
(2015) 03 CAL CK 0016
In the Calcutta High Court
Case No : Writ Petition No. 108 of 2015

Mani Square Ltd.

APPELLANT

Vs

Additional Registrar of Assurances-1 and Others

RESPONDENT

Date of Decision : 18-03-2015

Acts Referred:

Stamp Act, 1899 — Section 2(10)

Citation : (2015) 2 CHN 687 : (2015) 4 WBLR 260

Hon'ble Judges : I.P. Mukerji, J.

Bench : Single Bench

Advocate : Ahin Choudhury, S.N. Mitra, Senior Advs., Manju Agarwal, Arindam Banerjee and B. Mannot, for the Appellant; Kishore Dutta, Senior Advocate and Ayan Banerjee, Advocates for the Respondent

Judgement

I.P. Mukerji, J.—By a Deed of Sale dated 18th January, 2007 the Baricks, as Joint Receivers of this court appointed by the Hon"ble Appeal Court in a Testamentary suit (Suit No. 117 of 1973) sold a property to Patodia Real Estates and Builders Private Limited and several other group companies, for a consideration of Rs. 5,35,99,333. This property covered an area of 131 cottahs 4 chittacks and 12 square feet on the southern side of Premises No. 156A Manicktala Main Road, Kolkata. The property consisted of buildings, sheds and other structures as described in the conveyance. The registering authority however, valued the property at Rs. 6.37 crores. Stamp duty was accordingly paid and the sale deed registered with the registering authority. On the same day, Patodia and its group companies on one hand, and the writ petitioner company, hereinafter referred to as the writ petitioner on the other hand, entered into a development agreement where the writ petitioner was described as a developer. Describing the nature of this agreement, very briefly, it is an agreement by which the writ petitioner is to develop and build on this property. The owners that is the Patodias would be allotted 50 percent of the total saleable area in the new building to be constructed at the premises. Upon completion of this construction the developer would be entitled to conveyance of 50 percent of this property, by the Patodias.

2. The dispute is in this writ is with regard to the payment of stamp duty.
3. Before I discuss this dispute the terms and conditions of the development agreement which are relevant to this application have to be seen.
4. Clause 1 (x) and (xi) of the agreement specifically describes what are "owners" allocation and developer's allocation" respectively. Clause 2.2 provides for this 50 percent owner's allocation and transfer of 50 percent to the developer. It is quite clear from Clause 2.2 as to how this allocation would be made. The developer would make the construction at his own cost. The writ petitioner paid stamp duty on the development agreement valuing the property in the same way as the property has been valued in the sale deed of 18th January, 2007 and paid Rs. 18,96,500 on their 50 percent share in the said property.
5. On 28th June, 2010 the Collector passed an order making an assessment for the purpose of payment of stamp duty assessed at Rs. 15,23,16,800. After duly giving credit to the sum of Rs. 18,96,500 received by the department as stamp duty the collector demanded Rs. 72,42,538 from the writ petitioner as deficit stamp duty. On 3rd September, 2014, on appeal, the Appellate authority upheld this order.
6. This is the subject matter of challenge in this writ.
7. The Collector, in his own wisdom, treated the transaction as an exchange which is seriously disputed by learned counsel for the petitioner. First of all, he has taken the value of 50 percent of the land at Rs. 3,18,73,600. In addition to that, he has taken the value of the flats to be conveyed to the land owner. He took the maximum built up area to be 94,512 square feet and allocated 47,256 square feet as the owner's share being 50 percent of that area. Each square feet was valued at Rs. 2800. Added to that were the values of car park etc. All this added to Rs. 15,23,16,800.
8. I will now set out the material parts of Schedule 1A to the Indian Stamp Act 1899 together with Section 2(10) thereof:-

"2(10). Conveyance.- "conveyance" includes a conveyance on sale and every instrument by which property, whether movable or immovable, is transferred inter vivos and which is not otherwise specifically provided for by Schedule 1."

Explanation.- The expression "Agreement or Memorandum of an Agreement", if relating to a sale, shall include an agreement to sell or any memorandum or acknowledgment in relation to transfer or deliver of possession of immovable property with an intent to transfer right, interest in, or title to, such property at any future date."
9. Now, let me deal with the arguments. Mr. Ahin Choudhury learned senior advocate appearing for the petitioner submitted that the above agreement was only a development agreement. No title to the property passed under it. The

owner retained 50 percent of the property. 50 percent of it was handed over to the developer who took possession of it. He had the right to build upon the property. Only 5 (f) of the Schedule 1A would be attracted under which only rupees seventy five thousand was payable as stamp duty. Upon completion of the petitioner's part he would be entitled to conveyance of the land proportionate to 50 percent of the property. At the time of conveyance of the property by the indenture dated 18th January, 2007, the registering authority valued the property at Rs. 6.37 crores. Half of this would be the value of the portion to be conveyed to the developer. Proportionate stamp duty on this of Rs. 18,96,500 had already been paid, treating the development agreement as an agreement for sale under 5(d) and explanation thereto, to the said Schedule. The development agreement was stamped as a conveyance under item No. 23 thereof which attracted 7% of the market value as stamp duty.

10. The impugned determination made by the stamp Collector was absolutely erroneous and perverse and ought to be set aside by this court, it was submitted. Mr. Kishore Dutta learned senior advocate for the respondents submitted that if one made a harmonious construction of the development agreement, particularly Clause 2.2 read with the definition clause 1 (x) and (xi) relating to developer's and owners' allocated area, the terms of allocation and the provision at page 19 of the agreement under which the developer had the right to sell the property, for all purposes, the real title in the property had passed to the developer. They were in actual possession thereof. Therefore, the stamp collector had rightly taken the transaction as exchange and determined duty accordingly. In the alternative, he submitted that even if it was held that property had not passed, still the development agreement was an agreement for sale and that full stamp duty thereon was payable under item 5(d) read with item 23 of Schedule 1A to the said Act.

11. Now, let us analyse the transaction. We have to assume the entire property to be absolutely vacant after the conveyance of 18th January, 2007. The title is vested in the Patodias. By the development agreement dated 18th January, 2007 there is no transfer of title. The land is divided up into two equal parts, one to be retained by the Patodias and the other would be the writ petitioner's in future. Under the development agreement, the writ petitioner would start building on the owners' 50% part of the land. According to the agreement he has to hand over 50 percent of the "saleable area" to the Patodias. The part that would go to the Patodias cannot be piecemeal constructed. The whole building has to be constructed. When the whole building is constructed the Patodias get 50 percent of the land and building. No title passes. The title is with them. No document has to be executed to give them title. On getting this 50 percent of the building the Patodias under the agreement would be obliged to transfer the other 50 percent of the land in favour of the writ petitioner.

12. The subject development agreement contains only a promise by the owner to convey this part to the petitioner in future. No title passes to them at this stage.

To understand the transaction, one has to be hypothetical. One has to imagine that 50 percent of the land that is to be retained by the Patodias is to be constructed upon. The other 50 percent of the property will be only land. As per the development agreement only this land is to be transferred to the petitioner developer after the owner's 50 percent share is handed over to them. (See Clause 2.2).

13. The Collector and the Appellate authority fully knew that this kind of a notional land sale without the building was very usual in modern day multi-storeyed building conveyance. They tried to overcome this difficulty by adding the cost of constructing the owner's share to the value of the land. This is most illogical and erroneous. The developer will notionally get only the land for constructing the owners' part of the building. It is only the land which ought to have been valued. The land and the flats which the developer will construct on his share, will be sold notionally at a later point of time. When these flats are sold, then the value of the land and the flats and the construction can be added for valuation and a fresh valuation will be made. I say notionally, because here again, a well-entrenched trade practice has developed, to avoid multiplicity of conveyances. To avoid stamp duty, the owner defers conveyance of the land till the flats are constructed. Then by a single tripartite conveyance between the owner, developer and the purchaser, a proportionate share of the land together with the flats and common areas are conveyed to the purchaser.

14. So, at this point of time the transaction is a combination of a development agreement described in item 5(f) of Schedule 1A to the Stamp Act, 1899 and an agreement for sale under 5(d) thereof read with the explanation.

15. In my opinion, the writ petitioner has correctly valued its share of the property as 50 percent of the market value and paid the stamp duty on it. I hold that the petitioner's valuation is correct because it has valued it on the government's valuation of Rs. 6.37 crores.

16. For all those reasons, the impugned assessment order of the collector dated 28th June, 2010 and of the Appellate authority dated 3rd September, 2014 are set aside. The Collector is directed to calculate the stamp duty payable by the writ petitioner on the basis of the valuation of the property shown in the first part of his impugned order only within two weeks of communication of this order.

17. Certified photocopy of this Judgment and order, if applied for, be supplied to the parties upon compliance with all requisite formalities.