

(2015) 01 KAR CK 0073

In the Karnataka High Court

Case No : STRP Nos. 355 of 2012 and 726 of 2013

The State of Karnataka

APPELLANT

Vs

Chaitanya Properties Pvt. Ltd.

RESPONDENT

Date of Decision : 13-01-2015

Acts Referred:

Karnataka Value Added Tax Act, 2003 — Section 39(1), 4(1)(c), 41(2), 47, 49(1)(c)

Citation : (2015) 01 KAR CK 0073

Hon'ble Judges : N. Kumar and B. Veerappa, JJ.

Bench : Division Bench

Advocate : T.K. Vedamurthy, HCGP, for the Appellant; S.S. NaganandAdvocateCounsel for E.I. Sanmathi, Advocate and R.V. Prasad, Advocate, for the Respondent

Final Decision : Allowed

Judgement

N. Kumar, J.—The revenue has preferred these revision petitions against the order passed by the Karnataka Administrative Tribunal holding that there is no liability on the part of the owner of the land to pay tax under Section 49(1)(c) of the Karnataka Value Added Tax, 2003.

2. The Assessee is a Company registered under the provisions of Karnataka Value Added Tax Act, 2009, for short, hereinafter referred to as the "Act". The assessee entered into a joint development agreement with M/s. Prestige Estates Projects, Pvt. Ltd., Bangalore for development of the land of the assessee. In terms of the agreement entered into between them, the developer M/s. Prestige Estates Projects, Pvt. Ltd., agreed to develop an integrated small town which consists of Commercial Complexes, Community Halls, Lodges, Apartments and Cinema Theatres. The assessee has provided the land to the developer and the developer has to give 31.77% of the constructed portion to the assessee and the developer would retain the balance of 68.23%. The prescribed Authority concluded the assessment under Section 39(1) of the Act by levying tax on materials used in the construction of 31.77% of the assessee's share for the

assessment period April 2005 to March 2007 by two separate orders. Aggrieved by the said order, the assessee preferred an appeal before the First Appellate Authority. The First Appellate Authority set aside the said order on the ground that the land was given for the construction of building and as such, the land value cannot be subjected to tax. Further it was held that as the assessee was not involved in any execution of the works contract, the liability to pay tax under Section 4(1)(c) of the Act is not attracted. Aggrieved by the said order, the assessee preferred an appeal to the Karnataka Appellate Tribunal. In the said appeal, the State preferred Cross Objection. The Tribunal after hearing both the parties was of the view that when the Appellate Authority has granted relief to the assessee, they do not really understand why the assessee has preferred an appeal, as the said order is in their favour. However, they considered the cross objections filed by the Revenue and did not find any justification to interfere with the order passed by the First Appellate Tribunal, as admittedly the assessee was the owner of the land, he was not involved in execution of the works contract and therefore, in the course of such works contract, there was no transfer of any goods. Accordingly, it dismissed the Cross Objections as well as the main Appeal. Aggrieved by the said order, the Revenue has filed these revision petitions.

3. The learned Government Advocate assailing the impugned order contended that when the developer transferred 31.77% of the built up area in terms of the agreement to the land owner, the land owner became the owner of 793 flats. Out of them, the developer himself had sold 293 flats in the course of construction and therefore he submits that Section 4(1)(c) of the Act is attracted and the owner has to pay tax in respect of the said 293 flats as the developer transferred the consideration received from the prospective purchasers of 293 flats, to the land owner. Therefore he submits that a case for interference is made out.

4. Per contra, the learned Counsel for the assessee submits that the assessee was not involved in the execution of the works contract and he has not transferred any goods.

5. In the light of the aforesaid facts and rival contentions, the point that arise for our consideration in these revision petitions is as under:

Whether the order passed by the Appellate Authorities holding that the assessee is not liable to pay VAT on the execution of Works Contract as, under the agreement to build between the assessee and the builder, it was the responsibility of the builder to pay VAT on works contract, is justified?

6. The facts are not in dispute. The assessee has entered into an agreement with Prestige Estates projects on 05.02.2005 for development of his land measuring 83 acres 39 guntas situated at Sadaramangala and Hoodi villages of Krishnarajapuram Hobli, Bangalore South Taluk. The assessee obtained a sanctioned plan for such construction from the Bangalore Development Authority. Under the terms of the agreement, the builder shall construct buildings in accordance with the development plan. The entire cost of construction of the

buildings/tower are to be borne by the builder. The assessee is not required to pay any amount in the Joint Development Agreement except those specified in the agreement. In consideration of the same, the assessee agreed to transfer by way of sale or otherwise 68.23% of undivided share in the property so constructed and the builder shall deliver to the assessee 31.77% of the super built-up area in the development. The builder would be entitled to 68.23% of the super built-up areas in the buildings. The builder shall have sole discretion in selection of construction materials, method of construction, equipments to be used for construction and other related techniques of construction. The assessee shall not interfere with the same, provided that it is made clear that the development and construction shall be in accordance with the specifications agreed to between the parties. In terms of the aforesaid agreement, the assessee was entitled to 793 flats constructed by the builder. After entering into the said agreement with the assessee, the builder entered into an agreement with prospective purchasers of the share of the assessee namely 793 flats. In fact the tripartite agreement was entered into with 293 such flats purchased. The said tripartite agreement refers to the Joint Development Agreement. After referring to the said Joint Development Agreement, the relevant clauses in the tripartite agreement are as under:

"(1) WHEREAS the Sellers and the Builder have evolved a scheme of ownership of residential apartments in "Prestige Shantiniketan" being developed on the Schedule "A" Property, in terms of which any person desirous of owning an apartment in any of the towers of the apartment buildings stated about, is required to purchase from the Sellers, the proportionate undivided interest in the Schedule A" Property by entering into an Agreement to Sell with the Sellers and Builder, by virtue of which the purchaser gets a right to get constructed the corresponding apartment in any of the towers in Prestige Shantiniketan chosen by the purchaser exclusively through the Builder. In the overall scheme, each of the owners of the apartments in Prestige Shantiniketan will be proportionately holding undivided right, title and interest in the Schedule "A" Property and the scheme as stated above forms basis of this Agreement.

(2) WHEREAS the Sellers and the Builder have mutually agreed and identified the apartments/built-up areas falling to their respective shares in both residential and commercial buildings to be constructed by the Builder on Schedule Property in terms of two Sharing Agreements dated 05/02/2005 and 28/02/2005. Further as agreement in the Development Agreements stated above, the Builder and the Sellers are entitled to dispose of their respective shares of built-up areas, car parking areas and other benefits together with corresponding undivided share in the Schedule Property and realize in their own names, the value of the undivided share in the land and the cost of construction of the corresponding apartments and built areas and other sums agreed to be paid by the prospective buyers.

(3) WHEREAS the Schedule "C" Apartment has fallen to the share of the Sellers in terms Sharing Agreements referred to above and the Purchaser has therefore

approached the Seller to purchase the proportionate undivided share in the Schedule "A" Property from the Sellers morefully described in Schedule "B" hereunder and the Schedule "C" Apartment.

(4) WHEREAS the Seller has agreed to sell the Schedule "B" Property and Schedule "C" Apartment in favour of the Purchaser in terms of this Agreement. The Sellers have agreed to convey the Schedule "B" Property and Schedule "C" Apartment subject to Purchaser complying with the terms and conditions of this agreement as well as the and payment of all the amounts detailed herein. Upon such conveyance, in the over all scheme the entire Schedule "A" Property will be jointly owned and held by the owners of the apartments in the buildings to be built therein, each of them having a definite undivided share in the Schedule "A" Property and absolute ownership to the respective apartments got constructed by them and limited ownership with the right to use all the common amenities, areas and facilities like staircases, lifts, lobbies, passages, common garden, access, roads etc., within the Schedule "A" Property and the apartment building.

(5) WHEREAS the Schedule "B" Property and Schedule "C" Apartment have fallen to the share of Seller under the Sharing Agreements dated 05/02/2005 and 28/02/2005 and hence consideration stipulated herein and all other amounts payable b the Purchaser/s under this Agreement shall be paid to the Seller however the Seller has appointed the Builder as an authorized agent to collect the amount on their behalf in their name undertaking that the same shall be valid discharge of the obligation on the part of the Purchaser to pay the sale consideration reserved herein.

(b) The Purchaser has paid the Seller through the Builder the amounts mentioned in Annexure-I as advance towards sale consideration for sale of Schedule "B" Property and Schedule "C" Apartment the balance sale consideration shall be payable to the Seller through the Builder as detailed in said Annexure I.

7(i) The Seller/Builder agrees to construct or cause to be constructed the Schedule "C" Apartment as per Specifications detailed in Annexure II herein as per the Development Plan and other Plans sanctioned and/or to be sanctioned by the Bangalore Development Authority. The Purchaser has expressly given consent and empowered the Seller/Builder for variations and/or modifications and/or alterations as the Builder may consider necessary or as may be required by any Public Authority to be made in such Plans or constructions as may be necessitated due to exigencies without however substantially altering the size of the apartment or its external dimensions.

7. From the aforesaid clauses, it is clear that the purchaser under the tripartite agreement is required to purchase from the assessee, the proportionate undivided interest in the Schedule "A" property by entering into an Agreement to Sell with the Sellers and Builder, by virtue of which, the purchaser gets a right to get constructed the corresponding apartment in any of the towers in Prestige

Shantiniketan chosen by the purchaser exclusively through the builder. As agreed in the Development agreements, the Builder and the assessee are entitled to dispose of their respective shares of built-up areas, car parking areas and other benefits together with corresponding undivided share in the schedule property and realise in their own names, value of the undivided share in the land and the cost of construction in the corresponding apartments and built areas and other sums agreed to be paid by the prospective buyers. The apartment which is the subject matter of the tripartite agreement has fallen to the share of the assessee in terms of the share agreement. Therefore, the purchaser approached the assessee to purchase proportionate undivided share in the property and the apartment. The assessee agreed to sell the undivided land and the apartment in favour of the purchaser in terms of the tripartite agreement. It is not in dispute that on the day the tripartite agreement was entered into, there was no apartment in existence and Apartment had to be constructed. Therefore, it is stipulated that all the amounts payable by the purchaser under the tripartite agreement shall be paid to the assessee. However, the assessee has appointed the builder as an authorized agent to collect the amount on their behalf in their name and undertake that the same shall be valid discharge of the obligation on the part of the purchaser to pay the sale consideration reserved in the agreement. Accordingly, the purchaser paid the assessee through the builder the amounts mentioned in the agreement as advance towards sale consideration for the sale of the undivided interest in land and also the consideration for construction of the apartment on the said land. The assessee and the builder agreed to construct or cause to be constructed, the apartment as per the specifications. The purchaser expressly gave consent and empowered the Assessee/Builder for variations and/or modifications and/or alterations as the Builder may consider necessary or as may be required by the Public Authority to be made in such Plans or constructions as may be necessitated due to exigencies without however substantially altering the size of the apartment or the external dimensions.

8. From the aforesaid terms of the agreement, it is clear that under the tripartite agreement, the assessee has to execute a registered sale deed in respect of the undivided interest in the land. Further, the assessee has to construct an apartment and handover the same to the purchaser. The assessee authorized the builder to receive the consideration for construction as his agent. In terms of the agreement entered into between the builder and the assessee, the cost of entire consideration is to be borne by the builder. It is in this background, we have to find out, who is liable to pay VAT on a sanction of works contract.

9. It is not in dispute that this tripartite contract is a Works Contract. The Apex Court in the case of Larsen and Toubro Limited and another Vs. State of Karnataka and another reported in [2008] 17 VST 460(SC), dealing with the conditions to be fulfilled before sustaining levy of tax, has held as under in para 94:

"For sustaining the levy of tax on the goods deemed to have been sold in execution of a Works Contract, in our opinion, three conditions must be fulfilled: (i) there must be a Works Contract, (ii) the goods should have been involved in the execution of works contract, and (iii) the property in those goods must be transferred to a third party either as goods or in some other form. In a building contract or any contract to do construction, the above three things are fully met. In a contract to build a flat there will necessarily be a sale of goods element. Works contracts also include building contracts and therefore without any fear of contradiction it can be stated that building contracts are species of the works contract."

10. In view of the authoritative pronouncement by the Apex Court, as there is no dispute that the tripartite agreement is a Works contract, the first condition stipulated by the Apex Court is fulfilled. It is also not in dispute that goods are involved in the execution of the Works contract. Thus, the second condition is also fulfilled. After the construction of the apartment, the said apartment has been transferred to the purchaser. So the third condition is also fulfilled.

11. The point of controversy is:

Who should transfer the goods and who is liable to tax?

12. If the agreement between the Builder and the assessee is taken into consideration, the entire responsibility of putting up the construction by way of apartments is on the Builder. It is he, who has to transfer the apartments to the intending purchasers. Insofar as the assessee's share is concerned, he has to transfer 793 flats to the assessee, who in turn can sell to a person of his choice. But in the light of this tripartite agreement in respect of 293 flats belonging to the share of the assessee, contract to execute the work was entered into before construction of the apartments. The above recital shows that the purchaser paid the money to the assessee for construction of the building. The assessee authorized the Builder to collect the money as their agent. The Builder did not collect the money in his individual right in terms of the agreement entered into between the Builder and the assessee. The apartment is sold by the assessee to the intending purchaser. Therefore, in the facts of this case, notwithstanding the Joint Development Agreement between the parties in the tripartite agreement, the assessee entered into an agreement with the prospective purchaser for execution of a Works Contract, received consideration to build the apartment through the Builder and then transfer the apartment to the purchaser.

13. The Apex Court had an occasion to consider in some what similar position, the legal aspects in the case of M/s. Raheja Development Corporation Vs. State of Karnataka. At para 16, it has been held as under:

"We have heard the parties, perused the various documents and considered the cases cited at the bar. As has been rightly submitted by Mr. Hegde the definition of the term "works contract" in the said Act is an inclusive definition. It does not include merely a works contract as normally understood. It is a wide definition

which includes "any agreement" for carrying out building or construction activity for cash, deferred payment or other valuable consideration. The definition does not make a distinction based on who carries on the construction activity. Thus even an owner of the property may also be said to be carrying on a works contract if he enters into an agreement to construct for cash, deferred payment or other valuable consideration. We, therefore, do not need to go into the question whether the Appellants are owners as even if the Appellants are owners to the extent that they have entered into Agreements to carry out construction activity on behalf of somebody else for cash, deferred payment or other valuable consideration, they would be carrying out a works contract and would become liable to pay turnover tax on the transfer of property in the goods involved in such works contract. Further under the said Act there is no distinction between construction of residential flats or commercial units. Thus, a works contract, within the meaning of the term in the said Act, can also be for construction of commercial units. For the purposes of considering whether an agreement amounts to a works contract or not, the provisions of the Karnataka Ownership Flats (Regulation of Promotion of Construction, Sales Management and Transfer) Act, 1974 will have no relevance."

14. The learned Senior Counsel appearing for the assessee submitted that in the first instance, the assessee was not the owner of the goods, which were transferred. Transfer of Property presupposes the person transferring the property should be the owner. The physical work is done by the Builder under the Joint Development Agreement. The Court has to look into both the Joint Development Agreement and the Tripartite Agreement and look into substance of the transactions. Viewed from this angle, he submits that the assessee was not the owner of the goods, which went into the construction of apartment. He was under no obligation to put up such construction. He was entitled to such construction of apartment, free of cost. Merely because they entered into a Tripartite Agreement, no liability can be foisted on him. The liability is on the Builder. The Builder at the time of sale of these apartments to the purchasers, not only has collected the cost of construction but also collected the tax payable and therefore, relying on Section 47 of the Act, it is submitted that when he is not liable, if he has by mistake collected the money, the Department should proceed against him and collect the amount. However, he submitted that the liability to pay tax precisely is that of the Builder and not that of the assessee and therefore, no case for interference in the impugned order is made out.

15. In fact it is also brought to the notice of the Court that when the proceedings were initiated against the Builder, the said proceedings were challenged before this Court in W.P. Nos. 23716-23727/2013(T-Res) and in the said proceedings, the Department sought to withdraw the show cause notice issued, with liberty to issue fresh show cause notice under Section 41(2) of the KVAT Act and therefore, he submits that the levy should be on the Builder and not the assessee.

16. The Joint Development Agreement is between the Assessee and the Builder.

Under the agreement, if the Builder has to pay the tax, it is always open to the assessee to recover such tax, if, he is under an obligation to pay in law and collect it from him. But what is to be seen for the purpose of assessment is, who actually entered into an agreement to construct, who was paid consideration and who transfers the goods?

17. Admittedly, the Tripartite Agreement shows that the assessee entered into an agreement with the purchaser for sale of an apartment and received the consideration under the agreement through the agent, i.e., the Builder and he has completed the construction and he has delivered possession of the constructed apartment to the purchaser. Therefore, notwithstanding the terms of the Joint Development Agreement, the liability to pay tax under the Act is on the assessee and rightly, the Assessing Authority levied tax.

18. Both the Appellate Authorities, without properly appreciating the case and law on the point erred in holding that the liability is that of the Builder and not that of the assessee and committed an error in setting aside the order passed by the Assessing Authority.

19. In fact in this appeal, a notice was issued to the Builder also, who is present before the Court by filing an impleading application. The documents produced by the assessee shows that the Builder has collected the tax from these prospective purchasers. In fact the proceedings are also initiated by the Department against the Builder and it was withdrawn. It is open to the assessee to pay the tax and recover the money from the Builder by virtue of the terms of the Joint Development Agreement. It is also open to the Department to proceed against the Builder in accordance with law including Section 47 of the Act and recover the amount, which he has collected from these prospective purchasers and then give deduction of the same to the assessee. However, that is a matter to be worked out at the stage of the assessment officer.

20. It was brought to our notice that the Department has taken a stand that it is the Builder who has to pay and not the assessee. Twice notices were issued to recover and it has been withdrawn. If the Builder was liable to pay the tax, we do not find any good reason why they did not initiate any proceedings in the beginning itself, when they have collected the tax from him insofar as the share of the developer's property is concerned. There appears to be more than what meets the eye. It is a fit case where proceedings are to be initiated against the concerned officials, firstly, for not initiating action against the Builder at the earliest point of time and secondly, after initiating proceedings and withdrawing the same and till today, no effort is made to recover the money from the Builder if, he has collected any amount representing the tax, pertaining to owner's share as well from the purchaser. The Department is directed to initiate appropriate action against all the concerned officials within a month from today and place on record the action taken by them.

Two months time is granted to the assessee to pay the amount as assessed by

the assessing authority.

21. Accordingly, we pass the following order:-

- (a) The application filed for impleading the Builder is rejected.
- (b) In that view these revision petitions are allowed.
- (c) The impugned orders passed by both the Appellate Authorities are set-aside.
- (d) The order passed by the Assessing Authority is restored.