

**ONCE STAMP DUTY IS PAID ON A DEVELOPMENT AGREEMENT, THEN NO STAMP DUTY IS PAYABLE ON A PERMANENT ALTERNATE ACCOMMODATION AGREEMENT BEING AN INCIDENTAL DOCUMENT**

**INTRODUCTION:**

*The Bombay High Court in a recent decision in **Adityaraj Builders vs The State of Maharashtra and Ors.**<sup>1</sup> observed that once a Development Agreement has been stamped, then a Permanent Alternate Accommodation Agreement is only an incidental document within the meaning of Section 4(1) of the Maharashtra Stamp Act, 1958 and need not be assessed to stamp duty.*

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**FACTS:**

In the present case, all the Petitions raised a common question of law under the Maharashtra Stamp Act, 1958 ("**said Act**"). All the Petitions relate to the stamp duty sought to be levied on a Permanent Alternate Accommodation Agreement ("**PAAA**"). Typically, PAAAs are executed by a developer with individual members of housing societies or other persons already in occupation and whose houses are being redeveloped. All PAAAs generally follow a pattern. A society enters into an agreement, called a Development Agreement ("**DA**") or a Redevelopment Agreement with a developer which has two parts. One part is the construction of new homes for existing society members or occupants. The second part is the construction of free sale units which the developer can put to sale in the open market. Sometimes, but not always, individual society members also sign the DA. Equally, there are many cases where the society executes the DA with the developer, but individual members of the society do not. Such individual members are members of the society and the society acts on their behalf.

On 4<sup>th</sup> June, 2013, the State Government issued a circular that stamp duty would be chargeable on PAAAs. The value of stamp duty would be computed on the basis of the costs of construction of the flats and the market value of the additional area, if any.

On 7<sup>th</sup> November, 2013, the Chief Controlling Revenue Authority of the Maharashtra State issued a circular with guidelines for charging stamp duty on PAAAs. This circular stated that the stamp duty would be computed on the costs of construction of the retained area. Where fungible Floor Space Index ("**FSI**") was used, stamp duty would be computed on the construction cost and the premium paid on the fungible area.

Thereafter, on 23<sup>rd</sup> June, 2015, the impugned circular, was issued by the Chief Controlling Revenue Authority. This circular made a distinction between a cooperative society and the 'owners', meaning the members of the Society. The impugned circular contemplated that PAAAs between the society members and the developer were different from the DA between the society and the developer.

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<sup>1</sup> Writ Petition No. 4575 of 2022

Another clarificatory circular dated 30<sup>th</sup> March, 2017, was thereafter issued by the Chief Controlling Revenue Authority. This clarificatory circular purported to specify a criteria to be complied that individual society members must compulsorily join in the execution of the original DA, i.e., that every single society member must countersign the DA. The circular further stated that only on such compliance, PAAAs with individual society members would be treated as documents incidental to the DA, attracting the application of Section 4 of the said Act.

Both the circulars, i.e. circular dated 23<sup>rd</sup> June, 2015 and circular dated 30<sup>th</sup> March, 2017 ("**Impugned Circulars**"), were challenged by the present Petitions.

The Petitioners in the present Petitions were of the view that the Impugned Circulars overlooked a fundamental aspect, viz., that existing members and occupants were not in any sense 'purchasers' of the areas to which they were entitled in law on reconstruction. The existing members and occupants were only being provided new accommodation in lieu of earlier accommodation. The Petitioners were also of the view that for the purposes of assessment of stamp duty, PAAAs were never independent of the DA.

There was also no dispute that the DA was to be stamped. The issue was on the demand by the stamp authority that individual PAAAs for members or existing occupants must also be stamped on a value reckoned at the cost of construction.

#### **ISSUE FOR CONSIDERATION:**

The main issue for consideration before the Bombay High Court was as follows:

Whether PAAAs are required to be stamped on a value estimated at the cost of construction?

#### **JUDGMENT:**

The Bombay High Court observed that an agreement between an outsider and a society binds members of the society. Conversely, an agreement with an individual member was part and parcel of, included in, covered by or subordinate to the principal DA between the society and the developer. To substantiate its view, the Bombay High Court relied on its judgment in ***Girish Mulchand Mehta and Anr. vs Mahesh S Mehta and Anr.***<sup>2</sup>.

The Bombay High Court in the present Petitions observed that at the time of executing a DA, the society acts for all its members, even those who may disagree, because a society is run by majority.

The Bombay High Court further observed that a PAAA may provide for other matters such as bespoke questions of the amount of transit rent, individual flat numbers, distinct flat sizes, and so on, but a PAAA was only a particularisation per member of the redevelopment contemplated by the DA itself. As a matter of fact, it is the society that goes into redevelopment, which redevelopment is governed by the DA. There could, conceivably, be a DA without a single PAAA, i.e., by adding pages and pages of annexures, but there could never be society redevelopment only on the basis of PAAAs without a DA with the society. The segregation of the documents adopted by the society and its members was merely for convenience and done for simplicity, clearer understanding and ease of reference of all concerned.

The Bombay High Court was of the view that the only stamp duty a member of society would be

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<sup>2</sup> 2016 SCC OnLine Bom 100

liable to pay would be for any additional area that such member would actually purchase for consideration.

From the perspective of a society member, such member would be getting: (a) a home in replacement of a home; (b) a larger home in replacement of a smaller home; and (c) the option of purchasing additional area for the replacement home. It is only item (c) that could ever be assessed to stamp duty. Items (a) and (b) would never be liable to stamp.

Referring to Section 4(1) of the said Act, the Bombay High Court observed that if PAAAs were included in the DA as annexures then there would only be one Agreement covering the whole of the DA. The question of charging stamp duty by the stamp authority would not arise as there was no method by which the stamp authority could ever levy stamp duty on every annexure to a DA.

The Bombay High Court observed that the requirement contained in the Impugned Circular dated 30<sup>th</sup> March, 2017, that every member must also sign the DA suffered from two vulnerabilities. Firstly, it was entirely beyond the jurisdictional remit of the revenue authorities to dictate what form an instrument must take. A revenue authority must take the instrument as it finds it. Secondly, there was no concept in law of a society not representing the interests of all its members.

The Bombay High Court opined that although there was no problem with the requirement contained in the Impugned Circular dated 30<sup>th</sup> March, 2017, the difficulty however was the refusal to see the PAAA for what it actually was and to demand that there should be only one document, tripartite or multi-tripartite in nature, that everybody must sign. If everybody signed the document, then Section 4(1) of the said Act

which speaks of several instruments (meaning more than one document) had no application. Section 4(1) of the said Act clearly contemplates more than one document and does not speak of more than one party to a single document. The stamp authorities were not entitled in law to issue such a circular or to insist on any such requirement.

In view of the above, the requirement that a society must be a consenting party to the PAAA was not a requirement in law. Such a requirement could not be imposed at all under the said Act. Such a requirement could also not be applied by means of a circular as a circular cannot do something that the parent statute does not contemplate.

The Bombay High Court *inter alia* passed the following order:

- a) A DA between a society and a developer for development of the society's property (land, building, apartments, flats, garages, godowns, galas) is required to be stamped.
- b) A DA is not required to be signed by individual members of the society.
- c) A PAAA between a developer and an individual society member is not required to be signed on behalf of the society. It was optional for a society to be included as a confirming party.
- d) Once the DA is stamped, the PAAA cannot be separately assessed to stamp duty beyond the Rs. 100/- requirement of Section 4(1), only if such PAAA relates to the rebuilt or the reconstructed premises in lieu of the old premises used/occupied by the member of the society, including any additional area made available for free to such member. The PAAA is an incidental document within the meaning of Section 4(1) of the said Act.

e) A PAAA between a developer and a society member is required to be additionally stamped only to the extent that it provided for the purchase by the member for actual stated consideration of additional area over and above any area that is made available to such member in lieu of the earlier premises.

Accordingly, the Petitions were allowed and the Impugned Circulars were quashed and set aside.

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*The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.*