to the satisfaction of the assessing authority concerned for the payment of the outstanding amount.

(11) The members of the Tribunal shall sit in such benches of one, two or more members, as may be constituted from time to time, and do such work of the Tribunal as may, subject to sub-section (12) and the rules framed under this Act, be allotted to them, by order or in accordance with the directions of the President of Tribunal.

(12) (a) An appeal against the order of appellate authority under Section 55 shall be heard and disposed of-

(i) [by a bench of two members, where in such order, not being an order passed on the application of the appellant for stay, the amount of tax, fee or penalty in dispute exceeds two lakh

rupees or such amount not exceeding three lakh rupees as may be determined by the State Government from time to time.]

(ii) by a single member bench, in any other case.

[(b) An appeal against a direction given under the proviso to sub-section (7) of Section 48 shall be heard and disposed of by a bench of two members;

(c) an appeal against an order under Section 56 shall be heard and disposed of by a bench of two members.]

(d) An appeal against [an order passed by the Commissioner under section 42 or a decision given under section 59], shall be filed before the President and shall be heard and disposed of by a bench of three members.

(e) The President may, if he so thinks fit,-

(i) direct an appeal to be heard and decided by a larger bench;

(ii) transfer an appeal from one bench to another bench.

(f) In a case before a bench consisting of two or more members any order other than an order finally disposing of the case may be passed by any one of the members constituting the bench:

Provided that an appeal against an order passed on an application for stay, may be disposed of finally by a single member bench.

(13) All appeals arising out of the same cause of action in respect of an assessment year shall, as far as possible, be heard and decided together:

Provided that where anyone or more of such appeals have been heard and decided earlier, if the bench hearing the remaining appeals considers that such decision may be a legal impediment in giving relief in such remaining appeals, it may, if the earlier decision was given-

(a) by a smaller bench or a bench of equal strength, recall such earlier decision and proceed to decide all the appeals together;

(b) by a larger bench, refer such remaining appeals to such larger bench having jurisdiction and thereafter such larger bench may recall such earlier decision and proceed to decide all the appeals together.

(14) The place of sitting and procedure of, and the manner of presenting appeals and other documents to the Tribunal shall, subject to the rules framed under this Act, be such as the Tribunal may deem fit to adopt.

(15) The decision, of case heard by a bench, shall be in accordance with opinion of the majority. Where the members are equally divided the President of the Tribunal may,-

(a) if he was not a member of such bench, give his own opinion or refer the case for the opinion of another member, whereupon the case shall be decided in accordance with such opinions; or

(b) form a larger bench."

15. For the sake of convenience, the provisions Rule 63 of the Rules, 2008 are reproduced below:

"63. Disposal of appeal.- (1) *The appeal shall be heard on the date to be fixed by the appellate authority or the Tribunal, as the case may be.*

(2) The appellate authority or the Tribunal, as the case may be, shall cause a notice of the date fixed to be served well in time on parties to the appeal at the addresses mentioned in the memorandum of appeal, or on their lawyer or authorized agent.

(3) The notice for cases fixed for hearing in a week shall be fixed on the notice board of the appellate authority or the Tribunal, as the case may be, on the last working day of the preceding week.

(4) On the date of hearing, if all the relevant records of appeal have been received, the parties shall be given reasonable opportunity of being heard and the appellate authority or the Tribunal, as the case may be, may after examining all the relevant records, decide the appeal:

Provided that if, despite proper service of the notice either party is not present, the appeal may be heard and decided ex parte.

(5) The judgment in appeal shall be in writing and shall state -

- (a) the points for determination,*
- (b) the decision thereon, and*
- (c) the reasons for such decision.*

(6) Cross appeals arising out of the same case, admitted by the Tribunal shall, as far as possible, be heard and decided together.

(7) Copy of every order under Section 55 and Section 57 shall be delivered to, or served on the parties concerned free of charge. Copies of such order other than the first copy shall be given to the parties concerned on application and on furnishing copying folio of the value of twenty rupees.

(8) Any applicant or opposite-party shall be entitled to have his case argued before the appellate authority or the Tribunal by a lawyer or an accountant or a State Representative, as the case may be.

(9) The provisions of Rule 72 shall, mutis mutandis apply to service of notice, summons, order, etc. under this rule:

Provided that the service, on the State Representative, shall be deemed to be the service on the Commissioner."

16. For the sake of convenience, the provisions of Order 41 Rule 31 Code of Civil Procedure are reproduced below:

"31. Contents, date and signature of judgment.- The judgment of the Appellate Court shall be in writing and shall state-

- (a) the points for determination;*
- (b) the decision thereon;*
- (c) the reasons for the decision; and*
- (d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled;*

and shall at the time that it is pronounced be signed and dated by the Judge or by the Judges concurring therein."

17. From perusal of Section 57 of the Act, 2008 it emerges that the same pertains to Commercial Tax Tribunal. Section 57(5) of the Act 2008 provides that the manner and procedure of summary disposal of appeal shall be as may be prescribed. Section 57(8) of the Act, 2008 provides that the Tribunal after calling for and examining the relevant records and after giving the parties reasonable opportunity of being heard or as the case may be after following the procedure prescribed in Section 57(8)(a) of the Act, 2008 may confirm, cancel or vary such order or (b) set aside the order and direct the assessing or appellate or revising authority or the Commissioner to pass a fresh order or (c) order such amount of tax, fee etc realized in excess to be refunded.

18. Rule 63 of the Rules 2008 provides the procedure for disposal of appeal. Rule 63(5) of the Rules 2008 stipulates that the judgement in appeal shall be in writing and shall state (a) the points for determination, (b) the decision thereon and (c) the reasons for such decision.

19. Order 41 Rule 31 of the Code of Civil Procedure provides that the judgement of the appellate court shall be in writing and shall state (a) the points for determination, (b) the decision thereon, (c) the reasons for the decision and (d) whether the decree appealed from is reversed or varied, the relief to which the appellant is entitled.

20. From perusal of the aforesaid it is apparent that the provisions of Order 41 Rule 31 Code of Civil Procedure are akin to Rule 63(5) of the Rules 2008.

21. As already indicated above Section 57(8) of the Act, 2008 stipulates that the manner and procedure of summary disposal of appeal shall be such as may be prescribed and Rule 63 of the Rules, 2008 stipulates the manner and procedure of summary disposal of appeal.

22. Again, as per the Rule 63(5) of the Rules, 2008 the judgement in appeal has to state the points for determination, the decision thereon and

the reasons for such decision which, as already indicated above, is akin to Order 41 Rule 31 Code of Civil Procedure.

23. The provisions of Order 41 Rule 31 Code of Civil Procedure have been held to be mandatory in the case of **Ved Ram (supra)** wherein this Court has held as under:

"6. The only point involved in the present appeal is whether substantial compliance has been made by the first appellate Court of Order 41, Rule 31 of the Code of Civil Procedure. Order 41, Rule 31, CPC states as under :

"31. Contents, date and signature of judgment. The judgment of the Appellate Court shall be in writing and shall state -

- (a) the points for determination;*
- (b) the decision thereon;*
- (c) the reasons for the decision; and*

(d) where the decree appealed from is reversed or varied, the relief to which the appellants is entitled;

and shall at the time that it is pronounced be signed and dated by the Judge or by the Judges concurring therein."

7. The provisions of Order 41, Rule 31 of the Code of Civil Procedure are mandatory. The first appellate Court while delivering the judgment is required to set out the points for determination, record the decision thereof and give its own reasons for the said decision. Looking at the plain language of the section, it is clear that failure to comply with this provision would not be a mere irregularity but would render the judgment nugatory. The first appellate Court being the last fact finding Court cannot run away from its onerous duties of recording the finding of fact and discussing the evidence and recording the findings of fact. In 1979 AWC 687 : (1979 All LJ (NOC) 110), Smt. Damyanti Devi v. Brindaban it was held-

"Where the judgment of the appellate Court is of reversal, the appellate Court should consider all the relevant and material evidence on record and thereafter give reasons for the said decision."

8. In *Keluni Dei v. Kanhei Sahu*, AIR 1972 Orissa 28, it was held -

"It is incumbent upon the final Court of fact, particularly in the case of reversing decision this is an instance of reversal as all the material findings were being reversed to meet the reasonings of the trial Court and indicate its own reasons for the conclusions to be reached."

9. *In my view, the judgment of the first appellate Court cannot be said to be a judgment within the meaning of Order 41, Rule 31, CPC. The appellate Court has neither discussed the evidence or has given any reason for reversing the decision given by the trial Court on various issues. It was the duty of the appellate Court to discuss the entire evidence afresh, take notice of the features which were noticed by the trial Court and then give its own independent reason. The lower appellate Court has failed to discharge its duties as a final Court of fact. The appellate Court has shirked its duties and has not discussed the evidence brought on record. On several occasions the appellate Court has only criticised the efforts made by the trial Court in issuing various commission in order to identify the land. The appellate Court instead of giving a finding of various issues framed by the trial Court has allowed the appeal on the ground that the plaintiff had failed to establish that the disputed land belonged to him. This finding given by the appellate Court, in my opinion, is based on no reason or evidence. The appellate Court has omitted to take stock of the entire material and failed to take a cumulative view from the material evidence on record."*

24. From perusal of the judgement of this Court in the case of **Ved Ram (supra)** it emerges that this Court has held the provisions of Order 41 Rule 31 Code of Civil Procedure to be mandatory and that the first appellate court while delivering the judgement is required to set out the points for determination, record the decision thereon and give its own reason for the said decision.

25. This Court has further held that failure to comply with these provisions would not be a mere irregularity but would render the judgement nugatory.

26. Accordingly, when the impugned judgement of learned Tribunal is seen in the context of the law laid down by this Court in the case of **Ved Ram (supra)** vis a vis the provisions of Section 57(8) and Section 57(5) of the Act, 2008 read with Rule 63(5) of the Rules, 2008 it clearly emerges that learned Tribunal has patently erred in neither noting the points for determination nor giving the reason for such decision thereon. Even though certain reasons are indicated in the impugned judgement, as emerge from a perusal of the said judgement, yet without determining the points for determination and the reasons for such decision thereon, it cannot be said that the judgement of learned Tribunal complies with the provisions of Rule 63(5) of the Rules, 2008.

27. Keeping in view the aforesaid discussion, the revision is **allowed**. The order impugned dated 19.03.2008, a copy of which is annexure 1 to the revision, is set aside so far as it pertains to Second Appeal No. 68 of 2017 in re: **Sarvshri Sarvshri Rajansh Marble House vs Commissioner of Commercial Tax, Lucknow**.

28. The matter is remitted to learned Commercial Tax Tribunal, Lucknow, U.P. to pass a fresh decision in accordance with law complying with the provisions of Section 57 of the Act, 2008 and Rule 63 of the Rules, 2008.

29. Let such an order be passed in accordance with law within a period of three months from the date of receipt of certified copy of this order.

Order Date :- 11.1.2024

J.K. Dinkar