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Ref. No. MCHI/PRES/17-18/211

April 11, 2018

To,
Hon'ble Shri Sushil Kumar Modi
Dy. Chief Minister, Govt. of Bihar &
Chairman for All State Finance Minister
GST Council,
Government of India
New Delhi

Sub: Representation seeking exemption from GST on lease premium paid leasehold rights of land or plots

CREDAI-MCHI is an apex body consisting of members from Real Estate Industry among Mumbai Metropolitan Region (MMR). It is the most prominent and the only recognized body of Real Estate Developers in Mumbai and MMR. We bring together members dealing in Real Estate Development on one common platform to address various issues facing the Industry. With a strong Membership of over 1800 leading Developers in Mumbai, CREDAI-MCHI has expanded across MMR, having its own units in the region of Thane, Kalyan-Dombivli, Mira-Virar, Raigad and Navi Mumbai. CREDAI-MCHI is recognized by Government of Maharashtra and the Central Government and helps in meeting their objectives of providing housing, which is a basic necessity.

1. Background:

- 1.1 India's biggest tax reform - One Nation One Tax is now a reality. The comprehensive dual Goods and Services Tax (GST) has replaced the complex multiple indirect tax structure since 1 July 2017. Since the inception of the GST regime, the Government is trying to simplify the indirect tax structure through ongoing amendments.
- 1.2 Recent developments in the GST law made by the Government concerning the real estate industry, and also various other initiatives taken to support the affordable housing scheme, indicate that the intention of the Government is to keep the cost of houses moderate. This initiative would make significant strides towards advancing the Government's "housing for all" campaign.
- 1.3 This representation concerns the problems being faced by the real estate industry and its customers by the applicability of GST on lease premium paid by the developers to various development authorities in lieu of receiving the leasehold rights.

2. GST Provision

- 2.1. Serial Number 41 of Notification 12/2017 - Central Tax (Rate) dated 28th June 2017 amended *vide* Notification No. 32/2017 - Central Tax (Rate) dated 13th October 2017, exempts from the payment of GST, one-time upfront amount (lease premium or salami etc.) in respect of long term (thirty years, or more) lease of industrial plots or plots for development of infrastructure for financial

business, provided by the State Government Industrial Development Corporations or Undertakings or by any other entity having 50 per cent. or more ownership of Central Government, State Government, Union territory to the industrial units or the developers in any industrial or financial business area.

2.2. It is pertinent to note that the above exemption is restricted to the industrial plots and plots for development of infrastructure for financial business. There is no such exemption for leasehold rights obtained in respect of other categories of plots.

3. Challenges faced by the real estate industry

3.1 In the State of Uttar Pradesh, it is the policy of certain development authorities to confer long term leasehold rights to the developers, usually for a period of 90 years or more, in consideration of lease premium and lease rentals. The developers are eligible to sub-license the same either to unit buyers or to any other person upon prior permission of the respective development authorities.

3.2 Under the GST regime, the Government has taxed the lease premium paid by the developers to the development authorities in respect of plots, other than two categories of plots discussed above, at the rate of 18%.

3.3 This has adversely affected the real estate industry due to various reasons, some of which are mentioned hereunder:

3.3.1. Increased cost in the hands of the customers

GST at the rate of 18% on the leasehold rights for various categories of plots including residential plots are increasing the cost of construction in the hands of developers, which will be ultimately borne by the customers only. Further, the Government has imposed a restriction that no refund of unutilized input tax credit shall be allowed under sub-section (3) of section 54 of the CGST Act, 2017, in case of construction services. Consequently, the cost of houses with leasehold rights may escalate.

Vide the recent amendment, the Government has reduced the applicable rate of GST on the construction services for affordable housing projects and has also given certain other benefits to stimulate the overall growth and success of the affordable housing scheme. These amendments are ostensibly an endeavor of the Government to keep the effective rate of GST low which would make such houses easily affordable to the people with lower income. However, charging GST on the backend leg i.e. on leasehold rights along with a restriction on claiming refund of unutilized input tax credit may adversely affect the Government's scheme of affordable housing i.e. housing for all by 2022, which seems to be an unintentional omission of the Government.

3.3.2. Sale of land is outside the ambit of GST

The sale of land is outside the ambit of GST *vide* Entry No. 5 of Schedule III of the CGST Act, 2017 wherein, the sale of land has neither been treated as supply of goods nor as supply of services. Therefore, the cost of constructed houses in the hands of the customers, in the case of freehold rights would be much lower than the cost of constructed houses in the case of leasehold rights of property.

This may bring a slump in the demand of the properties in the leasehold rights areas. Further, this may also burden the industry with increased cash flow requirement.

3.3.3. Lease premium is different from lease rental

Lease premium denotes the price paid for obtaining lease of an immovable property while the lease rent is payment made for use and occupation of an immovable property leased. Lease premium paid by the lessee to the lessor is for transfer of the leasehold interest in the property from the lessor to the lessee which should be kept at par with the sale of land or freehold rights.

3.3.4. Negative impact on employment opportunities

In 2016, as per the Oxford Economics Data, the Delhi Extended Urban Agglomeration (EUA), comprising Delhi, Gurgaon, Faridabad, Noida and Ghaziabad, was regarded as India's economic capital with a GDP of \$370 billion. Delhi NCR has become one of the fastest growing economic regions of the country. Several companies have set up their delivery centres and liaison offices in Noida. As a result, a number of people have either shifted or planning to shift to the city. However, increased cost in the hands of developers may result in reduction in generation of work which may further lead to less employment generation.

Due to increase in cost of property on account of increased tax component would also make the leasehold properties less attractive. Consequently, overall development of such areas may get hampered.

As a result, the Government should introduce an exemption from payment of GST to the lease premium charged by various authorities for granting leasehold rights of residential plots. Similarly, the Government should also extend the benefit of exemption from payment of GST to the leasehold rights of commercial plots as given to the industrial plots.

Hence, we at CREDAI-MCHI, would like to kindly request you, that in the light of the submissions above, it is most respectfully prayed to provide exemption from GST on the premium paid in the case of plots including Residential and Commercial plots.

Also, we would like to meet you in person, if you can give your some time out of your busy schedule, as convenient to you to discuss all above issues.

Thanking you,

Yours faithfully,
For CREDAI-MCHI



Mayur Shah
President



Domnic Romell
Hon. Secretary



S. S. Hussain, I.A.S. (Retd.)
Chief Executive Officer

Encls.: As above



IMPACT OF GST ON --- REAL ESTATE



Thank you for implementing a
path breaking reform in the Tax
system of our country

LAUDABLE EFFORT

BIGGEST TAX
REFORM IN
INDIA

Comprehensive
Indirect tax

Making India a
unified market

VERY
INTERACTIVE

Twitter

FAQs

Help Desk

QUICK
RESPONSES

Amendments
addressing
Industry and
Business
concerns



ISSUES UNDER GST FOR REAL ESTATE

REAL ESTATE ISSUES UNDER GST REGIME

1

LAND DEDUCTION

2

GST ON DEVELOPMENT RIGHTS / LONG TERM LEASE

3

CREDIT IN RESPECT OF SRA/REHAB BUILDING

4

INPUT TAX CREDIT IN RESPECT OF COMMERCIAL BUILDING

5

ADJUSTMENT FOR CANCELLATION OF FLAT

6

GST ON ADVANCE

7

TIME OF SUPPLY FOR DEVELOPERS

LAND DEDUCTION...



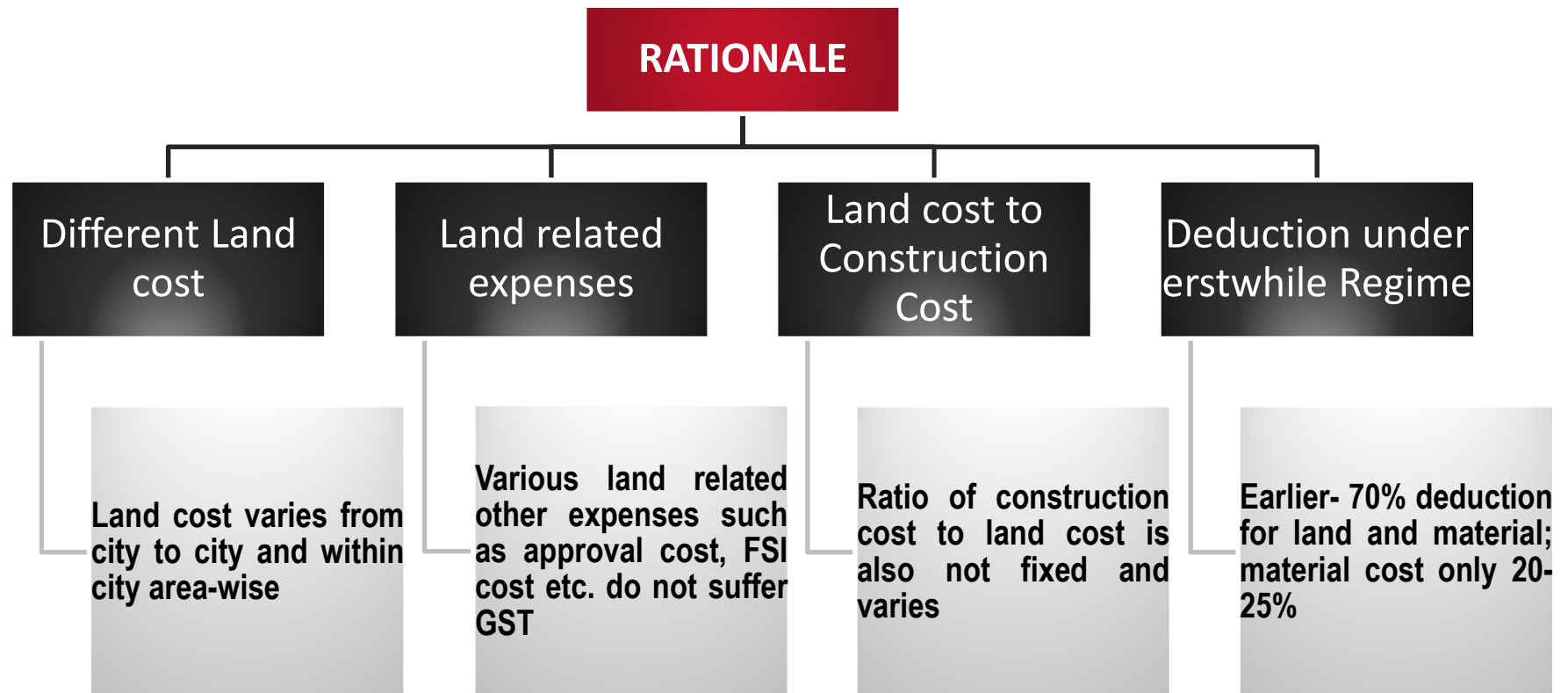
ISSUE

1

- A. Deduction for land @ $1/3^{\text{rd}}$ of the total value charged
 - Not the true value of land; especially for metro cities and other prime areas

- B. Applicability of deduction on leasehold land

...LAND DEDUCTION...



...LAND DEDUCTION...

ILLUSTRATION – Land deduction under GST

		Amount (Per Sq. ft.)	
Particulars		GST	Actual
Sale Price	A	40,000	40,000
Construction cost and margin	B	26800	15000
Land and associated cost	C	13200	25000
GST		4,800	2,700
IMPLICATION	GST implication of Rs.2100 on account of wrong assumptions		

As per deemed deduction, value of goods and services assumed @ 67%, of the sale value, which is significantly high than the actual cost.

RELIEF SOUGHT



GST @ 12% with ITC and 1/3rd of sale value as land deduction



Higher deduction for construction in Metro cities i.e. 50% to 60%

DEVELOPMENT RIGHTS / LONG TERM LEASE...



ISSUE

2

- Land and sale of building (post OC) excluded from GST (Schedule III entry 5 of CGST Act)
- Whether the following are excluded
 - Development Rights in JDA / Redevelopment Agreement with Society / Transfer of Development Rights (TDR)
 - Long Term Lease (LTL) [Schedule II – Entry 2(a) of CGST Act]

...DEVELOPMENT RIGHTS / LONG TERM LEASE...

GOODS

- *Goods means every kind of movable property other than money and securities*
- Immovable property is not 'goods'

SERVICES

- *Services means anything other than goods, money and securities*
- Immovable property, therefore, will be a 'service', unless exempted

SCHEDULE III – TRANSACTION NOT SUPPLY

- Entry 5 of Schedule III - *Sale of land and / or sale of building after issuance of occupation certificate*
- **Land and Building not defined under GST**

...DEVELOPMENT RIGHTS / LONG TERM LEASE...

RATIONALE & RELIEF SOUGHT

IMMOVABLE PROPERTY	PURVIEW OF STATE GOVERNMENT
<ul style="list-style-type: none">- Not defined under GST- General Clauses Act covers benefits arising out of land as Immovable Property- Judicial Precedents - TDR / LTL held as Immovable Property- Immovable Property excluded from Service tax under Erstwhile Regime	<ul style="list-style-type: none">- Transaction related to Immovable Property under purview of State Government [Constitution of India]- State Government already levying Stamp duty- GST levy leads to double taxation

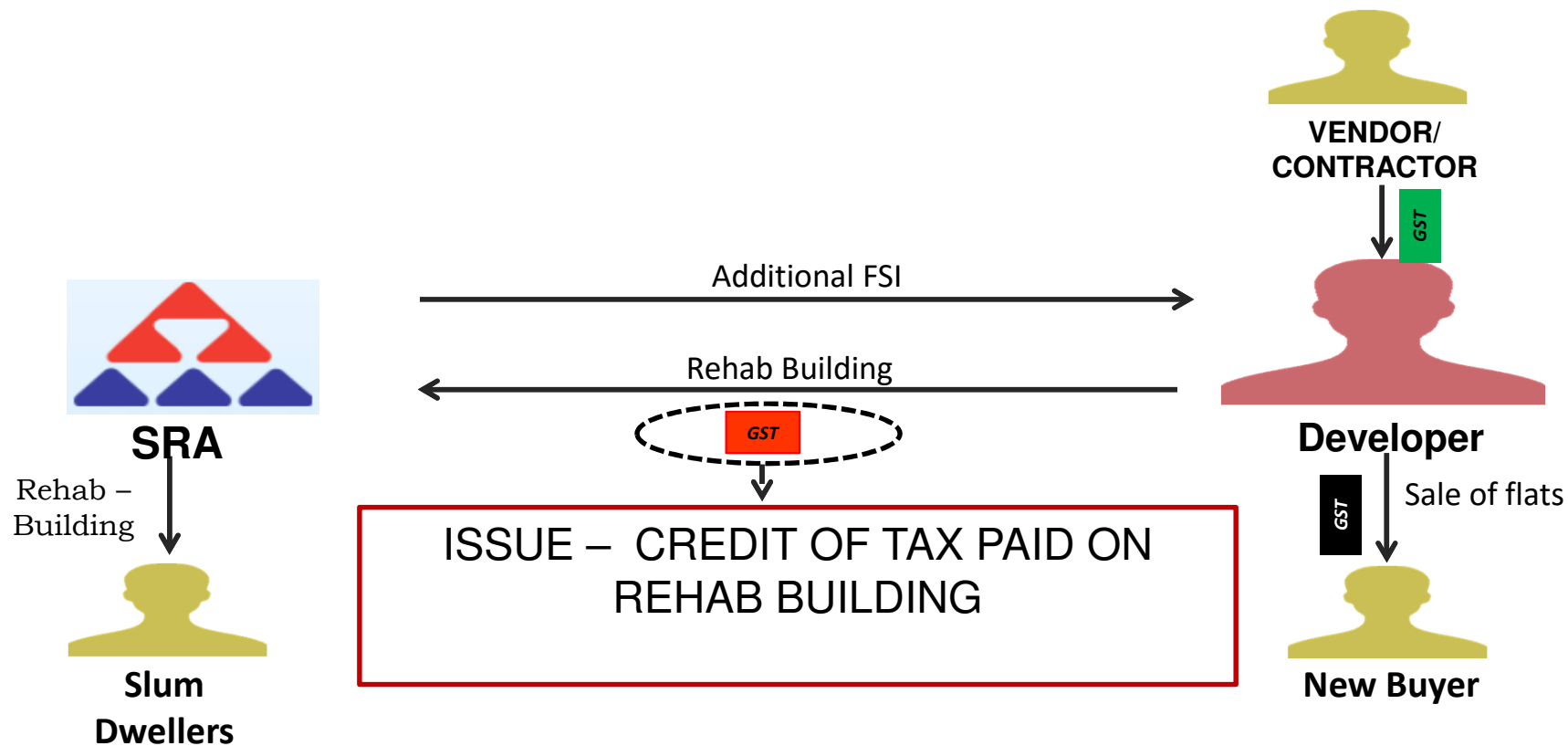
Clarification to be issued that no GST applicable on sale of development rights

CREDIT IN RESPECT OF SRA BUILDING ...



- Construction of SRA / Rehab building for Society - **Liable to GST**
- Authorities / Society does not reimburse GST - Cost in the transaction
- Additional FSI - Nothing but cost incurred towards sale building

SRA PROJECT



Similar transaction / implication under Redevelopment of Society

...ITC ON INPUTS COMPENSATE OUTPUT GST LIABILITY...

RATIONALE

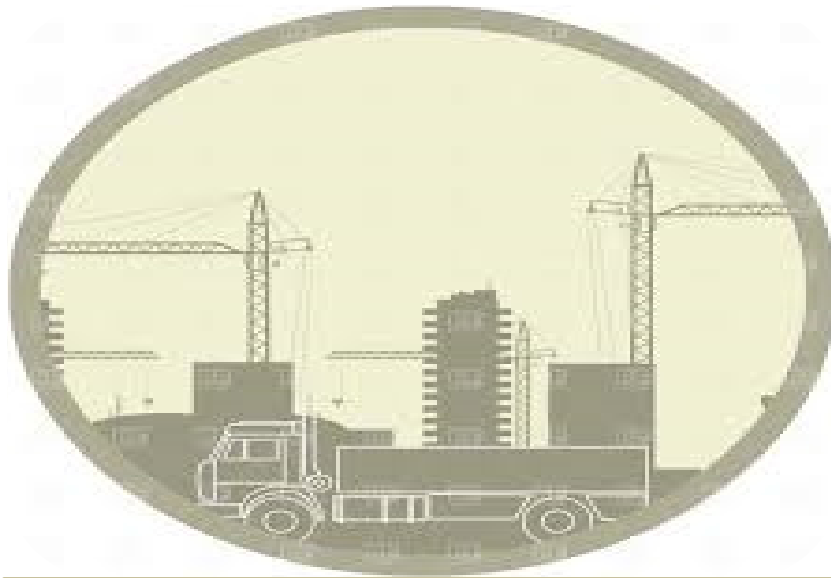
Developer constructs SRA / Rehab building in lieu of additional FSI

Additional FSI is an input cost towards sale building

No similar GST cost suffered on procurement of land or development rights

Authorities / Society do not reimburse the cost

RELIEF SOUGHT



GST on construction of SRA buildings for slum dwellers and on rehab building for existing society members should be *Nil* rated



If it is made taxable, GST paid on SRA / Rehab buildings must be eligible as credit to a developer

GST on construction of Commercial Building...

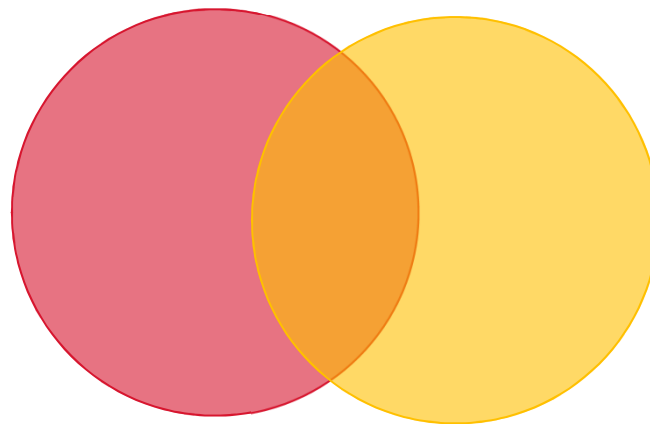


- Developer incurs various cost for the construction of commercial building
- Blocked credit in respect of works contract service under Section 17(5) of CGST Act
- Units in a commercial building are generally leased - No input tax credit available
 - Cost in the transaction

...GST on construction of Commercial Building

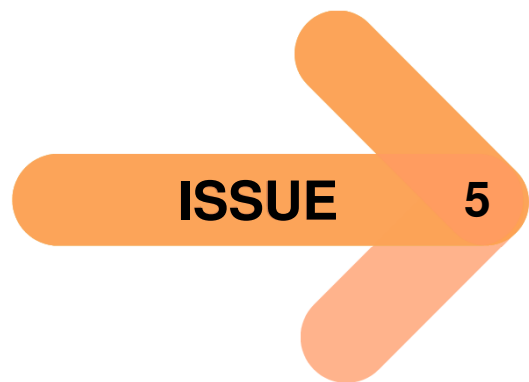
RATIONALE & RELIEF SOUGHT

Difference is in
the method of
collection of
revenue



Reduced rate of
GST to 5%

ADJUSTMENT FOR CANCELLATION OF FLAT...



- **Issuance of Credit Note** - Not provided for non-provision of service (Section 34 of CGST Act)
- **Refund may not be permissible** - Developer issues invoice for each milestone (Section 54 of CGST Act)
- **Refund for flat booked in pre-GST and cancelled post GST** - extremely tedious process

...ADJUSTMENT FOR CANCELLATION OF FLAT...

RATIONALE

GST REGIME

GST payable on sale of flat to new customer

Credit note permitted for sales return; similar analogy to be applied for cancellation of flat

Erstwhile Regime – Adjustment was permissible

Milestone invoicing must for Continuous Supply of Service (CSS)

CSS for more than 2 years - Limitation period of 2 years for refund

...ADJUSTMENT FOR CANCELLATION OF FLAT...

RELIEF SOUGHT

**Amendment to
Section 34**

**Issuance of
Credit note to
be permitted**

**Adjustment to
be permitted
against output
liability**

REVERSAL OF ITC / GST ON ADVANCE PAYMENT ...



- Non-payment to vendor within 180 days from invoice date –
 - Reversal of ITC
 - Interest thereon*(Section 16(2) of CGST Act)*
- GST on advance payment to works contractor

...REVERSAL OF ITC / GST ON ADVANCE PAYMENT ...

ADVANCE	
<u>ADVANCE FOR SUPPLY OF GOODS</u> NOT LIABLE TO GST <i>[NOTIFICATION NO. 66/2017 – CENTRAL TAX DATED 15/11/2017]</i>	<u>ADVANCE FOR SUPPLY OF SERVICE</u> LIABLE TO GST



- Works Contract - *'Supply of Service'*
- *'Mobilization Advance'* to Contractor for goods – Common Practice in Construction Industry

...REVERSAL OF ITC / GST ON ADVANCE PAYMENT

RELIEF SOUGHT

Remove 2nd Proviso
to Section 16 (2) of
CGST Act

Alternatively, amend
the Proviso for works
contract and barter
transactions

No tax at the time of
advance payment to
Works Contractor

TIME OF SUPPLY FOR DEVELOPERS...



- Under current GST Provision, liability to pay tax arises on accrual or cash basis, whichever is earlier
- Considerable time gap between demand raised and payment made
- Working capital blockage

... TIME OF SUPPLY FOR DEVELOPERS

Relief Sought

- For Construction Service, GST should be payable on receipt of consideration from end customer and not on accrual basis



THANK YOU!

Detailed explanation of the various points discussed in the meeting on 28th February 2018

1. Land Deduction:

Relevant provision

<u>GST Regime</u>	<u>Service tax Regime</u>
<p>The tax rate is stipulated at 18% in case of sale of under construction flats vide notification no 11/2017- Central Tax (Rate) dated 28.06.2017.</p> <p>After allowing presumptive deduction for land cost at 1/3rd of sale value of the flat, the effective tax rate comes to 12% of flat value [except few notified specified Housing Schemes where the effective tax rate is 8%]</p>	<p>Abatement of 70% on gross amount charged towards the unit without input tax credit in respect of inputs used towards construction service i.e. the Developer was permitted to avail the credit on input services and Capital goods as defined under Cenvat Credit Rules, 2004 [Notification No. 26/2012 Service tax dated 20.06.2012]</p>

Concerns and issues:

- Under Service tax regime, an abatement of approx. 70% on the gross value charged was permitted along with credit of input services and capital goods and only credit of inputs was not permitted which is approx. 2 to 3 % of the total input tax cost incurred by the Developer.
- Under the GST Regime, a presumptive land deduction of 1/3rd of sale value of flat has been permitted. It is important to note that 6% deduction towards land in most cases is not commensurate to the cost of land. The actual land value differs from area to area, city to city. Moreover, in metros, cost of land is major component of the cost of a project and it always exceeds 33%. **This indirectly results into levy of GST on land value which is not in consonance with GST legislation which specifically excludes land from scope of supply and/or levy of GST.**
- The aforesaid can be easily understood with the help of following example:

		Premium Location (Metro City)	Medium Location (Metro City)	Tier II & III City
		Rs per sq feet		
Sale price	A	70,000	40,000	5,000
Land cost	B	50,000	27,500	1,500
Land Cost (as % of Sale Price)	B/A	71.4%	68.8	30
Presumptive Deduction for land cost (1/3 rd of A)	C	23,333	13,333	1,667
Value of land on which GST is paid (B - C)	D	26,667	14,167	-
GST on Land @ 18% (D x 18%)	E	4,800	2,550	-

- A presumptive deduction of 1/3rd of the sale value of the flat across the country (being attributed to the cost of land) may not be the appropriate basis. For example in a metro city like Delhi or Mumbai, the cost of land (on a per square feet basis) is much more than the cost of construction (on a per square feet basis) and in fact in some cases the land cost is more than 10 times that of the construction cost. Such standardised ratio being applied

across the board for the deduction in land cost does not provide the true deduction towards land value.

- e. Incidental cost of Stamp Duty and GST being 17% of value of a flat is a huge burden for a citizen buying a house in metro cities especially when they put their life time savings in buying a house, in addition to taking a new home loan. This has resulted into significant slowdown of the demand in already sluggish real estate market in most of the big cities.
- f. Most importantly, all input costs that are incurred by the real estate sector do not suffer GST like, land cost, approval cost, finance cost and employees cost. The Government is under a bona-fide belief that real estate developers will be eligible for input tax credit of material and passing that credit to customers will offset the rise in the tax rate. In reality, impact of additional input tax credit available on materials and contracts in GST regime is very nominal as compared to hike in effective tax rate particularly in cases where the actual land cost is in multiples of the construction cost. The cost of construction (material and services) is usually in the range of Rs.2,000 - 5,000/- per square feet. Average input tax on such construction cost comes in the range of Rs.400 to 1000/- per square feet. Assuming that the selling rate of flat is Rs.40,000/- per square feet, additional output tax is 6.50% of Rs.40,000/- i.e. Rs.2,600/-. The net tax incidence on customer would Rs. 2,200 to 1,600/- per square feet when developer passes on input tax credit of Rs.400 - 1000/- to customer. The additional tax incidence is in the range of 4 to 5.5% of flat value which is exorbitant from any standard.
- g. This incidence (with minimal set off against the input depending on the location of the property) would ultimately be passed on the actual consumers and is thus bound to increase the cost of housing; and the same will not be socio-economically desirable.

Representation and suggestion:

- i. We suggest that the applicable tax rate of GST be reduced to 12%, whilst allowing deduction of input tax credit and continuing the 1/3rd deduction towards land.
 - ii. Higher land deduction of 2/3rd should be allowed in metro cities which represents the true value of the land and hence may not result in levy of GST on the land
2. **Tax implications on purchase of development rights, transferrable development rights (TDR), floor space index (FSI) and tenancy rights:**

<u>GST Regime</u>	<u>Service tax Regime</u>
<p>Section 9 of CGST Act stipulates GST levy on supply of Goods and/or Services.</p> <p>Section 2(52) of CGST Act defines 'goods' to mean every kind of movable property other than money and securities.</p> <p>'Service' is defined u/s 2(102) of CGST Act to mean 'anything other than goods, money and securities'.</p> <p>Immovable property, not being goods, will be a 'service' as defined u/s 2(102) of CGST Act.</p> <p>Clause 5 of Schedule III to CGST Act</p>	<p>The definition of 'Service' as per Section 65B(44) of the Finance Act, 1994 excludes from its scope an activity that merely constitutes 'a transfer of title in goods or immovable property, by way of sale, gift or in any other manner'.</p>

<p>excludes only the following from scope of supply:</p> <ul style="list-style-type: none"> • Sale of land • Sale of building (other than under - construction sale of flats/unit) 	
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Concerns and issues:

The development rights in case of joint development agreements or redevelopment projects with societies, TDR, FSI or even grant or transfer of tenancy rights or long term leases are rights arising out of land / building but it may not be regarded to be land / building per se. Under General Clauses Act, the term ‘immovable property’ is defined to include any benefits arising out of land. Therefore, development rights, FSI, TDR, etc. are ‘immovable property’ under general law. Various courts in a plethora of judgments have held that the development rights and TDR are “*immovable property*”.^{1&2}

An apprehension, therefore, is that acquisition of development rights, TDR, FSI, tenancy rights, long term lease, etc. is liable to GST and it will be taxed at 18%. The Government has clarified the time of supply for a transaction involving consideration against development rights in the form of construction service [Area Share Arrangement] till the date conveyance deed or any other similar instrument is being entered [vide Notification No 01/2018 Central Tax (Rate) dated 25.01.2018]. However, the said notification is silent on the applicability of GST on development rights per se.

Levy of GST on such rights (development rights, TDR, FSI, tenancy rights, long term lease, etc.) tantamount to effectively taxing immovable property which is not in consonance with GST legislation.

We are sure that it cannot be the intention of the Government to levy GST on such transactions, which in essence are nothing but ‘transfers’ of immovable property. However, due the language used in the existing legislation, the position today is quite obfuscating and it is of extreme importance that this position be clarified. The language presently used, could have an interpretation or it could be implied therefrom that GST could be levied on such transactions, which are actually in the nature of a simpliciter sale or other mode of transfer of immovable properties which do not technically qualify as a “sale of land” or “sale of building” but in essence are transactions of transfer of immovable property without there being any value addition to such immovable property or actual provision of any service. Similarly, lease premium paid on long term leasing of land which are akin to purchase of land should also not be subject to GST.

It may also be mentioned at this juncture that the levy of such a tax (i.e. Stamp Duty) on transactions of sale/transfer of immovable property falls within the purview of a State Government and not the Central Government under the Constitution of India and such a levy may thus be amenable to challenge on such ground. Further, State Government already levies stamp duty on transfer of such rights and hence levy of SGST on the same will lead to double taxation.

¹ Chheda Housing Development Corporation vs. Bibijan Shaikh Farid [2007 (3) MhLJ 402]

² Sadoday Builders Private Limited vs. Joint Charity Commissioner [WP No 4543/2010, delivered on 23 June 2011]

Representation and suggestion:

The scope of supply should be amended to exclude all types of transfers in respect of rights arising out of immovable property such as development right, TDR, FSI, tenancy rights, long term lease etc.

3. Credit in respect of Slum Rehabilitation Project (SRA Project) under the SRA Authority and rehabilitation buildings for existing members in a scheme of redevelopment of Society (Redevelopment Scheme)

Concerns and issues:

The modus operandi adopted in SRA Project is as follows –

- a) The Project (to be undertaken by the developer with consent of co-operative society of slum dwellers) is submitted by the developer to the SRA;
- b) The proposal is scrutinized by SRA and accepted;
- c) The developer provides alternative accommodation to slum dwellers as per guidelines of the SRA
- d) The construction of rehabilitation building is commenced post receipt of Letter of Intent ('LOI') from the SRA;
- e) The units constructed by the developer are allotted to slum dwellers by the SRA;
- f) The SRA permits construction on sale building as per provisions of the Scheme.

Similarly, Developer undertakes redevelopment of the property owned by Society under Redevelopment Scheme by demolition of the existing building and construction of a new building in place thereof for which the Society / members of the Society grant the development rights in favor of the Developer which is ultimately used for the construction of the sale building.

It can be observed that the reason for undertaking the construction of a rehab building under both the Scheme is with the intention to construct the sale building. The nature of transaction is similar to purchase of FSI / TDR from market with the difference that in case of purchase from market the developer would be required to pay consideration in monetary terms whereas in the instant case, the consideration is non-monetary.

Consequently, the construction service provided to SRA and Society though being an output service, is also an input service without which Developer will not be able to construct sale building. In the event the credit of GST, paid on such construction service is not allowed than it would result in double taxation and contrary to the larger scheme of GST.

Representations and suggestions:

Tax paid by the Developer on the construction services provided under the SRA Project and Redevelopment Scheme , should be allowed as input services credit.

4. High GST on commercial, Office / IT Premises on rental basis @ 18%:

Relevant provision:

<u>GST Regime</u>	<u>Service tax Regime</u>
<p>Section 17(5)(c) of CGST Act provides that input tax credit shall not be available in respect of works contract services when supplied for construction of an immovable property except where it is an input service for further supply of works contract service.</p> <p>Section 17(5)(d) provides that input tax credit shall not be available in respect of the goods or services received by a taxable person for construction of an immovable property on his own account.</p>	<p>Similar Position under Service Tax Regime</p>

Concerns and Issues:

Even though the position with respect to the availability of input tax credit is similar to erstwhile regime, such position creates unnecessary cost burden on the Developer and ultimately on the end customer.

A developer typically constructs a commercial building for the purpose of sale or lease. A sale of under-construction building attracts GST and the renting of immovable property also attracts GST. However, while credit on procurement of goods and services for the building construction is available to a developer constructing a building for the purpose of sale, no credit is available to a builder who constructs a building for the purpose of lease. The only change in both the constructions is the revenue model for earning income for the developer. While in the sale model, the revenue is earned upfront, in the lease model, the revenue is earned over a period of time. A developer cannot earn the rent income (the output supplies which attract GST) unless he procures goods and services for the construction of the building (input and input services used for earning the rent income). 18 % GST is not justified at all, as for the same premises GST is charged twice, while construction and while renting. It is also worthwhile to note that it has been held by the Hon'ble Delhi High Court³ that renting of immovable property should not be subject to Service tax although the same has been appealed before the Hon'ble Supreme Court and the decision is pending.

Representation and Suggestions:

Since GST is already paid during construction of premises, the rate of GST on leasing should be reduced to lower rate such as 4% considering the fact that there is no input credit available on procurement of goods and services for construction of such buildings. Government has recognized the importance of Real estate industry in achieving various national objectives such as employment etc. A reduced rate of GST on leasing service will further boost the employment opportunities, create conducive environment for

³ Home Solution Retail India Ltd. vs. Union of India 2009 (14) STR 433 (Del)

Multinational Companies, IT and other business. It will also help in growing retail malls in India which in turn will further help in increasing trade and employment in the said sector.

5. Adjustment of tax on cancellation of flats:

Relevant provision:

<u>GST Regime</u>	<u>Service tax Regime</u>
<p>Credit Note -</p> <p><i>“34. (1) Where a tax invoice has been issued for supply of any goods or services or both and the taxable value or tax charged in that tax invoice is found to exceed the taxable value or tax payable in respect of such supply, or where the goods supplied are returned by the recipient, or where goods or services or both supplied are found to be deficient, the registered person, who has supplied such goods or services or both, may issue to the recipient a credit note containing such particulars as may be prescribed”</i></p> <p>(Section 34 of CGST Act)</p> <p>Refund</p> <p><i>“(8) Notwithstanding anything contained in sub-section (5), the refundable amount shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to –</i></p> <p>(a)...;</p> <p>(b)...;</p> <p><i>(c) refund of tax paid on a supply which is not provided, either wholly or partially, and for which invoice has not been issued, or where a refund voucher has been issued;”</i></p> <p>(Section 54(8) of CGST Act)</p>	<p>Credit Note -</p> <p><i>“(3) Where an assessee has issued an invoice, or received any payment, against a service to be provided which is not so provided by him either wholly or partially for any reason or where the amount of invoice is renegotiated due to deficient provision of service, or any terms contained in a contract, the assessee may take the credit of such excess service tax paid by him, if the assessee.-</i></p> <p><i>(a) has refunded the payment or part thereof, so received for the service provided to the person from whom it was received; or</i></p> <p><i>(b) has issued a credit note for the value of the service not so provided to the person to whom such an invoice had been issued.”</i></p> <p>(Rule 6(3) of Service Tax Rules, 1994)</p>

Concerns and issues:

Rule 6(3) of Service tax Rules, 1994 permits a service provider to adjust service tax refunded on cancellation of flats/ units (non-provision of service) to customer against tax liability of the month in which such cancellation is done.

A strict reading of the relevant provisions of CGST Act (Section 34 pertaining to credit note) indicates that there is no effective mechanism for issuance of credit notes on account of cancellation of flats. Section 34 of CGST Act does not permit adjustment of GST

refunded against tax liability in case of cancellation of flat booking (Non-provision of service). The applicable provisions should be amended to permit such adjustment of GST in case of cancellation of transaction for purchase of constructed flats/premises, since the applicable GST would be paid on the subsequent sale/transfer of the same flat/premises.

Section 54(8)(c) of CGST Act permits refund of tax paid on supply which is not provided either wholly or partially. This refund is permitted in the case where invoice are not issued. The builders are obliged to issue the invoice on receipt of installments due. Builders may not be in a position to apply for refund under this section. Moreover, limitation period of 2 years is prescribed for refund, Developers will not be in a position to go for refund.

Representations and suggestions:

Section 34 of CGST Act be amended to allow to issue credit note on cancellation of flat to enable builders to adjust the tax refunded on cancellation against tax payable for the month in which such cancellation happens or in subsequent months.

It is suggested that a similar facility of adjustment of tax paid against future liability must also be made available in respect of flats booked under the pre-GST regime being cancelled post implementation of GST.

6. Tax on Advance Payment and Reversal of ITC on non-payment of consideration to vendors within 180 days:

Relevant provision:

<u>GST Regime</u>	<u>Service tax Regime</u>
<p>Tax on Advance Payment -</p> <p>The time of supply in case of services will be earliest of the following -</p> <p>(a) Date of issue of invoice or date of receipt of payment</p> <p>(b) Date of provision of services or date of receipt of payment</p> <p>(c) In cases other than (a) and (b) above, the date on which entered in the book of the recipient.</p> <p>In case of goods the liability to pay tax on advance payment towards goods have been removed vide Notification No. 66/2017 Central Tax dated 15.11.2017</p> <p>Reversal of ITC -</p> <p>2nd Proviso to Section 16(2) of CGST Act</p>	<p>Tax on Advance Payment</p> <p><i>“RULE 3. Determination of point of taxation. - For the purposes of these rules, unless otherwise provided, point of taxation’ shall be,-</i></p> <p>(a) <i>the time when the invoice for the service provided or agreed to be provided is issued :</i></p> <p><i>Provided that where the invoice is not issued within the time period specified in rule 4A of the Service Tax Rules, 1994, the point of taxation shall be the date of completion of provision of the service.</i></p> <p>(b) <i>in a case, where the person providing the service, receives a payment before the time specified in clause (a), the time, when he receives such payment, to the extent of such payment :”</i></p> <p>Reversal of ITC -</p>

<p>provides that where recipient fails to pay the supplier (or service provider) the value of supply along with tax payable thereon within 180 days from the date of issue of invoice an amount equal to ITC shall be added to output tax liability along with interest thereon.</p> <p>However, in terms of Rule 37(4) of CGST Rules, the registered person shall be allowed to re-avail the credit which was reversed due to non-payment of consideration on payment of the said amount</p>	<p>Second proviso to Rule 4(7) of Cenvat Credit Rules, 2004, provides that in case the payment of the value of input service and service tax paid or payable as indicated in the invoice, bill or, as the case may be, challan is not paid within three months of the date of the invoice, bill or challan, the service provider who has taken credit on such input service shall pay on amount equivalent to the CENVAT Credit availed on such input service. However on payment the person shall be allowed to avail the credit.</p>
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Concerns and issues:

- i. It is a normal practice in the Real Estate Industry to give mobilization advance to works contractor. This mobilization advance is for the procurement of material by the contractor and therefore the benefit of non-payment of tax towards advance for goods should also be extended to mobilization advance keeping in mind the purpose for which such advance is made. Further, it is also a known fact that the work undertaken by a works contractor such as civil contract continues for around 2-3 years to complete. Considering the provisions of Section 16 of the CGST, to the extent milestone has not been achieved by the contractor, the Developer will not be able to avail the credit and hence result in working capital blockage.
- ii. Similarly, considering the gestation period of a project, it is an industry practice to retain a fixed % of amount payable to the contractor in order to have adequate control over the work and timely completion of the milestones agreed. Under GST regime, vendor is obliged to pay GST on accrual basis and he discharges GST liability irrespective of realisation of consideration. As the Government has already realised tax on accrual basis, there is no justification in holding back the tax credit of the person acquiring such supplies on delay of stipulated period in payment to vendors. The credit period and delay in payment to the vendors are business exigencies and there is no justification for the Government to intervene in this area.

Further, such provisions unnecessarily complicate the record keeping of the supplier/service provider and also poses challenge for tax authorities to monitor such provisions.

Representations and suggestions:

- The relaxation from payment of tax on advance payment for goods should be extended to works contract services availed by the Developer considering the nature of transaction and reason for which the advance payment is made to the works contractor.

- In case GST is payable on advances, credit should be permitted immediately to the Developer.

7. Time of Supply for Developers

Relevant provision:

<u>GST Regime</u>	<u>Service tax Regime</u>
<p>The time of supply in case of services will be earliest of the following -</p> <p>(d) Date of issue of invoice or date of receipt of payment</p> <p>(e) Date of provision of services or date of receipt of payment</p> <p>(f) In cases other than (a) and (b) above, the date on which entered in the book of the recipient.</p>	<p><i>"RULE 3. Determination of point of taxation. - For the purposes of these rules, unless otherwise provided, 'point of taxation' shall be,-</i></p> <p><i>(a) the time when the invoice for the service provided or agreed to be provided is issued :</i></p> <p><i>Provided that where the invoice is not issued within the time period specified in rule 4A of the Service Tax Rules, 1994, the point of taxation shall be the date of completion of provision of the service.</i></p> <p><i>(b) in a case, where the person providing the service, receives a payment before the time specified in clause (a), the time, when he receives such payment, to the extent of such payment :"</i></p>

Concerns and Issues:

The service provided by the Developer qualify as a continuous supply of service considering the fact that the construction services are provided over a period of more than 3 months for which the payment is required to be made periodically. Therefore, the Developer defines the milestone in the agreement entered with the customer and accordingly raises the invoice. Based on the provisions of the GST Law, the time of supply in case of continuous supply of service will be the date on which the Developer raises the invoice / demand note. Practically even after the invoice / demand note is issued by the Developer, the customer does not pay the amount for a considerable time. However, the Developer is required to pay the tax as soon as the invoice is issued. Considering the average cost of a flat and the demands raised, such delays in payment by the customer results in a huge cash outflow in the form of GST for a developer.

Representation and Suggestions:

For construction service, GST should be payable on receipt of consideration from end customer and not on raising of invoice.

Alternatively, the liability to pay GST could arise on receipt of consideration or on 90 days from the date of raising of invoice, whichever is earlier.

Issues under GST for Real Estate Industry

Sr. No.	Issues	Description of Issues	Relief Sought
1	Land Deduction	<ul style="list-style-type: none"> 33% of sale value as deduction towards land does not represent the true value of land, especially for metro cities and other prime areas 	<ul style="list-style-type: none"> GST @12% with ITC and 1/3rd of sale value as land deduction Higher land deduction should be provided in respect of Metro cities i.e. @ 50% to 60%
2	GST on development rights/ long term lease	<ul style="list-style-type: none"> Land and sale of building (post OC) is excluded from GST under Schedule III entry 5 of CGST Act However, it is not clear if the following are excluded <ul style="list-style-type: none"> (a) Development Rights (DR) in Joint Development Agreement (JDA), Redevelopment Agreement with Societies, Transfer of Development Rights (TDR) (b) Long Term Lease (LTL) [Schedule II-Entry 2(a) of CGST Act] 	<ul style="list-style-type: none"> Clarification to be issued that no GST applicable in these cases
q3	Credit in respect of SRA buildings / rehabilitation buildings for existing members in a scheme of Redevelopment of Society	<ul style="list-style-type: none"> Developer constructs SRA buildings / Rehabilitation buildings and hands it over to the SRA / Society members for receipt of additional FSI. Construction of such SRA / Rehab buildings is an output service and hence not eligible as credit to the developer. GST on SRA / Rehab buildings is not reimbursed by the SRA authorities / Societies. Similar to land (not subject to GST), or development rights (which we believe are not subject to GST as per 2 above and even if taxable, credit is available to a developer), this is also a cost incurred towards construction of sale building) 	<ul style="list-style-type: none"> GST on construction of SRA buildings for slum dwellers and on rehab building for existing society members should be *Nil* rated If it is made taxable, GST paid on SRA / Rehab buildings must be eligible as credit to a developer
4	High GST on commercial premises	<ul style="list-style-type: none"> While credit is permitted for constructions of properties which are sold under-construction, no credit is permitted when such properties are intended to be given on lease. The only difference is in the method of collection of revenue i.e. upfront in case of sale model and over a period of time in case of lease model 	<ul style="list-style-type: none"> Since the GST is already paid during construction of premises, reduce the rate of GST to 5%

5	Adjustment for Cancellation of Flat	<ul style="list-style-type: none"> • There is no provision for issuance of credit note in case of non-provision of service (Section 34 of CGST Act) • There is no provision for refund of GST paid on each milestone by the Developer (Section 54 of CGST Act) as he issues invoices • Extremely tedious process in case of refund for flat booked in pre-GST and cancelled post GST 	<ul style="list-style-type: none"> • Permit issuance of credit note in these cases • Adjustment of tax paid earlier against output liability
6	Tax on advance payment	<ul style="list-style-type: none"> • No GST is payable for advance on goods • GST is payable on advance for services • In construction industry, advances are given to contractors for procurement of material. However, since works contract is deemed to be services, advance paid to contractors is subject to GST and credit is available only when services are rendered. 	<ul style="list-style-type: none"> • No GST should be payable on advances for works contract • If GST is payable, credit should be available to the developer on payment of such advances
7	Time of Supply for Developers	<ul style="list-style-type: none"> • There is lot of time gap between raising of demand to end customer and receipt of consideration • As per current provisions, GST is payable on accrual or receipt, whichever is earlier • This results into blockage of large working capital 	<ul style="list-style-type: none"> • For construction service, GST should be payable on receipt of consideration from end customer and not on accrual basis
8	Higher tax on real estate under GST	<ul style="list-style-type: none"> • Effective tax rate under GST has gone up as compared to the pre-GST regime • Earlier it was 5.5% (4.5% Service tax and 1% VAT) with additional 2.5% tax cost of non-creditable taxes on goods. • In GST the effective tax rate is 12% (18% less 33% abatement). 	<ul style="list-style-type: none"> • The GST rate on real estate should be reduced to 12% with 33% abatement towards land so that the effective rate is 8% which is at par with the rates under the pre-GST regime.

Bombay High Court

Chheda Housing Development ... vs Bibijan Shaikh Farid And Ors. on 15 February, 2007

Equivalent citations: 2007 (3) MhLj 402

Author: F Rebello

Bench: F Rebello, V Tahilramani

JUDGMENT F.I. Rebello, J.

1. This an Appeal by the Plaintiff. Along with the Appeal respondent Nos. 1 to 9 and Respondent Nos. 10 and 11 have also filed cross objections. All of them are being heard and finally disposed of by this judgment.

2. The Appeal is preferred by the Appellant who is the original plaintiff. The respondent Nos. 1 to 9 are the original defendant Nos. 1 to 9, Respondent No. 10 is the original defendant No. 10, respondent No. 11 is the original defendant No. 11 and respondent Nos. 12 and 13 are the original defendant Nos. 12 and 13. The respondent Nos. 1 to 9 are the legal heirs of one late Shaikh Farid Shaikh Kalander, who had filed a suit in respect of the suit property and other properties against Behramjee Jeejeebhoy Pvt. Ltd. being Suit No. 2105 of 1989, claiming adverse possession against Behramjee Jeejeebhoy Pvt. Ltd. Consent terms came to be filed on 22nd June, 1992 under which a declaration was granted declaring late Shri Shaikh Farid Shaikh Kalandar to be the owner of the property. The consent decree came to be registered on 24th August, 2000. It is the case of the Appellants that on 20th April, 2004 there was a Memorandum of Joint development entered into between 10th respondent and the appellants for joint development of the property which was identified as a specific part of Plot C-2 in terms of the lay out scheme/Sub Division sanctioned under reference No. C/Office-7A/Sub Division/SR/3496 dated 15th October, 2002. A certificate had been issued by the Advocates and Solicitors for respondent No. 10 that the title in the said property was in late Shaikh Farid Shaikh Kalandar and respondent No. 10. Respondent NO.10 in respect of the cause of action against respondent Nos. 1 to 9 filed a suit being Suit No. 2180 of 2004, for various reliefs amongst others for an injunction against respondent Nos. 1 to 9 from causing any obstruction or hindrance or interfering with the right of the respondent No. 10 from exercising the power under the Power of Attorney. The plaint was amended by adding respondent No. 11 as defendant. The suit came to be decreed on 10th March, 2005. The Appellants contend that another certificate was issued on 23rd March, 2005 by the Advocate for Respondent No. 10, certifying that the certificate of title dated 16th March, 2004 issued by the Advocates was still good and the said property was free from all encumbrances and reasonable doubts.

At this stage it may be pointed out from the pleadings that the case of Respondent Nos. 10 and 11 is that there was an agreement entered into between the respondent Nos. 10 and 11 on 22nd January, 2004 whereby the respondent NO.11 was entrusted the right to develop the larger property. It may also be added that in respect of the sub division plots identified as sub plot No. A1, B and C1 were to be developed by one M/s.R.N.A. Builders. An agreement came to be entered into

on 24th March, 2005 between the respondent Nos. 1 to 9 and 10th respondent on the one hand and the appellants on the other whereby development rights were granted to the Appellants in respect of 2,00,000 sq.ft. of plot C-2. One of the Clauses in the Agreement was that the area admeasuring 2.00 lakh sq.ft. to be built was by utilising the FSI of 1.00 i.e. 1.00 lakh sq.ft. and by respondent Nos. 1 to 10 making available TDR to the extent of balance 1.00 lakh sq.ft. which would be available and/or generated from the larger portion of the property or by acquiring slum TDR from the market if required. Pursuant to this agreement the joint development agreement of 28th April, 2004 was returned back as cancelled. On the same day respondent Nos. 1 to 10 issued letter of confirmation that it authorised respondent No. 10 to initiate and execute development agreement of lakh sq.ft. on Plot C-2. The Appellants paid to respondent Nos. 1 to 11 a sum of Rs. 2,60,00,000/-, the receipt whereof is acknowledged by respondent Nos. 1 to 10. Further part consideration of Rs. 40.00 lakhs was to be paid within 15 days from the owners obtaining Plinth Commencement Certificate. The balance amount was to be paid in 5 equal quarterly instalments and the last instalment was to be Rs. 1.35 crore. A sum of Rs. 5.00 lakhs was to be paid on completion of transaction and on execution of vesting documents including Conveyance in favour of the Society/Societies, Organisations as may be formed and registered by the Developers of premises in the building/s to be constructed by the Developers under the Agreement. The possession was given to the appellant by letter dated 24th March, 2005 and recorded. A supplemental agreement was entered into on 25th March, 2005 whereby the price was increased to Rs. 3.35 crores.

Pursuant to a public notice on 14th May, 2005 a claim was filed by the 11th respondent. The Respondent No. 11 is a company incorporated under the [Indian Companies Act](#) and whose Directors are the members of the family of respondent No. 10. Pursuant to this, correspondence was exchanged on one hand between the Appellants and Respondent No. 1 to 10. As Respondent Nos. 11, 12 and 13 were developing on an area which was to be provided as access to Plot No. C-1, a notice was also given to them. A suit came to be filed in which Notice of Motion was taken out, being Notice of Motion No. 1915 of 2005 for ad-interim relief. The impugned order came to be passed on 1st September, 2005.

3. The defence of Respondent Nos. 10 is that there were two immovable properties belonging to respondent Nos. 1 to 10, one at Goregaon and the other the suit property at Kandivali. Respondent No. 10 approached the appellants for financial assistance for development the property at Goregaon to the tune of Rs. 5.00 crores. Accordingly, two allotment letters dated 24th March, 2004 and 20th April, 2004 were issued to secure part payment of Rs. 2.50 crores which had to be made by the appellants. It was the understanding that payment was to be made against these two allotment letters. The Appellants, however, desired that there should be a proper security as they are investing a considerable sum and the appellants sought security of 8.00 lakhs sq.ft. of FSI of suit property and that is how the joint development agreement in respect of Kandivali property was executed, as the Appellants apprehended that on account of several tenants and occupants in Goregaon property, the development proposal may not be feasible and in those circumstances the property would not constitute an adequate security. It is in these circumstances a security was given of 8.00 lakhs which was

subsequently was reduced, as the appellants failed to bring in further sum of Rs. 2.50 crores. The security was reduced to 2.00 lakh sq.ft. In the alternative it was submitted that the Agreement was adjudicated and stamped as a Development Agreement and the law is settled that Development Agreement cannot be specifically enforced. The respondent No. 11 have adopted the stand of the respondent No. 10. It was pleaded that there is suppression of material facts and that the suit as filed is not maintainable. The Appellants were aware of the Agreement entered into between the respondent Nos. 10 and 11 on 22nd January, 2004 and it is not open to the Appellants to contend that it was only noticed during the search of the proceedings of the City Civil Court. The Agreement between respondent Nos. 10 and Respondent No. 11 are prior agreements and must take precedence to the Agreement between the appellants and respondent Nos. 1 to 10. Respondent No. 11 made payment to respondent No. 10 as per Agreement dated 22nd February, 2004 and development work was in progress. The stand of respondent Nos. 12 to 13 is that the appellants have an alternative access in terms of the development plan of the property and as such the relief as prayed for could not be granted. Respondent Nos. 1 to 9 adopted the stand of respondent No. 10.

4. The learned Single Judge held, relying on the Agreement that the area agreed to be sold was part of Plot C-2. based on the sanctioned lay out. The learned single Judge also held that at the prima facie stage it was not possible to hold whether the Agreement is a Development Agreement. The learned single Judge held that the Agreement would have to be read as a whole and material will have to be considered which could only be done at the trial of the suit. The contention urged that in view of [Section 14](#) of the Specific Relief Act, the Agreement could not be enforced was rejected by the learned Judge by holding that the issue can only be decided at the final hearing of the suit. The various other contentions urged in support of the contention that the Agreement was a development agreement were rejected on the ground that the document would have to be construed by considering the other material on record and the evidence. After so holding and on considering the documentary evidence, the learned single Judge held that he was satisfied that a prima facie case has been made out. The learned Judge thereafter was pleased to make the Motion absolute in the following terms:

Defendants, their servants, agents are restrained by an order and injunction from in any manner disposing of or alienating and encumbering an area admeasuring 2 lakh sq.ft. on Plot No. C-2 more particularly described in second schedule to the Agreement dated 24th March, 2005 as also utilising benefit of TDR/DRC generated by defendant Nos. 1 to so as to adversely affect Plaintiffs right to construct and sell the said area in accordance with the agreement Exh.F-4 to the Plaint.

After this order was pronounced certain additional submissions were made and the learned Judge thereafter was pleased to further order as under:

46. In my view, once the injuction/linterlocutory relief is to protect right of Plaintiffs under this agreement, plaintiff cannot get anything more than what is the entitlement under the agreement. Hence, the defendant Nos. 1 to 11, their

servants, agents are restrained by an order and injunction from in any manner disposing of or alienating the area of 2 lakh sq.ft. to be used and utilised by construction of building as shown on plan annexed as Annexure "B" to the agreement, available as free sale on the property being part of property being C-2 shown shaded in the same plan and more particularly described in the Agreement so as not to adversely affect plaintiffs right under the same. The injunction granted in the foregoing paragraphs be read in this light and the clause in the Agreement reproduced above.

5. The Appellants are aggrieved by these observations in para.46 of the order, which according to them has resulted in denying them protections for their right of development of additional 1,00,000 sq.ft. by way of TDR on the suit plot. They are also aggrieved by the non-grant of the injunction in respect of the suit way.

6. There was a delay in preferring the Appeal, which on a Motion taken out being Notice of Motion No. 3537 of 2005 the delay was condoned. It is only after this, did the respondent Nos. 1 to 9 and 10 and 11 file their cross objections.

7. On behalf of the Appellants the issues raised and submissions made are as under:

(a) After having held, that the Plaintiffs have made out a prima facie case and having made the notice of Motion absolute in terms as mentioned in para.42 of the judgment, could the learned Judge clarify the order by adding a rider at the end of para.46 of the judgment which reads as under:

The injunction granted in the foregoing paragraphs be read in this light and the clause in the Agreement reproduced above" which rider has the effect of nullifying the protection to the appellants and thereby permitting the respondents to deal with the TDR to the extent which could be made available by the respondents to the appellants by acquiring or purchasing slum TDR from the open market free from all encumbrances, claims and dues.

(b) Whether inspite of the specific provision in the agreement granting to the appellants right of way through the Plot No. 2A to Plot A-2 of the respondents property the relief in respect thereof should have been refused.

8. On the other hand on behalf of the respondent No. 10 it is contended that the Agreement was an agreement for security and in the alternative is a development agreement and consequently the appellants are not entitled to specific performance of the agreement.

On behalf of respondent No. 11 it is submitted that the rights of the respondent No. 11 were antecedent/prior to the rights of the appellants as the agreement entered into between the respondent No. 11 and respondent No. 10 was dated 22nd January, 2004 prior to the agreement between the appellants and respondent Nos. 1 to 10 which was on 20th April, 2004 and further that the agreement dated 22nd January, 2004 had been acted upon and that the

agreement between the appellants and respondent Nos. 1 to 10 was an agreement for development and consequently could not be specifically enforced.

On behalf of the respondent Nos. 1 to 9 the argument advanced on behalf of the respondent No. 10 has been adopted.

9. On behalf of respondent No. 12 and 13 it is contended that the issue relating to right of way was not seriously pressed or argued or placed for consideration before the learned single Judge. At any rate, it is submitted that the appellants are claiming right on plot C-2 which has an access in terms of the approved plan. In these circumstances the Appellants on the ground that there was an existing right of way can claim no right as pursuant to the approved lay out plan it is the plan as approved, which has make provided for access to the various sub divisions.

10. From the above submissions of the parties the principal contentions which have to be decided are:

(1) Whether the appellants have made out a prima facie case that the agreement relied upon was an agreement for sale and not an agreement for security and/or alternatively an agreement for development which could not be specifically performed. If prima facie case is made out, for specific performance then whether the appellants are entitled to an injunction to restrain the respondents from alienating, transferring or using the TDR available from the suit plot and the remaining plot pending the hearing and final disposal of the suit.

(2) Whether the appellants have made out a case for grant of injunction in what is described as the existing right of way, after a lay out plan has been approved on 15th October, 2002 and an access has been provided to Plot C-2 to the D.P. Road.

11. We shall first deal with the contention as to whether the appellants have made out a prima facie case. In this context prima facie, a finding will have to be first recorded, that there is an agreement which can be specifically performed. It is only on arriving at this conclusion, can it be said that the appellants have made out a prima facie case warranting grant of interim injunction subject to the other requirements of balance of convenience and irreparable loss and injury. The learned Single Judge on a consideration of the various documents including the agreement has come to the prima facie finding that the agreement is an agreement to sell, which can be specifically enforced. The respondents, therefore, will have to make out a case that the finding by the learned single Judge is perverse. The view taken by the learned trial Court, ordinarily will have to be upheld, if it was a view capable of being taken, irrespective of the Appellate Court arriving at a conclusion that another view is probable which is a better view and as long as the findings based on which the view is taken are not perverse.

Before we answer the issue, let us consider the judgments cited at the bar for the proposition as to which contract can be specifically enforced. Let us first deal with the judgment relied upon by the appellants. In the case of Vallammal Rangarao Ramachar v. Muthukumaraswamy Gounder and Anr. , the Supreme Court noted, that there were interpolations of material nature in the document and no

explanation was offered on that count. The Appeal preferred by one of the appellants (Defendant No. 2) was dismissed. The Court held that the motivated interpolation in a solemn document completely vitiates the document. In the other Appeal which was pending, the Court noted that the High Court after evaluating the evidence recorded a conclusion that the plaintiff was always ready and willing to perform his part of the agreement and consequently found no reason to differ from the view taken by the High Court.

At this stage we may note the judgment, reliance on which placed by the Counsel for respondent No. 11 namely [Bharat Barrel & Drum Mfg. Co. Ltd. v. Hindustan Petroleum Corporation Ltd. and Ors.](#) AIR 1998 Bom.170. The issue before the Division Bench of this Court was consideration of explanation to [Section 16\(c\)](#) of the Specific Relief Act. That explanation requires that the plaintiff must aver performance of or readiness and willingness to perform the contract according to its true construction. The learned Division Bench held, that the correct interpretation would be, if the plaintiff avers his readiness and willingness to perform the contract according to its true construction by the Court. The Court also noted that in an ordinary suit for specific performance where the parties are ad idem about the interpretation of the agreement it is not necessary that the plaintiff should adopt any particular set off words to indicate that he was and is ready and willing to perform the agreement. The Court on the facts of that case was considering not an ordinary suit for specific performance, but a case where parties were not at ad idem about the interpretation of an agreement. The ratio of the judgment therefore is that parties must aver readiness and willingness to perform the contract according to the interpretation the Court places upon it in a case where there is a dispute about its true interpretation. The ratio of that judgment will, therefore,, have to be applied in a case where there is a dispute as to the true interpretation of a document for agreement to sell. The , parties must aver in such a case that they are ready and willing, to perform the contract as the Court interpreted by the Court. In the instant case firstly we are at an interim stage. It is still open to the plaintiffs to amend the plaint if the circumstances so warrant. Secondly there is no dispute about the terms of the contract. The dispute is whether it is an agreement to sell or a security agreement or alternatively development agreement.

In an unreported judgment in *Mrs. Pallavi R. Karani v. Dadhawala Builders Pvt. Ltd. and Ors.* in Appeal No. 784 of 1991 in Notice of Motion No. 2743 of 1990 in Suit No. 3067 of 1990 a learned Division Bench after considering the earlier judgments of this Court, noted that the order of 7th March, 1988 in Appeal No. 285 of 1988 in Notice of Motion No. 76 of 1987 cannot be read as laying down the law that specific performance for development can never be granted or interim relief in such a suit should always be refused. In Notice of Motion No. 763 of 1989 in Suit No. 844 of 1989 *Ghori & Khatri Builders (Regd) v. Iqbal Hussein Usman Fakir Mohamed Mansoori and Ors.* decided on February 8, 1991 a learned single Judge of this Court relying on the judgment in Appeal No. 285 of 1988 in Notice of Motion No. 76 of 1987 in Suit No. 3419 of 1986 held on the facts there, that the agreement was a development agreement and accordingly refused to grant injunction. In the Appeal which was preferred, being Appeal No. 218 of 1991 in Notice of Motion No. 763 of 1989 in Suit No. 844 of 1989, the Appellate Bench by

order dated March, 9, 1993 held that the contention advanced was that it was a finance agreement. The learned Appellate Bench did not agree with the view of the learned single Judge and held that the Agreement would indicate that the respondents therein had created interest in the land and felt that the Agreement was clearly for development of the property and allowed the Appeal. Next reliance was placed in the case of [Volition Investment Pvt. Ltd. v. Mrs. Madhuri Jitendra Mashroo](#) and etc. . On the facts there the Court held, that the Agreement to be an agreement of sale and not an agreement for development.

12. On the other hand on behalf of the respondents their learned Counsel relied on the unreported judgment in the case of [Asso Rihalani v. Mr. Wilfred DSouza and Ors.](#) dated 18th January, 1988 and the order in Notice of Motion No. 76 of 1987 in Suit No. 3419 of 1986 and the Appeal from the Appellate Bench and the judgment in the case of [Lokhandwala Estates & Development Company Ltd. and Anr. v. Goregaon Siddharth Nagar Sahakari Griha Nirman Sanstha Ltd.](#) dated 27th September, 1996 and the judgment in [Gurudev Developers v. Kurla Konkan Niwas Co-operative Housing Society](#) 1999 (supp.) Bom. C.R. 257 and another judgment in [The Peerless General Finance & Investment Co. Ltd. v. Swan Mills Limited and Ors.](#) , to contend that a development agreement cannot be enforced. All these judgments on the facts of those cases, have taken a view that a development agreement cannot be specifically enforced. Reliance is also placed in the case of [Union Construction Co. \(Private Ltd.\) v. Chief Engineer, Eastern Command, Lucknow and Anr.](#) AIER 1960 Allahabad 72. In that case the issue was whether a building or engineering contract could be specifically performed considering [Section 12\(c\)](#) of the Specific Relief Act. The Court held that compensation in money would be adequate remedy. In [Dave Ramshankar Jivatram v. Bai Kailasgauri](#) , what was in consideration was the explanation to [Section 10](#). The High Court was dealing with a Second Appeal and not a matter arising from an interim relief. [Section 10](#) provides that specific performance of a contract of immovable property should normally be granted as a rule. However, the explanation sets out that specific performance need not be granted if the contrary is proved, meaning thereby that compensation in money is adequate. In other words in a case of transfer of immovable property, the normal rule is that if there is a breach of contract to transfer the immovable property that cannot be adequately relieved by compensation in money unless the contrary is proved.

13. In our opinion from a conspectus of these judgments, what is relevant would be the facts of each case and the agreement under consideration. Agreements considering what is discussed, amongst others, could be:

- (a) An Agreement only entrusting construction work to a party for consideration;
- (b) An Agreement for entrusting the work of development to a party with added rights to sell the constructed portion to flat purchasers, who would be forming a Co-operative Housing Society to which society, the owner of the land, is obliged to convey the constructed portion as also the land beneath construction on account of statutory requirements.
- (c) A normal agreement for sale of an immovable property.

An Agreement of the first type normally is not enforceable as compensation in money is an adequate remedy. An Agreement of the third type would normally be specifically enforceable unless the contrary is proved. A mere agreement for development, which creates no interest in the land would not be specifically enforced.

We are however dealing with a case of the second type. Courts for construing such a contract in this State will have to take into consideration, the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and [Transfer](#)) Act, 1963 (hereinafter referred to as the Act, 1963 apart from the [Specific Relief Act](#). Under that Act, a local Act, there is an obligation cast on the owners of the land to convey not only the constructed portion but also his interest in the land beneath the construction. [Under the Act](#) an owner of the land who causes the construction to be put up becomes the promoter. Such construction can be put up by a developer or builder, who in turn sells the constructed portions to various persons by entering into Agreements. These provisions, in our opinion would be relevant in determining the true character of the document. Can such a contract be specifically enforced. Let us, therefore, consider some of the arguments advanced by the respondents to contend that the agreement is a development agreement. Reliance was placed by the 10th Respondent on Clause 6 of the Agreement to contend that no specific performance can be claimed and that payment of interest is sufficient remedy. In our opinion, such a contention is misplaced. The Clause, correctly construed prima facie would be a clause for liquidated damages in addition to specific performance. The other contention is that, considering the agreement was stamped and stamp duty paid as a Development Agreement and it must be so held. In our opinion, mere payment of stamp duty on an instrument will not change or alter the nature of the Agreement. The Agreement will have to be read considering its terms. Reliance is placed on the Judgment in [The Godhra Electricity Co. Ltd. and Anr. v. The State of Gujarat and Anr.](#) . The ratio of that judgment is that in a case of an ambiguous instrument, there is no reason why subsequent interpreting statement should be inadmissible and that extrinsic evidence to determine the effect of an instrument is permissible where there remains a doubt as to its true meaning and evidence of the acts done under it, is a guide to the intention of the parties, particularly, when acts are done shortly after the date of the instrument. In our opinion the learned Single Judge has construed the various terms of the agreement and the other material on record and at the prima facie stage has come to the conclusion that the Agreement can be specifically performed. An Appellate Court, more so a Court considering an interim order which involves exercise of discretion normally will not interfere with the finding of fact recorded by the trial Court and the exercise of discretion unless the finding is perverse. Nothing has been brought on record to hold that the findings are perverse. The document on the face of it, cannot be an agreement for security. It can only be construed as an Agreement to sell or a development agreement. In our opinion in this case, the finding recorded by the learned Single Judge was a finding eminently possible on the material on record. We are, therefore, clearly of the opinion that the Agreement prima facie is an agreement which can be specifically enforced and consequently the Appellants have made

out a prima facie case. The other predicates for grant of an injunction will be answered in the discussion that follows.

14. We then come to the issue of the clarification to the order issued by the learned Single Judge. The crux of the issue is, whether after having come to the conclusion that the Agreement could be specifically enforced, the learned single Judge could have in so far as FSI/TDR clarified the earlier part of the order. It is no doubt true that the clause in the Agreement provides that the Appellants will purchase from the owners the right to F.S.I. in respect of an area of 2,00,000 sq.ft. area to be used and utilised by construction of the buildings free from all encumbrances and as available on the property being part of Plot No. C-2 shown shaded in green colour on plan "B" by use of the FSI available in respect of Plot No. C-2 and potentiality of benefit of TDR by whatever name called as generated or to be generated and created by owners from and out of other portion of the entire property being subject to reservations of D.P. Road, P.G., etc., and/or to be acquired by purchase of Slum TDR, by the owners at their costs from the open market, free from all encumbrances claims and demands at or for the consideration of Rs. 500/-per sq.ft. (Built up area). From this, what emerges is firstly that the FSI available from the suit land on which the buildings are being put up can be used and balance to be supplied from the remaining property or to be supplied by purchase of Slum TDR. The expression TDR, is Transfer of Development Right. This enables the FSI to be used on any other plot of land which is generated from some other plot and can be used in terms of the D.C. Regulation in force.

15. The question is whether on account of the term in the clause which permits acquisition of slum TDR the Appellants in so far as the additional F.S.I.is concerned, are not entitled for an injunction to that extent. An immovable property under the [General Clauses Act, 1897](#) under [Section 3\(26\)](#) has been defined as under:

(26). "immovable property" shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth." If, therefore, any benefit arises out of the land, then it is immovable property. Considering [Section 10](#) of the Specific Relief Act, such a benefit can be specifically enforced unless the respondents establish that compensation in money would be an adequate relief.

Can FSI/TDR be said to be a benefit arising from the land. Before answering that issue We may refer to some judgments for that purpose. In *Sikandar and Ors. v. Bahadur and Ors.* XXVII Indian Law Reporter, 462, a Division Bench of the Allahabad High Court held that right to collect market dues upon a given piece of land is a benefit arising out of land within the meaning of Section 3 of the Indian Registration Act, 1877. A lease, therefore, of such right for a period of more than one year must be made by registered instrument. A Division Bench of the Oudh High Court in *Ram Jiawan and Anr. v. Hanuman Prasad and Ors.* AIR 1940 Oudh 409 also held, that bazar dues, constitute a benefit arising out of the land and therefore a lease of bazar dues is a lease of immovable property. A similar view has been taken by another Division Bench of the Allahabad High Court in [Smt.](#)

Dropadi Devi v. Ram Das and Ors. on a consideration of **Section 3(26)** of General Clauses Act. From these judgments what appears is that a benefit arising from the land is immovable property. FSI/TDR being a benefit arising from the land, consequently must be held to be immovable property and an Agreement for use of TDR consequently can be specifically enforced, unless it is established that compensation in money would be an adequate relief.

16. In the instant case as we have noted, FSI from the Plot is to be used, but if it is not sufficient, then from the other portion of the entire property. The question is whether the latter part of Clause 2(a). of the Agreement which provides "and/or to be acquired and purchased Slum TDR by the Owners at their costs from open market" would have the effect of denying to the appellants, injunction as prayed for. When the Court grants a relief it must be in a position to enforce the same. In so far as identifiable land is concerned, it is always possible for the Court to enforce the relief. If the respondents contention is considered, then the relief would not be by way of enforcing the right on the land, but calling on the respondents by way of mandatory injunction to buy slum TDR, whether at the relevant time the respondents are in a financial position to purchase slum TDR or whether Slum TDR would be available or whether a person holding slum TDR is agreeable to sell the same to Respondent Nos. 1 to 10. The escalating cost of TDR would be another factor. In our opinion, the Appellant in the first instance have a right to use F.S.I. of the property and the S.F.I. by whatever name of the reservations of D.P. Road and/or P.G. of the entire property to the extent of 2,00,000 sq.ft. in terms of the agreements. To that extent the learned single Judge clearly erred in law in clarifying the order. Specific performance can be granted of the land or interest in the land, belonging to a person who has agreed to sell the land with interest therein. If the person is not the owner or has no interest in the land agreed to be sold or transferred there is no question of granting specific performance. Slum TDR is not interest on the owners property. It is F.S.I. of some other land which is transferable in terms of D.C. Regulations. TDR may be owned by the holder but not the land from which TDR was generated. It can only be used on the owners property in terms of D.C. Regulation. Therefore, it is the F.S.I. of the entire property, including of R.G. and D.P. Road, which alone in terms of the Agreement, prima facie which can be specifically enforced. In such circumstances irreparable loss and injury would be occasioned to the Appellants, if the injunction is not granted. The balance of convenience is in their favour as compensation in money in such cases, would not be adequate. To that extent, we are clearly of the opinion, that the clarification given in para.46 of the impugned order is liable to be set aside and we accordingly do so.

17. That leaves us with the second contention, as to whether the Appellants are entitled to right of way as claimed in the Agreement and in the suit. In the instant case this is not an easement of necessity nor an easement by prescription. The only term of the contract was to provide an access. The plot has been sub-divided and the sub-division sanctioned by the Planning Authority. The Appellants are entitled to develop a part of the plot C-2 in terms of the Agreement. Plot No. C-2 has an independent access in terms of the sanctioned sub division. Even in a case of easement of prescription or necessity, the owner can always on the facts of a

case alter the access on the same land as long as it is provided on the same property and is easily accessible and does not have any impediments. In our opinion the learned Single Judge prima facie, on the facts, was right in not granting the injunction . We are clearly of the opinion that the Appellants have failed to make out a case irreparable loss or injury at the interim stage, in so far as access is concerned.

18. In the light of what we have set out above, we pass the following order:

(i) Appeal is partly allowed to the extent that we set aside para.46 of the impugned order of the learned Single Judge.

(ii) The Cross Objections are rejected.

(iii) In the circumstances of the case each party to bear their own costs.

IN THE HIGH COURT OF DELHI
Badar Durrez Ahmed and Rajiv Shakdher, JJ.

HOME SOLUTION RETAIL INDIA LTD.

Versus

UNION OF INDIA

W.P. (C) No. 1659 of 2008, with W.P. (C) Nos. 4130-4131, 4749, 5036, 5643, 5976, 5978, 6033, 6734, 6744, 6993, 7004, 7122, 7164, 7212, 7654, 7664, 7722-7723, 8538, 7964 and 8771 of 2008, decided on 18-4-2009

Renting of Immovable Property not liable to Service tax but services in relation to Renting of Immovable Property taxable - Service tax being a value added tax, value addition absent in renting of immovable property for use in the course or furtherance of business or commerce - Renting of immovable property by itself cannot be regarded as a service - Renting out of immovable property by itself for business or commercial use not constitutes a taxable service as per Section 65(105)(zzzz) of Finance Act, 1994 - Any service connected with renting of immovable property covered and exigible to Service tax - Other services such as air conditioning service provided along with renting of immovable property covered - Renting of immovable property as such not liable to Service tax - Services in relation to such renting alone liable - Sections 65(90a) and 65(105)(zzzz) *ibid.* - In so far as renting of immovable property for use in the course or furtherance of business or commerce is concerned, we are unable to discern any value addition. We hold that Section 65(105)(zzzz) *ibid* does not in terms entail that the renting out of immovable property for use in the course or furtherance of business or commerce would by itself constitute a taxable service and be exigible to Service tax. [paras 35, 36]

Renting of Immovable Property service - Exemption notification and C.B.E. & C. Circular - Validity of exemption Notification No. 24/2007-S.T., dated 22-5-2007 and C.B.E. & C. Circular No. 98/1/2008-S.T., dated 4-1-2008 - Service tax is a value added tax - Renting of immovable property for use in course or furtherance of business or commerce by itself neither a service nor a taxable service - Interpretation placed by impugned notification and circular on Section 65(105)(zzzz) of Finance Act, 1994 not correct and same are ultra vires the Act *ibid* in so far as levy of Service tax is authorized on renting of immovable property per se and hence, set aside - Alternative plea on legislative competence of Parliament not examined - Section 65(105)(zzzz) *ibid.* [paras 1, 36]

Taxable services - Statutory provisions - Interpretation of - Section 65(105)(zzzz) of Finance Act, 1994 referring to service provided or to be provided to any person, by any other person in relation to renting of immovable property for use in the course or furtherance of business or commerce - Service provided to 'A' by 'B' in relation to 'C' covered under taxable service in Finance Act, 1994 where 'A' is service recipient, 'B' is service provider and 'C' is subject matter - 'C' can either be a service such as dry cleaning, hair dressing or not a service by itself, such as real estate - Expression "in relation to" would have different meanings depending upon whether 'C' is a service or not - 'In relation to' means the service 'C' as well as any other service having connection with the service 'C' - Expression "in relation to" refers to only some service having connection with 'C' if 'C' is not a service and this not implies that 'C' by itself is a service - Sections 65(105)(zf), 65(105)(zq) and 65(105) (zzzz) *ibid.* [para 34]

Taxable services - Renting of Immovable Property service vis-a-vis Mandap Keeper service - Service provided by Mandap keeper entirely different in nature to the service under Section 65(105)(zzzz) of Finance Act, 1994 - Service of Mandap keeper not involves transfer of movable or immovable property - Right to ownership not transferred but right of possession transferred in renting of immovable property - Situations and activities under the two services different - Sections 65(105)(m) and 65(105)(zzzz) *ibid.* [para 32]

Interpretation of tax statutes - Service tax - Nature of - Service tax is a value added tax - Service tax is a tax on valued addition provided by a service provider - Service tax must have connection with a service and there must be

some value addition by that service- If there is no value addition, then there is no service - Section 66 of Finance Act, 1994. [para 34]

Interpretation of tax statutes - Finance Act, 1994 - Use of expression "in relation to" in Service tax provisions - Expression "in relation to" may be of widest amplitude but it has been used in said Act as per its context - Sometimes "in relation to" includes subject matter following it and on other occasions, it would not - Section 65(105) ibid. - In the case of the service of dry cleaning, the expression "in relation to dry cleaning" also has reference to the very service of dry cleaning. On the other hand, the service referred to in Section 65(105)(v)ibid, which refers to a service provided by a real estate agent "in relation to real estate", does not, obviously, include the subject matter of service. This is so because real estate by itself cannot by any stretch of imagination be regarded as a service. [para 34]

Petitions allowed

CASES CITED

All India Federation of Tax Practitioners v. Union of India — [2007 \(7\) S.T.R. 625](#) (S.C.) — *Relied on* ...[Paras 12, 15, 19, 29, 33]
Bharat Sanchar Nigam Ltd. v. Union of India — [2006 \(2\) S.T.R. 161](#) (S.C.) — *Referred*.....[Para 13]
Commissioner of Income-tax v. B.C. Srinivasa Shetty — (1981) 2 SCC 460 — *Referred*.....[Para 14]
Doypack Systems Pvt. Ltd. v. Union of India — (1998) 2 SCC 299 — *Referred*..... [Paras 12, 22, 29]
His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala — (1973) 4 SCC 225 — *Referred*.....[Para 27]
Lucknow Development Authority v. M.K. Gupta — (1994) 1 SCC 243 — *Referred*[Para 23]
N.S. Nayak and Sons v. State of Goa — (2003) 6 SCC 56 — *Referred*.....[Para 24]
T.N. Kalyana Mandapam Association v. Union of India — [2006 \(3\) S.T.R. 260](#) (S.C.) = [2004 \(167\) E.L.T. 3](#) (S.C.) — **Distinguished**.....[Paras 12, 19, 25, 26, 29, 32]
Union of India v. Inter Continental (India) — [2008 \(226\) E.L.T. 16](#) (S.C.) — *Referred*.....[Para 11]

DEPARTMENTAL CLARIFICATION CITED

C.B.E. & C. Circular No. 98/1/2008-ST, dated 4-1-2008..... [Paras 1, 2, 11]

REPRESENTED BY : S/Shri S. Ganesh, Sr. Advocate with Birendra Sarat, Ameet Naik, Rishi Agarwal, Ms Hemangi Abhyankar, Jayant Bhushan, Sr. Advocate with Shamik Sanjanwala, Tapas Ram Mishra, Shambhavi Sinha, Dr. A.M. Singhvi, Sr. Advocate with Mahesh Agarwal, Rishi Agrawala, Bhagvan Swarup Shukla, Rajeev Kumar, Akshay Ringe, Ms. Rohma Hameed, Ankit Shah and Jaiveer Shergill, S. Sukumaran, B. Karunakaran, Ms Saanjh N. Purohit, Ms. Anshul Singh. N.S. Arora, Ms Aradhana Patra, Sanjay Goswami with H. K. Balajee, J.K. Mittal with Sunil Upadhyay, Ms Rupal Bhatia for Alishan Naqvee, S.S. Pandit, Raman Kapur, A.R. Madhav Rao with Pawan Shree Agrawal and Tarun Jain, R.D. Jolly with Ms. Rani Kiyala, for the Petitioners.

S/Shri P.P. Malhotra, ASG with S.K. Dubey with Deepak Kumar, K.B. Thakur, Mukesh Anand with Shailesh Tiwari, Dalip Mehra Vivek Sibal with Prabal Bagchi, Amrendra Kr. Singh, S.C. Rana, S.K. Nanda for Rakesh Tiku, Rohit Kumar, Ajay Kapur with Ms Savita Rajdor, Ajay Kumar, Ajay Kumar, Ms Anjana Gosain, R.S. Mathur, Prakash Kumar, Pradeep Aggarwal with Deep Dhamija, Ms Sonia Mathur with Sushil Kr. Dubey and Amit Bhagat with Pulkit Gupta, Ankit Jain, Rajesh Mahna with Ram, Tarun Gulati with Tushar Jarwal, Raviv Tyagi with Ms Chanchal Biswal, Udit Kumar and S.S. Pandit, for the Respondent.

[Judgment per : Badar Durrez Ahmed, J.] - In this batch of writ petitions the legality, validity and *vires* of Notification No. 24/2007, dated 22-5-2007 and Circular No. 98/1/2008-S.T., dated 4-1-2008 issued by the Secretary, Ministry of Finance, Department of Revenue, Government of India, New Delhi is challenged. It is alleged that by virtue of the said notification and circular a completely erroneous interpretation is placed on section 65(90a) and section 65(105)(zzzz) of the Finance Act, 1994 as amended by the Finance Act, 2007. It is further alleged that because of this incorrect interpretation, service tax is sought to be levied on the renting of immovable property as opposed to service tax on a service provided "in relation to the renting of immovable property".

2. In essence, the petitioners have raised the question as to whether the Finance Act, 1994 (hereinafter referred to as the said Act) envisages the levy of service tax on letting out/renting out of immovable property *per se* According to the petitioners, who are either landlords or tenants in respect of leased premises, no such tax is envisaged under the said act. Consequently, the said notification dated 22-5-2007 and the said circular dated 4-1-2008 are sought to be set aside as being *ultra vires* the said act.

3. Alternatively, the petitioners have taken the plea that in case it is held that such a tax is envisaged then the provisions of section 65(90a), section 65(105)(zzzz) and section 66 insofar as they relate to the levy of service tax on renting of immovable property would amount to a tax on land and would therefore fall outside the legislative competence of Parliament inasmuch as the said subject is covered under Entry 49 of List II of the Constitution of India and would fall within the exclusive domain of the state legislature. As such, the said provisions would have to be declared as un-constitutional.

4. The said notification dated 22-5-2007 is an exemption notification purportedly issued in exercise of the power conferred by sub-section (1) of section 93 of the Finance Act, 1994. By virtue of the said notification, the central government exempted the “taxable service of renting of immovable property”, referred to in sub-clause (zzzz) of clause (105) of section 65 of the Finance Act, from so much of the service tax levy as was in excess of the service tax calculated on a value which is equivalent to the gross amount charged for renting of such immovable property less taxes on such property, namely property tax levied or collected by local bodies. An example has also been provided in the said notification by way of illustration. The example is as under :-

“Example :

Property tax paid for April to September = Rs. 12,000/-

Rent received for April = Rs. 100,000/-

Service tax payable for April = Rs. 98,000/- (100,000-12,000) (sic) (2000) * applicable rate of service tax”

5. It is the contention of the petitioners that though this notification speaks of an exemption it also refers to the “taxable service as a taxable service of renting of immovable property”. This, according to the petitioners, is not so provided under the said act. It is contended that section 65(105)(zzzz) refers to the service provided or to be provided to any person, by any other person, in relation to renting of immovable property for use in the course or furtherance of business or commerce. The reference in the said provision is not to the taxable service of renting of immovable property but to the taxable service “in relation to” the renting of immovable property. It is the petitioners contention that while the act does not treat renting of immovable property as a taxable service, the notification proceeds on the basis that the taxable service is the renting of immovable property itself. It is on this basis that it has been contended that service tax is sought to be recovered from the petitioners on a pure misreading of the statutory provision.

6. Similarly, the impugned circular whilst giving a clarification in respect of commercial and industrial construction service has purported to clarify that the “right to use immovable property is leviable to service tax under the renting of immovable property service”. Consequently, by the said clarification, the Union of India is seeking to levy service tax on renting of immovable property instead of on services in relation to renting of immovable property. According to the petitioners, the clarification therefore travels beyond the provisions of the said act by contemplating a service tax on the renting of immovable property itself.

7. Before we proceed any further it would be appropriate if the relevant provisions of the said act are pointed out. Chapters V and VA which comprise of sections 64 to 96-I of the Finance Act, 1994 pertain to provisions for service tax. Section 65 of the said Act is comprised of definitions. Section 66 provides for the charge of service tax. It stipulates that there shall be levied a service tax at the rate of 12% on the value of the taxable services referred to in, *inter alia*, sub-clause (zzzz) of clause (105) of section 65 and collected in such manner as may be prescribed. Clause (105) of section 65 of the said act defines taxable service. Sub-clause (zzzz) thereof reads as under :-

“Section 65. Definitions. - In this chapter, unless the context otherwise requires,-

xxxx xxx xxx xxx xxx

(105) “taxable service” means any service provided or to be provided,-

xxxx xxx xxx xxx xxx

(zzzz) to any person, by any other person in relation to renting of immovable property for use in the course or furtherance of business or commerce.

Explanation 1. - For the purposes of this sub-clause, “immovable property” includes—

- (i) building and part of a building, and the land appurtenant thereto;
- (ii) land incidental to the use of such building or part of a building;
- (iii) the common or shared areas and facilities relating thereto; and
- (iv) in case of a building located in a complex or an industrial estate, all common areas and facilities relating thereto, within such complex or estate,
 - but does not include -
 - (a) vacant land solely used for agriculture, aquaculture, farming, forestry, animal husbandry, mining purposes;
 - (b) vacant land, whether or not having facilities clearly incidental to the use of such vacant land;
 - (c) land used for educational, sports, circus, entertainment and parking purposes; and
 - (d) building used solely for residential purposes and buildings used for the purposes of accommodation, including hotels, hostels, boarding houses, holiday accommodation, tents, camping facilities.

Explanation 2. - For the purposes of this sub-clause, any immovable property partly for use in the course or furtherance of business or commerce and partly for residential or any other purposes shall be deemed to be immovable property for use in the course or furtherance of business or commerce;”

The expression “renting of immovable property” has been defined in section 65(90a) as under :-

“(90a) “renting of immovable property” includes the renting, letting, leasing, licensing or other similar arrangements of immovable property for use in the course or furtherance of business or commerce but does not include -

- (i) renting of immovable property by a religious body or to a religious body; or
- (ii) renting of immovable property to an educational body, imparting skill or knowledge or lessons on any subject or field, other than a commercial training or coaching centre.

Explanation 1. - For the purposes of this clause, "for use in the course or furtherance of business or commerce" includes use of immovable property as factories, office buildings, warehouses, theatres, exhibition halls and multiple-use buildings;

Explanation 2. - For the removal of doubts, it is hereby declared that for the purposes of this clause "renting of immovable property" includes allowing or permitting the use of space in an immovable property, irrespective of the transfer of possession or control of the said immovable property;"

8. Mr. S. Ganesh, the learned Senior Counsel appearing on behalf of the petitioner in writ petition (civil) no. 1659/2008 [Home Solutions Retail India Ltd. v. Union of India], submitted that the provisions of the said act do not provide for the levy of service tax on the renting of immovable property as such. It was also contended that the said act does not treat renting out of immovable property as a service. According to him, in terms of section 65(105)(zzzz), service tax is levied only on a service which is provided or to be provided to any person by any other person in relation to renting of immovable property for use in the course or furtherance of business or commerce. It was contended that on a plain reading of this provision, the service provided must be something which is distinct and different from the transaction of renting of immovable property as such though the service would have to be in relation to such renting. If the legislature wanted to treat renting of immovable property as a service, then, nothing would have been easier or simpler for the legislature than to use the words "service by way of renting of immovable property" or "the service of renting of immovable property" or "service consisting of renting of immovable property" (sic) (immovable property).

9. It was further contended that the said provision indicates that the service will be provided "by any other person" and not only by the owner or lessor or person in possession of the immovable property. Furthermore, the service could be rendered to any person provided it was in relation to the renting of the property and not merely to the person who takes the property on rent. If the renting of property as such constituted a service which could be taxed, then such a service could only be rendered to the person taking the property on rent and not "to any person". According to the learned senior counsel, this clearly indicates that renting of immovable property as such cannot be regarded as a service on which service tax could be levied under the provisions of the said act.

10. Mr. Ganesh also sought to draw a distinction between the provisions of section 65(105)(zzzz) and section 65(88) of the said act. The latter provision has a reference to the service of a real estate agent in relation to the renting of immovable property. It was contended that the language of the two provisions is similar. From this it was sought to be contended that there is a clear indication that the expression "service in relation to the renting of immovable property" means a service which is distinct and different from the renting of property itself although it may be connected with or related to such renting. According to him, these services (which are not covered by other specific clauses of section 65) include air-conditioning service, standby power service, sanitation service, water supply service etc. He also made reference to a circular dated 17-9-2004 issued by the Central Board of Excise and Customs which has been extracted at page 17 of the petition in WP(C) No. 1659/2008 [Home Solutions Retail India Ltd. v. Union of India] and which apparently states that "the activity of renting premises is not rendering of service".

11. It was therefore submitted that the impugned notification dated 22-5-2007 and the impugned circular dated 4-1-2008 which proceed on the assumption that the renting out of immovable property is by itself a service, are contrary to and inconsistent with the charging provision and are therefore *ultra vires* the Act and hence bad in law. With reference to the decision in the case of *Union of India v. Inter Continental* - [2008 \(226\) E.L.T. 16](#) (S.C.), the learned counsel submitted that a circular or notification can never rewrite or amend the provisions of the statute.

12. Mr. Ganesh submitted that the judgment of the Supreme Court in the case of *All India Federation of Chartered Accountants v. Union of India* - [2007 \(7\) S.T.R. 625](#) (S.C.) = (2007) 7 SCC 527 (sic) (*All India Federation of Tax Practitioners v. Union of India*) fully supports the case of the petitioner that the service contemplated and covered by section 65(105)(zzzz) is a property-based or property related service, but it must be a service all the same. Reliance was placed on paragraphs 7 and 48 of the said decision. He also referred to the Supreme Court decision in the case of *T.N. Kalyana Mandapam Association v. Union of India & Others* : [2006 \(3\) S.T.R. 260](#) (S.C.) = [2004 \(167\) E.L.T. 3](#) (S.C.) = (2004) 5 SCC 632 and submitted that the said decision also supports the case of the petitioners. According to him, the said judgment makes it clear that a particular property can be regarded as a *Kalayana Mandapam* (supra) only if it has all the apparatus, equipment and infrastructure which enables it to be utilised for rendering services for the holding of ceremonial, religious or social functions. It was also submitted by him that the Supreme Court decision in the case of the *Doypack Systems Private Limited v. Union of India* - (1998) 2 SCC 299, which had interpreted the words "*in relation to*", also contemplated that it applied to a different subject matter as compared to the thing to which it was related. In this backdrop, the learned counsel submitted that the service in relation to the renting of immovable property necessarily has to be a distinct subject matter as compared to the renting out of the property itself. There is no doubt that the words "*in relation to*" have a wide ambit but that only means that a wide variety of services relating to the renting a property would be covered by the charge of service tax.

13. It was further contended that a bare room in a commercial building could not be considered to be an office unless and until it was fully equipped with equipment and also manned by personnel. It is only then that the renting of such an office or permitting its use would constitute the rendering of a service. Similarly, renting out of a large property does not constitute a service in itself even though the tenant may use it for the purpose of conducting a wedding or other ceremonial function. Referring to the Supreme Court decision in the case of *BSNL v. Union of India* - [2006 \(2\) S.T.R. 161](#) (S.C.) = (2006) 3 SCC 1, the learned counsel submitted that the very same transaction cannot constitute both a transfer of property and also the rendering of a service. Whether the property is granted by way of a lease or licence it is merely a property transaction and cannot possibly be construed as the rendering

of a service.

14. The learned counsel appearing for the petitioner in writ petition (civil) number 8554/2008 [Alpha Future Airport Retail (India) Ltd. v. Union of India] submitted that his case had an added dimension. He submitted that Delhi International Airport Limited has the right to operate duty-free shops in designated areas in the Delhi International airport. The said Delhi International Airport Limited has granted a licence to the petitioner to operate the said duty-free shops. The licence agreement is a single indivisible agreement which grants to the petitioner the licence to operate the said duty-free shops and also permits the petitioner to use the space in the said areas. For this purpose, the petitioner pays a composite licence fee to Delhi International Airport Limited which is partly a fixed amount and partly a percentage of the gross sale proceeds of the duty-free shops. It is impossible to ascertain what part of it is attributable to the user of the immovable property as distinct from the grant of the licence to operate a duty-free shop. It was submitted that in the very nature of things, the user of the property and the grant of the licence were inseparable because the duty-free shops could not be operated in any place other than the said designated areas in the Delhi International airport. It was submitted that there is no machinery or provision under the said act to determine the amount which is attributable to the user of the property as distinct from the grant of the licence to operate the duty-free shops. Consequently, the charge of service tax would in any event break down. Thus, it was contended, that when the computation was not possible the charge itself would fail. Reliance was placed on the decision of the Supreme Court in *Commissioner of Income-tax, Bangalore v. B.C. Srinivasa Shetty* - 128 ITR 294 [(1981) 2 SCC 460].

15. Dr. Abhishek Singhvi, senior advocate, who appeared for the petitioner in writ petition civil number 4131/2008 [Shoppers Stop Limited v. Union of India], submitted that the expression "in relation to" separates objects from each other. According to him the phrase by itself conceives of two separate things. He submitted that service tax is a value-added tax and therefore only the value addition is liable to be taxed by way of a service tax. He referred to the decision of the Supreme Court in the case of *All India Federation of Tax Practitioners* (supra). In particular, he referred to paragraph 8 of the said decision which reads as under :-

"8. As stated above, service tax is VAT. Just as excise duty is a tax on value addition on goods, service tax is on value addition by rendition of services. Therefore, for our understanding, broadly "services" fall into two categories, namely, property-based services and performance based services. Property-based services cover service providers such as architects, interior designers, real estate agents, construction services, mandapwallas, etc. Performance-based services are services provided by service providers like stockbrokers, practising chartered accountants, practising cost accountants, security agencies, tour operators, event managers, travel agents, etc."

16. On the strength of these observations, it was contended by Dr. Singhvi that since service tax is a value-added tax and can only be levied on the value addition, the words "in relation to" in section 65(105)(zzzz) of the said Act are of great significance and importance. The value addition of service in the present context could be an improvement or the betterment of the property provided by the owner to the lessee or licensee. It is that betterment alone which can qualify as a service. The act of renting of the immovable property by itself does not provide any value addition to any person and therefore cannot be treated as a service. According to Dr. Singhvi, the legislature used the words "in relation to" with a clear intent of divorcing the actual renting of the property from the services to be rendered in relation to such renting. Thus, the transaction of renting of immovable property by itself is not taxable under section 65(105)(zzzz) of the said Act. Consequently, the notification dated 22-5-2007 which purports to tax the entire rent received by a landlord/owner tends to distort the legislative intent made clear through the said Act by means of an administrative interpretation.

17. It was further emphasised by Dr. Singhvi that an examination of the various entries falling within the scope of "taxable service" would reveal that it is only the value addition which is taxable. In the case of a stockbroker, real estate broker, auctioneer, travel agent, etc. it is only the commission received by the service provider which is subjected to service tax and not the main transaction of sale or purchase. This by itself clearly indicates that it is only the service rendered by a person to another which is the intangible value addition to the main transaction which is subjected to service tax. Consequently in respect of renting of immovable property also the main transaction of renting of immovable property and the rents paid therefor cannot be subjected to service tax. It is only the value addition by a service relating to renting of immovable property that can be the subject matter of service tax.

18. Mr. Jayant Bhushan who appeared for the petitioners in writ petition civil numbers 7164/2008 and 7212/2008 and Mr. Mittal who appeared for the petitioner in writ petition civil number 7964/2008, reiterated and adopted the arguments of Mr. Ganesh and Dr. Singhvi. Both of them also contended that renting of immovable property by itself did not constitute a service.

19. Mr. P.P. Malhotra, the learned Additional Solicitor General of India, appearing for the Union of India contended that the user of land/building itself is the service. He referred to the decision of the Supreme Court in the case of *All India Federation* (supra) and contended that service tax is a value-added tax which in turn is a general tax which applies to all commercial activity involving production of goods and provision of services. He contended that the transfer of the right to use a particular property for a commercial or business purpose was itself the service which was contemplated in section 65(105)(zzzz) of the said act. According to him, the mere renting of immovable property in itself constituted a service. He submitted that the definition of renting of immovable property in section 65(90a) was an all inclusive definition. Referring to the decision in *Kalyana Mandapam Association* (supra), Mr. Malhotra submitted that even if premises were made available for a few hours for the purpose of utilisation as a mandap, whether with or without other services, would itself be a service and could not be classified as any other kind of legal concept. He submitted that merely providing a premises on a temporary basis for

organising a financial, social or business function would also include other facilities in relation thereto and would therefore constitute a taxable service.

20. In response to the argument that the expression "in relation to renting of immovable property" does not refer to the renting itself but to some other service in relation to the renting of immovable property, Mr. Malhotra submitted that such an argument is demonstrably untenable. For this purpose he referred to section 65(105)(zt) which defines the service provided or to be provided to any person, by a dry cleaner in relation to dry-cleaning. Here, the service provided in relation to dry-cleaning clearly includes the service of dry-cleaning. Mr. Malhotra then referred to section 65(105)(zv) which defines the service provided or to be provided to any person, by a fashion designer in relation to fashion designing. Here, too, the service provided in relation to fashion designing includes the service of fashion designing itself. By this analogy, Mr. Malhotra contended that the expression "in relation to renting of immovable property" also covered the act of renting of immovable property. He submitted that the giving of a premises for commercial or business activity was itself a service.

21. He referred to Words and Phrases, permanent edition, volume 38A, page 542 wherein it is noted as under :-

"The term "services" generally includes any act performed for benefit of another under some arrangement or agreement whereby such act must have been performed."

He also drew our attention to page 555 thereof wherein it is written :-

"use of a garage is "service" within rent control regulation."

A reference was also made to the following at page 193 :-

"in common usage, a "service" is not property, tangible or otherwise, but, rather, is an act."

Mr. Malhotra also referred to Jowitt's Dictionary of English law, second edition, where service in connection with a landlord-tenant relationship has *inter alia* been shown to include :-

"certain services were such as were fixed in quantity, as to pay a certain rent, or to plough a field for three days every year;"

From the above references, Mr. Malhotra sought to contend that the use of the property by itself was a service. He contended that letting out the property or permitting another person to use the same as a licensee by itself constituted an act which could be classified as a service.

22. With reference to the Supreme Court decision in *Doypack Systems Private Limited* (supra), he contended that the expression "in relation to" is used in an expansive sense. It is an expression of expansion and not of contraction. Therefore, the expression "in relation to renting of immovable property" must be given an expansive meaning of the widest amplitude. Consequently, he said that the expression would definitely cover the renting of immovable property itself and not be limited to some service in connection with the renting of immovable property.

23. Our attention was also drawn to the decision of the Supreme Court in the case of *Lucknow Development Authority v. M.K. Gupta* - (1994) 1 SCC 243, wherein at page 254 the following observation is to be found :-

"4. What is the meaning of the word 'service'? Does it extend to deficiency in the building of a house or flat? Can a complaint be filed under the Act against the statutory authority or a builder or contractor for any deficiency in respect of given property. The answer to all this shall understanding of the word 'service'. The term has variety of meanings. It may mean any benefit or any act resulting in promoting interest or happiness. It may be contractual, professional, public, domestic, legal, statutory etc. **The concept of service thus is very wide. How it should be understood and what it means depends in the context in which it has been used in an enactment.**" (emphasis supplied)

24. A reference was also made by Mr. Malhotra to the Supreme Court decision in *N.S. Nayak and Sons v. State of Goa* - (2003) 6 SCC 56, wherein the court observed :-

"the expression "in relation to" is of the widest import as held by various decision of this court in *Doypack Systems Private Limited* ..."

"... when the legislature has used the expression "in relation to", a proper meaning has to be given. This expression does not admit of restrictive meaning."

25. On the basis of the foregoing, Mr. Malhotra contended that there is no occasion for any debate after the decision of the Supreme Court in the case of *T.N. Kalyana Mandapam Association* (supra) where the mere making available of a mandap with or without other services was itself regarded as a service exigible to service tax under the said act. The said decision also settled any debate about the constitutional validity of service tax. In conclusion, Mr. Malhotra submitted that the writ petitions deserve to be dismissed.

26. In rejoinder, Mr. Ganesh submitted that a mere property transaction cannot be a service. He submitted that even in the *T.N. Kalyana Mandapam* case it has not been held that a mere property transaction could constitute a service and that too a taxable service under the said act. He submitted that a mandap was not a bare piece of property but property with other furniture, etc. Moreover the service was to be provided by a mandap keeper as defined in section 65(67) of the said act. The Supreme Court decision itself noted that a mandap keeper provided a bundle of services and it was not the case of a mere permission to use a particular property. The expression with or without other services appearing in paragraph 55 of the said decision does not mean with or without services but has a clear reference to "other services", other than the services provided by a mandap keeper such as catering services.

27. He submitted that whenever the meaning of words in a statute is in question the same has to be seen in the context in which they are used. Reliance was placed upon the Supreme Court decision reported in *His Holiness Kesavananda Bharati Sripadagalvaru and Ors. v. State of Kerala and Anr* : (1973) 4 SCC 225 [at page 316]. He submitted that the expression "in relation to" was used in varying contexts in section 65(105) of the Act itself. For example, in section 65(105)(zm) there is reference to a service provided or to be provided to any person by a banking company or a financial institution including a non-banking financial company, or any other body corporate or commercial concern, in relation to banking and other financial services. The expression in relation to clearly refers also to the banking and other financial services. The activity, that is, banking and other financial services, is clearly an unmistakably a service. The service provider is identified and the nature of the service is such that it can be provided by the service provider. But, the renting of immovable property is merely a property transaction. There is no service provider. Section 65(105)(zzzz) does not specify the service provider. It also does not identify the service receiver. Nor is the nature of the service indicated.

28. Mr. Ganesh referred to other sub-clauses of section 65(105) which were similar to the sub-clause relating to banking and other financial services. He referred to sub-clauses (zn) which pertained to Port services; (zo) service stations; (zq) beauty treatment; (zr) cargo handling services; and (zs) cable services. He then referred to section 65(88) which defined a "real estate agent" to mean a person who is engaged in rendering any service in relation to sale, purchase, leasing or renting, of real estate and includes a real estate consultant. He submitted that here the expression "in relation to" did not cover the activity of sale purchase leasing or renting of real estate. It only referred to a service in connection with the activity of sale purchase leasing or renting of real estate. Consequently, the meaning of the expression "in relation to" has changed with the context. Similarly, he referred to section 65(105)(v) which refers to a service provided or to be provided to any person by a real estate agent in relation to real estate. It is obvious that real estate by itself is not a service and therefore the expression "in relation to" has to be read in a manner where real estate does not constitute the service but there is a reference to some other service having a connection with real estate. Mr. Ganesh finally contended that just as section 65(105)(v) refers to a service in connection with real estate and not to real estate itself as a service, section 65(105)(zzzz) refers to a service in connection with the renting of immovable property and not to the activity of renting of immovable property itself as a service. This being the clear intention of the legislature, the notification and circular which tend to give a different construction are clearly *ultra vires* the said act and ought to be set aside.

29. The counsel appearing on both sides have sought to place reliance on *T.N. Kalyana Mandapam* (supra), *All India Federation* (supra) and *Doypack Systems Pvt. Ltd.* (supra). It would, therefore, be necessary to examine these decisions of the Supreme Court. In *T.N. Kalyana Mandapam* (supra), the Supreme Court considered the issue of the taxable service provided by a mandap keeper. The said taxable service was earlier indicated under Section 65(41)(p) of the said Act. At present, with minor modifications, the relevant provision is Section 65(105)(m) of the said Act. Earlier, 'mandap keeper' was defined under Section 65(20) and 'mandap' itself was defined under Section 65(19). At present, 'mandap keeper' is defined under Section 65(67) and 'mandap' is defined under Section 65(66). There are only minor changes. As the provisions stood at the time of the decision of the Supreme Court in *All India Federation* (supra), the taxable service in question was :-

"Any service provided to a client, by a mandap keeper in relation to use of a mandap in any manner, including the facilities provided to the client in relation to such use and also the service, if any, rendered as a caterer";

'Mandap keeper' was defined to mean a person who allowed temporary occupation of a mandap for consideration for organising any official, social or business function. Mandap was defined to mean any immovable property as defined in Section 3 of the Transfer of Property Act, 1882 and included any furniture, fixtures, light fittings and floor coverings therein let out for consideration for organizing any official, social or business function. In the context of these provisions, one of the questions that arose before the Supreme Court was whether the tax imposed under the Finance Act on catering services did not amount to a tax on sale and purchase of goods. The Supreme Court held that the taxable service provided as a caterer by a mandap keeper was within the legislative competence of the Parliament and could not be construed as a tax on the sale and purchase of goods. In this context, the Supreme Court observed that it was well-settled that the measure of taxation cannot affect the nature of taxation and, therefore, the fact that service tax is levied as a percentage of the gross charges for catering did not alter or affect the legislative competence of the Parliament in the matter. The Supreme Court then observed as under :-

"47. The legislative competence of Parliament also does not depend upon whether in fact any services are made available by the Mandapam -Keepers within the definition of taxable service contained in the Finance Act. Whether in the given case taxable services are rendered or not is a matter of interpretation of the statute and for adjudication under the provisions of the statute and does not affect the vires of the legislation and/or the legislative competence of Parliament. In fact, a wide range of services are included in the definition of taxable services as far as Mandapam -Keepers are concerned. The said definition includes services provided "in relation to use of Mandapam in any manner" and includes "the facilities provided to the client in relation to such use" and also the services "rendered as a caterer". The phrase "in relation to" has been construed by this Court to be of the widest amplitude. In *Doypack Systems Pvt. Ltd. v. Union of India and Ors.* - 1988 (2) SCC 299 at p. 302, this Court observed as under :

"The expressions 'pertaining to', 'in relation to' and 'arising out of, used in the deeming provision, are used in the expansive sense. The expression 'arising out of has been used in the sense that it comprises purchase of shares and lands from income arising out of the Kanpur Undertaking. The words "pertaining to" and "in relation to" have the same wide meaning and have been used interchangeably for among other reasons, which may include avoidance of repetition of the same phrase in the same clause or sentence, a method followed in good drafting. The word 'pertain' is synonymous with the word 'relate'. The term 'relate' is also defined as meaning to

bring into association or connection with. The expression 'in relation to' (so also 'pertaining to'), is a very broad expression which presupposes another subject matter. These are words of comprehensiveness which might have both a direct significance as well as an indirect significance depending on the context."

The Supreme Court also observed :-

"51. Taxable services, therefore, could include the mere providing of premises on a temporary basis for organizing any official, social or business functions, but would also include other facilities supplied in relation thereto. No distinction from restaurants, hotels etc. which provide limited access to property for specific purpose."

30. Furthermore, the Supreme Court emphasized that a tax cannot be struck down on the ground of lack of legislative competence by enquiring whether the definition accords with what the layman's view of service is. It noted the well-settled principle that in matters of taxation, the courts permit greater latitude to the statute to pick and choose objects and rates for taxation and has a wide discretion with regard thereto. At this juncture, it may be pointed out that the main challenge in the present petitions is not on the ground of lack of legislative competence, but on the ground that the impugned notification and circular are *ultra vires* the Act itself. Therefore, the areas of discussion in the *T.N. Kalyana Mandapam* (supra) and the present case are somewhat different.

31. In the said decision of the Supreme Court, it has also been observed that a levy of service tax on a particular kind of service could not be struck down on the ground that it does not conform to the common understanding of the word "service" so long as it does not transgress any specific restriction contained in the Constitution. But, the scope of discussion in the present case is entirely different. It is the petitioners' contention that the intention of the legislature in enacting Section 65(105)(zzzz) was not to tax the activity of renting of immovable property, but only to levy a tax on a service which is provided in relation to renting of immovable property.

32. As noted above, Mr. P.P. Malhotra, the learned Additional Solicitor General had placed reliance on the observation of the Supreme Court in *T.N. Kalyana Mandapam* (supra), which is to the effect that 'making available a premises for a period of a few hours for the specific purpose of being utilized as a mandap whether with or without other services would itself be a service and cannot be classified as any other kind of legal concept'. But, we must not lose sight of the fact that the service provided by a mandap keeper is entirely different in nature to the service, which is in contemplation under Section 65(105)(zzzz). As noted in the Supreme Court decision in *T.N. Kalyana Mandapam* (supra) itself, the service of a mandap keeper does not involve transfer of movable property nor does it involve a transfer of any immovable property of any kind known to law either under the Transfer of Property Act or otherwise and, therefore, the said activity could only be classified as a service. In the present petitions, we find that there is a transfer of immovable property insofar as those properties are concerned where leases have been executed. Although the right of ownership is not transferred and is retained by the owner, the right of possession certainly gets transferred in the case of a lease. In the case of a licence also, the possession is of the licensee although the nature of such possession is only permissive. Thus, the observations of the Supreme Court in *T.N. Kalyana Mandapam* (supra) that the utilization of the premises as a mandap by itself would constitute a service would have to be distinguished from the kind of activity that is contemplated under Section 65(105)(zzzz). We are of the view that the case of a mandap and service provided by a mandap keeper would not be applicable to the case of renting of immovable property simpliciter. The Supreme Court in paragraph 56 of the said decision itself makes it clear that mandap keepers provide a wide variety of services apart from the service of allowing temporary occupation of a mandap. A mandap keeper, apart from the proper maintenance of mandap, also provides the necessary paraphernalia for holding official, social or business functions, apart from providing the conditions and ambience which are required by the customer, such as providing the lighting arrangements, furniture and fixtures, floor coverings, etc. The service provided by him, as indicated in the Supreme Court decision, cover the method and manner of decorating and organizing the mandap and the mandap keeper also provides the customer with advice as to what should be the quantum and quality of the services required keeping in view the requirement of the customer, the nature of the event to be solemnized, etc. It is in this context that the Supreme Court observed that the service of a mandap keeper cannot possibly be termed as a hire-purchase agreement or a right to use goods or property. It is obvious that there is a distinction between the services provided by a mandap keeper and the activity of hiring or giving on rent immovable property. The situations are different, the activities are different. The Supreme Court observed that a tax on services rendered by mandap keepers and outdoor caterers is in pith and substance, a tax on services and not a tax on sale of goods or on hire-purchase activities. We feel that this conclusion of the Supreme Court makes the distinction clear between the case of a mandap keeper and that of a person who rents out an immovable property for use in the course or furtherance of business or commerce. Consequently, the Supreme Court decision in the case of *Kalyana Mandapam* (supra) does not advance the case of the respondents. On the other hand, it does go towards clarifying the stand taken by the petitioners.

33. The next decision which requires consideration is the decision of the Supreme Court in the case of *All India Federation of Tax Practitioners* (supra). We have already quoted paragraph 8 of the said decision wherein it has been observed that service tax is a value added tax and that just as excise duty is a tax on value addition on goods, services tax is on value addition by rendition of services. A distinction has also been sought to be made

between property based services and performance based services. The property based services cover service providers, such as architects, interior designers, real estate agents, construction services, mandap keepers, etc. Whereas the performance based services are those provided by persons, such as stock-brokers, practising chartered accountants, practising cost accountants, security agencies, tour operators, event managers, travel agents etc. The Supreme Court also noted that service tax is a tax on service and not on the service provider.

34. From the above discussion, it is apparent that service tax is a value added tax. It is a tax on value addition provided by a service provider. It is obvious that it must have connection with a service and, there must be some value addition by that service. If there is no value addition, then there is no service. With this in mind, it would be instructive to analyse the provisions of Section 65(105)(zzzz). It has reference to a service provided or to be provided to any person, by any other person in relation to "renting of immovable property for use in the course or furtherance of business or commerce". The wordings of the provision are so structured as to entail - a service provided or to be provided to 'A' by 'B' in relation to 'C'. Here, 'A' is the recipient of the service, 'B' is the service provider and 'C' is the subject matter. As pointed out above by Mr. Ganesh, the expression 'in relation to' may be of widest amplitude, but it has been used in the said Act as per its context. Sometimes, 'in relation to' would include the subject matter following it and on other occasions it would not. As in the case of the service of dry cleaning, the expression 'in relation to dry cleaning' also has reference to the very service of dry cleaning. On the other hand, the service referred to in Section 65(105)(v), which refers to a service provided by a real estate agent 'in relation to real estate', does not, obviously, include the subject matter as a service. This is so because real estate by itself cannot by any stretch of imagination be regarded as a service. Going back to the structured sentence, i.e. - service provided or to be provided to 'A' by 'B' in relation to 'C', it is obvious that 'C' can either be a service (such as dry cleaning, hair dressing, etc.) or not a service by itself, such as real estate. The expression "in relation to" would, therefore, have different meanings depending on whether 'C' is a service or is not a service. If 'C' is a service, then the expression 'in relation to' means the service 'C' as well as any other service having connection with the service 'C'. Where 'C' is not a service, the expression 'in relation to' would have reference only to some service which has a connection with 'C'. But, this would not imply that 'C' itself is a service.

35. From this analysis, it is clear that we have to understand as to whether renting of immovable property for use in the course or furtherance of business or commerce by itself is a service. There is no dispute that any service connected with the renting of such immovable property would fall within the ambit of Section 65(105)(zzzz) and would be exigible to service tax. The question is whether renting of such immovable property by itself constitutes a service and, thereby, a taxable service. We have already seen that service tax is a value added tax. It is a tax on the value addition provided by some service provider. Insofar as renting of immovable property for use in the course or furtherance of business or commerce is concerned, we are unable to discern any value addition. Consequently, the renting of immovable property for use in the course or furtherance of business of commerce by itself does not entail any value addition and, therefore, cannot be regarded as a service. Of course, if there is some other service, such as air conditioning service provided along with the renting of immovable property, then it would fall within Section 65(105)(zzzz).

36. In view of the foregoing discussion, we hold that Section 65(105)(zzzz) does not in terms entail that the renting out of immovable property for use in the course or furtherance of business of commerce would by itself constitute a taxable service and be exigible to service tax under the said Act. The obvious consequence of this finding is that the interpretation placed by the impugned notification and circular on the said provision is not correct. Consequently, the same are *ultra vires* the said Act and to the extent that they authorize the levy of service tax on renting of immovable property *per se*, they are set aside.

37. Before parting with this batch of cases, we would like to observe that we have not examined the alternative plea taken by the petitioners with regard to the legislative competence of the Parliament in the context of Entry 49 of List II of the Constitution of India. Such an examination has become unnecessary because of the view we have taken on the main plea taken by the petitioners as indicated above.

38. The writ petitions are allowed to the extent indicated above. The parties are left to bear their own costs.

Bombay High Court

**Sadoday Builders Private Ltd vs The Jt.Charity Commissioner on
23 June, 2011**

Bench: R. M. Savant

wp4543.10.odt

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

WRIT PETITION NBO.4543 OF 2010.

PETITIONERS:

1. Sadoday Builders Private Ltd., A Company Incorporated and registered under the Provisions of Indian Companies Act, 1956, having its registered office at 237, Sadoday Plaza, Opposite Mayo Hospital, Central Avenue Road, Nagpur through its Director.

ig 2. Santdas s/o Sadoromal Chawla, aged 51 years, Occu: Business, being Director of the Petitioner No.1. Company, Resident of 237, Sadoday Plaza, Opposite Mayo Hospital, Central Avenue Road, Nagpur.

...VERSUS...

RESPONDENTS:

1. The Jt.Charity Commissioner, Nagpur.

2. Nagpur Diocesan Trust Association, having registration No.D-5(N) - through its Secretary, having its office at Cathedral House, Opposite Indian Coffee House, Sadar, Nagpur - 440 001.

3. M.P. V. Contractors, Builders and Developers, Opp.C.K.P.Hall, Near Ram Mandir, Nagpur.

Mr. S.V.Purohit, Advocate for the petitioners.
Mr. A.M.Gordey, Sr.Adv. with Mr.S.K.Pardhi, Adv. for
resp.no.2.
Mr.Deepak Gupta, Advocate for respondent no.3.

CORAM : R.M.SAVANT, J.

DATED : 23rd June, 2011.

1. Rule, with the consent of the parties, made returnable forthwith and heard.
2. The above writ petition filed under Articles 226 and 227 of Constitution of India takes exception to the two orders passed by the learned Joint Charity Commissioner, Nagpur. By the first order dated 3/8/2009, the learned Joint Charity Commissioner has rejected the objections raised by the petitioners herein in respect of the proposed sale of Transferable Development Rights (TDR) in favour of the respondent no.3 and by the second order dated 12/7/2010, the learned Joint Charity Commissioner has disposed of the application filed by the respondent no.2 - Trust by observing that for sale of TDR which is moveable property the permission of the Charity Commissioner is not required under Section 36(1)(c) of the Bombay Public Trusts Act, 1950 [for brevity sake referred to as the said Act].
3. The factual matrix involved in the above petition can be stated thus -

The petitioners herein were the participants in the sale of TDR, which was advertised by the respondent no.2 - Trust. The said TDR was to the extent of 2285.35 sq. meters and the advertisement for the same was issued on 6/5/2006. The offers which were to be received pursuant to the said advertisement were to be opened on 15/5/2006. It is the case of the petitioners that when they visited the office of the respondent - Trust on the day of opening, they were informed that on account of the Bishop not being available, the opening of the offer was postponed. It is further the case of the petitioners that thereafter they acquired knowledge that the sale of the said TDR would be effected in favour of some party which resulted in the petitioners' addressing letters to the respondent no.2 - Trust, which are annexed to the above petition. It is the case of the petitioners that no response was received to the said letters addressed by the petitioners. It is the case of the petitioners that they also made a complaint to the Joint Charity Commissioner vide letter dated 16/6/2007. The petitioners ultimately were constrained to file their objections on 26/9/2008 as regards the proposed sale of TDR in favour of respondent no.3 herein. The gist of the objections filed by the petitioners were to the effect that the petitioners were ready to offer a higher amount per square meter than offered by the respondent no.3 herein. The

objection was also as regards the fact that the whole process was sought to be carried out behind the back of the petitioners. The said objections of the petitioners were considered by the Joint Charity Commissioner and by the first impugned order dated 3/8/2009, the said objections of the petitioners came to be rejected inter alia on the grounds that the same were filed belatedly, the offer of the respondent no.3 was higher than that had made by the petitioners and that the petitioners had not deposited any amount to show their bona fides.

4. Thereafter, the learned Joint Charity Commissioner ventured to consider the application filed by the respondent no.2-

Trust under Section 36 of the said Act. The Joint Charity Commissioner applied the analogy of the payment of compensation by way of TDR for the land acquired and held that the TDR granted in favour of the owner of the land becomes a movable property. The learned Jt.Charity Commissioner, therefore, concluded that since the TDR is a moveable property, no permission of the Charity Commissioner is required under Section 36(1)(c) of the said Act. The learned Joint Charity Commissioner further observed that since the procedure was followed prior to the sale of the TDR in favour of respondent no.3, by the order dated 12/7/2010 the application filed by the respondent no.2 - Trust came to be disposed of. As indicated above, it is the said two orders which are subject-matter of the above petition.

5. The principal issue which arose before the learned Joint Charity Commissioner as to whether the TDR could be termed as a movable property, is concluded and is no more res integra in view of the judgment of the Division Bench of this court reported in 2007(3) Mh.L.J. 402 in the matter of [Chheda Housing Development Corporation ..vs.. Bibijan Shaikh Farid and ors.](#)

Para no.15 of the said judgment is material and is reproduced hereunder.

15. The question is whether on account of the term in the clause which permits acquisition of slum TDR the appellants insofar as the additional F.S.I. is concerned, are not entitled for an injunction to that extent. An immovable property under the [General Clauses Act, 1897](#) under [section 3\(26\)](#) has been defined as under : -

(26). "immovable property" shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth."

If, therefore, any benefit arises out of the land, then it is immovable property. Considering [section 10](#) of the Specific Relief Act, such a benefit can be specifically enforced unless the respondents establish that compensation in money would be an adequate relief.

Can FSI/TDR be said to be a benefit arising from the land. Before answering that issue we may refer to some judgments for that purpose. In [Sikandar and ors. .vs. Bahadur and ors.](#), XXVII Indian Law Reporter, 462, a Division Bench of the

Allahabad High Court held that right to collect market dues upon a given piece of land is a benefit arising out of land within the meaning of section 3 of the Indian Registration Act, 1877. A lease, therefore, of such right for a period of more than one year must be made by registered instrument. A Division Bench of the Oudh High Court in Ram Jiawan and anr. .vs.

Hanuman Prasad and ors., AIR 1940 Oudh 409 also held, that bazaar dues, constitute a benefit arising out of the land and therefore a lease of bazaar dues is a lease of immovable property. A similar view has been taken by another Division Bench of the Allahabad High Court in [Smt.Dropadi Devi vs. Ram Das and ors.](#), AIR 1974 Allahabad 473 on a consideration of [section 3\(26\)](#) of General Clauses Act. From these judgments what appears is that a benefit arising from the land is immovable property. FSI/TDR being a benefit arising from the land, consequently must be held to be immovable property and an Agreement for use of TDR consequently can be specifically enforced, unless it is established that compensation in money would be an adequate relief."

6. The Division Bench has held that since TDR is a benefit arising from the land, the same would be immovable property and therefore, an agreement for use of TDR can be specifically enforced. The said dictum of the Division Bench is later on followed by a learned single Judge of this court in 2009(4) Mh.L.J.

533 in the matter of Jitendra Bhimshi Shah .vs.. Mulji Narpar Dedhia HUF and Pranay Investment and ors. The learned judge relying upon the judgment of the Division Bench in Chheda Housing Development Corporation (supra) has held that the TDR being an immovable property, all the incidents of immovable property would be attached to such an agreement to use TDR. In view of the judgments of this court (supra), in my view, the order of the Charity Commissioner that no permission under [Section 36](#) is required as TDR is a movable property cannot be sustained and therefore, the application filed by the respondent no.2 - Trust under [Section 36](#) of the said Act would have to be considered on the touch stone of the said [Section 36](#) and also on the touch stone of the principles applicable to such a sale by a Trust.

7. Now, the question remains of the order dated 3/8/2009 rejecting the objection filed by the petitioners. Since the learned Joint Charity Commissioner has held that permission under [Section 36](#) of the said Act was not required for the sale of the TDR and, now, in view of the position in law as enunciated by the judgments of this court (supra) that such a permission would be necessary, in my view, it would be necessary to reconsider the objections filed by the petitioners in the context of the said application under [Section 36](#) of the said Act filed by the petitioners. If permission under [Section 36](#) was not required for sale of the property, the consideration of the objections by the learned Joint Charity Commissioner and their ultimate rejection cannot operate against the petitioners herein as the objections could have only been considered in the context of an application which was necessary under [Section 36](#) of the said Act. In my view, therefore, the order dated 3/8/2009 is also required to be set aside and the objections of the petitioners would have to be considered de novo, in the context of the fact that the permission is now required and that the said applications

would have to be considered by the Joint Charity Commissioner on the touchstone of [Section 36](#) of the said Act.

Hence, both the impugned orders dated 3/8/2009 and 12/7/2010 would have to be set aside and are accordingly set aside and the following directions are issued.

i) The application for sale of TDR filed by the respondent no.2 - Trust stands revived in view of what has been stated herein above and the said application would have to be considered by the Joint Charity Commissioner in the context of [Section 36](#) of the said Act on its own merits and in accordance with the law. Since now an application under [Section 36](#) of the said Act is required, the objections of the petitioners would also be considered in the said context and would be considered on their own merits and in accordance with law, uninfluenced by the fact that by the earlier impugned order dated 3/8/2009 the objections were rejected, and also uninfluenced by the instant order.

ii) The parties to appear before the Joint Charity Commissioner on 18/7/2011 at 2.30 p.m. The Concerned Charity Commissioner to hear and decide the application within a period of two months from 18/7/2011.

Rule is accordingly made absolute with parties to bear their own costs.

The record to be transmitted forthwith.

Steno copy of this order be furnished to the parties to act upon.

JUDGE chute