

Bombay High Court clarifies the position regarding payment of stamp duty on Permanent Alternate Accommodation Agreements when stamp duty has already been paid on the Development Agreement

A division bench of the Bombay High Court (“*High Court*”) in its recent judgment of *Adityaraj Builders v. State of Maharashtra & Ors*¹ *inter alia* held that once requisite stamp duty has been paid on a development agreement entered into between a developer and co-operative housing society, the ancillary Permanent Alternate Accommodation Agreements (“*PAAAs*”), executed between the developer and the individual members of the co-operative housing society, are not liable to be separately assessed and stamped beyond the requirement under Section 4(1) of the Maharashtra Stamp Act, 1958 (“*Stamp Act*”).

Brief Facts:

A batch of 9 (nine) Writ Petitions were filed under Article 226 of the Constitution of India before the High Court *inter alia* challenging the *vires* of two circulars dated: (i) June 23, 2015 (“*2015 Circular*”) and (ii) March 30, 2017 (“*2017 Circular*”) issued by the relevant stamp authorities.

2015 Circular

This circular concerns stamp valuation at the time of allotment of areas to members in new buildings in redevelopment projects of co-operative housing societies, and concerns what are called PAAAs. These PAAAs are typically executed by a developer with either the individual members of a housing society or persons already in occupation and whose houses are being redeveloped.

The 2015 Circular sought to draw a distinction between 2 (two) scenarios, namely, where: (i) both the development agreement as well as the PAAAs (incidental agreements) were executed between the developer and the co-operative housing society (termed as the original owner); and (ii) the development agreement was executed between the society and the developer, and the agreements for transferring the tenements (PAAAs) were executed between the developer and each original member of the society.

In the first scenario, in terms of Section 4 of the Stamp Act, payment of full stamp duty as prescribed would only be attracted on the principal agreement, i.e., the development agreement and all other instruments i.e., the incidental agreements/PAAAs would be subject to a duty of INR 100 (Indian Rupees one hundred).

¹ Writ Petition No. 4575 of 2022

In the second scenario, the agreements for transfer of the tenements to the original members of the society were not to be treated as incidental agreements to the main development agreement but were instead to be regarded as independent agreements on which full stamp duty on the construction costs for the area to be transferred would have to be paid.

2017 Circular

Subsequently, the 2017 Circular was issued to clarify the position under the 2015 Circular and *inter alia* provided as follows:

1. Where the development agreement was made between the society and the developers, and individual members were not parties to such development agreement, the provisions of Section 4 would not be applicable to the the PAAA. Accordingly, the PAAA would not be treated as an incidental document but as an independent document, on which stamp duty would be charged on the cost of construction.
2. In cases where the following criteria were complied with, the transfer documents in favour of the individual members would be treated as PAAAs of the original development agreement and the provisions of Section 4 of the Stamp Act would be applicable:
 - a) the making of a tripartite agreement between society (original owner), member and developer; and
 - b) the incorporation of a provision in the development agreement to make a separate transfer document for the new flat of each individual member; and
 - c) the limited objective of transferring the built-up area in the transfer document in favour of the member in accordance with the terms and conditions of the original development agreement; and
 - d) the housing society being a consenter / confirming party in the transfer document in favour of each individual member.

Issue:

Whether PAAAs executed pursuant to a duly stamped development agreement between a developer and a co-operative housing society are also required to be stamped on the basis of a value reckoned at the cost of construction?

Findings and Analysis by the High Court:

The High Court allowed the petitions and set aside the 2015 Circular and the 2017 Circular. The following are the key takeaways from the judgment:

1. A development agreement between a cooperative housing society and a developer for development of the society's property (land, buildings, apartments, flats, garages, godowns, galas) is required to be stamped.
2. The development agreement need not be signed by individual members of the society. Even if the individual members do not sign, the development agreement controls the redevelopment and the rights of the society members.
3. It is entirely beyond the remit of revenue authorities to dictate what form an instrument must take. A revenue authority must take the instrument as it is found.
4. A PAAA between a developer and an individual society member is not required to be signed on behalf of the society. This is optional, with the society as a confirming party.
5. Once the development agreement is stamped, the PAAA cannot be separately assessed to stamp beyond the requirement of INR 100 (Indian Rupees one hundred) as provided under Section 4(1) of the Stamp Act if it relates to, and only to, rebuilt or reconstructed premises in lieu of the old premises used / occupied by the member. This

holds good even if the PAAA includes additional area available free to the member because it is not a purchase or a transfer but is in lieu of the member's old premises. The stamp on the development agreement includes the reconstruction of every unit in the building and cannot be levied twice.

6. To the extent that the PAAA is limited to the rebuilt premises without the actual purchase for consideration of any additional area, the PAAA is an incidental document within the meaning of Section 4(1) of the Stamp Act.
7. A PAAA between a developer and a society member is to be additionally stamped if the member, for a stated purchase price, purchases an additional area over and above any area that is made available to the member in lieu of the earlier premises.
8. The provision or stipulation for assessing stamp on the PAAA on the cost of construction of the new premises in lieu of the old premises cannot be sustained.
9. The findings are not limited to the facts of the petitions.
10. The references to re-development and homes are to be read to include garages, galas, commercial and industrial use, and every form of society re-development.

JSA Comment

The judgment has far reaching implications on redevelopment projects in the State of Maharashtra and particularly, the city of Mumbai in which large scale redevelopment projects are currently being undertaken. This judgment is likely to bring relief to both developers and individual members in societies that are in the process of undergoing redevelopment.

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