IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CENTRAL EXCISE APPEAL NO.289 OF 2016

The Commissioner of Service Tax,
Mumbai-VI Commissionerate, Mahavir
Jain Vidhyalay, Juhu Lane, C.D.
Bufiwala Road, Andheri – West,
Mumbai - 400 058. .... Appellant

- Versus -

M/s. Shri Krishna Chaitanya Enterprises,
102, "A" Wing, Radha Vilas Apartment,
Kandarpada, Dahisar – West,
Mumbai – 400 068. .... Respondent

WITH

CENTRAL EXCISE APPEAL NO.311 OF 2016

The Commissioner of Service Tax,
Mumbai – VII Commissionerate,
16th Floor, Satra Plaza, Sector 19D,
Palm Beach Road, Vashi,
Navi Mumbai, Pin Code – 400 705. .... Appellant

- Versus -

M/s. Green Valley Developers,
Olympia, Central Avenue, Hiranandani
Business Park, Powai, Mumbai-400 076. .... Respondent

WITH

CENTRAL EXCISE APPEAL NO.74 OF 2017

The Commissioner of Central Excise &
Service Tax, Pune – III, having his
office at ICE House, A-Wing,
41/A, Sassoon Road, Pune – 1. .... Appellant

- Versus -

Kumar Beheray Rathi,
having office at Kumar Capitals,
2nd Floor, East Street,
Pune – 411 001. .... Respondent

Ms P.S. Cardozo for the Appellant in CEXA-289/2016.
Mr. Bharat Raichandani i/by UBR Legal for the Respondent in CEXA-289/2016.
Mr. Swapnil Bangur with Mr. Amol D. Joshi for the Appellant in CEXA-311/2016.
Mr. M. Dwivedi for the Appellant in CEXA-74/2017.
Mr. M.H. Patil with Ms Padmavati Patil i/by Ms Aparna Hirandagi for the Respondent in CEXA-74/2017.

CORAM: S.C. DHARMADHIKARI &
SMT. BHARATI H. DANGRE, JJ.

DATE : JANUARY 25, 2018

ORAL JUDGMENT (Per Shri S.C. DHARMADHIKARI, J.**):**

1. All these appeals involve similar questions of law and facts and were heard together. They are, therefore, being

disposed of by this common Judgment and Order.

2. The Central Excise Appeal No.289 of 2016, from which we take the facts, is directed against the order of the Customs, Excise & Service Tax Appellate Tribunal ("CESTAT" for short), West Zonal Bench, Mumbai, dated 7-3-2016.

3. By the order under appeal, the CESTAT held that the assessee before us could not be called upon to pay service tax on amounts which are collected as maintenance charges for up-keep of the apartment or premises. The CESTAT further held that the issue is settled in favour of the assessee and against the Revenue by its prior orders.

4. To appreciate the correctness of this legal conclusion and finding that even otherwise the appeals involve substantial questions of law, we proceed to **admit** these appeals on the following substantial questions of law:-

> *"(a) Whether the CESTAT was right in holding that the assessee was not providing Management, Maintenance or Repair Service by collecting amount from prospective flat buyers, for maintaining the building, in the guise of*

deposits which is not returnable? Whether the CESTAT has erred in holding that assessee is providing statutory service and has rendered definition provided under Section 65(105)(zzg) of Finance Act as null and void by accepting that he is not providing Management, Maintenance or repair service by maintaining the building and collecting amount for that or not?

(b) Whether the CESTAT was right in setting aside the interest and penalty on the assessee?"

5. Since Ms Cardozo and Mr. Raichandani, as also Mr. Patil have made extensive submissions and we heard them at length, we dispose of these appeals with their consent by this Judgment and Order.

6. It is common ground that the assessee before us is in the business of construction of buildings and is a builder and developer. Apart therefrom, what is urged is that on investigation by Officials of the Anti-Evasion, Service Tax-II, Mumbai, it was found that the assessee was engaged in providing works contract service during the period October, 2008 to March, 2013 and was not discharging the service tax liability. The service tax of Rs.9,57,98,251/- under the category of works contract service, Rs.25,77,710/- under the category of

management, maintenance or repair Service, totally amounting to Rs.9,83,75,962/- was due and payable by the assessee for the aforesaid period. The assessee applied for service tax registration on 28-11-2011, for construction of residential complex service and after the visit of the Officers of the Anti-Evasion Cell. The assessee was granted registration.

7. A Show Cause Notice dated 28-2-2014, alleging as above, was issued and the demand was raised on the basis that the service tax amount collected from customers during the period 1-7-2010 to 31-3-2011 but not paid in the Government treasury, is the subject-matter and that was quantified at Rs.1,23,68,420/-.

8. The assessee admitted that it had not applied for service tax registration even though it provided taxable service since 2009-10. The assessee got registered on 28-11-2011 and paid Rs.87,59,633/- out of the total service tax liability of Rs.89,82,087/- for the period 2010-11 to 2011-12, without interest. The assessee admitted that at the time of introduction

of service tax with effect from 1-7-2010, it was indeed providing taxable service but due to lack of knowledge, the registration could not be obtained within the prescribed time limit. The assessee admitted that the service tax for the period July, 2010 to June, 2012 was not paid on due dates and the interest for the delay was also not paid. As per the Service Tax Returns for this period, the assessee declared total taxable income of Rs.34,88,18,870/- and the taxable value, after availing abatement of 75%, comes to Rs.8,72,04,718/- and the service tax payable works out to Rs.89,82,087/-. The assessee paid Rs.87,59,633/- leaving a short-payment of Rs.2,22,454/- which is due to non-revision of the Service Tax Returns for the period April, 2011 to September, 2011.

9. The assessee provided an explanation in reply to this Show Cause Notice and as far as the subject of the present appeal is concerned, the assessee stated it is following the project completion method for accounting of income and the said amount was received against the Flat bookings before 1-7-2010 and therefore that amount was not taxable. As regards

the amount of Rs.99,08,640/-, charged and collected towards the maintenance costs from the clients who had booked the Flats after 1-7-2010, the assessee has not paid the service tax on the said amount because it was not aware whether that amount is liable for service tax. However, the assessee assured that the service tax liability of Rs.10,20,590/- at full rate @ 10.30% along with applicable interest will be paid within three days.

10. The assessee had also disputed the liability insofar as the amount collected towards the booking of Flats from the clients. A statement was given of admission of the tax liability and the disputed sum. The Bank account was freezed and that is why this Court was approached by filing a Writ Petition and on 5-12-2013 the Writ Petition was disposed of with a direction to provide Bank Guarantee for the balance amount. There was a direction to issue a Show Cause Notice and adjudicate it. Accordingly, the Show Cause Notice was adjudicated by the Commissioner of Service Tax and he passed the order dated 30-4-2014. The amount of service tax demanded under the sub-heads was confirmed.

11. It is such an order which was challenged by filing an appeal to the CESTAT. As far as the activity undertaken by the assessee, and particularly the provision of Works Contract Service, the Tribunal held as under:-

> *"(i) Prior to 01.07.2010 the activity undertaken by assessee will not be covered under "Works Contract Services" as it is undisputed that they are engaged in providing construction of residential complex services and selling the flats to prospective buyers. (ii) Construction of residential complex is category under which service tax liability arises with effect from 01.07.2010 by an amendment which stated the activity of construction would deem to be taxable service provided by the builder/promoter/developer to the prospective buyers unless the entire consideration for property is paid after the completion of the construction. Post 01.07.2010 there is no justification given that these are works contract services by the adjudicating authority.*
>
> *Accordingly, CESTAT set aside the impugned order to the aforesaid points and remit the matter back to the adjudicating authority to reconsider the issue afresh after following the principle of natural justice quoting the judgment of the tribunal in the case of Krishna Homes vs. CCE 2014 (34) S.T.R. 881 and also after the amendment to the statutory provision from 01.07.2010. The case cited above has been accepted by the department."*

12. As regards service tax on the amount collected as a builder/promoter towards the maintenance of common facilities and service tax liability thereof, the CESTAT held as under:-

> *"(ii) As regards service tax on an amount collected as a builder/promoter towards maintenance of common facilities and service tax liability thereof, the CESTAT observed that the issue is no more res-intigra as this bench in the case (a) Kumar Behary Rathi 2014 (34) S.T.R. 139 (b) Goel Nitron Constructions 2015-TIOL-1787-CESTAT-Mum (c) Hiranandani Constructions Pvt. Ltd. 2015-TIOL-2135-CESTAT-Mum, held that service tax is not leviable on such amounts which are collected as maintenance charges for up keep of the apartment's premises.*
>
> *Accordingly, the CESTAT set aside that portion of the order which confirmed the demand along with interest and penalty."*

Thus, that portion of the Order-in-Original which confirmed the demand under this head along with interest and penalty, was set aside.

13. The Revenue has brought this appeal only in relation to the finding of the Tribunal and its ultimate conclusion that the assessee was not providing management, maintenance or repair services by collecting the amount from prospective Flat buyers, for maintaining the building in the guise of deposit which is not refundable. The Revenue says that the CESTAT erred in holding that the assessee is providing statutory service

and the definition provided by Section 65(105)(zzg) of the Finance Act would not be applicable or attracted. In short, the assessee is not providing management, maintenance or repair services for maintaining the building and collecting the amount for that purpose.

14. Ms Cardozo would submit that this conclusion of the Tribunal is *ex facie* erroneous and unsustainable in law. The CESTAT presumes that in taking deposits the assessee acts as a Trustee or pure agent. The agreements made between the assessee and the buyers of the Flats submitted by the assessee on a sample basis also confirm the factual position that the assessee received the amounts from the buyers for maintenance and repairs of the property. Thus it was providing a taxable service. Inviting our attention to the definition of the words "management, maintenance or repair" as appearing in the Finance Act, 1994, Ms Cardozo would submit that the CESTAT failed to appreciate that the amounts were received by the assessee from the buyers of the Flats, admittedly, for maintenance and repairs of the property. The assessee has also

received monetary consideration from them. That is how it has rendered a taxable service. The Tribunal has rendered conflicting Orders and Judgments and in that regard our attention is invited to an order passed by the Tribunal's South Zonal Bench, Chennai and the orders passed by the Tribunal in the case of some builders holding that maintenance charges collected by them are their income. However, the Tribunal relied upon another order passed in the case of **Kumar Behary Rathi v. Commissioner of Central Excise, Pune-III** {2014 (34) S.T.R. 139 (Mumbai)} and that, according to Ms Cardozo, does not take into consideration the various facets of the services rendered. She would, therefore, submit that the Tribunal's findings are erroneous and its conclusions thus unsustainable in law.

15. On the other hand, Mr. Raichandani and Mr. Patil, appearing on behalf of the respective assessees, would submit that the Tribunal has insofar as the Works Contract Services is concerned, came to the conclusion that post-amendment to the statutory provision with effect from 1-7-2010, the matter must

go back for reconsideration by the Adjudicating Authority. Therefore, it is submitted that insofar as this aspect is concerned, there is no expression of opinion on merits. That part of the order of the Tribunal, therefore, raises no substantial question of law.

16. As far as the conclusion on the other and debatable point, Mr. Raichandani and Mr. Patil would submit that we should not loose focus and sight of the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 ("MOFA" for short). The assessee is a promoter within the meaning of this law. The Tribunal, on appreciation and appraisal of all the factual materials and in the backdrop of the obligations and duties, particularly mentioned in Sections 5 and 6 of the MOFA, correctly concluded that service tax is not leviable on such amounts which are collected as maintenance charges for the up-keep of the apartment or premises. The Tribunal committed no error in following **Kumar Behary Rathi** (supra). Both would, therefore, submit that the substantial questions of law need to

be answered in favour of the assessee and against the Revenue.

17. For a proper appreciation of the rival contentions, we must first consider the factual allegations. We have summarised the factual allegations and what has been argued is that amenities were provided and maintenance was done from July, 2010 to March, 2012. On this count, a sum was charged and collected. That was categorised as maintenance cost from the clients who had booked Flats after 1-7-2010. The service tax was not paid on the same. The Adjudicating Authority came to the conclusion that this was a taxable service. Pertinently, the Adjudicating Authority held that the assessee/noticee before us entered into agreements with the prospective buyers for sale of the residential Flats even before their completion of all the projects constructed by the noticee. By a letter dated 17-4-2014, the assessee submitted a copy of the sample Agreements for Sale of the Flats entered into with the buyers. The assessee received the consideration for sale at the time of initial booking and subsequently during the course of construction, in instalments which has been admitted. It is not the case of the

assessee/noticee before us that the agreement to sell the Flats have been entered into only after completion of the Flats and consideration for sale of the Flats have been received only after grant of the Completion Certificate by the Competent Authority. The Adjudicating Authority then concluded that the assessee collected amounts against the services provided and which were taxable under the category of management, maintenance or repair. Apart from alleging suppression, the Adjudicating Authority concluded that there was a clear liability and which has not been discharged in relation to this category of services. That is how the demand was confirmed.

18. Our attention has been invited to the definition of the term "management, maintenance or repair". The Finance Act, 1994 commences with Section 64 and in Section 65 the definitions are set out. Insofar as the subject-definition is concerned, that activity is defined in Section 65 (64). That reads as under:-

> *"**(64) "Management, maintenance or repair"** means any service provided by —*

(i) Any person under a contract or an agreement; or

(ii) A manufacturer or any person authorised by him, in relation to,

(a) Management of properties, whether immovable or not;

(b) Maintenance or repair of properties, whether immovable or not; or

(c) Maintenance or repair including reconditioning on restoration, or servicing of any goods, excluding a motor vehicle.

Explanation. *— For the removal of doubts, it is hereby declared that for the purposes of this clause -*

(a) "goods" includes computer software;

(b) "properties" includes information technology software."

19. A perusal of the same would indicate that management, maintenance or repair means any service provided by any person under a contract or an agreement, or a manufacturer or any person authorised by him, in relation to, the management of properties, whether immovable or not, maintenance or repair of properties, whether immovable or not, or maintenance or repair including reconditioning on restoration, or servicing of any goods, excluding a motor vehicle.

Then, there is an explanation which clears doubts and it declares that for the purposes of this clause, namely, 65 (64), goods includes computer software and properties include information technology software. The words "Taxable service" is defined in Section 65, Clause (105) to mean any service provided or to be provided to any person by any person in relation to management, maintenance or repair.

20. Since the MOFA has been referred by the counsel appearing before us, we would be required to make a reference to its provisions. The MOFA is an Act to regulate in the State of Maharashtra, the promotion of the construction of the sale and management, and the transfer of Flats on ownership basis. It was brought to the notice of the State Government that, consequent on the acute shortage of housing in several areas of the State of Maharashtra, sundry abuses, malpractices and difficulties relating to the promotion of construction, and the sale and management and transfer of Flats taken on ownership basis exist and are increasing. That is why the Government decided to appoint a Committee to advice it and that Committee

inquired into and reported to the State Government on several matters referred to aforesaid with the purpose of considering measures for their amelioration. Then, the report of the Committee was published for general information and after considering its recommendations and suggestions, it was decided to make provision during the period of such shortage of housing, for the regulation of the promotion of the construction, sale and management and transfer of Flats taken on ownership basis in the State of Maharashtra.

21. The Act must, therefore, receive an interpretation consistent with its object and purpose. This Court, on several occasions, had emphasised the aims and objects of the Act.

22. In a recent decision delivered by a Division Bench of this Court, of which one of us (Shri Justice S.C. Dharmadhikari) was a party and reported in AIR Bombay High Court Reports 2017 (1) ABR Page 673 **{*Paul Parambi, Chief Promoter, Springs CHS Limited and another v. Bombay Dyeing & Manufacturing Co. Ltd. & another*}**, the Division Bench held

and in this context as under:-

> *"17. We have heard the learned counsel for parties at length and have perused the papers and proceedings in the Writ Petition as well as the compilation of documents. We have also carefully perused the impugned order. Before we deal with the rival contentions, it would be necessary to note the objects and reasons of MOFA, 1963 as well as the MAO Act and several of its provisions. The objects and reasons of the MOFA, 1963 indicate that initially the Government of Maharashtra appointed a committee known as the Paymaster Committee to study and report various aspects of the business of construction and sale of flats on ownership basis. The Committee submitted its report to the Government of Maharashtra on 29th June, 1961. On the basis of the findings of this Committee, the Government introduced a Bill. The object behind the legislation was to see that there is integrity of purpose on the part of the promoter and that there is willingness and earnest co-operation of the flat purchaser and to solve the enormous problem of housing to some extent. It is in these circumstances, that MOFA, 1963 was promulgated. The preamble of this Act would show that it is enacted to regulate in the State of Maharashtra, the promotion of construction, sale, management and transfer of flats taken on ownership basis.*
>
> *18. Section 2 of this Act (MOFA, 1963) is the Definitions Section. The words "Competent Authority" have been defined in Section 2(a) to mean a Competent Authority appointed under Section 5A of the Act. The word "Flat" is defined in section 2(a-1) to mean a separate and self-contained set of premises used or intended to be used for residence, or office, show-room or shop or godown or for carrying on any industry or business and includes a garage, the premises forming part of a building and includes an apartment. The word "Apartment" has also been defined in Section 2(f) and would have the same meaning assigned to it in the MAO*

Act. The word "Registrar" has been defined in Section 2(d) to mean the Registrar as defined in the Maharashtra Co-operative Societies Act, 1960 or as the case may be in the Companies Act, 1956. The word "prescribed" is also defined in section 2(b) to mean prescribed by the rules made under MOFA, 1963.

19. Thereafter, Section 3 deals with the general liabilities of the Promoter. Section 4 deals with the obligation of the promoter to enter into an agreement before accepting advance payment or deposit. Section 5A talks about who is the Competent Authority under the Act and reads as under:

> *"5A. Competent Authority*
>
> *The State Government may, by notification in the Official Gazette, appoint an officer, not below the rank of the District Deputy Registrar of Co-operative Societies, to be the Competent Authority, for an area or areas to be specified in such notification and different officers may be appointed as Competent Authority for different local areas, for the purposes of exercising the powers and performing the duties under Sections 5, 10 and 11 of this Act."*

20. As can be seen from the said Section, the State Government may appoint an Officer not below the rank of the District Deputy Registrar of Co-operative Societies, to be the Competent Authority, for an area or areas to be specified in such notification. Different officers may be appointed as the Competent Authority for different local areas for the purposes of exercising powers and performing the duties under Sections 5, 10 and 11 of the Act. As far as, Sections 6, 7, 8 and 9 are concerned, they are not really germane for the controversy before us. The real controversy before us is with reference to Section 10 of MOFA, 1963. Section 10 as it was originally enacted read as under:-

> *"10. Promoter to take steps for formation of co-operative society or company:- As soon as a minimum number of persons required to form a co-operative society or a company have taken flats, the promoter shall within the prescribed period submit an application to the Registrar for registration of the organisation of persons who take the flats as a co-operative society or, as the case may be, as a company; and the promoter shall join, in respect of the flats which have not been taken, in such application for membership of a co-operative society or as the case may be of a company. Nothing in this section shall affect the right of the promoter to dispose of the remaining flats in accordance with the provisions of this Act."*

21. Thereafter, the MAO Act was brought into force w.e.f. 19th February, 1971. Because of this, Section 10 of MOFA, 1963 was amended in 1971 and read thus:

> *"10. Promoter to take steps for formation of co-operative society or company: (1) As soon as a minimum number of persons required to form a co-operative society or a company have taken flats, the promoter shall within the prescribed period submit an application to the Registrar for registration of the organisation of persons who take the flats as a co-operative society or, as the case may be, as a company; and the promoter shall join, in respect of the flats which have not been taken, in such application for membership of a co-operative society or as the case may be of a company. Nothing in this section shall affect the right of the promoter to dispose of the remaining flats in accordance with the provisions of this Act.*
>
> *(2) If any property consisting of building or buildings is constructed or to be constructed and the apartment takers propose to submit the apartments to the provisions of the Maharashtra*

> *Apartment Ownership Act, 1970, by executing Declaration and Deed of Apartments as required by that Act, then the promoter shall inform the Registrar, as defined in the Maharashtra Co-operative Societies Act, 1960 accordingly; and in such cases it shall not be lawful to form any co-operative society or company and each apartment owner shall be entitled to the exclusive ownership and possession of his apartment as provided in the first mentioned Act."*

> *22. As can be seen from the above reproduction, sub-section (2) was added to Section 10 and inter alia stipulated that if any property consisting of building or buildings, is constructed or to be constructed and the apartment takers propose to submit the apartments to the provisions of the Maharashtra Apartment Ownership Act, 1970 by executing a Declaration and Deed of Apartments as required by that Act, then the promoter shall inform the Registrar, as defined in the Maharashtra Co-operative Societies Act, 1960 accordingly, and in such cases it would not be lawful to form any co-operative society or company as contemplated under Section 10(1). It further provided that each apartment owner would be entitled to the exclusive ownership and possession of his apartment as provided in the first mentioned Act."*

23. Another Judgment ***{Mazda Construction Company & Ors. Vs. Sultanabad Darshan CHS Ltd. & Ors., 2013 (2) All M.R. 278}*** of this Court should also be referred where certain amendments made to the law came to be challenged as unconstitutional together with an order passed by the Competent Authority granting deemed conveyance. The said

Judgment is also relevant for the purposes of noting the aims and objects of this law and the amendments brought to it from time to time. Thus, the law which provides for the promotion of construction, sale, management and transfer of Flats on ownership basis, while defining the term “promoter” it also sets out the general liabilities of the promoter. The Section 3 of the MOFA provides for his general liabilities. The sub-section (1) of this provision opens with a non-obstante clause and states that, notwithstanding anything in any other law, a promoter who intends to construct or constructs a block or building of Flats, all or some of which are to be taken on ownership basis, shall in all transactions with persons intending to take or taking one or more of such Flats, be liable to give or produce, or cause to be given or produced, the information and the documents mentioned in this section. Then, by sub-section (2) the liabilities are set out. The promoter before accepting advance payment or deposit has to enter into Agreement and the Agreement to be registered. That is an aspect taken care of by Section 4 and by Section 4A, the effect of non-registration of Agreement required

to be registered under Section 4 is set out.

24. By Section 5, it is stated that the promoter shall maintain a separate account in any Bank of the sums taken by him, from persons intending to take or who have taken, Flats, as advance or deposit, including any sums so taken towards the share capital for the formation of a co-operative society, or towards the outgoings, including ground rent if any, municipal or other local taxes, taxes on income, water charges, electricity charges, revenue assessment, interest on any mortgage or other encumbrances if any, and he shall hold the said moneys for the purposes for which they were given and shall disburse the moneys for those purposes and shall on demand in writing by a Competent Authority, make full and true disclosure of all transactions in respect of that account. By Section 6, it is clear that there is a responsibility for payment of outgoings till property is transferred. A promoter shall while he is in possession, and where he collects from persons who have taken or are to take over Flats, sums for the payment of outgoings even thereafter, pay all outgoings until he transfers the property

to the persons taking over the Flats, or to the organisation of any such persons and the promoter shall continue to be liable in terms of this provision. Then, by Section 7 there are certain other matters and which are taken care of, namely, plans and specifications disclosed cannot be altered. The refund of amount paid with interest for failure to give possession within specified time or further time allowed, is a matter covered by Section 8. Then, by Section 9 no encumbrance can be created without consent of parties after execution of Agreement for Sale. Then by Section 10, the promoter has to take steps for formation of co-operative society or company, and by Section 11 the promoter to convey title, etc., and execute documents according to the agreement. There are general liabilities of Flat takers also. Then there is a provision whereby essential supply or service cannot be cut, withheld, or curtailed or reduced. By Section 13, offences by promoters and consequences on conviction are pointed out.

25. Thus, this is an enactment which takes care of the aspects noted above.

26. The arguments of the Revenue fail to take note of this backdrop and in which it terms the obligations and duties under the MOFA to be rendering of taxable service. The definition in the Finance Act, pure and simple, alone has been looked at for the purpose of advancing this argument. The backdrop in which the promoter comes on the scene is totally lost sight of and that is precisely noted by the Tribunal. It is well-settled that in India there is dual ownership. The land beneath the building does not belong to the person who constructs or owns the building. In most of the cases, the builders and developers obtain rights from the land owners so as to enable them to pull down the existing structure and exploit the potential of the land to its optimum. The covenants with the owner are that such land would be exploited to its optimum and with its exploitation and usage the builder and developer can construct building/s comprising of units and flats which can be sold in the open market. The consideration for this agreement is strictly a sum payable in money so also certain number of units or Flats to be handed over to the owner. The cost of construction

and other charges are defrayed or reimbursed by the promoter or builder by selling units or Flats other than those reserved for the owner of the land, in open market at the price which it commands on the given date. It is also clear from the provisions of law that it is not necessary that any or all the Flats should be ready or the building itself should be completely constructed and fit for occupation. The Flats in the buildings under construction can also be sold and the agreement for sale with individual Flat takers can provide for appropriate stipulation with regard to payment of money and consideration. This is agreed to be paid and collected slab-wise. The Flat taker, therefore, knows at what stage he has to pay the amount and if he has to pay the amount in toto by the stage, namely, construction of a particular floor, located on which the Flat agreed to be sold to him is constructed, then, full payment would be made by that time. However, the obligation that is carved out by the statute goes beyond this contractual stipulation between the promoter/developer and the Flat purchaser. The law enacts a regulatory mechanism so that there

is enough safeguard and protection for such Flat takers and unit purchasers which would ensure to them a title in the property. The title in the building has to be conveyed together with the rights to the land beneath it. The land beneath and appurtenant to the building therefore enables the building owner, namely, a co-operative housing society or a company to enjoy the fruits of the development. When housing accommodation is scarce and there is acute shortage, private participation for removal of this shortage or scarcity is encouraged by the State, but at the same time the Legislature has ensured that there are safeguards and inbuilt protection to the Flat purchasers else they could be exploited by builders and developers. There are often complaints and cases of unscrupulous builders and developers fleecing and cheating Flat purchasers. Therefore, a complete mechanism till conveying of the property is put in place. Prior thereto, it is the promoter who must form the legal entity, namely, a co-operative housing society or a company. It is towards that end that he has to hold on to the property and the money for complete discharge of his eventual duty and function. Until that stage is reached, he

has to maintain, safeguard and protect the property. He has to look after the day-to-day wear and tear. Therefore, when he maintains the structure or repairs it, he is not rendering a taxable service in the sense envisaged by the Financial Act, 1994. If one looses complete focus or sight of the backdrop in which the so called service is rendered, then, the conclusion as erroneous and suggested by the Revenue will be reached.

27. The deposit or the monies themselves are held and appropriated towards payment of taxes, etc., popularly known as outgoings. The building and the Flats therein has to stand intact till all the Flats or units are sold and the statutory obligations are fully discharged. This is not a service of the nature understood by Section 65 (64) of the Finance Act, 1994. It is not a contractor simplicitor of maintenance of immovable property. It is not as if there is a existing building comprising of Flats, fully occupied, the maintenance and upkeep of which is handed over under a contract. It is a statutory obligation superimposed on a contract to sell a Flat/unit in a building to be constructed on a piece or parcel of land. That cannot be

confused with a taxable service as defined under the Finance Act, 1994. The day-to-day upkeep, maintenance and repair is till the statutory duty is fully performed as noted above.

28. True that while defining the term “Service” in the Consumer Protection Act, 1986, the Legislature did not exclude construction or building activity and therefore provided that the definition under that {Section 2(o)} means service of any description which is made available to potential users and includes the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or loading or both, and by amendment housing construction is also included in the inclusionary part of the definition. We are not concerned with the definition of service under the Consumer Protection Act, 1986 and that would not control the provisions of the Finance Act, 1994, for the simple reason that interest and rights of a consumer are protected and safeguarded by law so as to enable him to complain about deficiency and defect in the service by approaching the Forum under the Consumer Protection Act,

1986 and that law has a distinct objective and purpose. As noted by the Hon'ble Supreme Court in the case of **Lucknow Development Authority Vs. M.K. Gupta**, reported in AIR 1994 SC 787, the building and construction activity is a service covered by the expression Service as defined in the Consumer Protection Act, 1986 but that law is not a taxing or fiscal statute. Hence, that definition is of no assistance in construing similar expression in the Finance Act, 1994. The backdrop, setting and the context in which the word or expression and its definition appears is thus different. We are concerned here with a taxable service. The service of maintenance, management or repair, rendered by any person to any other person is a taxable service but in the context and backdrop in which the issue arises before us, we do not think that a taxable service is rendered. The Revenue does not wish to take into consideration the background in which buildings are maintained and till they are conveyed with complete title to even the land beneath. Thus, the provisions of Sections 5 and 6 and eventually the further provisions right upto Section 13 of the MOFA would make it

clear that builder and developer maintains and repairs the property till it is conveyed or the title in the same is conveyed to the Flat purchasers or the legal entity which would ultimately be formed by him. Thus, a co-operative housing society or a company would have to be formed of all those Flat purchasers who have purchased the Flats prior to or under construction, namely, subsequently purchased Flats. The completion of the building or it being rendered fit for occupation is one of the duties and obligation of the builder and promoter under this law. For them to be conveyed he has to maintain the property. His liability is in terms of the statute itself. It is towards that end that money is collected and paid over to the statutory authorities in the form of charges and taxes as it is the builder's obligation to collect these amounts from individual Flat takers and make it over to these authorities. After formation of the legal entity, the obligation ceases and it is taken over by the co-operative housing society or the company. Until that takes place, the promoter continues to be liable. If this aspect is ignored, then, the narrow or restricted construction placed on the provision by

the Revenue can be accepted. The tax then can be justified on the ground that it is a taxable service provided by the builder. However, if all this has been seen not *de hors* the MOFA by the Tribunal, then, it has not committed any error of law apparent on the face of the record, or perversity. It has construed the definition of the above provision consistent with the provisions of MOFA and mindful of the same. When such is the exercise undertaken by the Tribunal, we do not think that its conclusions are so vitiated or perverse so as to enable us to interfere therewith in our further appellate jurisdiction.

29. As a result of the above discussion, we answer the substantial questions of law in favour of the assessee and against the Revenue. Consequently, these three appeals stand dismissed but with no order as to costs.

(SMT. BHARATI H. DANGRE, J.) (S.C. DHARMADHIKARI, J.)