

(2005) 01 KL CK 0010
In the High Court Of Kerala
Case No : O.P. No. 5879 of 1996

Hajara

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 27-01-2005

Acts Referred:

Income Tax Act, 1961 — Section 147
Kerala Building Tax Act, 1975 — Section 10
Kerala Building Tax Ordinance, 1974 — Section 15(3)
Kerala General Sales Tax Act, 1963 — Section 19

Citation : (2005) 1 ILR (Ker) 695 : (2005) 2 KLT 206

Hon'ble Judges : P.R. Raman, J

Bench : Single Bench

Advocate : N. Subramaniam and M.S. Narayanan, for the Appellant; S. Soman, Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

P.R. Raman, J.—Petitioners were assessed to building tax in respect of the building bearing Nos. 6/990A, A1, A2, A3, A4 and A5 of Mattancherry Village. The land was purchased by the petitioners in 1982 and thereafter the building in question was constructed in 1983-1984. The building has a ground floor, first floor and second floor. For the purpose of assessment, the plinth area of all the floors were taken into account and the entire building was taken as the unit of assessment. Though the petitioners had a contention that each floors should be separately assessed treating it as a separate building, the said contention was not accepted by the authorities and the matter has already become final. As such, this question does not arise for consideration. The building tax was assessed under the Kerala Building Tax Act, 1975 based on the return filed by the petitioners. It was assessed to tax at Rs. 9,853 fixing the total capital value of the building at Rs. 3,33,608/-. Petitioners were served with a demand notice u/s 10 of the Kerala Building Tax Act on 16.12.1986 and the petitioners paid the said amount. There was no appeal or revision against the order of assessment. While

so, a demand notice Ext.P4 was served on the petitioners under date 17.3.1988 calling upon the petitioners to pay a further amount of Rs. 5,249.56 alleging that the earlier order of assessment Ext.P3 is irregular causing a loss of Rs. 5,249.56 to the Government and the District Collector, Ernakulam has directed the Tahsildar to revise the assessment order and to recover the loss of the aforesaid sum. Accordingly, a revised assessment order u/s 15(3) of the Kerala Building Tax Ordinance, 1974 was also enclosed along with Ext.P4. This notice, evidently, is issued in a printed form and no revised order of assessment said to have been enclosed along with Ext.P4 is either produced by the petitioner nor by the respondent. On a perusal of the file also, I find that other than Ext.P4, no other order was passed by the Tahsildar. According to the petitioners, they received only Ext.P4 along with Ext.P4(a) demand dated 18.3.1988. From the order Ext.P4 itself, it is evident that though this notice was issued u/s 15(1) of the Kerala Building Tax Act, the basis on which the order is issued is as a result of the direction issued by the District Collector stating that the earlier assessment is irregular causing a loss to the Government. However the petitioners, without a whisper, paid the said amount of Rs. 5,249.56 in instalments as allowed by the authorities. In the absence of anything to show that the said amount was paid under protest and in the absence of any appeal or revision filed against the said order Ext.P4. I must proceed on the basis that Ext.P4 having been satisfied by the petitioner, the same has become final and it is not now open for the petitioner to challenge Ext.P4. However, the Tahsildar issued a further notice Ext.P6 dated 14.3.1990, more than 3 years after the original assessment order Ext.P3, but within three years after the revised order passed Ext.P4. By Ext.P6 notice, again the Tahsildar informed the petitioner that the assessment made earlier as per Order No. B.T. Nos. 17 to 24/86 is irregular causing a loss of Rs. 75,729. Obviously, therefore, the Assessing Officer proposed to rectify the original order of assessment which according to him was irregular. Ext.P6 further shows that the Tahsildar was not exercising the power u/s 15(1) of the Kerala Building Tax Act independently, but was rather subjected to the dictation by the higher authorities as evidenced by Ext.P6 itself. It is stated that it is because of the direction of the Government and the Accountant General as per Order No. SRACHQ/IV/LR 21-671-88-89 dated 7.7.1988 to revise the assessment that the proceedings to recover the loss was initiated. Though Ext.P6 further informs the petitioner to appear before the Tahsildar for a hearing and to file objections, in so far as Ext.P6 itself was issued as per the directions issued by the higher authorities, it would have been only an empty formality to inform the petitioner to file any such objections as the officer himself was subjected to the dictation by the higher authorities and it is not a surprise that by Ext.P9 order, he rejected all the contentions raised in Ext.P8 objection filed by this petitioners in one line order demanding an amount of Rs. 75,729/-. Though an appeal and revision were preferred by the petitioners before the higher authorities, in a like manner, the appeal and revision were also dismissed as per Exts.P1 1 and P13. Constrained by such circumstances and left with no other alternate remedy, the petitioners have approached this Court seeking to quash the entire proceedings

Exts.P9, P11 and P13 orders, alleging that the said orders are vitiated for non compliance of principles of natural justice, barred by law of limitation and as totally want of jurisdiction.

3. The files were called for and on perusal of the files, it is seen that Ext.P9 order was passed as a result of the directions issued by the higher authorities who themselves decide that the Government had already suffered a loss and the Tahsildar virtually agreed to recover the amount from the petitioners. The file also discloses that even the provision under which the Tahsildar has to initiate the action was advised. The file further discloses that it is as a result of the change in the annual value of the building, that the authorities came to the conclusion that the loss has been suffered by the Government. Ext.P9 order evidences the fact that the total capital value of the building was fixed at Rs. 11,70,316/- as against the earlier capital value fixed at Rs. 3,33,608/- vide Ext.P3. As a matter of fact, the original capital value fixed was revised by Ext.P4 raising it to Rs. 4,08,608/-. Therefore, the annual value is from time to time increased based on which fresh demand is raised against the petitioner under the guise of a rectification of a mistake invoking the power, u/s 15(1) of the Kerala Building Tax Act. In the counter-affidavit filed by the Junior Superintendent attached to the Collectorate office, it is averred that the original order of assessment Ext.P3 merged with Ext. P-4 and when it was subsequently revealed that the fixation of the capital value was without considering the monthly rent received by the assessee, steps were taken, to rectify the mistake as though it is a mistake apparent on the face of record by revising the assessment dtd. 22.2.1988 after determining the capital value of the building. So much so, there is no dispute that it is as a result of the change in the capital value of the building that a revised order of assessment was passed purporting to be in the exercise of a power u/s 15 which provides for rectification of an order within a period of three years from the assessment order, as the case may be.

4. The following points are raised for consideration:

(1) Whether the order impugned is vitiated for the reason of violation of the principles of natural justice?

(2) Whether in the facts and circumstances of the case Section 15 is attracted and whether the authority has got jurisdiction to invoke the power u/s 15(1) of the Kerala Building Tax Act on the basis of a revised capital value of the building?

(3) Whether the order is barred by limitation?

5. In *Kurian George v. Tahsildar* (1995 (2) KLT 457) a Division Bench of this Court considered whether the Assessing Authority has jurisdiction to issue notices u/s 15 of the Building Tax Act, 1975 and whether the authority could revise the earlier assessment treating it as a mistake apparent on the face of record. It was held that the Assessing Authority cannot reopen an order and to substitute it with a fresh order on a different basis. That was also a case where the assessment made earlier was sought to be reopened on the direction of the

District Collector in suo motu revision proceeding, which was vitiated by law. There, the building have three distinct door numbers and each individual partner was assessed to tax. Treating it as a mistake, Section 15 was invoked demanding further amount of tax treating all the three buildings together as a unit of assessment. In that case also the Assessing Authority sought to assess tax by adopting the method prescribed in Sub-section 2 of Section 6 of the Act on the ground that the latter method would yield more tax and the earlier method adopted was a mistake. What is more, the mistake was not found by the Assessing Authority. It was sought to be rectified on the basis of a report of the auditor who found that the alternative method should have been adopted instead of the one adopted by the Assessing Authority in levying the tax. It was held that the same cannot be permitted. The Division Bench also held that, usually, the mistakes apparent on the face of record should be,

- (a) Arithmetical error
- (b) Clerical error
- (c) Slip or inadvertent omission in an Order or Judgment
- (d) If the later enactment having retrospective operation enables an authority to modify or alter the original assessment order, and
- (e) Where in the earlier assessment order, no valid principle of law was applied.

6. It was also held that an authority has no jurisdiction to rectify a mistake, when the authority has passed orders by taking one of the alternative views, when two views are possible and that the mistake has to be discovered and if the mistake is discovered by a long drawn process of reasoning or examining arguments on points where there may conceivably be two opinions cannot be said to be a mistake or error which is apparent on the face of record. Reopening or review of an assessment order is not permissible if the relevant statute does not confer such powers on an authority.

7. In *Parur Tourist Home v. State of Kerala and Ors.* (1993 (1) KLT 932 = 1993 KLJ (TC) 307) a learned Single Judge of this Court considered a similar case. There, the Assessing Authority closed the annual value fixed by the local authority and no reasons were disclosed in the order of assessment. It was also held that the order of assessment, being the culmination of a quasi judicial process should disclose, on its face, the basis on which it is made and the materials on which the Assessing Authority chooses to depart from the annual value fixed by the local authority should also be disclosed in the order of assessment itself. In *P.P. Yousef & Bros. v. State of Kerala* (1993 (2) KLT 59 = 1993 KLJ (TC) 178) which has also a case of rectification u/s 15 of the Kerala Building Tax Act. In that case the building was assessed to tax on a capital value of Rs. 2,94,000 on the basis of the annual value fixed by the Tellicherry Municipality, namely Rs. 29,400. The petitioner paid the tax as demanded. Subsequently, the Assessing Authority viz. the Tahsildar, Tellicherry issued a

notice intimating that the District Collector had directed him to reopen the assessment, as some "irregularities and omissions had crept in". This Court after referring to Section 15 of the Building Tax Act, it was held that, the Act nowhere provides for reopening of an order and to substitute it with a fresh order on a different basis. That there is no provision in the Act akin to Section 147 of the Income Tax Act, 1961 or Section 19 of the Kerala General Sales Tax Act, 1963, such a provision is significant by its absence in the Act. There is a distinct difference between the two, namely, the reopening of an assessment and the rectification of any mistake apparent on the face of record. The consequence of reopening an assessment is to set aside the original order of assessment and to substitute it with another order of assessment in accordance with law, whereas in the case of a rectification of a mistake, the order which is vitiated by the mistake continues to subsist and operate but with the mistake in it rectified. A provision for reopening an assessment has to be specifically conferred as the finality which otherwise attaches to it stands affected by the reopening. Ordinarily the authority passing the order becomes functus officio once the assessment is completed, unless the statute in question vests him with further power either to reopen it, or to rectify any mistake in it. The mistake to be so rectified must be apparent from the records and not with reference to extraneous materials and this is crucial in the exercise of jurisdiction u/s 15. In the circumstances, it is held that the order passed was without jurisdiction and unsustainable and it also suffers from another vice viz. violation of the principles of natural justice since it was never indicated to the petitioner previous to the passing of the order that the annual value of the building was proposed to be enhanced from what was originally fixed and that the petitioner was not afforded any opportunity of being heard in the matter. In *George v. Tahsildar* (1992 (2) KLT 690) this Court held that the building tax once assessed cannot be enhanced on account of the increase in the assessment as a result of the quinquennial revision by the local authority. It was also held that the rectification, if any, has to be done within a period of three years, as provided u/s 15(1) of the Act. *Shajahan v. Tahsildar* (2003 (3) KLT 143) it was held that notice of hearing issued without disclosing reasons for rectification is not a valid notice and that Section 15(1) contemplates a fair hearing and not an empty formality.

8. From the foregoing discussion, I find that the order impugned is not as a result of an independent exercise of the power conferred on the Assessing Authority, but it was passed as a result of the dictation made by the higher authorities. Assessment proceedings being a quasi judicial proceedings the Assessing Authority has to exercise his powers independently. Hence the order is vitiated and the authority has passed the order in a mechanical way without application of his mind in the matter independently rather he was persuaded by the higher authorities to recover the alleged loss by invoking Section 15(1) of the Act. I also find that though the order was passed under purported exercise of power u/s 15(1) it is virtually an order reopening the assessment, as even the Assessing Authority has held that the original assessment was irregular and that

the basis of the rectification was as a result of the change in the total capital value of the building. Section 15(1) of the Kerala Building Tax Act does not empower the authority to reopen an assessment and what has been done in the present case is to reopen the assessment earlier made and not a rectification based on any mistake apparent on the face of record. I also find that before passing the order u/s 15(1), the basis of which he proposes to pass the order, namely that there is a change in the total capital value of the building were not informed to the assessee and given an opportunity of being heard. The petitioner was denied of much opportunity. It is evident from the order itself that a decision was already taken by the higher authorities which was sought to be implemented through the Tahsildar. As a result, the order passed by the Tahsildar is without jurisdiction. The question of limitation is left open to be decided in an appropriate case on the order is found otherwise bad.

In the result Exts.P9, P11 and P13 orders are quashed.

Original Petition is thus allowed.