Prahitha Contruction Private Limited vs Union Of India And 3 Others on 9 February, 2024

Author: P.Sam Koshy

Bench: P.Sam Koshy

THE HON'BLE SRI JUSTICE P.SAM KOSHY
AND
THE HON'BLE SRI JUSTICE LAXMI NARAYANA ALISHETTY

WRIT PETITION No.5493 of 2020

ORDER :

(per Hon'ble Sri Justice P.SAM KOSHY) The instant writ petition has been filed by the petitioner which is a company engaged in the business of construction activities. The relief sought for in the instant writ petition is for a direction by way of a writ of Mandamus declaring that the transfer of development rights of land by the land owners to the petitioner by way of a Joint Development Agreement (for short 'JDA') should be treated as sale of land by the land owners and hence the execution of the said agreement should not be subjected to levy of GST. That it should be covered under Entry 5 of Schedule III of Goods and Services Tax Act, 2017 (for short 'GST Act, 2017') and the Telangana Goods and Services Tax Act, 2017 (for short 'TGST Act, 2017'). The incidental relief also sought for is issuance of a writ of Mandamus declaring the Notification No.4 of 2018-Central Tax (Rate) (Annexure P1) dated 30.09.2019 imposing GST on transfer of development rights of land by the land owners under a JDA be ultra vires the Constitution of India.

2. Heard Sri S. Ravi, learned Senior Counsel for the petitioner and Sri Dominic Fernandes, learned Senior Standing Counsel for CBIC appearing for the respondent-Department.

3. For better understanding of the dispute, it would be relevant at this juncture to briefly note the facts which led to filing of the instant writ petition which are as under:

> 3.1. The petitioner M/s. Prahitha Constructions Private Limited had entered into a JDA with M/s. Jitvan Land Limited and M/s. Janina Marine Properties Private Limited who are the land owners. The JDA was for development of the land belonging to the land owner Nos.1 and 2 in the JDA admeasuring 8.30 acres forming part of plot Nos.9, 10A and 10B in Survey No.83/1 situated at Hyderabad Knowledge City, Raidurg Village, Serilingampally Mandal, Ranga Reddy District, Telangana, and also land admeasuring 1.82 acres forming part of plot No.8B2 in Survey No.83/1 situated at Hyderabad Knowledge City, Raidurg Village, Serilingampally Mandal, Ranga Reddy District, Telangana. The two plots have to be developed as one composite block which for convenience sake has been referred as "scheduled property" which stands marked as Annexure P1 in the JDA.

3.2. The petitioner is expert in the business of conceptualizing, planning, constructing and developing commercial real-estate projects. The petitioner herein is the developer of the land belonging to M/s. Jitvan Land Limited and M/s. Janina Marine Properties Private Limited by virtue of the JDA which was executed on 28.12.2017. By virtue of the said JDA, there were certain conditions and agreements entered into between the parties. The petitioner had agreed for development of the subject property by constructing three towers of the annexed building in the first phase with modern, common amenities and facilities. The JDA was required to be executed within a given deadline period as per the terms. The provisions of the GST law which came into force with effect from 01.01.2017 excludes levy of GST in respect of sale of land.

4. The petitioner herein is contending that the execution of JDA technically is almost like a sale of the land which was to be developed by the petitioner. It is further contended that the respondents cannot compel the petitioner to pay GST by treating the JDA and the consequences thereof as, not a sale transaction of the land. It was in this context that the petitioner intends to assail the notification under challenge in the present writ petition.

5. According to the learned Senior Counsel for the petitioner, the transaction entered into between the petitioner and the land owner can be safely brought within the purview of sale of land and pursuant to the JDA, the original land owner in fact transferred the development rights of the subject property to the petitioner.

Thereby, the said transfer of development rights amounts to sale and the rights on the said property getting transferred upon the petitioner, the same should be exempted from the levy of GST.

6. In the given factual backdrop, the issues which need to be deliberated upon and decided in the present writ petition are:

a) Whether the transfer of development rights is in the nature of transfer of immovable property or the nature of services would fall within the scope of GST?

b) Whether the transfer of development rights can be safely brought within the purview of an outright sale of land?

7. Learned Senior Counsel for the petitioner agitated that the said impugned notification is ultra vires of Article 14, 246A and 265 of the Constitution of India. Particularly, for the reason that the said notification does not prescribe any methodology or offer of development rights. Thus, it becomes arbitrary and also unconstitutional. It was also contended that the said notification has been issued without there being any logical reasons for issuance of the same. It is also irrational, unreasonable and against the tenets of law. Therefore, it is liable to be quashed, stressing hard on the fact that the net result of execution of the JDA is the sale of land belonging to the land owners to the so called developer after retaining part of the area which shall be developed by the developer.

8. According to the learned Senior Counsel for the petitioner, it is the implication and the effect of execution of the JDA which has to be considered as a whole, rather than taking note of only certain particular clauses. It was also contended that the JDAs are normally entered enabling the land owners to sell the land and procure residential or commercial apartments in lieu of such sale. That the land owners are given residential and commercial apartments corresponding to the value of the property sold to the developers and the JDAs are to be viewed as conveyance as is expected in other laws.

9. It was the contention of the learned Senior Counsel that sale of land is one which is not taxable in terms of Schedule III Entry 5 of the GST Act. By virtue of the execution of the JDA itself there is a substantive transfer of development rights of property in favour of the petitioner which results in sale of land proportionate to the amount of investment made by the developer and hence, there is a statutory embargo on the levy of tax as the execution of JDA gives rise to an element of sale of land.

10. It was the further contention of the learned Senior Counsel that transfer of development rights to a developer or the transfer of construction services against consideration in the form of transfer of development rights has been made amenable to GST by virtue of the impugned notification dated 30.09.2019.

11. It was also the contention of the learned Senior Counsel that the said notification would not be tenable in the eye of law for the reason that levy of tax would not be made permissible by way of issuance of a notification and the same would also be unconstitutional. The notification under challenge dated 30.09.2019 cannot be brought within the purview of a delegated legislation and if at all it is a delegated legislation, it has to be one which has been issued within the four corners of the statute which in the instant case is silent. Hence, according to the learned Senior Counsel, the respondents have travelled beyond the four corners of the GST law. Thus, have exceeded its jurisdiction with issuance of the said notification.

12. It was the contention of the learned Senior Counsel that taxing areas under the GST law cannot be expanded only by way of issuance of a notification. In addition, there is no specific mechanism or machinery which determines the quantum of tax liability upon the transfer of development rights and there is no specific provision under the GST law which determines the rate at which tax has to be levied on a JDA pertaining to transfer of development rights.

13. It was the further contention of the learned Senior Counsel for the petitioner that the impugned notification would amount of it being a delegated legislation and the delegated legislation cannot travel beyond the scope of substantive law. The learned Senior Counsel relied upon the judgments of the Hon'ble Supreme Court in the case of Rajasthan State Industrial Development and Investment Corporation v. Subhash Sindhi Co-operative Housing Society, Jaipur and others 1. Likewise, the authorities concerned cannot impose levy of tax by way of a notification. It was further contended that the notification seems to have been issued invoking the provisions of Section 148 of the CGST Act, 2017, and TGST Act, 2017. However, Section 148 does not confer either upon the respondent No.1 or the respondent No.2 the power to levy GST.

14. In support of his contentions, learned Senior Counsel for the petitioner further relied upon the following decisions:

> i. Super Poly Fabriks Ltd. v. Commissioner of Central Excise 2 (2013) 5 SCC 427 (2008) 10 STR 545 (SC) ii. Bhopal Sugar Industries Ltd. v. D. P. Dube, Sales Tax Officer, Bhopal Region, Bhopal 3 iii. Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc. 4 iv. DLF Universal Limited v. Director, Town and Country Planning Department, Haryana 5 v. Safiya Bee v. Mohd. Vajahath Hussain 6 vi. Pradeep Oil Corpmn. v. Municipal Corporation of Delhi 7 vii. Sadoday Builders Pvt. Ltd. v. Joint Charity Commissioner 8 viii. M/s. Jindal Stainless Limited v. Union of India and Ors. 9 ix. State of T.N. v. P. Krishnamurthy and Ors. 10 x. CIT v. B.C. Srinivas Setty 11 xi. Commissioner of C.Ex & Cus., Kerala v. Larsen & Turbo Ltd. 12 xii. Natural Resources Allocation in Re: Special Reference No.1 of 2012 13 xiii. S.G. Jaisinghani v. Union of India and Ors. 14 xiv. Sri. Patrick Bernardinz D'Sa 15

15. Per contra, learned Senior Standing Counsel for the respondent-Department in turn contended that the writ petition filed by the petitioner being totally perverse deserves to be dismissed inlimine as there is hardly any substance on the part of (1977) 3 SCC 147 AIR 2016 SC 1285 (2010) 14 SCC 1 (2011) 2 SCC 94 (2011) 5 SCC 270 (2012) 1 AIR Bom R (NOC 35) 11 [ILR (2011) V1 Delhi 373] 2006 (4) SCC 517 (1981) 2 SCC 460 (2015) 39 STR 913 (SC) (2012) 10 SCC 1 AIR 1967 SC 1427 2019 (20) G.S.T.L. 181 (A.A.R GST) the petitioner for assailing the impugned notification. Learned counsel for the respondent-Department contended the fact that the provisions of GST law excludes levy of GST upon the sale of land.

16. It was the contention of the learned Senior Standing Counsel for the respondent-Department that the only ground of challenge to the notification is trying to bring the execution of JDA within the purview of an outright sale of land so as to exclude it from the coverage of GST.

17. Learned Senior Standing Counsel for the respondent- Department strongly contended that in order to reach to a conclusion whether the JDA would amount to an outright sale of land or it is only a transfer of development rights alone, it would be necessary to take into consideration certain clauses of JDA itself.

18. Some of the relevant clauses of the JDA necessary for understanding the issue involved in the instant case are reproduced herein under:

> "A. Landowner I is the sole and absolute owner of the non-agricultural land admeasuring 8.3 0 (eight point three zero) acres forming part of Plot Nos. 9, 10A and 10B and comprised in Survey No. 83/1, all situated at Hyderabad Knowledge City, Raiduty Village, Serilingampally Mandal, R.R. District, Telangana State, the details of which are morefully described in Part A of the First Schedule hereinunder written and hereinafter referred to as "Portion I".

B. Landowner II is the sole and absolute owner of the non-agricultural land admeasuring 1.82 (one point eight two) acres forming part of Plot No. 8B2 and comprised in Survey No. 8III /1, situated at Hyderabad Knowledge City, Raiduty Village, Serilingampally Mandal, R.R. District, Telangana State, the details of which are morefully described in Part B of the First Schedule hereinunder written and hereinafter referred to as "Portion II".

D. The Developer is having expertise in the business of conceptualizing, planning, constructing and developing commercial real estate projects. The Landowners have approached the Developer with a view to engage its services for developing the Schedule Property as an IT/ITES and/ or commercial office project in accordance with the terms of this Agreement.

E. After undertaking due diligence in respect of the Landowners title for their respective portions in the Schedule Property, for which the Landowners furnished the Developer all documents and complete information available with the Landowners limited to that as set out in the list annexed hereto and marked as Annexure II, and also relying on the representations, warranties and covenants provided by the Landowners as here-in-after set out in this Agreement, the Developer has expressed its willingness to provide expertise and services towards developing the Schedule Property.

F. The Parties are desirous to record the mutually agreed and clearly defined roles and responsibilities to develop the Schedule Property.

2.2 In consideration of the Developer performing terms of this Agreement, in pursuance of the foregoing, the terms and conditions hereinafter contained and subject to the mutual obligations undertaken by the Parties under this Agreement, the Landowners hereby irrevocably permit, grant and authorize the Developer, its agents, servants, associates and any person claiming through or under it, the exclusive right to enter upon the Schedule Property on and from the Effective Date only for the purpose of developing the Schedule Property subject to the terms of this Agreement.

2.3. Simultaneous with the execution of this Agreement, the Landowners have put the Developer in permissive possession of the Schedule Property in pursuance of Clause 2.2 above. The Landowners have granted such permissive possession and authority to develop, to the Developer, in pursuance of the terms of this Agreement and such permissive possession and authority to develop is one coupled with interest since the Developer will be incurring infrastructural costs and expenditure towards development of the Project including but not limited to costs for obtaining the Approvals.

2.4. The Parties agree that nothing contained in Clause 2.3 above shall be construed as delivery of possession in part performance of any agreement to sell under Section 53-A of the Transfer of Property Act, 1882 and/or Section 2(47) of the Income Tax Act, 1961.

2.5. (a) The Developer shall be entitled to engage architects, engineers, contractors and other agencies, to mobilize work force (collective "Vendors") necessary, as the Developer deems fit for execution and achieving Project Completion. Under no circumstances shall it be construed that the Landowners have any privity of contact with such Vendors. In the event of disputes/claims by such

Vendors from time to time, such disputes/claims shall not be the liability of the Landowners under any circumstances.

5.3. The Developer shall achieve Project Completion within 48 (forty eight) months commencing from the Project Commencement (such 48 (forty eight) months being hereinafter referred to as "Deadline Date"). The Parties further agree that, the Developer shall be entitled for a grace period of 6 (six) months commencing from the Deadline Date without the Developer being liable to the Landowners for any penalties or damages i.e. 54 (fifty four) months from the Project Commencement Date (such (fifty four) months from the Project Commencement Date (such 54 (fifty four) months being hereinafter referred to as "Default Deadline Date").

6.1. In consideration of the Developer agreeing to construct, develop and deliver to the Landowners the Landowners share, the Developer shall be entitled to construct, develop and absolutely own the Developer Share and receive conveyance of the Developer UDS as set out in this Agreement. Notwithstanding the Developer being in possession of the Schedule Property in accordance with Clause 2.2 above, the Landowners Share shall be delivered by the Developer on the Delivery Date contemporaneous with which the Landowners shall transfer and convey to the Developer and/or its nominee/s, the Developer UDS proportionate to such Developer Share for which Completion has been achieved subject to terms of this Agreement.

6.5. The Parties agree that the Landowners Chargeable Area shall be handed over to the Landowners in the following manner:

> 6.5.1. Land Owner I shall be handed over 82.2 % (eighty two point zero two percent) [i.e. 8,25,079 (eight lakh twenty five thousand seventy nine) square feet assuming Landowners Chargeable Area being 10,06,000 (ten lakh six thousand) square feet] of the Landowners Chargeable Area as may be mutually agreed and demarcated at the time of finalization of the Sanction Plan and further accurately identified in the Allocation Agreement.
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> 6.5.2. Land Owner II shall be handed over 17.98 % (seventeen point nine eight percent) [i.e. 1,80,921 (one lakh eighty thousand nine hundred twenty one) square feet assuming Landowners Chargeable Area being 10,06,000 (ten lakh six thousand) square feet] of the Landowners Chargeable Area as may be mutually agreed and demarcated at the time of finalization of the Sanction Plan and further accurately identified in the Allocation Agreement.
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> 23.4. Any Force Majeure event pursuant to Clause 23.2 shall extent the Approvals Deadline, but shall not in the aggregate be in excess of 12(twelve) months beyond the Approvals Deadline ("Long Shop Date"). Further, in the event such Force Majeure events result in extension of the Approvals Deadline beyond Long Stop Date, the Parties agree that the Landowners shall have the right but not the obligation (which will be exercised by way of a notice in writing to be issued to the Developer no later than 15 (fifteen) Business Days from the Long Stop Date:

to terminate this Agreement. Upon exercise of such right to terminate by the Landowners, this Agreement shall then stand terminated and each of the Parties shall stand released from all of their rights and obligations under this Agreement against the Landowners: (i) reimbursing the Developer in full all the actual costs, out in Annexure VIII upon the Developer providing the documentary proof towards such costs and expenses, and (ii) refund of the entire Security Deposit. Immediately upon such termination and upon payment of such costs and expenses and refund of Security Deposit, the Developer shall cease to be in permissive possession and the license to Developer in respect of the Schedule Property shall stand cancelled."

19. Referring to the aforesaid clauses of the JDA, learned Senior Standing Counsel for the respondent-Department strongly contended that upon reading of the clauses of the JDA, particularly the clauses which are reproduced in the preceding paragraphs, it gives a clear indication that there is no outright sale of property in the name of the developer. Rather, it is a case where the conditions would clearly indicate that the ownership, the title rights are all retained by the land owner himself and the only role which the developer has is the execution of JDA so far as developing of land belonging to the land owner is concerned.

20. The further contention of the learned Senior Standing Counsel for the respondent-Department is that the bar on levy of tax on sale of land admittedly is one which is given in Entry 5 of Schedule III of the GST law. Further, in the instant case according to the learned Senior Standing counsel for the respondent-

Department, there is no specific sale of land belonging to the owner reflected. That the so-called impugned notification dated 30.09.2019 issued by the GST Council is one which has been conferred with enormous powers as would be evident from Article 279A of the Constitution of India.

21. Referring to various clauses of the JDA, the learned Senior Standing Counsel for the respondent-Department pointed out that clause 5.3, 6.6, 12.1 and 12.4 so also the clause 18.1 and 23.4 all of which deal with the timelines, manner and procedure to be adopted by the developer in the course of execution of the JDA. These clauses would also reflect the nature of powers to be exercised by the developer in the course of execution of the JDA and with conditions and restrictions clearly spelt out, including that of force major, the timelines within which it has to be completed and on completion, handing over of the developed property to the landowners and other incidental clauses pertaining to the different activities to be undertaken by the developer. None of these clauses, according to the learned Senior Standing Counsel for the respondent-Department would clearly reflect that only by way of the petitioner undertaking to develop the property of the landowner in terms of the JDA would amount to an outright sale of land by the landowner to the petitioner.

22. It would be relevant to take note of clause 6.7 of the JDA which reads as under:

"6.7 The Parties have agreed that upon achieving Project- Phase I including but not limited to the handover of Landowner's Share (including but not limited to the handing over of possession of the Landowners UDS) to the Landowners on Delivery Date, the Developer shall be entitled to seek in its favour or in favour or any of its nominee(s) (subject to the terms of this Agreement), a conveyance (in the form of sale) from the Landowners of the Developer UDS in proportion to the completed Tower and Annex Building in the Project which is attributable to the Developer Share as per the Allocation Agreement. The Parties have further agreed that upon Project Completion, the Developer shall be entitled to seek and receive in its favour and/or in favour of any of its nominee(s) (subject to the terms of this Agreement), a conveyance (in the form of sale) from the Landowners of the remaining proportionate Developer UDS. It is clarified that in the event Completion of all 3 (three) Towers in the Project is achieved contemporaneously, then the Developer shall be entitled to receive conveyance (in the form of sale) of the entire Developer UDS. For the purposes of receiving sale of the Developer UDS in accordance with this Clause 6.7, the Developer shall be entitled to execute all relevant deeds and documents including sale deeds, conveyance deed etc. on behalf of the Landowners and admit execution thereof for purposes of registration before the jurisdictional Sub-Registrar of Assurances by using the authorization provided by the Landowners in terms of Clause 17 herein. Further, at the request of the Developer, the Landowners shall furnish certificate from its statutory auditor confirming that the Developer UDS is classified as stock in trade in its current financials and that there are no pending proceedings or liabilities in terms of Section 281 of the Income Tax Act, 1961 affecting the Landowners, prior to conveyance by sale of the Developer UDS or any part thereof in accordance with this Clause."

23. Reading of the aforesaid clause further gives a clear picture of the fact that mere execution of JDA by itself would not mean that the right, title and ownership of the property or a portion of that property stands transferred in the name of the petitioner/ developer. There are certain conditions/milestones/stages which have to be crossed before which the petitioner would be entitled to have a certain element of right over the completed constructed area which has been agreed to be left at the disposal of the petitioner. But that does not mean that mere execution of the JDA would amount to transfer of right to the petitioner.

24. What needs to be primarily considered and decided in the instant writ petition is whether the transfer of development rights of the immovable property of the landowners can be brought within the scope of GST. Reading of the clauses of JDA reproduced in the preceding paragraphs would by itself reflect that the landowners have bundle of rights attached to his immovable property. One of the rights is that of getting the property developed by engaging an agency of his choice, on his terms and in the manner he deems fit.

25. There is no quarrel so far as the ownership, title and possession of the subject property being vested with the landowners. There is also no dispute so far as the petitioner being engaged as an agency by the landowners for the purpose of developing their property into a commercial complex.

For the purpose of undertaking the construction and development of the land belonging to the landowners, the petitioners and the landowners have entered into a JDA cum power of attorney. By virtue of the JDA, the petitioner would have the permission/license to enter into the subject property of the landowners for the purpose of undertaking and execution of the development activities on the said property. In terms of the JDA, upon the petitioner developing the entire property, the landowners would be granting a share in the land proportionate to the built-up area for which the petitioner is entitled towards consideration for the development.

26. As per the terms of the JDA, it also has a clause which deals with a situation of any default on the part of the petitioner in not timely completing the project or any other conditions stipulated or breach of any of the conditions referred to in the said JDA. There is also a condition of cancelling the contract agreement and under such situation; the entire rights over the said property would continue to remain with the landowners. This again would show that the right and title of the property even as on date stands vested with the landowners and not with the petitioner.

27. Clauses 6.1 and 6.7 of JDA further envisages that after the development, later on when the developer/petitioner hands over the completed units to the landowners, the landowners and the developer will then enter into a conveyance deed whereby the landowners will execute a sale deed to transfer the undivided share of land which would fall to the share of the petitioner towards the investment, efforts, cost of construction and expenses incurred by the petitioner in the course of developing that entire property. Thus, it is evident that the petitioner is offering construction services to the landowners in exchange for the landowners transferring the development rights to the petitioner. Only on account of the development rights thus the petitioner gets the right to enter into the land to undertake construction over the said property.

28. The contention of the learned Senior Counsel for the petitioner that the JDA eventually results in sale of land to the petitioner is incorrect and misleading. It is only by way of a separate conveyance deed, that too, after the completion of the development activity, the undivided share of land to the extent the petitioner is entitled, could be transferred and not solely by virtue of the JDA, thus, the execution of the JDA between the two parties by itself would not amount to result in transfer of ownership. The transfer of development rights is hence a service under GST Law which the landowner is offering to the developer and that too for a consideration. Thus, the transfer of development rights is a service and not an outright sale of an immovable property.

29. From plain reading of the JDA that was entered into between the two parties, what is apparently visible is that, there was no outright sale of land being effectuated and the JDA per se cannot be considered merely as a medium adopted by the landowner selling his land and the JDA does not lead to sale of land by itself. After the entire development activities are carried out for the investment made by the petitioner for realizing what he has invested, he would be permitted to sell/dispose of certain developed properties constructed in execution of the JDA. In the said circumstances, the petitioner though has a right to realize the money from the sale of developed property, but the eventual transfer of developed/constructed property including undivided share of land in favour of the purchaser of the constructed property will happen only after transfer of undivided share of land by the landowner by way of sale deed. It is pertinent to refer the clause- 2.4,

by which, the parties agree that execution of JDA and permissive possession of the developer shall not be construed as delivery of possession in part performance of any agreement to sell under Section 53-A of the Transfer of Property Act, 1882. It is also relevant to mention that clause 6.1, by which , parties have agreed that the landowners shall transfer and convey to the developer and/or its nominee(s), the developer UDS proportionate to such developer share for which completion has been achieved subject to terms of this agreement contemporaneous with the delivery of the landowners share by the developer.

30. The transfer of ownership from the landowner goes directly to the purchaser of the constructed property and not in favour of the petitioner unless and until the land stands transferred in the name of the petitioner. The same cannot be brought within the ambit of sale. Transferring of the development rights does not result in transfer of ownership rights. That the sale of land/transfer of land or undivided share of land would get executed only after issuance of completion certificate of the project. This itself would give a clear indication that the services rendered by the petitioner in execution of JDA was supplied prior to the issuance of completion certificate and would thus be amenable to GST.

31. The reliance of the circular dated 10.02.2012 i.e. Circular No.151/2/2012-ST, may not be of any relevance for the dispute in the present writ petition as the same was issued under service tax regime under which service tax was levied only on those services which figured in the specified list of services and where sale of land by the landowner was held to be non-taxable. This definitely does not also say that the transfer of development rights would also automatically become non-taxable.

32. As regards the contention of the learned Senior Counsel for the petitioner that Article 265 of the Constitution of India prohibits imposition of tax otherwise that by authority of law, it has to be taken note of the fact that GST is levied under Article 246A of the Constitution which empowers the Parliament and State Legislatures to make laws with respect to GST. Section 9(1) of the CGST Act states that there shall be a tax levied called the 'central goods and services tax' on all intrastate supplies of goods or services or both, except on the supply of alcoholic liquor for human consumption on the value determined under Section 15 and at such rates not exceeding 20% as may be notified by the Government on the recommendations of the Council and collected in such manner as may be prescribed and shall be paid by the taxable person. That the Government after recommendation of the GST Council, had fixed the GST rates on supply of goods and services and thereafter GST on supply of the said service is levied in accordance and with authority of law. It was in this context that the subsequent notification dated 28.06.2017 i.e. Notification No.11/2017-CT(R) was issued.

33. It is as per the GST Council recommendation that the liability to pay GST on supply of TDR shall be shifted to the developer- promoter under reverse charge and was notified vide Notification No.5/2019-CT(R) dated 29.03.2019. Under reverse charge only the person required to deposit the tax and report it in return is changed. The eventual burden to bear the tax remains the same i.e. the service recipient in this case the developer-promoter.

34. From plain reading of the JDA, what is reflected is that there are two sets of transactions to be met in its entirety. One is agreement between the landowner and the petitioner and another is the supply of construction services by the petitioner to the landowners and only thereafter sale of constructed area to third party buyers. Both these transactions qualify as supplies made and would attract GST subject to clause (b) of paragraph 5 of Schedule II and both these supplies would fall under Section 7 of the GST Act i.e. construction services further read with Entry 5(b) of Schedule II. Under no circumstances can the aforesaid two supplies can be termed as sale of land under Entry 5 of Schedule- III.

35. The Hon'ble Supreme Court in the case of Commissioner of Income Tax v. Balbir Singh Maini 16 though dealing with the provisions of Income Tax Act, but under similar factual backdrop in paragraph Nos.19, 25 and 26 had held as under:

> "19. A plain reading of the JDA shows that it is essentially an agreement to facilitate development of 21.2 acres so that the developers build at their own cost, after obtaining necessary approvals, flats of a given size, some of which were then to be handed over to the members of the Society. Payments were also to be made by the developer to each member in addition to giving each member a certain number of flats depending upon the size of the member's plot that was handed over. What is important to bear in mind is that payments under the third instalment were only to be made after the grant of approvals and not otherwise, and that it is an admitted position that this was never done because no approvals (2018) 12 Supreme Court Cases 354 could be obtained as the High Court ultimately interdicted the project. Also, the termination clause is of great significance because it shows that in the event of the JDA being terminated, whatever parcels of land have already been conveyed, will stand conveyed, but that no other conveyances of the remaining land would take place.

25. The object of Section2(47)(vi) appears to be bring within the tax net a de facto transfer of any immovable property. The expression "enabling the enjoyment of"

> takes colour from the earlier expression "transferring", so that it is clear that any transformation which enables the enjoyment of immovable property must be enjoyment as a purported owner thereof. The idea is to bring within the tax net, transactions, where, though title may not be transferred in law, there is, in substance, a transfer of title in fact.

26. A reading of the JDA in the present case would show that the owner continues to be the owner throughout the agreement, and has at no stage purported to transfer rights akin to ownership, and that too for a specific possession alone is given under the agreement, and that too for a specific purpose--the purpose being to develop the property, as envisaged by all the parties. We are, therefore, of the view that this clause will also not rope in the present transaction."

36. The Notification No.4 of 2018 dated 25.01.2018 as amended by Notification No.23/2019-Central Tax (Rate), dated 30.09.2019, on its plain reading would reveal that it is not with which there is a charge created on the transfer of development rights, but in fact only provide for the time when the tax need to be paid. The very purpose of issuance of the said notification appears to be ensuring ease for the landowners and developers as transfer of development rights happen at the time of execution of JDA. However, handing over of the constructed area to the landowner happens at a later stage only on issuance of the completion certificate of the project. In other words, the aforesaid notification deals with the time of supply of services of transfer of development rights which was otherwise always taxable, since introduction of GST, has now been postponed to a time when the petitioner transfers the possession of the constructed/developed area to the landowner.

37. The Hon'ble Supreme Court also in the case of Super Poly Fabriks Limited v. Commissioner of Central Excise, Punjab 17 held as under:

> "There cannot be any doubt whatsoever that a document has to read as a whole. The purport and object with which the parties thereto entered into a contract ought to be ascertained only from the terms and conditions thereof. Neither the nomenclature of the document nor any particular activity undertaken by the parties to the contract would be decisive."

38. As far as the various judgments cited by the learned Senior Counsel for the petitioner which are reflected in paragraph No.14, if we look into the facts of each of those judgments, it will be evidently clear that all those judgments were rendered under an entirely different factual backdrop unconnected and unrelated to the issue involved in the present case. In view of the same, without dealing with each of those cases separately, we are of the 2008 SCC OnLine SC 715 considered opinion that those judgments and the principles laid down in those judgments cannot be made applicable in a straight jacket manner/formula to the facts of the present case.

39. On conjoint reading of the clauses under JDA, clause d of the JDA along with clause 2.2, 2.3, 2.4, 6.1, 6.7 and 23.4 (all of which stands reproduced in the preceding paragraphs of this order) it will clearly indicate that there is no automatic transfer of ownership given to the petitioner at the time of execution of the JDA. That until the completion of the project takes place, the petitioner does not get any right on the said property and it is only after the completion of the project, issuance of completion certificate, the petitioner derives the right to sell the area of property which stood allotted to him for the realization of amount of money invested by him in the course of execution of the JDA. Thus, as has been held earlier, under no circumstances can the execution of the JDA or the mere transfer of development rights nor any of the clauses of the JDA indicate an automatic transfer of ownership or title rights over any portion of land belonging to the landowner in favour of the petitioner/developer. In the absence of any cogent and substantial material to establish right, title and ownership being created in favour of the petitioner/developer, the transfer of development rights as it stands is amenable to GST and cannot be brought within the purview of Entry 5 of Schedule-III of the GST Act.

40. Taking into consideration the provisions of Article 246A of the Constitution of India and also considering the extraordinary powers which have been conferred upon the GST Council and upon whose recommendation the Government has issued the notification clarifying the aspect of transfer of development rights being attracted to GST/TGST, the challenge to the notification issued by the Government of India can be safely held to be devoid of merits.

41. For all the aforesaid decisions and reasons, we are of the considered opinion that the grounds and contentions raised by the petitioner in respect of the reliefs sought for is not sustainable and the writ petition sans merit and therefore deserves to be and is accordingly, dismissed. No costs.

Consequently, miscellaneous petitions pending if any, shall stand closed.

_ P. SAM KOSHY, J _____ LAXMI NARAYANA ALISHETTY, J Date: 09.02.2024 GSD/kkm THE HON'BLE SRI JUSTICE P.SAM KOSHY AND THE HON'BLE SRI JUSTICE LAXMI NARAYANA ALISHETTY Date: 09.02.2024 Gsd/kkm