

GAHC010094612022



2024:GAU-AS:12811-DB

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

INCOME TAX APPEAL No.08 OF 2022

1. The Commissioner of Income Tax, Office of the Principal Commissioner of Income Tax, Guwahati, Aayakar Bhawan, Seventh Floor, G.S. Road, Guwahati – 781005.
2. Income Tax Officer, DCIT/ACIT, Circle-3, Guwahati, Office of the Principal Commissioner of Income Tax, Guwahati, Aayakar Bhawan, Seventh Floor, G.S. Road, Guwahati – 781005.

.....Appellants

-Versus-

M/s Goldstone Cements Limited, Village-Musiang Lamare (Old), Khliehriat, East Jaintia Hills, Meghalaya-793200. (PAN NO. AADCG2870Q).

.....Respondent

– **B E F O R E** –

HON'BLE MR. JUSTICE LANUSUNGKUM JAMIR

HON'BLE MR. JUSTICE KAUSHIK GOSWAMI

For the Appellants : Mr. S.C. Keyal, Standing Counsel, CBDT, IT

For the Respondent : Dr. A. Saraf, Senior Advocate,
assisted by Mr. P.K. Bora,
Advocate

Date of Hearing : 05.12.2024.

Date of Judgment : **17.12.2024.**

JUDGMENT & ORDER (CAV)

(Kaushik Goswami, J)

Heard Mr. S.C. Keyal, learned Standing Counsel, CBDT, IT for the appellants as well as Dr. A. Saraf, learned Senior Counsel assisted by Mr. P.K. Bora, learned counsel for the respondent.

2. This appeal is preferred under the provision of Section 260A of the Income Tax Act, 1961 (hereinafter referred to as the 'IT Act') against the impugned order dated 10.12.2021 passed by the Income Tax Appellate Tribunal, Gauhati Bench in I.T.A. Nos. 126 to 131/GAU/2020 for the Assessment Year 2011-12 to 2015-16 & 2017-18.

3. The facts relevant for the purpose of this appeal are as follows:-

Upon a search and seizure as per Section 132 of the IT Act being conducted in the office premises of the respondent company as well as in the residence of family members and other business concerns etc., the Assessing Authority having doubted the sale transaction in respect of few companies, framed assessment under Section 153A/143 (3) of the IT Act and determined the assessed income of the respondent company for the annual year 2017-19. The Assessing Authority, doubted the genuineness of the transaction in respect of share capital received from M/s. Orchid Finlease Pvt. Ltd. amounting to Rs. 1,75,54,848/- and M/s. Shantidham Marketing Pvt. Ltd. amounting to Rs. 32,94,00,000/- and accordingly added Rs. 34,69,54,848/- to the income of the respondent company under Section 68 of the IT Act. Aggrieved by the aforesaid order of the Assessing Officer, the respondent preferred an appeal before the learned Commissioner of Income Tax (Appeals), Guwahati-2 (hereinafter referred to as the 'Appellate Authority') and the said Appellate Authority was pleased to delete the aforesaid addition made by the Assessing Authority by order dated 18.03.2020. Aggrieved by the aforesaid order of the Appellate Authority, the appellants filed an appeal before the learned Income Tax Appellate Tribunal, Guwahati Bench (hereinafter referred to as the 'Second Appellate Tribunal'). The learned Second Appellate Tribunal by order dated 10.12.2021 dismissed the aforesaid appeal of the Appellate

Authority. Accordingly, the present third appeal is being preferred by the Appellants.

4. Mr. S.C. Keyal, learned Standing Counsel for the appellants submits that the impugned order of the Second Appellate Tribunal is totally erroneous. He further submits that the respondent/assessee has not been able to establish the source of source as regards the transaction in question and as such, the order of the Assessing Authority under Section 68 of the IT Act is valid and ought not to have been interfered with by both the Appellate Authorities. He further submits that under Section 68 of the IT Act, the obligation stands with the assessee to explain the source of source and hence, in the present case, since the assessee has not been able to explain the source of source as regards the transaction in question, the Assessing Officer has rightly added the sum to be charged to income tax as the income of the respondent/assessee for the assessing year in question. He further relies upon the decision of the Apex Court in the case of ***Principal Commissioner of Income Tax (Central) 1 vs. NRA Iron & Steel Pvt. Ltd.***, reported in **(2019) 15 SCC 529**.

5. Per contra, Dr. A. Saraf, learned Senior Counsel appearing for the respondent/assessee submits that the present appeal being filed before the Third Appellate Court, this Court shall not go to the factual matrix of the case and shall also not disturb the concurrent findings of the Appellate Authority and the Second Appellate Tribunal. He further submits that there is no substantial question of

law involved in this appeal and hence, the appeal is not maintainable. He further submits that the Appellate Authority as well as the Second Appellate Tribunal elaborately discussed the materials placed by both parties and by discussing the same has returned the verdict against the Assessing Authorities/Appellants. Accordingly, he submits that this appeal warrants to be rejected at the outset. He further relies upon the following decisions:-

- (1) *Karnataka Board of Wakf vs. Anjuman-E-Ismail Madris-Un-Niswan*, reported in (1999) 6 SCC 343. (Apex Court)**
- (2) *Hamida & Ors. vs. Md. Khalil*, reported in (2001) 5 SCC 30. (Apex Court)**
- (3) *Aradhna Oil Mills vs. Commissioner of Income Tax & Anr.*, reported in (2001) 252 ITR 607. (High Court of Madhya Pradesh)**
- (4) *Commissioner of Income Tax vs. Gom Industries Ltd.*, reported in (2007) 292 ITR 406. (High Court of Madhya Pradesh)**
- (5) *Commissioner of Income Tax vs. Antartica Investment Pvt. Ltd.*, reported in (2003) 262 ITR 493. (High Court of Delhi)**
- (6) *Principal Commissioner of Income Tax vs. Gaurav Bagaria*, reported in (2023) 453 ITR 513. (High Court of Rajasthan)**

- (7) Commissioner of Income Tax, New Delhi vs. Odeon Builders Pvt. Ltd.**, reported in **(2020) 17 SCC 311. (Apex Court)**
- (8) Commissioner of Income Tax, Orissa vs. Orissa Corporation (P) Ltd.**, reported in **(1986) (Supp) SCC 110. (Apex Court)**
- (9) Dhanalaxmi Steel Re-Rolling Mills vs. Commissioner of Income Tax**, reported in **(1997) 228 ITR 780. (High Court of Andhra Pradesh)**
- (10) Commissioner of Income Tax vs. Baishnab Charan Mohanty**, reported in **(1995) 215 ITR 827. (High Court of Orissa)**

6. We have given our prudent consideration to the arguments made by the learned counsels appearing for the contesting parties and have perused the materials available on record and have also considered the citations submitted at the bar.

7. Apt at the outset to refer to Section 260A of the IT Act under which the present appeal has been filed, which reads as hereunder:-

“260A. Appeal to High Court.

(1) *An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal [before the date of establishment of the National Tax Tribunal], if the High Court is satisfied that the case involves a substantial question of law.*

(2) *The [Principal Chief Commissioner or Chief Commissioner] or the [Principal Commissioner or Commissioner] or an assessee aggrieved by any order passed by the Appellate Tribunal may file an appeal to the*

High Court and such appeal under this sub-section shall be—

(a) filed within one hundred and twenty days from the date on which the order appealed against is received by the assessee or the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner;

*(b) [***]*

(c) in the form of a memorandum of appeal precisely stating therein the substantial question of law involved.

(2A) The High Court may admit an appeal after the expiry of the period of one hundred and twenty days referred to in clause (a) of sub-section (2), if it is satisfied that there was sufficient cause for not filing the same within that period.

(3) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(4) The appeal shall be heard only on the question so formulated, and the respondents shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the court to hear, for reasons to be recorded, the appeal on any other substantial question of law not formulated by it, if it is satisfied that the case involves such question.

(5) The High Court shall decide the question of law so formulated and deliver such judgment thereon containing the grounds on which such decision is founded and may award such cost as it deems fit.

(6) The High Court may determine any issue which—

(a) has not been determined by the Appellate Tribunal; or

(b) has been wrongly determined by the Appellate Tribunal, by reason of a decision on such question of law as is referred to in sub-section (1).

(7) Save as otherwise provided in this Act, the provisions of the Code of Civil Procedure, 1908 (5 of 1908), relating to appeals to the High Court shall, as far as may be, apply in the case of appeals under this section.”

8. Reading of the aforesaid provision, it is apparent that the appeal under Section 260A of the IT Act shall be maintainable only if it involves substantial question of law. It further appears that the provisions of second appeal as contained under Section 100 of Code of Civil Procedure, 1908 (hereinafter referred to as 'CPC'), is made applicable in respect of appeal filed under Section 260A of the IT Act.

9. Pertinent that this Court while admitting the appeal on 24.05.2023 formulated the following substantial questions of law:-

(a) Whether the learned Tribunal erred in law in holding that assessee had discharged its burden of substantiation of the identity, creditworthiness and genuineness of the transactions involving receipt of share application monies?

(b) Whether the learned Tribunal was justified in deleting the addition under Section 68 of share application money of Rs. 34,69,54,848/- received from Shantidham Marketing Pvt. Ltd., and Orchid Finlease Pvt. Ltd.?”

10. Apt therefore to first determine whether the questions framed by this Court as stated above involves a substantial question of law or not. The Apex Court in the case of **Hero Vinoth (Minor) vs. Seshammal**, reported in **(2006) 5 SCC 545** has held in paragraphs Nos. 21 – 24 as hereunder:-

“21. The phrase “substantial question law”, as occurring in the amended Section 100 of the CPC is not defined in the Code. The word substantial, as qualifying “question of law”, means - of having substance, essential, real, of sound worth, important or considerable. It is to be understood as something in contradistinction with – technical, of no substance or consequence, or academic merely. However, it is clear that the legislature has chosen not to qualify the scope of “substantial question of law” by suffixing the words “of general importance” as has been done in many other provisions such as Section 109 of the Code or Article 133(1)(a) of the Constitution. The substantial question of law on which a second appeal shall be heard need not necessarily be a substantial question of law of general importance. In Guran Ditta v. T. Ram Ditta (AIR 1928 PC 172), the phrase ‘substantial question of law’ as it was employed in the last clause of the then existing Section 100 CPC (since omitted by the Amendment Act, 1973) came up for consideration and their Lordships held that it did not mean a substantial question of general importance but a substantial question of law which was involved in the case. In Sri Chunilal’s case (supra), the Constitution Bench expressed agreement with the following view taken by a full Bench of the Madras High Court in Rimmalapudi Subba Rao v. Noony Veeraju (AIR 1951 Mad. 969)

“When a question of law is fairly arguable, where there is room for difference of opinion on it or where the Court thought it necessary to deal with that question at some length and discuss alternative views, then the question would be a substantial question of law. On the other hand if the question was practically covered by the decision of the highest court or if the general principles to be applied in determining the question are well settled and the only question was of applying those principles to be particular facts of the case it would not be a substantial question of law.” This Court laid down the following test as proper test, for determining whether a question of law raised in the case is substantial”

“The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the question are well settled and there is a mere

question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law.”

22. *In Dy. Commnr. Hardoi v. Rama Krishna Narain (AIR 1953 SC 521) also it was held that a question of law of importance to the parties was a substantial question of law entitling the appellant to a certificate under (the then) Section 100 of the CPC.*

23. *To be “substantial” a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, insofar as the rights or the parties before it are concerned. To be a question of law “involved in the case” there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstance of each case whether a question of law is a substantial one and involved in the case, or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis. (See : Santosh Hazari v. Purushottam Tiwari (deceased) by Lrs. [(2001) 3 SCC 179].*

24. *The principles relating to Section 100 CPC, relevant for this case, may be summerised thus:-*

(i) *An inference of fact from the recitals or contents of a document is a question of fact. But the legal effect of the terms of a document is a question of law. Construction of a document involving the application of any principle of law, is also a question of law. Therefore, when there is misconstruction of a document or wrong application of a principle of law in construing a document, it gives rise to a question of law.*

(ii) *The High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be a substantial question*

of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue. A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the court below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled position of law.

(iii) The general rule is that High Court will not interfere with concurrent findings of the Courts below. But it is not an absolute rule. Some of the well recognized exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to 'decision based on no evidence', it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding."

11. The test as laid down by the Apex Court for determining whether a question of law raised in the case is substantial or not, thus is whether it is of general public importance or whether it directly and substantially affect the rights of the parties, and if so, whether it is either debatable, not previously settled by law of the land and there is no binding precedent.

12. In the present case, upon reading the first substantial question of law formulated by this Court, i.e., whether the learned Tribunal erred in law in holding that assessee had discharged its burden of substantiation of the identity, creditworthiness and genuineness of the transactions involving receipt of share application money, it appears that the same is essentially a question of fact.

13. It appears that the Appellate Authority, in the appeal filed by the respondent/assessee before the Commissioner of Income Tax (Appeals) Guwahati, by order dated 18.03.2020 after examining the information and documents furnished by the share holders i.e., M/s. Orchid Finlease Pvt. Ltd. and M/s. Shantidham Marketing Pvt. Ltd. held that both the share holders were genuine and that the identity, creditworthiness and genuineness of the two share holders were established and therefore deleted the impugned addition made in the assessment year in question.

14. It further appears that the Second Appellate Tribunal has also examined the explanation and materials produced by the respondent assessee and has held that no fresh credit has been received by the respondent/assessee in the financial year in question and that unsecured loan has been converted into equity capital by way of journal entry. Accordingly, the Second Appellate Tribunal has held that the Appellate Authority has rightly held that no addition was warranted under Section 68 of the IT Act in relation to the conversion of loan into equity.

15. It further appears that the Second Appellate Tribunal has also accepted the explanation for source of source provided by the respondent/assessee. It further appears that the Second Appellate Tribunal has examined the investment made by the concerned shareholder company and has held that the share holders had actually advanced loan to the respondent/assessee pursuant to loan cum share purchase agreement. Relevant portion of the First Appellate order is reproduced hereunder for ready reference:-

“11.13 Having regard to the above legal position, we now proceed to examine the facts of the case on hand. We note that the assessee, when called upon by the AO to explain the nature and source of the credit entries for the respective AYs, has discharged its burden by furnishing the necessary details inter alia including the name, PAN, address of the share subscribers, details of share application monies received, shares allotted along with bank statements evidencing that all payments were received through banking channel. After going through the details submitted the AO had made verification/enquiries u/s 133(6) of the Act from the shareholders, who in response had filed copies of their Income-tax Acknowledgments, financial statements, bank statements, explanation regarding source of their funds, copies of assessment orders etc. in support of their identity, creditworthiness and genuineness of these transactions. Thus, the inference that flows from the aforesaid facts is that the initial burden imposed under section 68 of the Act stood discharged. The details filed by the assessee were cross verified by the AO from the shareholder and no infirmity was pointed out in the same, except making a bald statement that the "source of source" of funds of the application monies was not properly explained. Having perused the orders impugned before us in light of the documents furnished by the shareholders, we find that the AO only looked with suspicious the "source of source" brought to his notice and other than making a bald statement that "source of source" was not fully explained, the AO failed to bring any material or evidence on record, which suggested that the amount credited in the books of the assessee did not belong to the shareholder but that of the assessee. For this, let us now into the relevant facts of each investor/s which invested money in the company in the form of share capital along with share premium.

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“(I) Orchid Finlease Pvt. Ltd. (AY 2017-18- Rs. 1.75,54,848)

(i) We note from pages 1057-1144 of the paper book, the details of M/s. Orchid Finlease Pvt Ltd are set out. Perusal of the reply furnished by this shareholder in response to the notice issued u/s 133(6) of the Act, shows that the shareholder is a registered non banking finance company (NBFC) holding certificate of registration No. B.08.00108, having PAN AABCG9438Q and CIN: U65929AS 1996PTC004898, which regularly filed its return of income and is assessed under the jurisdiction of ITO Ward 3(1), Guwahati. It is noted that this shareholder had actually advanced loan to the assessee of Rs.2,55,00,000/- in the earlier FY 2015-16 pursuant to a loan cum share purchase agreement dated 11-01-2016. Copy of the said agreement and board resolution approving the same is found placed at Pages 1065 to 1069 of the paperbook. We further note that the said company has provided detailed break-up of loans advanced along with the bank statement evidencing the advancement of loan, copy of which is enclosed at Pages 1070 to 1073 of the paperbook. It is noted that the net owned funds of the company was in excess of Rs.2611 lacs and therefore it is evident that the company had sufficient net worth to justify the loan advanced to the assessee. The details of source of source of loan advanced to the assessee was also provided by the shareholder, which is found placed at Pages 1060-1062 & 1074-1080 of the Paper book. It is noted that the source of funds of the shareholder for advancement of such loan was mainly the proceeds of Rs.1,95,50,000/- received on sale of investment holdings in M/S VRC Technologies Pvt. and M/s Parasmani Planning & Development Pvt. Ltd. to M/s Darkwell Dealers Pvt. Ltd., details of which along with copies of sale bills are found placed at Pages 1074-1080 of the paperbook.

(ii) In the relevant FY 2016-17, M/s Orchid Finlease Pvt. Ltd. did not pay any fresh sum to the assessee company. From the documents available on record, it is noted that the assessee vide Board Resolution dated 04-05-2016 had exercised their right available

under the loan agreement to convert the unsecured loan into equity shares. Having regard to the fair market value of the shares determined in accordance with Rule 11UA, the company allotted 4,04,761 equity shares at Rs.63 per share to this shareholder. Copy of the allotment letters issued by the assessee are found placed at Pages 1063 & 1064 of the Paperbook. Having regard to these facts, we therefore note that there was no fresh credit received by the assessee in the relevant AY 2017-18 from M/s Orchid Finlease Pvt. Ltd. It was a case where the unsecured loan has been converted into equity capital by way of journal entry. In absence of there being any fresh credit received during the relevant year, the provisions of Section 68 of the Act could not have been invoked or applied in AY 2017-18. For this, we find support in the decisions of the Hon'ble Calcutta High Court in the case of Jatia Investment & Company vs CIT (206 ITR 718) and Hon'ble Madhya Pradesh High Court in the case of VISP Pvt. Ltd. (265 ITR 202). We therefore hold that the Ld. CIT(A) had rightly held that no addition was warranted u/s 68 of the Act in relation to the conversion of loan into equity to the extent of Rs.1.75,54,848/- in AY 2017-18.

(iii) Even otherwise, it is noted that the explanation regarding source of source of funds to the extent of Rs.1,95,50,000/- was payments received from M/s Darkwell Dealers Pvt. Ltd. It is noted that the AO chose to believe this source of source to the extent of Rs. 19,95,152/- and disbelieved sum of Rs.1,75,54,848/-. We find that no reasons were given by the AO for believing some sums and disbelieving some sums in relation to the same source of source of funds. Even the Ld. CIT, DR was unable to throw light on this apparent irrational action of the AO. In such a scenario, when the A.O is found to be satisfied with the source of source to the extent of Rs.19,95,152/- paid by them, his action of not accepting the balance sum of Rs. 1,75,54,848/- cannot be countenanced.

(iv) Perusal of alleged cash trail prepared by the AO in relation to M/s Orchid Finlease Pvt Ltd, shows that it was the source of source of M/s Darkwell Dealers Pvt. Ltd. where cash deposits in the account of the payers to the extent of Rs.97,67,000/- were found. Hence, going by this chart, suspicion, if any, gets raised qua the source of source of M/s Darkwell Dealers Pvt. Ltd and not the assessee. There was no evidence whatsoever brought on record by the AO to show that the

cash deposits made in the accounts of the proprietary concerns represented unaccounted monies provided by the assessee or any evidence regarding nexus with the assessee. We thus find that this cash trail extracted by the AO in his order raises doubt but due to lack of any adverse material to connect the assessee with the proprietary concern, no adverse view can be taken against the assessee.

(v) For the reasons discussed in the foregoing, it is held that the assessee had discharged its onus of substantiating the identity, creditworthiness and genuineness of the transaction with M/s Orchid Finlease Pvt Ltd. and also the source of source of funds.

(J) Shantidham Marketing Pvt. Ltd. (AY 2017-18 - Rs.32.94,00,000)

(i) We note from pages 1145-1266 of the paper book, the details of M/s. Shantidham Marketing Pvt. Ltd. are set out. It is observed that the AO had issued notice u/s 133(6) dated 27.11.2019 upon this shareholder requisitioning several details and inter alia requiring it to substantiate its source of funds out of which it paid the share application monies to the assessee. Perusal of their response reveals that the shareholder belongs to the UFM Group of companies (promoter of the assessee) and is engaged in the business of promoting and marketing of cement and trading of poly weave bags. The shareholder AAOCS2874F and CIN: a GST registered entity having PAN U51909 AS2010PTC012266, which regularly filed its return of income and is assessed under the jurisdiction of ITO, Ward 2(1), Kolkata. The shareholder had explained the strategic business objective behind infusion of share capital into the assessee company, for the reason that it was in the last leg of completion and commissioning of its cement plant. It is noted that the investment was made at the fair market value computed in terms of Rule 11UA of the Rules. Copy of the valuation report is found placed at Pages 1255 to 1264 of the paperbook. Therefore, the justification regarding share premium stands fulfilled.

(ii) It is noted that during AY 2017-18, the assessee had received share application monies of Rs.55,62,50,814/- from M/s Shantidham Marketing Pvt Ltd. qua the application monies aggregating to

Rs.22,68,50,814/-, the AO has accepted the identity, creditworthiness & genuineness of the transaction but chose to dispute sum to the extent of Rs.32,94,00,000/-. We find that no reasons were ascribed by the AO for believing some sums are correct and disbelieving some part of share transactions from the same shareholder, particularly when similar documentation in as much as even the explanation regarding source of source of funds were furnished by the shareholder in the same manner as sought for by the AO under the cover of the same letter furnished in response to AO's notice u/s 133(6) of the Act. The AO has instead made a bald assertion that some of the source of source of funds remained unexplained without giving any cogent basis or reasoning whatsoever. When confronted with this fact, even the Ld. CIT, DR was unable to explain this irrational action of the AO. In such a scenario, when the A.O is found to be satisfied with the identity, creditworthiness and genuineness of the shareholder by his action of accepting the share application of Rs.22.68,50,814/- paid by them, his action of not accepting the balance sum of Rs.32,94,00,000/-, is held to be un tenable/un-reasonable/irrational being arbitrary.

(iii) From the audited financial statements furnished, which are found placed at Pages 1180 to 1195 of the paperbook, it is noted that the company was having sufficient own funds in the form of capital and free reserves to the tune of Rs.46,42,76,005/- as on 31-03-2017 which is sufficient to cover the cost of investments made by the shareholder during the relevant year. As regards the source of source of funds, it is noted that the company had placed on record the copy of the bank statement for the relevant period at Page 1161 to 1179 of the Paper book. On examination of the bank statement it is taken note that there is no deposit of cash and all transfer have been made through proper banking channels. The details of source of source of funds received by the assessee were also provided by the shareholder, in the manner as prescribed in the notice u/s 133(6) of the Act, which is found placed at Page 1157 to 1160 & 1245 to 1254 of the Paper book. It is noted that the source of funds of the shareholder was primarily deposits from channel partners and/or sale of investment holdings, details of which along with name, PAN & address are found placed at Pages 1245 to 1254 of the paperbook.

(iv) Shri Dudhewewala pointed out that M/s Shantidham Marketing Pvt Ltd was an associate concern and that the director of the said shareholder company and the assessee were common. He invited our attention to the details of the directors of the shareholder, which is available at Page 1155 of the paper book, from which it is noted that Shri Vishal Jain, who is also the director of the assessee. Perusal of the statement of Shri Vishal Jain, which was recorded under oath by the AO on 28-11-2019, shows that the director had also affirmed the transactions between M/s Shantidham Marketing Pvt Ltd and the assessee and nothing adverse came out from his statement. When enquired about the source of funds of the shareholders, the Director stated that the shareholder was engaged in the business of marketing of clinkers and cement in North Bengal, Bhutan and Nepal and that the names, addresses and PANS of the payers had been provided to the AO so that the AO can make enquiries from the respective source of sources. It is also noted that upon insistence of the AO, the Director collated and furnished various supporting documents viz, which includes invoices, bank statements as well as confirmations from the payers of the shareholders in support of source of source of funds under the cover of his letter dated 21.12.2019, which is found placed at Pages 1267 to 1507 of the paperbook. Having perused the same, we find that the assessee had furnished relevant evidences in support of the source of source of funds and that even the AO was unable to point out any defect nor any falsity or infirmity in the documents submitted before him.

(v) It is also noted that this shareholder was also subjected to income-tax scrutiny u/s 143(3) of the Act in AY 2017-18. Perusal of the assessment order, copy of which is at Pages 1265-1266 of paper book, shows that the AO of the shareholder did not draw any adverse inference regarding the source of investments made by the shareholder in the assessee company. In the circumstances when the source of funds of the investor had been accepted to be genuine by the AO of the investor, we hold that the AO, in the present case, was unjustified in holding that the source of source of funds remained unexplained. Having regard to the aforesaid facts, we find that not only did the assessee discharge its onus of establishing the identity, creditworthiness and genuineness of the transaction but even the source of source of funds was explained.

11.14 In light of the above, we now proceed to examine whether the decision of the Hon'ble Supreme Court in the case of *Pr.CIT v. NRA Iron & Steel (P) Ltd* (412 ITR 161) relied upon by the Ld. DR is apt in the facts and circumstances of the present case? For this, let us so examine the principles laid down by the Hon'ble Supreme Court in the case of *Pr.CIT v. NRA Iron & Steel (P) Ltd* (supra) and whether it is applicable to the present facts of the case or not. In the decided case, the assessee-company received share capital and premium of Rs.17.60 crores in all from nineteen parties (six from Mumbai, eleven from Kolkata and two from Guwahati). The shares had a face value of Rs.10/- and were subscribed by the investor-companies at a premium of Rs. 190 per share. The AO made the addition of Rs. 17,60 crores after carrying out various inquiries as under-

(i) To verify the veracity of the transactions, the notices were served on three investor-companies namely Clifton Securities Pvt. Ltd.-Mumbai, Lexus Infotech Ltd.-Mumbai, Nicco Securities Pvt. Ltd. Mumbai but no reply was received.

(ii) The address with respect to a company namely Real Gold Trading Co. Pvt. Ltd.- Mumbai was not correct.

(iii) The notice could not be served on two investor-companies, namely Hema Trading Co. Pvt. Ltd.-Mumbai, Eternity Multi Trade Pvt. Ltd.-Mumbai.

(iv) Submissions from nine companies were received (Neha Cassetes Pvt. Ltd.-Kolkata, Warner Multimedia Ltd. Kolkata, Gopikar Supply Pvt. Ltd. Kolkata, Gromore Fund Management Ltd. Kolkata, Bayanwala Brothers Pvt. Ltd. Kolkata, Shivilaxmi Export Ltd. Kolkata, Natraj Vinimay Pvt. Ltd. Kolkata, Neelkanth Commodities Pvt. Ltd. Kolkata, Prominent Vyappar Pvt. Ltd. Kolkata), however, they had not given any reasons for paying such a huge premium.

(v) The details of share purchased and the amount of premium were not specified by certain companies, namely Super Finance Ltd. Kolkata, Ganga Builders Ltd. Kolkata. Furthermore, these companies had not enclosed the bank statement.

(vi) In addition to above, AO found that:

- a. *Out of the four companies at Mumbai, two companies were found to be non-existent at the address furnished.*
- b. *With respect to the Kolkata companies, nobody appeared nor did they produce their bank statements to substantiate the alleged investments.*
- c. *Guwahati companies - Ispat Sheet Ltd. and Novelty Traders Ltd., were found non-existent at the given address.*
- d. *None of the investor-companies appeared before the A.O.*

11.15 It was in light of the above conspectus of facts that it was held by the Hon'ble Apex Court, that the Assessee-Company failed to discharge the onus required under Section 68 of the Act. However in the case on hand, we find that, the assessee and all the shareholders had discharged the onus casted upon them under the provisions of Section 68 of the Act which has been elaborated in the preceding paragraph."

16. Reading the aforesaid paragraphs of the impugned Second Appellate Tribunal's order, it is manifestly apparent that the decision of the Second Appellate Tribunal is based on evidence. This Tribunal while exercising jurisdiction under section 260A of the IT Act, cannot re-appreciate the evidences on record. It is trite law that the Second Appellate Court under Section 100 of CPC shall not disturb the concurrent findings of the Trial Court and the First Appellate Court unless and until the same is totally perverse. The provisions of section 100 of CPC being applicable in the case of appeal under Section 260A of the IT Act, the Third Appellate Court, i.e. this Court shall not interfere such finding of facts recorded by the First Appellate Tribunal.

17. Reference is made to the decision of the Apex Court in the case of **Karnataka Board of Wakf (supra)**. Paragraphs 11, 12, 13 & 14 & 15 of the aforesaid judgment are reproduced hereunder for ready reference:-

“11. A perusal of this question hardly gives an impression that the said question involves any question of law much less a substantial question of law. In the ordinary course, what we have stated above would have sufficed for the disposal of this appeal. However, the approach of the High Court in this case has been in total contravention of the law laid down by this Court in a catena of decisions.

12. This Court had repeatedly held that the power of the High Court to interfere in second appeal under Section 100 CPC is limited solely to decide a substantial question of law, if at all the same arises in the case. It has deprecated the practice of the High Court routinely interfering in pure findings of fact reached by the courts below without coming to the conclusion that the said finding of fact is either perverse or not based on material on record.

13. In Ramanuja Naidu v. V. Kanniah Naidu this Court held: (SCC Headnote)

‘It is now well settled that concurrent findings of fact of trial court and first appellate court cannot be interfered with by the High Court in exercise of its jurisdiction under Section 100 of Civil Procedure Code. The Single Judge of the High Court totally misconceived his jurisdiction in deciding the second appeal under Section 100 of the Code in the way he did.’

14. In Navaneethammal v. Arjuna Chetty this Court held: (SCC Headnote)

‘Interference with the concurrent findings of the courts below by the High Court under Section 100 CPC müst be avoided unless warranted by compelling reasons. In any case, the High Court is not expected to reappraise the evidence just to replace the findings of the lower courts. ... Even assuming that another view is possible on a reappraisal of the same evidence, that should not have been done by the High Court as it cannot be said that the view taken by the first appellate court was based on no material.’

15. And again in Secy., Taliparamba Education Society v. Moothedath Mallisseri Illath M.N. this Court held: (SCC p. 486, para 5)

‘The High Court was grossly in error in trenching upon the appreciation of evidence under Section 100 CPC and recording reverse finding of fact which is impermissible.’

18. Reference is also made to the decision of the Apex Court in the case of ***Hamida & others (supra)***. Paragraph No. 6 is reproduced hereunder for ready reference:-

“The High Court has upset the finding of fact recorded by the first appellate court, taking a different view merely on reappreciation of evidence in the absence of valid and acceptable reasons to say that the findings recorded by the first appellate court could not be sustained, either they being perverse or unreasonable or could not be supported by any evidence. The High Court neither framed a substantial question of law nor is any such question indicated in the impugned judgment as required under Section 100 of the Code of Civil Procedure. The approach of the High Court, in our view, is clearly and manifestly erroneous and unsustainable in law. Para 10 of the impugned judgment reads:

‘The appellate court although has decided the issue of personal necessity but from the judgment it appears that the appellate court has not decided this issue in its correct perspective. Since the trial court has not recorded any finding on the issue of personal necessity, the finding recorded by the appellate court cannot be said to be a concurrent finding of fact. I am, therefore, of the definite view that in such circumstance, this Court can reappreciate the evidence and scrutinize the findings recorded by the appellate court under Section 100 CPC when admittedly this issue was not decided by the trial court.

The sons of the plaintiff for whose requirement the plaintiff sought eviction, have not been examined. The nephew of the plaintiff was examined as a witness who supported the case of the plaintiff. The plaintiff has also not led any evidence to the effect that the house property where the plaintiff resides, is not sufficient for their own use and occupation. There is also no evidence to the effect that suitable alternative accommodation is not available to the plaintiff for meeting the requirement. I am, therefore, of the view that the finding recorded by the appellate court on the issue of personal necessity cannot be sustained in law for want of sufficient evidence.’

As can be seen from the para extracted above, the High Court thought that it could reappreciate the evidence and scrutinize the findings recorded by the first appellate court under Section 100 CPC. This approach is plainly erroneous and against law. The High Court was also wrong in saying that the plaintiff did not lead sufficient evidence to establish his bona fide requirement. As observed by the first appellate court and noted above already, there is evidence of the plaintiff, his nephew and the neighbour. The finding of fact recorded

by the first appellate court based on evidence could not be interfered with by the High Court, that too in the absence of any substantial question of law that arose for consideration between the parties.”

19. It is thus apparent that the High Court while exercising power under Section 100 CPC shall not re-appreciate the evidence and scrutinize the findings recorded by the First Appellate Tribunal. In the above case, the Apex Court has also held that the High Court shall not weigh the evidence led by the plaintiff to establish his bonafide requirement.

20. Reference is also made to the decision of the Division Bench of the Madhya Pradesh High Court in the case of ***Aradhana Oil Mills (supra)***, wherein the Division Bench of the said High Court in the context of an appeal filed under 260A of the IT Act, has clearly held that the High Court shall not examine the factual background of the issue as regards the reliability, adequacy, credibility and genuineness of the explanation provided by the assessee. Paragraph 9 of the aforesaid judgment is reproduced hereunder for ready reference: -

“9. In effect, the question whether a particular entry in the account book is genuine or not, or whether the assessee is able to show its source is a question of fact, In other words, it only involves appreciation of evidence tendered by the assessee pursuant to a query made by the Revenue. It is for the Assessing Officer to accept the explanation offered or not. No doubt, the first appellate court as also the second appellate court are also empowered to examine the factual background of the issue with a view to examine whether the explanation offered is reliable, adequate or/and proper. But that exercise, the High Court in its third appellate jurisdiction cannot do it by virtue of the specific language employed in section 260A of the Act.”

21. Reference is also made to the decision of the Division Bench of the High Court of Madhya Pradesh in the case of ***Commissioner of Income Tax (supra)***. Paragraphs 6, 7 & 8 of the aforesaid judgment are reproduced hereunder for ready reference: -

“6. A mere perusal of the aforesaid paragraph would indicate that the Tribunal went into the factual aspects of the case and having examined the factual documents brought on record at the instance of the assessee in support of the bona fides of the transactions in question, recorded a finding of genuineness of transaction. In other words, the Tribunal was satisfied on the facts that the transaction in question is not bogus but genuine. It could be entered into in the circumstances appearing and there is a reason for its entering by the assessee for their business with the company.

7. In our opinion, the aforesaid finding being a finding of fact, this court cannot upset such finding of fact in this appeal filed under section 260A ibid. As a matter of fact, the question whether a particular transaction entered into by the assessee with a particular person is genuine essentially a question of fact and, therefore, once any finding on either way is recorded by the Tribunal, then the same is not liable to be interfered with by the High Court unless an error of law as contemplated under section 260A ibid, is pointed out. No such error is either pointed out or noticed.

8. In our opinion, thus, the appeal really does not involve any substantial question of law within the meaning of section 260A ibid. As observed supra, there is no question framed so as to enable this court to examine the entire transaction in question de novo on facts. Firstly, it is not legally possible in this appeal. Secondly, no question of law is framed to permit us to do that exercise. Thirdly, no perversity as such is pointed out in the impugned finding and, hence, this court cannot interfere in the impugned finding of fact recorded by the Tribunal.”

22. What transpires from the above is that the High Court of Madhya Pradesh in the aforesaid cases has held that the Appellate Court under 260A of the IT Act cannot upset the finding of fact recorded by the Appellate Tribunal.

23. Reference is also made to the decision of the Division Bench of the Delhi High Court in case of ***Commissioner of Income Tax (supra)***, wherein the Division Bench has also taken a similar view. Paragraphs 7, 8 and 9 of the said judgment are reproduced hereunder for ready reference:

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“7. We have heard Ms. Prem Lata Bansal, learned senior standing counsel for the Revenue. Learned counsel submits that mere production of confirmation letters from the two companies and the receipt of money by means of cheques, on which too much emphasis is laid by the appellate authorities, is not sufficient to prove the genuineness of the transaction. She would urge that despite summons issued under section 131 of the Act Ajay Gupta, a common director of both the subscribing companies, did not appear before the Assessing Officer with the result that the Assessing Officer could not elicit further information with regard to the transactions in question. It is thus, pleaded that the Tribunal having ignored the relevant factors germane to the determination of question of genuineness of the transactions, its finding, based on irrelevant material, is perverse and, therefore, a substantial question of law does arise from the impugned order.

8. We do not agree. Admittedly, the aforementioned finding of the Tribunal is factual. Therefore, the only question for consideration is whether the said finding could be said to be without any evidence or material or is it contrary to the evidence on record or there is no direct nexus between the conclusion of fact and the primary fact upon which that conclusion is based. It is only under any one of these circumstances, a finding of fact may be interfered with. Otherwise, a bare question of fact cannot be turned into a question of law by asking whether as a matter of law the authority came to a correct conclusion upon a matter of fact.

9. In the present case, as noticed above, the Tribunal's finding, which is essentially factual, is based on cogent material highlighted by the Commissioner of income-tax (Appeals). The Commissioner of Income-tax (Appeals) had even gone to the extent of examining the bank account of the two companies from where the cheques in question were issued and had found that there were numerous transactions of deposits and withdrawals and whenever the cheques in favour of the assessee were issued, there was sufficient balance available. It is pertinent to note that it was not the case of the Assessing Officer that any amount found credited in the account of the two companies, has direct or indirect nexus with the assessee-company.”

24. Reference is also made to the decision of the Division Bench of the Rajasthan High Court, Jaipur Bench in the case of ***Principal Commissioner of Income Tax (supra)*** wherein also the Division Bench has taken a similar view as that of the other High Courts as extracted herein above. Paragraph 4 of the said judgment is reproduced hereunder for ready reference:

“4. We are of the view that the present appeal does not involve any substantial question of law. The learned Income-tax Appellate Tribunal has specifically held that the assessee has produced all the relevant documentary evidence to establish the genuineness of the transaction and there is no contrary evidence to doubt the correctness of the evidence produced by the assessee and therefore treating the transaction of purchase and sale as sham is not justified. Further, the learned Income-tax Appellate Tribunal has also relied upon the decision of the jurisdictional High Court titled as CIT v. Smt. Pooja Agarwal reported in [2018] 99 taxmann.com 451 (Raj) wherein the learned Income-tax Appellate Tribunal has relied upon the judgment of the Division Bench involving the same facts wherein the Division Bench has dismissed the appeal filed by the Revenue.

In the light of the above facts, this court is of the view that the order of the learned Income-tax Appellate Tribunal requires no interference and therefore, the appeal is dismissed.”

25. Pertinent that against the aforesaid decision of the Rajasthan High Court, a Special Leave Petition was filed by the department before the Apex Court which is reported in ***2023 452 ITR (St.) 412***, wherein the Apex Court was pleased to dismiss the Special Leave Petition.

26. In view of the above, we are of the unhesitant view that the Third Appellate Court under Section 260A of the IT Act cannot decide an appeal which does not involve any substantial question of law and shall

also not go into factual finding of facts recorded by the Second Appellate Tribunal unless and until the same is based on no evidence. However, if the decision of the Second Appellate Tribunal is based on evidence, this Court while exercising the jurisdiction of the Third Appellate Court shall not weigh the sufficiency and adequacy of such evidence.

27. In the present case, the decision of the Second Appellate Tribunal being based on evidence, the same cannot be therefore said to be perverse. It is evident that the Second Appellate Tribunal has specifically held that the genuineness and creditworthiness of the transaction in question has been fully established by the assessee respondent. In our opinion, the aforesaid finding being a finding of fact, this Court cannot upset such finding of fact in this appeal filed under Section 260A of the IT Act. In fact, the first substantial question of law whether the learned Tribunal erred in law in holding that the assessee had discharged its burden of substantiation of the identity, creditworthiness and genuineness of the transaction involving receipt of share application money being essentially a question of fact is not a substantial question of law. Similarly, the second substantial question of law that whether the learned Tribunal was justified in deleting the addition under Section 68 of IT Act of share application money received from M/s. Shantidham Marketing Pvt. Ltd and M/s. Orchid Finlease Pvt. Ltd. is also essentially a question of fact and is not a substantial question of law.

28. Furthermore, as noted above, both the Appellate Authority and the Second Appellate Tribunal has recorded findings in respect of the

genuineness of the transaction in question and the creditworthiness of the shareholders concerned based on evidences and materials placed by the assessee and hence, such finding once recorded by both the authorities on the basis of evidence, the same is not liable to be interfered with by the Third Appellate Court, unless an error of law as contemplated under Section 260A of the IT Act is made out.

29. Pertinent that the decision of the Apex Court in the case of ***Principal Commissioner of Income Tax (Central) 1 (supra)*** relied by the appellant to buttress the contention that the initial onus is on the assessee to establish genuineness of the transaction and creditworthiness of the investor as regards share capital and premium, the above decision being rendered in the context of the facts and circumstances of that case wherein pursuant to the detailed inquiry conducted by the Assessing Authority it was revealed that there was no material on record to prove or even remotely suggest that the share application money was received from independent legal entities. However, that is not the position in the instant case. As stated above, both the Appellate Authority as well as the Second Appellate Tribunal has recorded findings on the basis of evidence and materials against the impugned addition of income by the Assessing Authorities to the income of the respondent/assessee for the financial year in question. Hence, the aforesaid decision of the Apex Court is not applicable to the facts of the present case.

30. Therefore, we are of the considered opinion that neither the two questions framed by this Court involves any substantial question of law

within the meaning of Section 260A of the IT Act, nor any perversity as such is pointed out in the impugned findings and hence, this Court cannot interfere in the impugned finding of fact recorded by the Second Appellate Tribunal.

31. Accordingly, in view of the forgoing discussion, we are unable to notice any merit in this appeal. As a result, the appeal fails and is dismissed.

JUDGE

JUDGE

Comparing Assistant