

(1999) 09 KAR CK 0051

Karnataka High Court

Case No: S.T.A. No"s. 35-38 of 1998

Mittal Investment Corporation

APPELLANT

Vs

Additional Commissioner of
Commercial Taxes, Zone I

RESPONDENT

Date of Decision: Sept. 24, 1999

Acts Referred:

- Karnataka Sales Tax Act, 1957 - Section 17 (6), 5 B
- Transfer of Property Act, 1882 - Section 53 A, 54

Citation: (2001) 121 STC 3

Hon'ble Judges: V.K. Singhal, J; T.N. Vallinayagam, J

Bench: Division Bench

Advocate: S. Narayan, for the Appellant; Kishore Malya, High Court Government Pleader,
for the Respondent

Final Decision: Dismissed

Judgement

V.K. Singhal, J.

In this appeal, the following questions have been raised :

- Whether, on the facts and circumstances of the case, the respondent revisional authority is justified in holding the appellant as not the owner of the land though full consideration has been paid to the seller of the property acquiring all title, right and benefits relating to the land which the appellant has developed to sell the immovable property later ?
- Whether, on the facts and circumstances of the case, the respondent revisional authority is justified in presuming the transfer of property in goods as it relates to the development of the property when that development is not done for any other party under any agreement or understanding but the appellant itself ?

(iii) Whether, on the facts and circumstances of the case, development of property of one's own would attract any tax u/s 5-B of the Act when none of the features of a sale or deemed sale in works contract is established ?

(iv) Whether, on the facts and circumstances of the case, it is permissible in law to take the sale price of immovable properties sold by the appellant as the consideration for tax u/s 5-B of the Act ?

2. The assessee is a registered dealer under the Karnataka Sales Tax Act, 1957 and according to him he is engaged in the business of developing properties ; acquiring the land with rights of the owner by paying full consideration, and thereafter developed the property on the said land and later sold the same as immovable property ; the assessee appellant claimed exemption from paying tax u/s 5-B of the Act ; the assessment for the years 1987-88, 1988-89, 1989-90 and 1990-91 were concluded by extending the benefit of composition u/s 17(6) of the Act by the order dated November 18, 1993 and March 1, 1994 and April 12, 1994. In appeal to Additional Joint Commissioner of Commercial Taxes which is the first appellate authority, the first appellate authority held that the appellant is not exigible to tax under the Act. The revisional authority initiated the proceedings under section" 22(A) of the Act for 1987-88 and other assessment years and is issued show cause notice on February 13, 1996, the said authority held that the appellant although has paid the full consideration for the sale of land has not acquired the title to the property on account of non registration of the documents and is not the owner thereof and the work of developing the property and the subsequent sale of flats would attract tax u/s 5-B as a dealer developing the property. The revising authority further directed the assessing authority for a fresh assessment only to exempt if any flat, shop, office, etc., constructed by the appellant but not taken, by other person, if sold subsequently to be excluded as sale of immovable property ; holding that the relationship between the appellant and such persons as one of contractor and a contracted, the appellant is liable to be taxed u/s 17(6) read with Section 5-B of the Act.

3. The various questions which were decided by the revising authority against the appellant were as under :

(1) Whether the dealer MIC were, in law, the owners of the land on which the block building of flats, shops, offices, godowns, garages, etc., were constructed by them and whether they effected composite sale of land with structured buildings thereon ?

(2) What is the effect of the agreements between the dealer MIC and each of the several persons who had agreed to take the flats, shops, offices, godowns, garages, etc., proposed to be constructed by the dealer MIC ? Whether it was in the nature of a works contract to construct block buildings of flats, shops, offices, godowns, garages, etc., by the dealer MIC as a contractor for those persons, or a contract for

the sale of flats, shops, offices, godowns, garages, etc., by the dealer MIC as their owner ?

(3) In the case of building contracts is it necessary, in law, that the contracted should have absolute ownership of the land on which the building is to be constructed ? Is not a limited interest of the contracted in the land sufficient ?

(4) Whether the persons who had entered into agreement with the dealer MIC agreeing to take the flats, etc., before construction, had by virtue of that agreement acquired some limited right or interest in the plot of land on which the flats, etc., were to be built ?

4. The dealer MIC was not the owner of the land on which the block building of flats, shops, offices, godowns, garages, etc., were proposed to be constructed by them and they did not effect composite sale of land with structured buildings thereon. Unlike English Law, Indian Law does not recognise legal and equitable estates as such, therefore there can be only one "owner". Where sale deed requires registration u/s 54 of the Indian Transfer of Property Act, 1882, title does not pass until the sale deed has been registered though there may be transfer of possession and payment of consideration. In the absence of a registered sale deed nobody can be the owner of an immovable property on the basis of agreement to sell and the power of attorney executed by the vendor in his favour,-- [Imtiaz Ali Vs. Nasim Ahmed](#). The equitable doctrine of part performance incorporated in Section 53-A of the Transfer of Property Act, 1882 can be used only as defence in action for ejectment, etc., it cannot be used as a weapon of attack. Section 53-A can be used only as a shield and not as a sword-- [Juarmal Vs. Kapoor Chand and Others](#), ; [Kashi Nath Tewari and Another Vs. Makchhed Tewari and Others](#), , the concept of de facto ownership or deemed ownership of property by virtue of possession obtained by the purchaser in part performance of the contract for sale is limited to "house property" for the purpose of taxation of income from "house property" and acquisition of undervalued immovable property by the Income Tax Department under the Income Tax Act, 1961. It does not extend for any other purposes.

5. The dealer MIC did not construct the block buildings comprising of flats, shops, offices, godowns, garages, etc ; for themselves as owners. The agreement between the dealer MIC and each of the several persons who had agreed to take the flats, shops, offices, godowns, garages, etc., proposed to be constructed by the earlier MIC on ownership basis under the scheme of Ownership Flats (Regulation of Promotion of Construction, Sale, Management and Transfer) Act, 1972, constitute legally binding contract between the two. And the contract was in the nature of works contract to construct flats, shops, offices, godowns, garages, etc., by the dealer MIC as a contractor for those persons who had agreed to take them on ownership basis under the scheme of the Ownership Flats Act, 1972. Therefore, in respect of such flats, shops, offices, godowns, garages, etc., the dealer MIC cannot be the owner as per the provisions of the Ownership Flats Act, 1972. In their

capacity as promoters under the scheme of the Ownership Flats Act, 1972, the dealer MIC can be owners only in respect of the remaining flats which were not taken by other persons before completion of the construction of the building.

6. In view of the authoritative treatise of Hudson's Building Contracts which is quoted with approval by the Supreme Court in [Builders Association of India and Others Vs. Union of India \(UOI\) and Others](#), the relevant provisions of the Transfer of Property Act, 1882 and Karnataka Sales Tax Act, 1957 and the decision of the High Courts and the Supreme Court on the point, in building contracts it is not necessary that the contracted should have absolute ownership of the land. It is enough if the contracted has some limited interest in the land.

7. In view of the terms of the agreement between the dealer MIC and the several persons who had agreed to take the flats, shops, offices, godowns, garages, etc., proposed to be built by the dealer MIC ownership basis under the scheme of Ownership Flats Act, 1972 and the terms of development agreement between the dealer MIC and Venkateswara Enterprises, of which the landlady Smt. Thirulakshmi was a partner, and the cross connections between these two sets of agreements, and the relevant provisions of the Specific Relief Act, 1963 and the Transfer of Property Act, 1882, it is clear that each of the several persons who had entered into agreement with the dealer MIC to take the flats, shops, offices, godowns, garages, etc., on ownership basis, had by virtue of that agreement acquired a right or interest in the plots of land on which flats, shops, offices, godowns, garages, etc., were proposed to be built to the extent of the undivided portion of the land relatable to flats, shops, offices, godowns, garages, etc., agreed to be taken by them.

8. Once the existence of works contracts is established, the contention that what was flats as immovable property cannot be accepted. Because after 46th Amendment to the Constitution, what was an indivisible contracts has been altered by a legal fiction into a divisible contract, one for the sale of goods and the other for supply of labour and services.

9. It is not in dispute that though the full consideration is said to have been paid in respect of the land, there is no conveyance conveying the title to the land through a registered instruments within the meaning of Section 17 of the Registration Act.

10. Section 53 of the Transfer of Property Act was relied upon to claim that in part performance of contract for sale, the appellant had become de facto owner of the land. But Section 53-A of the Transfer of Property Act makes it clear that the person who is in possession in the absence of any registered instrument cannot maintain a suit on title ; and the transferee cannot take benefit of the said Section 53-A to establish his right as owner of the immovable property ; even though the purchaser is put into possession of the immovable property with all other rights thereto in the absence of a registered sale deed where the value of the immovable property is Rs. 100 and above will not make the transferee as owner as decided in the cases of

[Commissioner of Income Tax, Bombay City III Vs. Zoroastrian Building Society Ltd.,](#),
[Ram Gopal Reddy Vs. Additional Custodian Evacuee Property, Hyderabad,](#),
[Commissioner of Income Tax, Bombay City-IV Vs. Sultn Brothers Pvt. Ltd.,](#),
[Commissioner of Wealth-tax, Gujarat-IV Vs. H.H. Maharaja F.P. Gaekwad,](#), impliedly
approved in [Late Nawab Sir Mir Osman Ali Khan Vs. Commissioner of Wealth Tax,](#)
[Hyderabad,](#), [Commissioner of Wealth Tax v. Meattles P. Ltd. \[1985\] 153 ITR 201](#),
[Chettinad Corporation Pvt. Ltd. Vs. Tamil Nadu Agricultural Income Tax Appellate](#)
[Tribunal and Others,](#), [Ramkumar Mills P. Ltd. Vs. Commissioner of Income Tax,](#),
[Commissioner of Income Tax Vs. Sivanandha Mills Limited,](#).

11. The entire exercise embarked upon by the appellant amounts to offering to build the plot over the fixed time and such offers are accepted by the several persons who were in need of flats, shops, offices, garages after approving the plans and specification of the buildings proposed to be built by the dealer according to specified plan and specification for a particular price. The proposal or offer, acceptance, consideration were enforceable by law. The ruling of *Carlill v. Cabolic Smoke Balls Co.* [1893] 1 Q.B. 256 is to the following effect :

"It was also said that the contract is made with all the world that is with everybody, and that you cannot contract with everybody. It is not a contract made with all the world. There is a fallacy of the arguments. It is an offer made to all the world and why should not an offer be made to all the world which is to ripen into a contract with anybody who comes forward and performs the conditions ?Although the offers made to the world, the contract is made with that limited portion of the public who come forward and perform the condition on the faith of the advertisement."

12. Taking into consideration the definition of the plot u/s 2(a) of the Ownership Flats Act, 1972 and the promoters u/s 2(c) of the said Act and the liabilities fixed on the promoters u/s 3 of the Act on the promoter and the effect of Section 7 of the Ownership Flats Act goes to show that when a promoters proposes to construct a bulk block building of flats, enters into an agreement that a person who agreed to take plots, the promoters does not make a contract to sell the completed flats until by that time or after becoming owner of the flats. But what he contract is to construct the flats according to the plan and specifications inspected and approved by the persons who agree to take the flats ; by using such materials and with such fixtures and fittings, as are disclosed to such persons before entering into an agreement. In other words the promoter does not contract to sell the pre-existing flats which are owned by him, but he contracts to construct the flats according to certain plans and specifications and transfer them without becoming owner thereof. Merely because the title to such flats was effected by means of a registered sale deed, it does not mean that it was a case of the sale of flat by the dealer as owner. The fact remains ; undoubtedly that he is only a promoter who constructs flats or other buildings for others on ownership basis under the schemes of Ownership of Flats Act, 1972 under which the promoter cannot become absolute owner of the

flats. The effect of the agreement between the appellant and the persons who had agreed to take such flats was to construct such flats or other buildings for them and it is not a contract of sale of flats by the dealers as their own, except in respect of the remaining flats which are not taken by the persons before completion of the construction of the building.

13. It is also seen that the contractor or an employer must be the absolute owner of the land or free holder of the land on which the building is to be constructed, he may be lessee or licensee or even have no interest in the land at all as in the case he is the sub-contractor.

14. The dictum in the case of [Sakarchand Chhaganlal Vs. Controller of Estate Duty, Gujarat](#), is to the following effect, is relied upon :

"The question before the High Court was of a co-operative society of the tenant-ownership type. It was held, on facts, that since the deceased being lawfully in possession had constructed on the land belonging to the society, the deceased was the owner of the superstructure and the only right which the deceased had in regard to the superstructure was to remove it, if for any reason his possession of the land came to an end. This is so because the law in India, unlike the English law, recognises dual ownership, the land belonging to one person and the structure upon it belonging to another."

15. Another dictum in [Builders Association of India and Others Vs. Union of India \(UOI\) and Others](#), at pages 401-402. The Supreme Court has extracted with approval the following passages from Hudson's Building Contracts at pages-362 :

"The well-known rule is that the property in all materials and fittings, once incorporated in or affixed to a building, will pass to the freeholder-- quicquid plantatur solo, solo cedit. The employer under a building contract may not necessarily be the freeholder, but may be a lessee or licensee, or even have no interest in the land at all, as in the case of a sub-contract. But once the builder has affixed materials, the property in them passes from him, and at least as against him they become the absolute property of his employer, whatever the latter's tenure of or title to the land. The builder has no right to detach them from the soil or building, even though the building owner may himself be entitled to sever them as against some other person--e.g., as tenant's fixtures. Nor can the builder reclaim them if they have been subsequently severed from the soil by the building owner or anyone else. The principle was shortly and clearly stated by Blackburn, J., in *Appleby v. Myers* [1867] LR 2 CP 651 at p. 659 : "Materials worked by one into the property of another become part of that property. This is equally true, whether it be fixed or movable property. Bricks built into a wall become part of the house ; thread stitched into a coat which is under repair, or planks and nails and pitch worked into a ship under repair, become part of the coat or the ship." "

16. The term works contract has been defined in Section 2(1)(v-i) of the K.S.T. Act as follows :

" "works contract" includes any agreement for carrying out for cash, deferred payment or other valuable consideration, the building, construction, manufacture, processing, fabrication, erection, installation, fitting out, improvement, modification, repair or commissioning of any movable or immovable property."

17. Section 5B of the K.S.T. Act which is the charging section in respect of works contract reads as follows :

"Levy of tax on transfer of property in goods (Whether as goods or in some other form) involved in the execution of works contracts.--Notwithstanding anything contained in Sub-section (1) or Sub-section (3) or Sub-section (3C) of Section 5, but subject to Sub-section (4), (6) or (6) of the said section, every dealer shall pay for each year, a tax under this Act on his taxable turnover of transfer of property in goods (whether as goods or in some other form) involved in the execution of works contract mentioned in column (2) of the Sixth Schedule at the rates specified in the corresponding entries in column (3) of the said Schedule."

Civil works like construction of buildings is one of the items included under the Sixth Schedule to the K.S.T, Act. Section 17(6) provides for composition of tax payable on works contracts. It reads as follows :

"Notwithstanding anything contained in Sub-sections (1) to (3), but subject to such conditions and in such circumstances as may be prescribed, the assessing authority of the area may, if a dealer liable to tax u/s 5-B in respect of the works contract specified in column (2) of the table below so elects, accept in lieu of the amount of tax payable by him during the year under this Act, by way of composition an amount at the rates specified in the corresponding entries in column (3) of the table on the total consideration received or receivable by him in respect of such works contract executed by him in that year in the State."

18. From the above, it is seen that in building contract, it is not necessary that the contractor or contracted should have absolute ownership over the land, but it is enough that he has some limited interest in the land. It is also seen that the person who are entered into an agreement with the dealer to take the flats before construction or by virtue of that agreement acquire any right or interest over the flats or land on which the flats were to be built to the extent of an undivided proportion of the land relating to the flats agreed to be taken by them.

19. After the 46th Amendment to the Constitution and insertion of Clause (29-A) to Article 466 by a legal fiction altered the definition of "sale" which is divisible into one for sale of goods and the other for supply of labour and services. Tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of those contracts is deemed to be a sale of those goods by the person

making the transfer and a purchase of those goods by the person to whom such transfer is made.

20. In [Builders Association of India and Others Vs. Union of India \(UOI\) and Others](#), , the apex Court held that :

"..... It is difficult to agree with the contention of the States that the properties that are transferred to the owner in the execution of a works contract are not the goods involved in the execution of the works contract, but a conglomerate, that is the entire building that is actually constructed. After the 46th Amendment it is not possible to accede to the plea of the States that what is transferred in a works contract is the right in the immovable property. That after the 46th Amendment the works contract which was an indivisible one is by a legal fiction altered into a contract which is divisible into one for sale of goods and the other for supply of labour and services."

21. The dictum of the Supreme Court in [Satyabrata Ghose Vs. Mugneeram Bangur and Co. and Another](#), is relied upon to the following effect :

"According to the Indian law, which is embodied in Section 54 of the Transfer of Property Act, a contract for sale of land does not of itself create any interest in the property which is the subject-matter of the contract. The obligations of the parties to a contract for sale of land are, therefore, the same as in other ordinary contracts and consequently the doctrine of frustration is applicable to contracts for sale of land in India."

Another dictum of Supreme Court in [Narandas Karsondas Vs. S.A. Kamtam and Another](#), is also relied upon to the following effect :

"In India, there is no distinction between legal and equitable property in the sense in which it was understood when equity was administered by the Court of Chancery in England. Under the Indian law, there can be but one owner that is, the legal owner.

A contract of sale in view of Section 54 of the Transfer of Property Act does not of itself create any interest in, or charge on, the property. The personal obligation created by a contract of sale (as recognised in Section 3 of the Specific Relief Act and Section 91 of the Trust Act) is described in Section 40 of the Transfer of Property Act as an obligation arising out of contract and annexed to the ownership of property, but not amounting to an interest or easement therein. In India, the word "transfer" is defined with reference to the word "convey". The word "conveys" in Section 5 of the Transfer of Property Act is used in the wider sense of conveying ownership.

The combined effect of Section 54 of the Transfer of Property Act and Section 17 of the Registration Act is that a contract for sale in respect of immovable property of the value of more than one hundred rupees without registration cannot extinguish the equity of redemption. In India it is only on execution of the conveyance and registration of transfer of the mortgagor's interest by registered instrument that

the mortgagor"s right of redemption will be extinguished."

22. If the building was first constructed and thereafter agreed to be sold then it was a case of transfer of immovable property. According to the agreement entered into by the appellant with the allottee of flat or other building, advance is taken at the time of execution of contract and thereafter in 15 instalments the balance amount is to be paid at the time of giving possession of flat, etc. It has not been established that at the time when the agreement was entered into even construction of building started by the appellant. The ultimate purchaser has to purchase the land of his share from the owner and not from the appellant. It had also come on record that after entering into the agreement by the appellant with the owner only plans were got approved and immediately thereafter agreements were entered into with the prospective buyer. The construction was done under the Karnataka Ownership Flats (Regulation of Promotion of Construction, Sales, Management and Transfer) Act, 1972. The prospective buyer has right of inspection during construction under Clause (x) of the agreement ; the developer is deemed to be owner only when the building constructed is not taken or acquired by any person at the time the building is ready for occupation. There is transfer of property in goods involved in the execution of the contract. A finding of fact is recorded that the purchasers have acquired right/interest in plot of land on which the flats were to be constructed and as such the appellant had acted as a contractor for construction of the flats for them. The conclusion which have been drawn on the basis of various clauses of agreements and cannot be said to be illegal.

23. In the light of the above, we find no merit in the appeals and the appeals having no force are dismissed.