29th August, 2023
(AK)
06

W.P.A 4744 of 2023

Progressive Uddyog and others
Vs.
State of West Bengal and others

Mr. Arabinda Chatterjee
Mr. Debrup Bhattacharjee
Mr. Arkadipta Sengupta
Mr. A. Karim
...for the petitioners.

Mr. Debapriya Chatterjee
...for the State.

1. The present challenge has been made against an assessment of stamp duty by the respondent authorities.

2. In the present case, the dispute pertains to an agreement which the petitioners seek to represent as a developer's agreement, although, erroneously, the nomenclature *"Agreement for Sale"* was used.

3. Learned senior counsel appearing for the petitioners places reliance on several clauses of the agreement to impress upon the court that the same is a mere agreement for development.

4. In particular, learned senior counsel places reliance on the clause of the agreement which sets out the developer's share. The said clause enumerates that the balance portion of the multistoried building shall mean and include the 70% share of the constructed area out of

the total F.A.R. of the proposed new building to be available.

6. Clause 3 stipulates that the developer shall complete the construction of the new multistoried building within a period of five years from the date of sanction of the plan.

7. Clause 7 stipulates the rights of the developers, which includes the exclusive right of the developer to develop the said premises by way of construction of a multistoried building, whereas Clause 7(b) provides that the owners agree and undertake to convey, transfer, assign and assure undivided proportionate impartible part or share in land as well as that the owners shall execute and registered deed of conveyance in respect of the flat owners/intending buyer, nominee of the developer appertaining to the constructed area of the multistoried building allocated to the developer and in favour of the developer.

8. As such, it is clear from the agreement, it is argued, that the same contemplates future execution of transfer deed by the owners, thereby showing that the ownership was retained by the owners themselves and not transferred to the developers.

9. Hence, the agreement-in-question being merely a developer's agreement, it is argued that Item-5(e) of Schedule-IA of the Stamp Act ought to be operative,

which relates to matters not otherwise provided for in the other clauses of the said Item.

10. Learned senior counsel contends further that the stamp duty was assessed by the collector at the rates prevailing in the year 2012, after the amendments came into force with regard to stamp duties, whereas the calculation ought to have been done at the 2006 rates, since admittedly the agreement was executed in the year 2006.

11. Learned senior counsel further argues that in view of stamp of Rs.100/- having already been paid in connection with the agreement, the same exceeds the stipulated stamp duty of Rs.10/-, which was, at the relevant juncture, the appropriate stamp duty to be paid in the event the agreement is deemed to be one under Item 5(e) of Schedule-IA.

12. Learned counsel for the respondent authorities places reliance also on the same clauses of the agreement.

13. It is argued that the said agreement falls within the ambit of Item-5(d) which speaks about agreements relating to sale.

14. The explanation thereto provides that 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 delivery of possession of immovable property with intent to transfer right, interest in, and title to, such property at any future date.

15. It is further argued, by placing reliance on the assessment impugned herein, that the valuation of the property and the stamp duty assessed was in terms of the 2006 rates, which is 8% of the value.

16. It is argued that the agreement-in-question undoubtedly is an agreement for transfer, although containing provisions as to development as well.

17. Thus, it is contended that the assessment of the stamp duty was justified.

18. For adjudicating the proper stamp duty, the tenor of the agreement should be read as a whole, not confining the enquiry to the mere nomenclature which is in any event *"Agreement for Sale"*.

19. Clause 7 of the agreement provides for the developer's rights, which speak about the exclusive right to develop the premises.

20. However, Clause 7(b) also provides that the owners agree and undertake to convey, transfer, assign and assure undivided proportionate impartible part or share in land of the said premises appertaining to the constructed area of the building to sell the F.A.R. of the sanctioned plan of first part share of 30% by the joint venture.

21. In the same clause, the owners also undertake that they shall execute and register deeds of conveyance in respect of the flat owners/intending buyers/nominee of the developer appertaining to the constructed area allocated to the developer and in favour of the developer. Such clause indicates that the owners did not part with their right, title and interest in the property in favour of the developer by the said agreement.

22. However, Clause 8 of the agreement stipulates that the developer shall be entitled to sell its allocated constructed area together with undivided proportionate impartible share in the land of the properties appertaining thereto on such terms and conditions as the developer may deem fit and proper and it may also take earnest money against the agreement for sale in respect thereof after their portions of the new multistoried building to be constructed are given to them.

23. It is made clear in the agreement that the owners shall have no obligation and liability with regard to breach of any agreement by the developer.

24. The said provision indicates that the developer has an exclusive right to enter into agreement for transfer regarding their portion of the property as well as to transfer and allocate such portions in favour of third parties.

25. The same Clause, that is, Clause 8 also stipulates that on the other part the developers shall have exclusive right to construct the proposed building as per sanctioned plan at their own cost and expenses with full liberty to construct the building subject to municipal law and sanction.

26. Clause 17 of the agreement provides for the developer's further right, which includes that the developer shall punctually and regularly pay rates and taxes in respect of their respective allocated areas to the concerned authorities and shall keep each other indemnified against all claims, actions etc.

27. Clause 20, relating to Miscellaneous Clause, further provides that the owners and the developer have entered into the agreement purely as a contract on the basis of the joint venture agreement and any other circumstances shall not be treated as partnership and/or associations of persons between the owners and the developers.

28. Immediately after possession of the premises be given by the owners, it is provided, the developers shall be entitled to start construction of the said building in accordance with the sanctioned building plan.

29. A careful perusal of the said agreement indicates that although the development of and construction on the property is one of the primary considerations between the parties thereto, the same also contains clauses whereby

the mode of sale to third parties has also been contemplated.

30. For example, Clause 8 provides that the developer shall be entitled to sell its allocated constructed area together with undivided proportionate impartible share in the land of the said premises appertaining thereto on such terms and conditions as the developer may deem fit and proper and also take earnest money against agreement for sale in respect thereof after their portions of the new multistoried building are constructed.

31. The developers also have exclusive right as per the agreement to construct the proposed building with full liberty and to construct the same subject to municipal law and sanction at their own cost and expenses.

32. Thus, there are several components to the agreement which include ingredients of development/construction as well as sale by the developer in favour of third parties subject, of course, to consensus on the part of the owner.

33. As such, the respondent authorities were justified in classifying the agreement-in-question under Item-5(d), which pertains to agreements or memorandum of agreement relating to a sale.

34. The explanation thereto also pertains to agreement for sale and includes agreement to sell in relation to transfer or delivery of possession of immovable property

with intent to transfer right, interest in, or title to such property at any future date.

35. In view of the above discussions, the explanation fits in the agreement in toto and the said proposition cannot be deviated from.

36. However, insofar as the petitioners' agreement as to the rates prevalent in 2006 is concerned, the same definitely has force behind it.

37. Even the valuation of the property has been made by the Collector on the premise of the valuation as on 2006, which was the year when the agreement was entered into.

38. However, the assessment of stamp duty, as rightly pointed out by learned senior counsel for the petitioners, has been made at the rates as prevalent after amendment in 2012, and not as per the 2006 rates.

39. The rate prevalent in the year 2006, as pointed out by learned counsel for both sides, was seven percent.

40. Hence, it was incumbent upon the Collector to calculate the stamp duty at the rate of seven percent on the valuation of the property as evaluated by the Collector himself.

41. Keeping in view the above observations, WPA 4744 of 2023 is disposed of by directing the concerned Collector to re-assess the stamp duty at the rate as prevalent in the year 2006, taking the agreement-in-

question to be classified under Item-5(d), that is, an agreement for sale, under Schedule-IA of the Stamp Act (as amended in of West Bengal).

42. The penalty, thereupon, shall also be calculated accordingly, taking the stamp duty to be assessed at the rate as prevalent in the year 2006.

43. Such exercise shall be completed by the Collector within a fortnight from date and the Collector shall intimate to the petitioners in writing the re-evaluated stamp duty and penalty thereon as well as the deficit stamp duty to be paid by the petitioners.

44. Upon such intimation being given to the petitioners, the petitioners will be at liberty to apply for a refund of the excess amount paid by the petitioners in terms of the impugned assessment dated February 20, 2023, by deducting the fresh assessment from the deficit stamp duty already deposited with the Registrar of this court in terms of the impugned assessment by the petitioners.

45. Upon such application being made, the Registrar General of this court shall refund the excess amount to the petitioners at the earliest thereafter, preferably within a month from the application being made by the petitioners.

46. Apart from seeking a refund of the difference between the amount already deposited by the petitioners

and the amount re-assessed now pursuant to this order, the petitioners will also be at liberty to seek a refund from the Registrar of the amount of interest apportioned according to the proportion of the amount refunded to the petitioners out of the total amount deposited by the petitioners.

47. If such an application is made, the same shall be processed by the Registrar as well and the due amount of apportioned interest which has accrued on the deposit made by the Registrar, commensurate with the amount to be refunded to the petitioners, shall also be paid.

48. Insofar as the rest of the amount and the interest thereon is concerned, on an appropriate application made by the respondent authorities, the Registrar General shall also refund the balance amount along with the interest accrued thereon to the respondent authorities.

49. It is, however, made clear that while refunding the amounts respectively to the petitioners and the respondent authorities, the Registrar General shall be at liberty to deduct the necessary expenses which has been incurred for opening the said accounts and any ancillary expenses, if any, by apportioning the same equally between the petitioners as well as the respondent authorities.

There will be no order as to costs.

Urgent photostat copies of this order, if applied for, be given to the parties upon compliance of all requisite formalities.

(Sabyasachi Bhattacharyya, J.)