

**IN THE COURT OF III SENIOR CIVIL JUDGE, CITY CIVIL COURT,
AT SECUNDERABAD.**

Dated: Thursday this the 21st day of November, 2013.

Present: Smt. G. Neelima, B.L.,
III Senior Civil Judge.

OS.NO. 19 OF 2011

Between:

Dr. GHL Saravana.

...Plaintiff.

A n d

M/s. Alpine Estates.,
Rep. by its Managing Partner,
Mr. Soham Modi.

...Defendant.

This suit is coming for hearing before me in the presence of Sri. S. Venkatachalam, Advocate for Plaintiff and Sri. C. Balagopal, Advocate for defendant, and the matter having stood over for consideration till this day, this court delivered the following:

J U D G M E N T

1. This is a suit filed for recovery of amount paid towards service tax.
2. **Brief averments of the plaint** are that plaintiff purchased flat No.514 in B-block of West wing in May flower heights, Mallapur. Hyderabad admeasuring 1175 sq.feet @ 2450 per sq.ft. for a total sale consideration of Rs.32,30,000/- from the defendant. Plaintiff has also paid a sum of Rs.89,825/- towards stamp duty and registration charges. Rs.32,300/- towards vat and Rs.99,910/- towards service tax on the said amount. In all plaintiff had paid a total sum of Rs.34,52,035/- towards the cost of the flat so purchased by the plaintiff. Plaintiff paid all the said amounts within the schedule of the payment prescribed by the defendant and also as per the statement of account issued to the plaintiff. Defendant had executed and registered sale deed in favour of the plaintiff and handed over possession of the flat to the plaintiff. Service tax of Rs.99,910/- was wrongly collected by the defendant from the plaintiff and it was not all accounted by the defendant. Defendant is not entitled to collect the service tax from the plaintiff and plaintiff had already addressed letter on 23.09.2010 requesting the defendant for refund of the service tax wrongly collected by the defendant. Defendant had replied to the plaintiff's letter vide its

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letter dt.27.09.2010 alleging that the service tax liability is under litigation and unless and until the said litigation is resolved with the service tax department the defendant cannot conclude for refund of the said amount. Plaintiff subsequently addressed letter to the income department on 08.10.2010 with regard to collection of service tax by the defendant. On plaintiff's further enquiries he came to know that on 16.06.2010 the commissioner of Central Excise has issued a show cause notice to the defendant with regard to non payment of service tax. It is very clear and evident that the defendant has collected the amount from the plaintiff in the name of service tax but till now it has not deposited the said amount with the concerned department of the Government and it is also a fact that the flat purchaser is not all liable to pay the service tax and in this connection there exists a circular No.108/2/2009, dt. 29.01.2009 stating that the purchaser is not liable to pay service tax. It is very clear and evident from the above that the defendant is not entitled for collection of service tax from the plaintiff and the same has been wrongfully collected from the plaintiff by defendant. Defendant is therefore liable to return the said amount of Rs.99,910/- together with 18% interest per annum. Though he made several demands the defendant gave deaf ear. On further enquiries resident of flat No.106 of the same complex belonging to Mr. S. Subramanian confirmed that the defendant has refunded the service tax amount of Rs.1,28,569/- which has been collected from him. Defendant is not refunding the service tax amount to the plaintiff on par with the said Mr. Subramanian. Therefore, plaintiff caused a legal notice dt.23.09.2010 calling upon the defendant to refund to the plaintiff a sum of Rs.99,910/- being the service tax collected from the plaintiff. Defendant issued a vague reply dt.27.09.2010. Hence this suit.

3. Written statement filed by the defendant alleging that defendant had given its reply regarding the service tax liability saying that the same is under litigation and no decision can be taken regarding the refund unless the litigation is sorted out. Letter addressed to income tax department is not within the knowledge of defendant. Defendant does not indulge in such illegal activities as they had reputation in the market. Circular No.108/2/2009, dt.29.01.2009 regarding service tax liability has been issued by the authorities.

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In spite of the above circular the central excise authorities have issued show cause notices to this defendant for non payment of service tax. As such this defendant through its associate company Modi Constructions has filed a writ petition No.26007/2009 before the Hon'ble High Court of judicature of A.P., which is being contested by the central excise department and the matter is pending adjudication. The writ petition has been filed challenging the service tax liability. As such there is an ambiguity regarding the payment of service tax by the defendant and due to which the defendant had collected the service tax and deposited the same with authority. Defendant cannot take a decision on the service tax as it is subjudice. It is not the intention of the defendant to dupe the plaintiff or any other customers. Defendant is not liable for refund any amount much less Rs.99,910/- with interest which was collected for service tax. At the time of booking the plaintiff has been clearly explained regarding the service tax liability which is also mentioned in the booking form so also the agreement of sale dt.05.09.2008 at clause 16 it is clearly mentioned that the service tax is payable by the buyer i.e. plaintiff. Subsequent documents like agreement of construction and the sale deed which has been duly registered also clearly state about the service tax liability of the buyer i.e. plaintiff. Defendant had sent a statement of account dt.03.07.2009 which shows a service tax liability of Rs.99,910/- and the plaintiff had received the same and acknowledged. As per the statement of account the plaintiff has paid the complete amount through his father and the plaintiff had also addressed a letter dt.09.12.2009 confirming the payments and further stated that no excess payment has been made by the plaintiff. There was an ambiguity in applicability of service tax. Service tax was first introduced for residential complex in 2005. Since there have been several circular and notifications regarding applicability of service tax. Builders are liable to pay service tax on a monthly/quarterly basis on the installments/advances received from customers and upto 31.03.2009. Rs.51.01 lakhs was paid to the service tax department. The allegation that no payment is made to the department is not true. This defendant submit that circular No.108/02/2009 dt.21.01.2009 has further complicated matters as one interpretation of the circular implies that builders and the purchasers are not liable for payment of service tax. Department has

issued a show cause notice demanding payment of Rs.31.10 lakhs. Subsequently after hearing the appeal of the defendant the department has issued an order dt.15.10.2010 confirming the liability of Rs.31.10 lakhs. The defendant is in the process of further appeals. Litigation pertains to advance received from the customers for the period of September 2007 to December 2009. Amount collected from the plaintiff has been paid to the department. Defendant is liable to pay huge amount to the department for the year 2009. Therefore the question of refunding the service tax amount to the plaintiff does not arise at this point of time and can be considered only after the out come of the writ petition pending before the Hon'ble High court of A.P., It has been pressurized by the department for the service tax liability and as mentioned above the same is subjudice. Defendant has been collecting th service tax liability in the form of security deposit or post dated cheques along with an undertaking from the customers regarding the service tax liability. Hence prayed to dismiss the suit.

4. **Following issues framed for trial:**

1. Whether the plaintiff is entitled to recover the suit amount from the defendant as prayed for ?

2. To what relief ?

5. Plaintiff examined himself as PW.1 but his evidence eschewed from record and PW.2 was examined and marked Ex.A1 office copy of legal notice, dt.23.09.2010, Ex.A2 reply to legal notice sent by defendant, Ex.A3 letter, dt.08.10.2010, Ex.A4 extract downloaded from internet regard service tax, Ex.A5 copy of the circular No.108/2/2009, of the Government department, Ex.A6 general power of attorney given in favour of G. Babu Prasad, on its behalf.

6. Defendant examined as DW.1 and marked Ex.B1 order No.49/2002, dt.31.08.2012 issued by the service the service tax authorities, Ex.B2 appeal No.8/2012, dt.31.01.2011, Ex.B3 stay order No.666 & 667/2012, Ex.B4 certificate issued by the Chartered Accountant of the defendant on its behalf.

7. Heard arguments.

8. **ISSUE NO.1:** *Whether the plaintiff is entitled to recover the suit amount from the defendant as prayed for ?*

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Case of the plaintiff is that he purchased flat No.514 in B-block of west wing in may flower heights, Mallapur, Hyderabad for a total sale consideration of Rs.32,30,000/- from the defendant. Plaintiff has also paid a sum of Rs.89,825/- towards stamp duty and Rs.32,300/- towards vat and Rs.99,910/- towards service tax in all he had paid a total sum of Rs.34,52,035/- towards cost of the flat. Accordingly sale deed was executed in favour of the plaintiff. Service tax was wrongly collected by the defendant. Defendant is not entitled to collect the service tax from the plaintiff. He also issued letter to the defendant on 23.09.2010. Defendant gave reply stating that service liability is under litigation. Subsequently defendant had received notice from central excise department for non payment of service tax. It is very clear and evident that respondent has collected the amount from the plaintiff in the name of service tax but till now it has not deposited the said amount with the concerned department of the Government and flat purchaser is not liable to pay the service tax. There is a circular issued by central excise department dt.29.01.2009. So defendant is liable to refund the service tax which it had collected from the plaintiff.

Whereas defendant contended that plaintiff had purchased the flat and made payments but it has not wrongfully collected service tax from the defendant. Service tax liability is under litigation and no decision can be given regarding refund unless the litigation is sorted out. Central excise department had issued notice to the defendant inspite of circular No.108/2/2009 dt.29.01.2009 regarding service tax liability. Then this defendant through its associate company filed writ petition No.26007/2009 before Hon'ble High Court of Judicature of A.P., challenging service tax liability and is pending adjudication. As there is an ambiguity regarding payment of service tax defendant collected service tax and has deposited the same with the department. Defendant cannot take decision on the service tax as it is subjudice and it is not the intention of the defendant to dupe the plaintiff or any other customer. Hence it is not liable to make payment.

The plaintiff in order to prove the liability of the defendant examined his father as PW-2 and marked Ex.A1 to A6 on his behalf. Since the defendant deny its liability to refund the service tax the primary burden is on the plaintiff

to prove the liability of the defendant in respect of service tax.

Evidence of PW.2 is in accordance with the averments of the plaint and in tune with Ex.A1 notice and Ex.A3 letter.

During the cross examination he had stated that at the time of booking flat by the defendant in the year 2008 defendant had furnished the booking form and as per the form service tax has to be paid by the party in whose name the flat is booked. Sale deed was executed in favour of his son on 10.11.2008 and as per clause 8 of the sale deed purchaser of flat shall be solely responsible for any sales tax, vat, service tax or any other similar levy responsible for any sales tax, vat, service tax with respect to the sale of the construction of the apartment under this sale deed. Builder has collected service tax from plaintiff and circular was issued in the month of January 2009. After the above circular he had issued notice under Ex.A1 on 23.09.2010 to the defendant. As per Ex.A2 the defendant replied that litigation is pending between the defendant and central excise department with regard to service tax. So they cannot decide about refund of service tax to the plaintiff.

Defendant examined DW.1. He reproduced the allegation of written statement. A lot of cross examination was done by the learned counsel for plaintiff with regard to various aspects.

With the above evidence available on record now the issue required to be decided is whether defendant is under an obligation to refund the service tax collected from the plaintiff even before it was refunded by the central excise department.

Plaintiff based his claim relying on the Ex.A4 extract downloaded from internet with regard to service tax. Ex.A4 is neither a circular nor a notification issued by the central excise department. Ex.A4 appears to be a text note. Only a circular or notification issued by the Government department is binding on the defendant.

It is not denied by the plaintiff that no litigation is pending between the central excise department and the defendant with regard to levy of service tax. Ex.B1 order 49/2002, dt. 31.08.2012, Ex.B2 appeal No.8/2012, dt.31.01.2011 issued by service tax authorities, Ex.B2 stay order in appeal ST/669, 702/2011 clearly discloses that defendant knocked the doors of court seeking verdict with

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regard to the circular and show cause notice issued by the central excise department. In Ex.B3 stay order the central sale tax tribunal had referred about the payment of entire amount of service tax and education cess totaling to Rs. 9,47,737/-. Ex.B4 also reveals that Rs.9,038,392/- was paid by the defendant from January 2007 to December 2012 under different challans. From Ex.B1 to B4 defendant could establish that it has remitted service tax collected from the plaintiff to the central excise department and is also prosecuting the matter of service tax with that department.

When the adjudication is pending with regard to service tax collected by the defendant and remitted to the Government defendant shall not be forced to refund the service tax to the plaintiff. Even the defendant fairly conceded before this court that once the writ petition filed by it was disposed he is ready to comply the directions issued by central excise and sales tax tribunal with regard to service tax.

Though the plaintiff contended that defendant had refunded the service tax so collected to some persons but failed to prove and establish the same which improbabilizes the case of the plaintiff.

Taking into consideration of all the facts this court has no hesitation to come to conclusion that basing on Ex.A4 text note plaintiff cannot demand the defendant to refund the service tax collected from him. Plaintiff is at liberty to seek the refund of service tax if the tribunal concerned directs so while disposing appeal No.ST/669 & 702/2011. Therefore plaintiff is not entitled for the suit amount.

9. **ISSUE NO.2: To what relief ?**

For the aforesaid discussion, plaintiff is not entitled for decree of the suit.

In the result, suit is dismissed without costs.

Typed to my dictation, corrected and pronounced by me in open court this the 21st day of November, 2013.



P. N. S.
21/11/13
III Senior Civil Judge,
City Civil Court Secunderabad.

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Appendix of Evidence
Witnesses Examined.

For plaintiff.

P.W.1: Dr. GHL Saravana (Eschewed).
P.W.2: G. Babu Prasad.

For defendant.

DW.1: M. Jayaprakash.

Documents marked on behalf of plaintiff

- Ex.A1: Office copy of legal notice, dt.23.09.2010.
Ex.A2: Reply to legal notice sent by defendant, dt.27.09.2010.
Ex.A3: Letter, dt.08.10.2010.
Ex.A4: Extract downloaded from internet regard service tax.
Ex.A5: Copy of the Circular No.108/2/2009 of the Government department.
Ex.A6: General power of attorney given in favour of G. Babu Prasad.

Documents marked on behalf of defendant.

- Ex.B1: Order No. 49/2002, dt.31.08.2012 issued by the Service tax authorities.
Ex.B2: Appeal No.8/2012 dt.31.01.2011 issued by the Service tax authorities.
Ex.B3: Stay order No.666/2012 & 667/2012 in appeal No.ST/669, 702/2011 issued by the Service tax authorities.
Ex.B4: Certificate issued by the Chartered Accountant of the defendant.

IN THE COURT OF THE 1 ADDL
CHIEF JUDGE: C.C.C. SEC'BAD
CENTRAL PHOTO COPY SECTION

PCA.No..... 2480/15
Presented on..... 4/5/15
C.F. Called on..... 14/5/15
Charges Deposited on..... 16/5/15 Rs. 20/-
Receipt No.....
Made Ready on..... 16/5/15
Copy Delivered on.....

P. Narayana
21/11/13
III Senior Civil Judge,
City Civil Court Secunderabad.

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P.C. SUPERINTENDENT

P. Narayana
P.C. Superintendent

16/5/15
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DECREE IN ORIGINAL SUIT

**IN THE COURT OF III SENIOR CIVIL JUDGE, CITY CIVIL COURT,
AT SEUNDERABAD**

Dated: This the 21st day of November, 2013.

Present: Smt. G. Neelima, B.L.,
III Senior Civil Judge.

OS. No. 19 of 2011

Between:

Dr. GHL Saravana, S/o. G. Babu Prasad,
aged 33 years, Occ: Dental Surgeon,
R/o. Flat No.514, Block-B, West Wing,
May flower heights, Opp: Noma Kalyana Vedika,
Mallapur, Hyderabad - 500 076.

...Plaintiff.

A n d

M/s. Alpine Estates,
5-4-187/3&4, II Floor,
Soham Mansion, M.G. Road,
Secunderabad - 500 003.
Rep. by its Managing Partner,
Mr. Soham Modi.

... Defendant.

Claim: This suit is filed by the plaintiff U/Section 26, Order VII Rule 1 and 2 of CPC against the defendant for recovery of sum of Rs.1,37,626/- with subsequent interest @18% per annum from the date of suit till the date of realization.

Valuation: The suit is valued for Rs.1,37,626/- and court fee of Rs.3,826/- is paid U/Sec.20, Schedule I Article 1B & C of APCF and SV Act.

Cause of Action: The cause of action for the suit arose on 01.09.2008 when the plaintiff booked the flat with the defendant and subsequent when the plaintiff had paid the entire sale consideration and other charges as levied by the defendant which includes the service tax also by 01.09.2009. On 23.09.2010 when the legal notices was caused on the defendant, and on 27.09.2010 when the defendant replied to the legal notice caused by the plaintiff. On 08.10.2010 when the plaintiff addressed letter complaining against the defendant for collection of service tax and non refund of the same to the plaintiff.

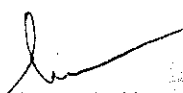
Plaint presented on: 28.12.2010.

Plaint numbered on: 19.01.2011.

This suit coming on this day before me for final disposal in the presence of Sri. S. Venkatachalam, Advocate for plaintiff, and of Sri. C. Balagopal, Advocate for defendant, and this court doth order and decree as follows:

1. that the suit be and the same is hereby dismissed;
2. that there is no order as to the costs of the suit.

Given under my hand and the seal of the court, this the 21st day of November, 2013.


III Senior Civil Judge,
City Civil Court, Secunderabad.

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Memo of Costs

	For plaintiff	For defendant
1. Stamp on plaint	Rs. 3,826-00	---
2. Stamp on power	Rs. 2-00	2-00
3. Advertise fee	----- FC AND MC NOT FILED -----	
4. Service of process	Rs. 50-00	---
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Total Rs.	3,878-00	2-00

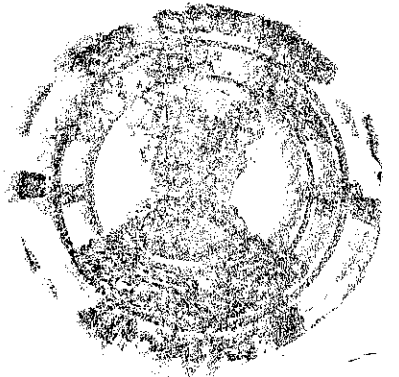
[Signature]
 III Senior Civil Judge,
 City Civil Court, Secunderabad.

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P.C. SUPERINTENDENT

IN THE COURT OF THE I ADDL
 CHIEF JUDGE: C.C.C. SEC'BAD
 CENTRAL PHOTO COPY SECTION
 PCA.No. 2480/15
 Presented on 4/5/15
 C.F. Called on 14/5/15
 Charge Deposited on 16/5/15 Rs. 20/-
 Receipt No.
 Made Ready on 16/5/15
 Copy Delivered on

[Signature]
 P.C. Superintendent 16/5/15
[Signature]



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