

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 25th DAY OF FEBRUARY, 2025

BEFORE

THE HON'BLE Mr. JUSTICE M.G.S. KAMAL

WRIT PETITION No.51001 OF 2019 (BDA)

C/W

WRIT PETITION No.7028 OF 2022 (BDA)

IN WRIT PETITION NO.51001/2019

BETWEEN:

SRI. B G PARAMESHWARA
S/O LATE C GOPAL
AGED ABOUT 47 YEARS
R/AT NO.74, CHANNABASAVA NILAYA
III MAIN ROAD, II CROSS,
MPM LAYOUT, MALLATHAHALLI,
BENGALURU-560 056.

...PETITIONER

(BY SRI. MONESH KUMAR.,ADVOCATE)

AND:

1. BENGALURU DEVELOPMENT AUTHORITY
T CHOWDAIAH ROAD
KUMARAPARK WEST,
BENGALURU-560 020
REP BY ITS COMMISSIONER.
2. THE GST CENTRAL TAX
BASAVESHWARA BUILDING
CRESCENT ROAD
BENGALURU - 560 001.
(REP BY ITS COMMISSIONER)
3. THE GOVERNMENT OF KARNATAKA

COMMERCIAL TAXES DEPARTMENT GST
 VANIJA THERIGE KARYALAYA
 I MAIN ROAD, GANDHI NAGAR
 BENGALURU - 560 009
 (REP BY ITS COMMISSIONER)

...RESPONDENTS

(BY SRI. G.S. KANNAN SENIOR COUNSEL FOR
 SRI. BASAVARAJA H.T., ADVOCATE FOR R1;
 SRI. AKASH B. SHETTY., ADVOCATE FOR R2
 SMT. B. SUKANYA BALIGA., AGA ROR R3)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA PRAYING TO QUASH THE ENDORSEMENT ISSUED BY THE RESPONDENT DATED 23.08.2019 INDICATING THAT AS PER SL.NO.10 TO THE ENDORSEMENT THE PETITIONER HAS TO MAKE GOOD A SUM OF RS.5,28,000/- TOWARDS BALANCE GST FEE AND PRODUCE THE CHALLAN FOR PROOF OF PAYMENT, COPY OF THE SAME IS PRODUCED AS ANNEXURE-N AND ETC.

IN WRIT PETITION NO.7028/2022

BETWEEN:

- 1 . SRI K.S. KUNAL
 S/O K R SHSIVANANDASWAMY
 AGED ABOUT 28 YEARS,
 RESIDING AT NO B-18-171 TYPE III
 PHASE II, ALUR BDA LAYOUT
 HUSKURU MAIN ROAD
 OPP GOLDEN PALM RESORT
 DASANAPURA,
 BENGALURU - 562 123.
- 2 . SMT SUSHEELA A G
 S/O K R SHIVANANDASWAMY

AGED ABOUT 61 YEARS,
RESIDING AT NO B-18-171, TYPE III
PHASE II, ALUR BDA LAYOUT
HUSKURU MAIN ROAD, OPP.
GOLDEN PALM RESORT
DASANAPURA,
BENGALURU - 562 123.

- 3 . SRI SHEKHARAPPA G. DODDAMANI
S/O GUDDAPPA DODDAMANI
AGED ABOUT 57 YEARS,
RESIDING AT NO C-37,
KPWD QUARTERS
NEAR SNEHA SADANA TRUST
JEEVAN BHIMA NAGAR
BANGALORE - 560 075.
- 4 . SMT SUNITHA D K
W/O SHEKHARAPPA G DODDAMANI
AGED ABOUT 47 YEARS,
RESIDING AT NO C-37,
KPWD QUARTERS
NEAR SNEHA SADANA TRUST
JEEVAN BHIMA NAGAR
BANGALORE - 560 075.
- 5 . SMT JAYASHREE BADRINARAYANA
W/O K V BADRINARAYANA,
AGED ABOUT 50 YEARS,
RESIDING AT NO 85, 3RD CROSS
P AND T COLONY, R T NAGAR
BANGALORE - 560 032.
- 6 . SMT K V VARALAKSHMI
W/O HARESHA BABU
AGED ABOUT 51 YEARS,
RESIDING AT NO 301,
ANJANADRI DUPLEX ROW HOUSE
NO 36/B2, 2ND MAIN, 2ND STAGE
INDUSTRIAL SUBURB,

YESHWANTHAPUR
BANGALORE - 560 022.

- 7 . SRI SRINIVASA MURTHY
S/O PAPANNA M,
AGED ABOUT 60 YEARS,
RESIDING AT FLAT NO 6 C 304,
LIC OFFICERS QUARTERS
JEEVAN BHIMA NAGAR
NEAR WATER TANK
BANGALORE - 560 078.
- 8 . SRI. PRASHANTH A GANGANAGOUDAR
S/O A B GANGANAGOUDAR
AGED ABOUT 40 YEARS,
RESIDING AT HOUSE #832,
3RD MAIN ROAD, E BLOCK, 2ND STAGE,
RAJAJINAGAR,
BANGALORE -560 010.

...PETITIONERS

(BY SRI. RAGHAVENDRA G GAYATRI, ADVOCATE)

AND:

- 1 . THE STATE OF KARNATAKA
REPRESENTED BY ITS
PRINCIPAL SECRETARY
URBAN DEVELOPMENT DEPARTMENT
VIKASA SOUDHA,
BANGALORE - 560 001.
- 2 . BANGALORE DEVELOPMENT AUTHORITY
REPRESENTED BY ITS COMMISSIONER
T. CHOWDAIAH ROAD,
KUMARA PARK WEST,
BANGALORE - 560 020.

- 3 . GST CENTRAL TAX
REPRESENTED BY ITS COMMISSIONER
BASAVESHWARA BUILDING
CRESCENT ROAD,
BANGALORE - 560 001.
- 4 . THE COMMERCIAL TAXES DEPARTMENT
GST, REPRESENTED BY ITS COMMISSIONER
VINIJYA THERIGE KARYALAYA
1ST MAIN ROAD, GANDHI NAGAR
BANGALORE - 560 009.

...RESPONDENTS

(BY SRI. G.S. KANNAN SENIOR COUNSEL FOR
SRI. BASAVARAJA H.T., ADVOCATE FOR R1;
SRI. AKASH B. SHETTY., ADVOCATE FOR R2
SMT. B. SUKANYA BALIGA., AGA ROR R3)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA PRAYING TO QUASH THE ENDORSEMENTS ISSUED BY THE 2ND RESPONDENT - BDA DATED 27.02.2020, 03.07.2021, 29.02.2020, 23.07.2020, 17.02.2021, 23.02.2022 AND 05.02.2022 INDICATING THAT THE PETITIONERS HAVE TO MAKE GOOD A SUM OF RS.4,34,175/- RS.5,04,000/-, RS.4,34,175/- RS.5,30,925/-, RS.5,04,000/-, RS.5,04,000/- AND RS.5,30,938/- RESPECTIVELY TOWARDS BALANCE GST FEE AND PRODUCE THE CHALLAN FOR PROOF OF PAYMENT, COPIES OF THE SAME ARE PRODUCED AS ANNEXURE-A TO G AND ETC.

THESE WRIT PETITIONS HAVING BEEN RESERVED FOR ORDERS, COMING ON FOR PRONOUNCEMENT THIS DAY, MADE THE FOLLOWING:

CORAM: HON'BLE MR JUSTICE M.G.S. KAMAL

CAV ORDER

Petitioner in W.P.No.51001/2019 is before this Court seeking following reliefs;

a) issue a writ order or direction in the nature of Certiorari to quash the endorsement issued by the Respondent dated 23.08.2019 vide No.BDA/AC/RR/BI-FOR/VGC-F/2BHC/19-20 indicating that as per Sl.No.10 to the endorsement, the Petitioner has to make good a sum of Rs.5,28,000/- towards balance GST fee and produce the challan for proof of payment, copy of the same is produced as ANNEXURE-N.

b) issue a writ order or direction in the nature of mandamus to the respondent to give effect to the representation of the petitioner to the respondent, copy of the representation of the Petitioner to the Respondent dated 05.09.2019 is produced as ANNEXURE-P.

(b1) Issue a writ order or direction in the nature of mandamus to the Respondent No.1 to refund the Car Park sale proceeds illegally received from the Petitioner being an amount of Rs.2.00 Lakhs in view of the law laid down by the Hon'ble Apex Court.

(b2) Issue a Writ Order or direction to the Respondent- BDA in the nature of Mandamus to execute the Lease Cum Sale deed and put the Petitioner in physical possession of the Flat allotted in his favor by providing all modern amenities within 15 days at the same price sold to identical purchasers as per the sale deed produced as ANNEXURE-Q from today to serve the ends of justice.

(b3) To impose exemplary costs on the Respondent BDA for all illegal actions contained in the petition being statutory lapses and volition of rule of law.

(c) pass such other orders/directions that this Honb'le Court may deem it fit and proper considering the facts and circumstances of the case together as to an order as to costs.

2. Petitioners in W.P.No.7028/2022 are before this Court seeking following reliefs;

(a) Issue a writ or order in the nature of certiorari and to quash the endorsements issued by the 2nd Respondent-B.D.A. dated 27.02.2020, 03.07.2021, 29.02.2020, 23.07.2020, 17.02.2021, 23.02.2022 and 05.02.2022 indicating that the Petitioners have to make good Rs.5,04,000/-, sum of Rs.4,34,175/-, of Rs.4,34,175/-, Rs.5,30,925/-, Rs.5,04,000/-, Rs.5,04,000/- and Rs.5,30,938/-respectively towards balance GST fee and produce the challan for proof of payment, copies of the same are produced as ANNEXURES-A to G.

(b) Issue a writ, order or direction in the nature of mandamus to the 2nd Respondent to give effect to the representations of the Petitioners to the 2nd Respondent. Copies of the representations of the Petitioners to the 2nd Respondent dated 00.05.2020 and 08.11.2021 are produced as ANNEXURES P & Q.

(c) Issue a Writ, Order or direction to the 2nd Respondent-B.D.A. in the nature of Mandamus to execute the Absolute Sale Deed and put the Petitioners in physical possession of the Duplex row houses allotted in their favour by providing all modern amenities within 15 days at the same price as sold to identical purchasers in terms of the sale deed to serve the ends of justice.

(d) To impose exemplary costs on the 2nd Respondent-B.D.A. for all illegal actions contained in the Petition being statutory lapses and violation of rule of law.

(e) Pass such other orders/directions that this Hon'ble Court may deem it fit and proper in the facts and circumstances of the case.

(f) To issue a writ of mandamus or direction directing the Respondent-B.D.A. to register the Sale Deeds by mentioning the extent of the land area to be sold to the petitioners."

3. Facts in brief involved in W.P.No.51001/2019 are as under;

(a) That by a notification dated 09.08.2017 the respondent- BDA had announced a scheme for residential apartments consisting of various sizes. Petitioner had applied for an allotment of two bedroom apartment in the said residential project of the respondent- BDA at Valagerahalli Phase 6. That petitioner was provisionally allotted an apartment bearing Flat No.B1-501 in terms of an Allotment Certificate dated 09.04.2018 and the petitioner had paid the entire sale consideration in a total sum of Rs.44,91,250/- as indicated by the respondent-BDA as per the payment schedule. In addition petitioner had also paid Rs.2,00,000/- towards the car parking space as per the advertisement. That petitioner had

requested the respondent-BDA to inform the date of registration of the apartment allotted in his favour.

(b) When things stood thus, respondent- BDA had issued an endorsement to the petitioner on 23.08.2019 calling upon the petitioner to pay a sum of Rs.5,28,000/- towards the service Tax (GST) under the provisions of the Central Goods and Services Tax Act, 2017 (**for short Act 2017**) fee and to produce challan as a proof for having made the said payment. Petitioner in response had made a representation as per Annexure-P informing the respondent-BDA that, what was offered to him was a full completed apartment and there was no pre-construction agreement between the petitioner and respondent-BDA. As such, there was no question of payment of any service tax. It is contended when there was no supply or exchange of any service between the petitioner and the respondent- BDA, the imposition of tax towards the GST was unjustified as the services tax is inapplicable in respect of a complete and ready apartment. And had consequently called upon the

respondent-BDA to withdraw the aforesaid endorsement and to arrange for registration of the apartment in his name at the earliest. Non-consideration of the same and the demand made by the respondent- BDA for payment of ₹5,28,000/- gave rise to the writ petition.

(c) Statement of objections had been filed by the respondent-BDA to the aforesaid W.P No.51001/2009 contending that the petitioner had filed an application for allotment of apartment on 28.03.2018 and the construction of the said apartment was completed on 31.12.2018. That the cost of the apartment was Rs.44,00,000/-. In addition the petitioner was required to pay Rs.91,250/- towards electricity and water charges and Rs.5,28,000/- towards 12% of GST. That the said payment of GST is as per Section 7 and Schedule II of CGST Act, 2017. Since the petitioner agreed to purchase the apartment and made the payment of part of consideration prior to completion of construction, he is liable to pay the GST. Hence, sought for dismissal of the petition.

4. Facts involved in the W.P.No.7028/2022 are as under;

(a) A notification was issued by the respondent-BDA on 19.11.2016 calling upon the general public to get affordable ready built duplex row houses on first come first served basis. That as per the notification the project had to be completed by the tenderer/contractor within 24 months. Totally 452 houses were to be constructed by the tenderer/ contractor consisting of 3 types of row houses. The agreement that was entered into between the tenderer /contractor and the respondent-BDA had clearly provided that the price quoted by the tenderer/ contractor for the whole work as detailed in the schedule included all taxes, namely, sales taxes, service taxes, municipal taxes, local taxes etc., and other duties and levies.

(b) That in furtherance to the aforesaid notification issued by the respondent -BDA petitioners had applied for allotment of 2 BHK, Type 3 duplex row houses. The respondent- BDA had allotted the said houses to the petitioners in terms of the letters of allotment produced at

Annexure-M series. The respondent-BDA had also issued no objection certificates to the petitioners enabling them to avail loan from the nationalised bank or any other financial institutions. That petitioners had initially paid the sale consideration as quoted in the letters of allotment. That inspite of the payments of the sale consideration, the respondent- BDA failed to register the houses by executing absolute deeds of sale, instead issued endorsement calling upon the petitioners to pay the GST contending the construction of their duplex row houses was completed on and after 30.06.2017.

(c) Some of the petitioners had submitted representations requesting the respondent -BDA not to insist for payment of GST, inasmuch as, in the initial notification issued by the respondent-BDA all taxes had been included. As such, respondent-BDA was not justified in collecting the additional tax towards the GST, is their claim.

(d) It is also contended the rate at which the GST is demanded is not uniform. Different amounts have been

demanded for different duplex row houses. It is contended that the respondent- BDA in its note sheet had noted no GST was liable to be paid in respect of the row houses that were completed before 30.06.2017. However, in respect to the houses purchased by the petitioners, the respondent-BDA had sought payment of GST. It is these demands which have led the petitioners to approach this Court on the ground of discrimination and disparity as contended in the writ petition.

(e) Objection statements have been filed to the said W.P.No.7028/2022 contending *inter alia* that the petitioners who had made applications for allotment of row houses at Alur Phase 2, Type 3 had made initial deposits as against which they were allotted row houses as per letters of allotment produced at Annexure-M series. That the petitioners had not paid balance sale consideration which was required to be paid in instalments, as such the respondent-BDA had called upon the petitioners to pay the balance amount, which was deposited by the petitioners on different dates. The

respondent-BDA had issued communications calling upon the petitioners to pay the GST amounts payable in respect of the houses allotted to them as required to be paid under the provisions of CGST Act, 2017.

(f) It is further contended that liability to pay the GST separately was made known to the applicants/allottees in the notifications published inviting applications. The petitioners had applied for allotment of houses being aware of their responsibility to make payment and as such they cannot contend to the contrary. That the GST amount is calculated based on the instalment amounts paid by the allottees. As such, there is variation in the rate of payment of GST. Some of the petitioners had approached the Consumer Disputes Redressal Forum wherein they had admitted to pay the GST amount at the time of registration of the houses and would seek refund of the same subject to result of the writ petition.

(g) That the construction of houses in Block Nos.1 to 5 were completed before 30.06.2017. The houses subject matter of the present petition that were allotted to the

petitioners are in Block Nos. 9, 13, 18 and 22 and the construction of these houses was completed on 31.01.2019 and the completion certificates were issued on 21.02.2019. Therefore, the GST was not applicable in respect of Blocks which were constructed prior to 30.06.2017. As such, there is no discrimination as alleged. Hence, sought for dismissal of the petition.

5. Sri.K.B.Monesh Kumar, learned counsel appearing for the petitioner in W.P.No.51001/2019 taking this Court through the averments made in the writ petition and the grounds urged therein and also the documents enclosed with the writ petition, vehemently submitted that;

(a) the petitioner had been provisionally allotted apartment bearing Flat No.B1-501 of Valagerahalli Phase 6. That by the very notification/advertisement which was published by the respondent- BDA, General Public was called upon representing "*pick a flat of your choice by submitting applications across the counter*", as such it has to be presumed that the apartment offered by the

respondent-BDA to the petitioner was completed in all respects.

(b) He also referred to Clause 5 of the said notification to submit that the same had indicated successful applicants would have the options of choosing apartment of their choice.

(c) He also referred to the Allotment Letter dated 09.04.2018 to contend that even on the date when the letter of allotment was issued the apartment was fully completed. As such, the total value of the apartment was indicated in the said letter as Rs.44,00,000/-.

(d) Referring to the aforesaid documents, learned counsel submitted that since what was given to the petitioner was a complete apartment, and there was no construction agreement, as such the respondent- BDA was not justified in demanding the service tax.

(e) That the apartment allotment certificate issued by the respondent-BDA and the payments made by the petitioner are not linked to the stage of construction. That

the petitioner made the final payment on 21.03.2019 while even according to the respondent -BDA the completion certification had been obtained on 31.12.2018. Thus, the payment made by the petitioner is subsequent to construction of apartment. As such, Section 5 of Schedule II of GST is not applicable to the case of the petitioner.

(f) He referred to Bangalore Development Authority (Allotment of Sites) Rules, to contend that the allotment of apartment is governed under the said Rules and the said Rules contemplate that until site is conveyed to the allottee, the amount paid by the allottee for purchase of the site shall be held by the authority as a security deposit for due performance of terms and condition of lease-cum-sale agreement entered into between the authority and the allottee. As such, payment made by the petitioner are not towards the agreement with respondent-BDA or linked to the stage of construction but was towards allotment of fully constructed apartment.

(g) That the respondent-BDA has not entered into any construction agreement, agreement to sell with the petitioner and no property /service is passed under such agreements. As such, GST is not applicable. Mere delay in obtaining the occupancy certificate by the respondent-BDA shall not be the reason for imposing tax on the petitioner. He also contended as regards the affordable housing GST payable is 5% and not 12% as claimed by the respondent-BDA.

(h) Learned counsel in support of his submission relied upon the judgment of the Apex Court in the case of **LARSEN AND TOUBRO LIMITED AND ANOTHER vs. STATE OF KARNATAKA AND ANOTHER** reported in **(2014) 1 SCC 708** and also the judgement of the Apex Court in the case of **M/S. TOTAL ENVIRONMENT BUILDINGS SYSTEMS PRIVATE LIMITED VS. DEPUTY COMMISSIONER OF COMMERCIAL AND OTHERS TAXES** reported in **(2022) 16 SCC 219**.

(j) Referring to the judgment of the Apex Court in the case of **Larsen and Toubro Limited** at paragraphs 88,

89, 90, 91, 92, 97,100, 101 and 102 learned counsel contended that since the law is well settled that if an agreement is entered into after the apartment or unit is already constructed, then there would be no work contract. As such, the demand made by the respondent-BDA was one against the law laid down by the Apex Court.

(k) He submitted that the law laid down by the Apex Court in the aforesaid judgments holds the field and the same is applicable to the facts of the instant case as well. Hence, seeks for allowing of the writ petition.

6. Sri Raghavendra G. Gayatri, learned counsel appearing for the petitioners in W.P.No.7028/2022 supplementing the submission made by Sri K.B. Monesh Kumar taking this Court through the records submitted that;

(a) the very tender document in terms of which the respondent-BDA had allotted the construction contract to the tenderer/contractor provided that all taxes and duties including the taxes, duties and levies towards sales tax, service tax, municipal taxes, local taxes, octroi, work

welfare cess etc., are required to be paid by the tenderer/contractor.

(b) He referred to Clause 17 of the said tender document to point out that it was the responsibility of the tenderer/contractor to have completed the construction within the time stipulated thereunder. He submitted even if there was any delay in completing the construction by the tenderer/contractor, the liability of payment of tax which was otherwise undertaken to be paid by the tenderer/contractor cannot be fastened on the petitioners.

(c) He referred to the Office Notings of the respondent-BDA produced at page 240 and 241 of the writ petition to contend that construction of some of the houses had been completed as on 30.06.2017 even then the respondent-BDA had not collected the GST in respect of the said projects. As such, there was discrimination in the case of petitioners.

(d) He further referred to the rejoinder filed by the petitioners to the statement of objection and to a calculation provided at para 12 of the said re-joinder to

contend that the GST which is being collected by the respondent- BDA is discriminatory and the same is contrary to the provisions provided under the Act, 2017.

(e) He submitted that the respondent-BDA has adopted discriminatory means as regards the petitioners requiring intervention at the hands of this Court .

7. Per contra, Sri.G.S.Kannur, learned Senior counsel appearing for the respondent- BDA submitted that;

(a) the very contention urged by the petitioners that the project was completed even when the apartment was allotted to them is incorrect and contrary to the records.

(b) He submitted what was advertised and the petitioners responded to was at a stage when the project was still under construction. He submitted that the said fact has been clearly depicted in the very notification which was issued by the respondent- BDA calling upon the general public to apply for the apartments and the row houses.

(c) He submitted even the payment schedule produced by the petitioner in W.P.No.51001/2019 at Annexure -K page No.46 would indicate that the petitioner had paid sum of Rs.44,91,250/- in 6 instalments spanning between 20.03.2018 to 16.03.2019. He submitted out of these payments, four of the payments were made prior to the date of completion of the project, which indicates the petitioners had entered into agreement at the time when the project was still under the construction. Similar is the situation as regards the petitioners in W.P.No.7028/2022 is his submission. He submitted that the petitioners had paid the consideration in instalments as evident from the records.

8. Sri K. Krishna, learned counsel appearing for the respondent-BDA in W.P.No.7028/2022 referring to the Office Notes at page 240 at Annexure-Z submitted that the Office Notes referred to in the said proceedings was in respect of a different project and not the project concerning the petitioners. He submitted that the project in which the petitioners have purchased the row houses pertain to Block Nos. 9, 13 ,18 and

22 constructed in the land bearing Sy.No.114 and 115 of Alur Village, Phase-2, construction of which was completed on 31.01.2019, while the project in respect of which the payment of tax was exempted was in respect of project in Blocks 1 to 5 construction of which was completed 30.06.2017. Hence, he submitted that there was no discrimination.

9. Learned Senior counsel appearing for the respondent -BDA as well as Sri. K.Krishna, learned counsel for the respondent -BDA also referred to Section 7 of the Act, 2017 and item 5 of Schedule II thereunder which according to them would provide that if an agreement is entered into prior to completion of construction the liability to pay the GST would be on the purchasers. Thus, they submitted the law laid by the Apex Court in the case of **Larsen and Toubro Limited** (supra) is applicable with full force to the facts and circumstance of the case at hand. Hence, seek for dismissal of the writ petitions.

10. Heard. Perused the records.

11. Before advertng to the rival contentions necessary at this juncture to refer to the provisions of Section 7 of CGST Act, 2017 which is read as under;

LEVY AND COLLECTION OF TAX

7. Scope of supply. (1) For the purposes of this Act, the expression "supply" includes-

(a) all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business;

[(aa) the activities or transactions, by a person, other than an individual, to its members or constituents or vice-versa, for cash, deferred payment or other valuable consideration.

Explanation. For the purposes of this clause, it is hereby clarified that, notwithstanding anything contained in any other law for the time being in force or any judgment, decree or order of any Court, tribunal or authority, the person and its members or constituents shall be deemed to be two separate persons and the supply of activities or transactions *inter se* shall be deemed to take place from one such person to another;]

(b) import of services for a consideration whether or not in the course or furtherance of business; 2[and]

(c) the activities specified in Schedule I, made or agreed to be made without a consideration; [***]

[***]

* 5[(1A) where certain activities or transactions constitute a supply in accordance with the provisions of sub-section (1), they shall be treated either as supply of goods or supply of services as referred to in Schedule II.]"

12. Also necessary to refer to relevant portion of Schedule II referred to in the aforesaid Section;

SCHEDULE II
[See section 7]
ACTIVITIES 1[OR TRANSACTIONS] TO BE TREATED AS SUPPLY
OF GOODS OR SUPPLY OF SERVICES

- "1. Transfer.....
- 2. Land and Building
- 3. Treatment or process
- 4. Transfer of business assets

5. Supply of services

The following shall be treated as supply of services, namely:-

(a).....

(b) construction of a complex, building civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier.

Explanation. For the purposes of this clause-
 (1) the expression "competent authority" means the Government or any authority authorised to issue completion certificate under any law for the time being in force and in case of non-requirement of such certificate from such authority, from any of the following, namely:-

- (i) an architect registered with the Council of Architecture constituted

under the Architects Act, 1972 (20 of 1972); or

(ii) a chartered engineer registered with the Institution of Engineers (India); or

(iii) a licensed surveyor of the respective local body of the city or town or village or development or planning authority;

(2) the expression "construction" includes additions, alterations, replacements or remodelling of any existing civil structure;

(c) temporary transfer or permitting the use or enjoyment of any intellectual property right;

(d) development, design, programming, customisation, adaptation, upgradation, enhancement, implementation of information technology software;

(e) agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act; and

(f) transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration."

13. Apex court in the case of **LARSEN AND TOUBRO LIMITED AND ANOTHER vs. STATE OF KARNATAKA AND ANOTHER** reported in **(2014) 1 SCC 708** at paragraphs 88, 89, 90, 91, 92, 97, 100, 101 and 102 held as under;

"88. The question is: whether taxing sale of goods in an agreement for sale of flat which is to be constructed by the developer/promoter is permissible under the Constitution? When the agreement between the promoter/developer and the flat purchaser is to construct a flat and eventually sell the flat with the fraction of land, it is obvious that such transaction involves the activity of construction inasmuch as it is only when the flat is constructed then it can be conveyed. We, therefore, think that there is no reason why such activity of construction is not covered by the term "works contract". After all, the term "works contract" is nothing but a contract in which one of the parties is obliged to undertake or to execute works. Such activity of construction has all the characteristics or elements of works contract. The ultimate transaction between the parties may be sale of flat but it cannot be said that the characteristics of works contract are not involved in that transaction. When the transaction involves the activity of construction, the factors such as, the flat purchaser has no control over the type and standard of the material to be used in the construction of the building or he does not get any right to monitor or supervise the construction activity or he has no say in the designing or layout of the building, in our view, are not of much significance and in any case these factors do not detract the contract being works contract insofar as construction part is concerned.

89. For sustaining the levy of tax on the goods deemed to have been sold in execution of a works contract, in our opinion, three conditions must be fulfilled: (i) there must be a works contract, (ii) the goods should have been involved in the execution of a works contract, and (iii) the property in those goods must be transferred to a third party either as goods or in some other form. In a building contract or any contract to do construction, the above three things are fully met. In a contract to build a flat there will necessarily be a sale of goods element. Works contracts also include building contracts and therefore without any fear of contradiction it can be

stated that building contracts are species of the works contract.

90. Ordinarily in the case of a works contract the property in the goods used in the construction of the building passes to the owner of the land on which the building is constructed when the goods and materials used are incorporated in the building. But there may be contract to the contrary or a statute may provide otherwise. Therefore, it cannot be said to be an absolute proposition in law that the ownership of the goods must pass by way of accretion or exertion to the owner of the immovable property to which they are affixed or upon which the building is built.

91. Value addition as a concept after the Forty-sixth Amendment to the Constitution has been accepted by this Court in *P.N.C. Construction [State of U.P. v. P.N.C. Construction Co. Ltd., (2007) 7 SCC 320]*. While dealing with this concept, the Court said that value addition was an important concept which had arisen after the Forty-sixth Amendment by insertion of sub-clause (b) of clause (29-A) in Article 366. It has now become possible for the States to levy sales tax on the value of the goods involved in a works contract in the same way in which the sales tax was leviable on the price of the goods in a building contract. On account of the Forty-sixth Amendment in the Constitution the State Governments are empowered to levy sales tax on the contract value which earlier was not possible.

92. Where a contract comprises of both a works contract and a transfer of immovable property, such contract does not denude it of its character as works contract. Article 366(29-A)(b) does contemplate a situation where the goods may not be transferred in the form of goods but may be transferred in some other form which may even be in the form of immovable property. The decision of the Australian High Court in *M.R. Hornibrook [M.R. Hornibrook (Pty) Ltd. v. Federal Commr. of Taxation, (1939) 62 CLR 272 (Aust)]* is worth noticing in this regard. Section 3(4) of the

Australian Sales Tax Assessment Act, 1930 was brought in by way of amendment by the legislature in 1932 which reads:

"3. (4) For the purposes of this Act, a person shall be deemed to have sold goods if, in the performance of any contract under which he has received, or is entitled to receive, valuable consideration, he supplies goods the property in which (whether as goods or in some other form) passes, under the terms of the contract, to some other person."

The question for consideration before the Australian High Court in light of the above provision was whether the contractor was liable to pay sales tax on the transfer of goods involved in a works contract. The majority judgment held as follows:

"In my opinion the Commissioner is right in his contention that this provision applies to the present case. The appellant company, in the performance of a contract for building a bridge under which contract it was entitled to receive and doubtless has received valuable consideration, has supplied goods, namely, reinforced concrete piles. Such piles are plainly manufactured articles. *They are chattels. They were intended to be incorporated in a structure and were so incorporated. They lost their identity as goods in that structure. But this fact does not prevent the piles from being goods any more than it prevents bricks or stones or nuts and bolts from being goods.* The fact that the goods were specially manufactured and designed for a particular purpose cannot be held to deprive them of the character of goods."

97. In light of the above discussion, we may summarise the legal position, as follows:

97.1. For sustaining the levy of tax on the goods deemed to have been sold in execution of a works contract, three conditions must be fulfilled: (i) there must be a works contract, (ii) the goods should have been involved in the execution of a works contract, and (iii) the property in those goods must be transferred to a third party either as goods or in some other form.

97.2. For the purposes of Article 366(29-A)(b), in a building contract or any contract to do construction, if the developer has received or is entitled to receive valuable consideration, the above three things are fully met. It is so because in the performance of a contract for construction of building, the goods (chattels) like cement, concrete, steel, bricks, etc. are intended to be incorporated in the structure and even though they lost their identity as goods but this factor does not prevent them from being goods.

97.3. Where a contract comprises of both a works contract does not denude it of its character as works contract. The term "works contract" in Article 366(29-A)(b) takes within its fold all genre of works contract and is not restricted to one specie of contract to provide for labour and services alone. Nothing in Article 366(29-A)(b) limits the term "works contract".

97.4. Building contracts are a species of the works contract.

97.5. A contract may involve both a contract of work and labour and a contract for sale. In such composite contract, the distinction between contract for sale of goods and contract for work (or service) is virtually diminished.

97.6. The dominant nature test has no application and the traditional decisions which have held that the substance of the contract must be seen have lost their significance where transactions are of the nature contemplated in Article 366(29-A). Even if

the dominant intention of the contract is not to transfer the property in goods and rather it is rendering of service or the ultimate transaction is transfer of immovable property, then also it is open to the States to levy sales tax on the materials used in such contract if such contract otherwise has elements of works contract. The enforceability test is also not determinative.

97.7. A transfer of property in goods under clause (29-A)(b) of Article 366 is deemed to be a sale of the goods involved in the execution of a works contract by the person making the transfer and the purchase of those goods by the person to whom such transfer is made.

97.8. Even in a single and indivisible works contract, by virtue of the legal fiction introduced by Article 366(29-A)(b), there is a deemed sale of goods which are involved in the execution of the works contract. Such a deemed sale has all the incidents of the sale of goods involved in the execution of a works contract where the contract is divisible into one for the sale of goods and the other for supply of labour and services. In other words, the single and indivisible contract, now by the Forty-sixth Amendment has been brought on a par with a contract containing two separate agreements and the States now have power to levy sales tax on the value of the material in the execution of works contract.

97.9. The expression "tax on the sale or purchase of goods" in Schedule VII List II Entry 54 when read with the definition clause (29-A) of Article 366 includes a tax on the transfer of property in goods whether as goods or in the form other than goods involved in the execution of works contract.

97.10. Article 366(29-A)(b) serves to bring transactions where essential ingredients of "sale" defined in the Sale of Goods Act, 1930 are absent within the ambit of sale or purchase for the purposes of levy of sales tax. In other words,

transfer of movable property in a works contract is deemed to be sale even though it may not be sale within the meaning of the Sale of Goods Act.

97.11. Taxing the sale of goods element in a works contract under Article 366(29-A)(b) read with Entry 54 List II is permissible even after incorporation of goods provided tax is directed to the value of goods and does not purport to tax the transfer of immovable property. The value of the goods which can constitute the measure for the levy of the tax has to be the value of the goods at the time of incorporation of the goods in works even though property passes as between the developer and the flat purchaser after incorporation of goods.

101. Section 5-B of the KST Act provides for levy of tax on transfer of property in goods (whether as goods or in some other form) involved in the execution of works contract.

102. On consideration of the arguments that were put forth by the parties, the Court in *Raheja Development [K. Raheja Development Corpn. v. State of Karnataka, (2005) 5 SCC 162]* held as under:

102.1. The definition of the term “works contract” in the Act is an inclusive definition.

102.2. It is a wide definition which includes “any agreement” for carrying out building or construction activity for cash, deferred payment or other valuable consideration.

102.3. The definition of works contract does not make a distinction based on who carries on the construction activity. Even an owner of the property may be said to be carrying on a works contract if he enters into an agreement to construct for cash, deferred payment or other valuable consideration.

102.4. The developers had undertaken to build for the prospective purchaser.

102.5. Such construction/development was to be on payment of a price in various instalments set out in the agreement.

102.6. The developers were not the owners. They claimed lien on the property. They had right to terminate the agreement and dispose of the unit if a breach was committed by the purchaser. A clause like this does not mean that the agreement ceases to be "works contract". So long as there is no termination, the construction is for and on behalf of the purchaser and it remains a "works contract".

102.7. If there is a termination and a particular unit is not resold but retained by the developer, there would be no works contract to that extent.

102.8. If the agreement is entered into after the flat or unit is already constructed then there would be no works contract. But, so long as the agreement is entered into before the construction is complete it would be works contract.

(emphasis supplied by this Court)

14. Perusal of the provisions of Central Goods and Services Tax Act, 2017 extracted hereinabove and in the light of the judgement of the Apex Court extracted hereinabove, makes it abundantly clear that if an agreement is entered into after the apartment/flat or unit is already constructed, then there would be no works contract. But so long as the agreement is entered into before the construction is complete, it would be a work

contract, which would invariably attract payment of service tax at the given rate.

15. Question therefore arises in the these cases is *whether the petitioners had entered into agreement with respondent-BDA at the time prior to completion of the construction?*

16. Relevant to refer the very notification dated 09.08.2017 issued by the respondent -BDA produced at Annexure-A. Under the heading "Note" below the table of payment, following is mentioned;

"Note: 1. Final price of the flat may vary depending upon the revision, if any,

2. BWSSB and BESCOM deposits are not included in the price of the flat. **These deposits are to be paid separately as per the zone where the flats are being constructed.**

3. applicable GST to be paid separately by the allottees.

4. available covered parking space will be separately allotted to the allottees on first come first serve basis at additional price Rs.2 lakhs per covered car parking flat."

Thus when the advertisement/notification was issued the construction was still in progress.

17. The acknowledgement slip at Annexure-A relied upon by the petitioner in WP No.51001/2019 reads as under;

"It is also informed that you have been provisionally allotted flat No.B1-501 of Valagerahalli phase 6. The project allotment letter will follow the date of the said acknowledgement is 09.08.2017."

Thus that allotment was only provisional.

18. Further the payment schedule as found at Annexure-K, a letter which was issued by the petitioner himself would indicate the following;

Date	Amount	Mode of payment
20.03.2018	5,50,000.00	Initial payment By way of pay order favouring BDA, deposited Canara Bank, BDA Complex. Copy enclosed.
29.06.2018	9,62,500.00	Vide DD No. 466125 dated 25.06.2018 payable at Union Ban India, Bengaluru
27.12.2018	9,62,500.00	RTGS from Union Bank of India
27.12.2018	9,62,500.00	RTGS from Union Bank of India
16.03.2019	9,62,500.00	RTGS from Union Bank of India,
16.03.2019	91,250.00	RTGS from Union Bank of India,
Total	44,91,250.00	

19. The completion certificate as produced by the respondent- BDA at Annexure-R2 would indicate that the project has been completed on 31.12.2018.

20. Reading of the above with the payment schedule and the completion certificate produced at Annexure-R2 would indicate that the project was completed only in the month of December, 2018, by which time, the petitioner had paid 4 instalments towards the cost of the construction, clearly indicating that the petitioner having paid the part of consideration during the process of construction. In other words, payments were made even before the completion of construction in terms of an agreement that had been entered into between the petitioner and the respondent -BDA.

21. In the case of the petitioners in W.P.No.7028/2022 the respondent-BDA in the statement of objection has given the details of the dates of application and the amounts paid by the petitioners thereunder, which is extracted hereunder;

Allottees	Date	Instalments	Allotment Letter dated
Petitioner	26.10.2017	2,10,000.00	07.11.2017

No.1	03.01.2020	91,250.00	
	03.01.2020	39,90,000	
Petitioner No.2	20.09.2017	2,10,000.00	28.09.2017
	18.11.2017	10,05,000.00	
	19.03.2018	10,00,000.00	
	02.01.2021	20,31,250.00	
Petitioner Nos.3 & 4	24.09.2018	2,10,000.00	24.09.2018
	17.09.2019	7,68,564.00	
	21.10.2019	33,12,686.00	
Petitioner No.5	16.08.2017	5,25,000.00	24.08.2017
	19.10.2017	9,18,750.00	
	13.12.2017	9,18,750.00	
	20.12.2018	9,18,750.00	
Petitioner No.6	30.09.2020	37,66,250.00	21.11.2017
Petitioner No.7	13.11.2017	21,00,000.00	21.11.2017
	20.04.2018	20,00,000.00	
	16.05.2019	10,00,000.00	
	17.09.2019	6,33,000.00	
	11.08.2020	3,50,000.00	
	16.12.2020	98,250.00	
Petitioner No.8	30.01.2018	5,25,000.00	08.02.2018
	07.04.2018	9,18,750.00	
	13.06.2018	9,18,750.00	
	09.08.2018	9,18,750.00	
	04.10.2018	9,18,750.00	

22. Perusal of which would indicate that the petitioners therein had made applications for allotment of houses pursuant to the notification that was issued during the years 2017 and 2018. That payments were made partly and there were certain balance amounts which warranted respondent-BDA to issue notices calling upon the petitioners therein to pay the balance amount along with the applicable GST. This had apparently constraints some of the petitioners to approach the Consumer Dispute Redressal Forum. It appears some of the petitioners had even voluntarily agreed to pay the GST amount without prejudice to seek refund subject to outcome of the present writ petition.

23. In the statement of objection of the respondent-BDA, it is contended that the project was completed only on 31.01.2019 and a certificate in this regard had been issued. The project in respect of which the petitioners had purchased the houses were in Block Nos.9, 13, 18 and 22 constructed in the land bearing Sy.Nos.114 and 115 of Alur village, Phase-II of Dasanapura Hobli, Bangalore North Taluk. Since the petitioners who had applied for allotment of flats between the years 2017

and 2018 and the project was completed on 31.01.2019, it is contended that the petitioners had entered into contracts during the construction period. As such, they are liable to pay the GST as provided under sub-section(b) of Section 5 of Schedule II of GST Act.

24. As regards the contention of discrimination in respondent-authorities collecting the taxes concerned, it is contended that exemption of payment of GST tax was only in respect of houses forming part of Block Nos.1 to 5 construction of which had been completed before 30.06.2017 and the persons therein had purchased the houses in their completed form. As such, it was under those circumstances the respondent -BDA had stated in its office notings that the GST was not liable to be collected in those cases. The petitioners without distinguishing this factual aspects of the matter, had sought to allege discrimination in the amounts being collected by the respondent -authorities. The same cannot be countenanced.

25. From the aforesaid legal and factual aspect of the matter, it is clear that the petitioners in these writ petitions had applied for allotment of apartment/houses, which even as seen

in the notification calling upon for application by the respondent-BDA, were still under construction. The said notification also specifically points out that applicable GST to be paid separately by allottees. The payment schedule referred to above would indicate that the part of the sale consideration was paid during the process of construction and much prior to issuance of completion certificate. It may be that there is no separate work contract entered into between the petitioners and the respondent- BDA, but what is the essence of law as found at Section 7 and Schedule II to the Central Goods and Services Tax Act, 2017 extracted above as well as the law laid by the Apex Court in the case of **Larsen and Toubro Limited** (supra), is that if the transaction is entered into before the completion of construction and the consideration was paid (partly or fully) before issuance of completion certificate, the same would amount to supply of services requiring payment of the service tax.

26. In light of the aforesaid undisputed factual aspect of the matter and in view of the settled position of law as noted

above, this Court do not see any ground to interfere with the matter and do find any ground to allow the petitions.

27. Hence, the following;

ORDER

- (a) Writ petitions are dismissed.
- (b) Notwithstanding the dismissal of the petitions the petitioners would be entitled for completion of the transactions including execution of deeds of conveyance, delivery of possession, if not already executed and delivered, as the case may be, after the payment of GST as demanded by the respondent -BDA at the applicable rate in accordance with law.

**Sd/-
(M.G.S. KAMAL)
JUDGE**