
(1989) 02 KL CK 0049
In the High Court Of Kerala
Case No : W.A. No. 1032 of 1988

K.P. Francis

APPELLANT

Vs

R.D.O. Fort Cochin and Others

RESPONDENT

Date of Decision : 28-02-1989

Acts Referred:

Kerala Building Tax Act, 1975 — Section 11(1)
Kerala Building Tax Rules, 1984 — Rule 10

Citation : (1989) 1 KLJ 395

Hon'ble Judges : K.S. Paripoornan, J;K.A. Nayar, J

Bench : Division Bench

Advocate : P.C. Chacko and Roy Chatke, for the Appellant; N.N. Divakaran Pillai, Government Pleader, for the Respondent

Judgement

K.S. Paripoornan, J.—The petitioner in O. P. No. 8674 of 1988-0 is the appellant in this writ appeal. C. M. P. No. 34047 of 1988 is filed by the petitioner in the O. P. seeking to implead 4 others as respondents 3 to 8 in the appeal. Respondents 1 to 3 are the Revenue Divisional Officer, Fort Cochin, the Tahsilder, Kanayannur Taluk and the State of Kerala. The matter involved in this writ appeal arises under the Kerala Building Tax Act (Act 7 of 1975) and the rules framed thereunder. The short facts necessary to understand the controversy raised in this writ appeal are as follows: The petitioner along with his 2 brothers and 2 sisters own 10.05 cents of land in Sy. Nos. 705/2 and 705/6 in Ernakulam Village. They filed a joint application for permission to construct a multi storied building in the said land. It was so done on the basis of an agreement entered into amongst them dated 7-4-1985. The interest of each of the owners in the land, on which construction was proposed is 15th, As per the agreement, the ownership of the building when completed is to be as per Schedule I to III shown in the said agreement. The construction of the ground floor of the building was completed in 1986. The Corporation allotted 5 numbers for the shop rooms. Property tax was determined on 26-3-1986. Similarly, the construction of the first floor was completed in April, 1987 and property tax was assessed by the

Corporation on 16-3-1988. The assessments were made on all the five persons jointly. The construction of the second floor was completed in June, 1988. It was not occupied. Due to non-receipt of the Engineer's report, the building has not been numbered and assessment has not been made. While so, the Tahsildar, Kanayannur Taluk (second respondent) initiated proceedings for assessment to building tax. In response to the notice issued, the co-owners filed separate returns, showing the ownership of the building. The Tahsildar called for details of the construction. The petitioner/appellant and others filed a copy of the agreement entered into, by them dated 7-4-1985 as also other Corporation records indicating the ownership, annual letting value of the building etc. It is further stated that one of the co-owners, who appeared before the Tahsildar, prayed for treating the construction of the building as belonging, to five different persons. There was also a plea that since the construction of the building was completed in three different years, there should be three separate assessments. Ignoring this, the Tahsildar passed an order of assessment treating the building as one unit and determined the tax payable at Rs. 2,21,670/-. The order of assessment is dated 29-6-1988. Ext. P1 is the order of assessment and Ext. P1 (a) is the relevant notice of demand. The petitioner, one of the co-owners, contends that the order of assessment was served on him, as per the directions of this Court in O. P. No. 7025 of 1988, only on 20-9-1988. The petitioner/appellant filed an appeal before the first respondent-Revenue Divisional Officer - on 23-9-1988. A plea was made that in view of acute financial difficulties, the petitioner has not paid the tax as per the proviso to Sec 11 (1) of the Building Tax Act. Ext. P2 appeal memorandum was returned by the first respondent to the petitioner/ appellant, by an endorsement dated 11-10-1988, stating that "the building tax amount due has not been seen paid and the receipt not produced and so the appeal petition is returned to the petitioner". The petitioner attacks the return of the appeal memorandum as illegal. In the Original Petition, the petitioner prayed for the following reliefs;

(i) a declaration that the proviso to Sec. 11(1) of the Kerala Building Tax Act, 1975 directing payment of tax as condition for entertainability of the appeal is unconstitutional and void.

(ii) a declaration that the return of Ext P2 appeal memorandum, for non-payment of tax is illegal.

(iii) a declaration that the assessment and demand of tax, evidenced by Exts, P1 and P1 (a), treating the building, belonging to the petitioner and 4 others, as one unit and determination of capital value of the building on the basis that the construction was over within one year is wrong.

(iv) a declaration that the petitioner is entitled to recompute the building tax payable by recognising separate ownership of the building in five different parts and the construction was completed in three assessment years."

Sukumaran, J directed the first respondent to entertain the appeal and dispose of

it on merits with a direction that the petitioner should pay, as a condition precedent for the entertainment of the appeal, Rs. 55,419/-within two weeks and a further sum of Rs. 55,419/-within one month from the date of judgment. The judgment was delivered on 3-11-1988. Aggrieved by the said judgment of the learned single Judge, in O. P. No. 8674 of 1988, dated 3-11-1988, the petitioner in the Original Petition has come up in writ appeal.

2. We heard counsel for the appellant, M/s. P. C. Chacko and Roy Chacko, as also the learned Government Pleader, Mr. N. N Divakaran Pillai. The appellant's counsel contended that the proviso to Sec. 11(1) of the Building Tax Act (Act 7 of 1975) is ultra vires and illegal, that the right of appeal, provided by the Act, is rendered illusory because of the proviso, that the order of assessment and notice of demand (Exts. P1 and P1(a) are illegal, and the return of Ext. P2 appeal memorandum, by the first respondent, is unauthorised and fails to take note of the facts stated in the statement filed along with the appeal, that the petitioner is not in a position to pay the entire tax demanded, and in the circumstances, the action of the first respondent in returning the appeal was totally unjustified and unauthorised.

3. The learned Government Pleader submitted that the proviso to section 11(1) of the Act is valid and legal, that Exts.P1 and P1(a) were passed in accordance with law and there is no infirmity therein, that the return of Ext. P2 appeal memorandum for non-payment of the building-tax assessed by endorsement dated 11-10-1988, is valid and proper, that the order passed by the learned Single Judge was justified on facts and that no interference is warranted in the writ appeal.

4. We considered the rival arguments advanced before us, by counsel appearing on both sides. For adjudicating the various aspects argued before us, it will be useful to refer to Sections 9(1), (10), 11(1), 11 (2) 11(3), Rules 8,9,10 and Forms No. V, VI and VII of the Kerala Building Tax Act & Rules. They are extracted herein below. "

Sec. 9. Assessment.--(1) If the assessing authority is satisfied that a return made by an owner u/s 7 or section 8 is correct and complete, it shall assess the amount payable by him as building tax on the basis of the return.

Sec. 10. Notice of demand. -- When any building tax is due in consequence of any order passed under or in pursuance of this Act, the assessing authority shall serve on the assessee a notice of demand in the prescribed form specifying the sum so payable.

Sec. 11. Appeals -(1) Any assessee objecting to the amount of building tax assessed u/s 9 or denying his liability to be assessed under this Act or objecting to any order of the assessing authority under this Act may appeal to the appellate authority against the assessment or against such order:

Provided that no such appeal shall lie unless the building tax has been paid.

(2) An appeal under sub-section (l) shall be in the prescribed form and shall be verified in the prescribed manner.

(3) The appeal shall be presented within a period of thirty days from the date of service of the notice of demand relating to the assessment or the date of service of the order, as the case may be, but the appellate authority may admit an appeal presented after the expiration of the said period if it is satisfied that the appellant had sufficient cause for not presenting it within the said period, provided however that no such appeal shall be admitted after a period of six months from the date of service of the notice of demand relating to the assessment or the date of service of the order, as the case may be

Rule 8. (1) The assessment order under S. 9 shall be in Form V.

(2) The order of assessment shall be served on the assessee as soon as the order is passed and a copy of the order shall be communicated to the concerned Village Officer also.

(3) The order of assessment shall specify the basis of assessment, the amount of tax payable, the amount payable in instalments, the last date of payment of each installment, etc.

Rule 9. The notice of demand under S. 10 shall be in Form VI.

Rule 10. (1) Appeals against the orders of assessment shall be in Form VII.

(2) Appeals shall be accompanied by:-

(a) the original or a certified copy of the order appealed against; and

(b) the original or a certified copy of the receipt obtained for the payment of the entire amount assessed.

(3) A court fee stamp to the value of Rs. 1 shall be affixed to every memorandum of appeal.

(4) Appeals shall be disposed of by the appellate authority only after giving the appellant an opportunity of being heard.

(5) The assessing authorities shall also have a right to be heard, at the hearing of the appeals.

FORM V(See rule 8(1)) Order of Assessment Under the Kerala Building Tax Ordinance, 1974.

No.

To

Whereas/it is found from the return submitted in Form II/you have failed to make a return in pursuance of the notice u/s 7(3) you have failed to comply with the terms of the notice, issued to you u/s 9(2)(4). and whereas enquiries

conducted by me have shown that a building has been constructed by you after 1-4-1973 major repairs of or improvements to the building constructed before 1-4-1973 has been carried out..... which is assessable under the provisions of the Ordinance, you are hereby informed that you are assessed to Building Tax amounting to Rs..... as specified in the Schedule.

The amount assessed shall be paid to the Village Officer of..... Village in four equal quarterly instalments as mentioned in the schedule. You are further informed that you are at liberty to pay the amount in a lump, if you so desire.

You are also informed that if any amount is not paid on the due dates specified, interest at 6 percent per annum will be charged on the arrears from the date of default and recovered under the provisions of the Revenue Recovery Act.

Place:

Date:

Assessing Authority

SCHEDULE Details of the building taxed

Description of the building

Capital value arrived at

Rate of tax

Amount

Rs. Ps.

Village Sy. No.

FORM VI (See rule 9) Notice of Demand u/s 10 of the Kerala Building Tax Ordinance, 1974.

To

Whereas it is found from the return in Form II submitted by you/you have failed to make a return in pursuance of the notice u/s 7(3) you have failed to comply with the terms of the notice issued to you u/s 9 (2) / 9 (4) and whereas enquiries conducted by me have shown that a building has been constructed by you after 1-4-1973/major repairs of or improvements to the building constructed before 1-4-1973 has been carried out.....which is assessable under the provisions of the Ordinance, you are hereby informed that you are assessed to Building Tax amounting to Rs.....as specified in the Schedule.

The amount shall be paid to the Village Officer/of..... Village in four equal quarterly instalments as mentioned in the schedule. You are further informed that you are at liberty to pay the amount in a lump if you so desire, you are also informed that if any amount is not; paid within the due dates specified,

interest at 6 percent per annum will be charged on the arrears from the date of default and recovered under the provisions of the Revenue Recovery Act.

Place:

Date:

Assessing Authority.

SCHEDULE

Details of the building or buildings.

Village Sy. No.

Total capital value of the building arrived at

Rate of assessment

Amount assessed

Rs. Ps.

The date of payment of the 1st quarterly installment.....

2nd ".....

3rd ".....

4th ".....

To

Copy to.....

FORM VII [(See rule 10 (1)] Appeal u/s 11 of the Kerala Building Tax Ordinance, 1974

To

The Revenue Divisional Officer,..... the day of.....19.....

The Petitioner.....

of.....

shows as follows:

1. Under Section.....of the Kerala Building Tax Ordinance, 1974 the building specified below owned by me has been assessed to Building Tax as in the Schedule (Vide Order No.....dated of the.....)

SCHEDULE

Details of the building

Taluk Village Sy. No.

Description of each building, out house, garage etc.

Total Capital value of the building arrived at.

Assessment amount.

Rs. Ps.

2 Copy of the order appealed against is enclosed.

3. Date of service of the order or me is.....

4. The original/copy of the receipt for payment of the tax assessed is enclosed.

5. Statement of facts.

6. Matters appealed against

(a).

(b).

(c).

7. Grounds of appeal

8. The petitioners therefore prays that:

Signature

FORM OF VERIFICATION

I,.....the petitioner named in the above my petition do hereby declare that the details furnished in the petition and the statement of facts above are true to the best of knowledge and belief.

Signature.

5. The following are some of the relevant dates which should be borne in mind in interpreting the above statutory provisions:

Ext. P1 order of assessment and notice of demand (Exts. P1 and P1 (a) are dated 29-6-1988. The petitioner states that the order was served on him only on 20-9-1988. Ext. P1 (a) notice of demand sent along with Exts P1, required the petitioner to pay the tax assessed in four equal quarterly instalments mentioned in the schedule Quarterly instalments are July, 1988, October, 1988, January, 1989, and April, 1989

The petitioner filed the appeal (Ext. P2) before the first respondent on 23-9-1988, stating that the order of assessments was served on him only on 20-9-1988. The appeal memorandum itself shows that no payment was made towards the tax assessed till then. The appeal was returned by the first respondent, by endorsement dated 11-10-1988, due to the non-payment of the building tax and failure to produce evidence in support thereof.

The petitioner filed the Original Petition, in this Court, on 1-11-1988. The writ appeal was filed on 7-12-1988.

6. It is evident from the above, that on the day when the petitioner filed the Original Petition in this Court, i.e. on 1-11-1988, two quarterly instalments towards the tax assessed and demanded, as per Exts. P1 and P1 (a), were due. The petitioner has not paid any amount till then towards the tax assessed. The learned single Judge, by judgment appealed against dated 3-11-1988, directed that two such instalments which has fallen due on the date of the judgment, to be paid within two weeks from the date of the judgment and the balance amount due (50% of the amount) within one month thereafter. It should be noticed that the balance of 50% was payable as per Exts. P1 and P1 (a) in two instalments in January, 1989 and April, 1989

7. We shall first take up the appellant's plea that the proviso to Section 11 (1) of the Act is ultra vires and illegal. It was contended that no appeal shall lie unless the building tax assessed has been paid. There is no force in this plea. A reading of sections 9, 10, 11 (1) taken along with rules 8 and 9 along with Forms No. V and VI of the Kerala Building Tax Act and Rules, will show that the appellant is required to pay the building tax assessed only in four quarterly instalments, as mentioned in the schedule. On the day when the appellant filed the appeal (Ext. P2) before the first respondent on 23-9-1988, the first installment had fallen due. A fair and reasonable construction of sections 10, 11 (1) and rules 8,9 and 10 along with Forms No. V and VI, will go to show that what is contemplated by the proviso to section 11 (I) of the Act is only the payment of building tax due as on the date of filing of the appeal. The moment, an appeal is filed, the appellate authority is seized of, the entire matter. He has got all the powers of the assessing authority. The appellate authority has got even the power to enhance the assessment. The authority competent to hear the appeal has got the jurisdiction and power to pass appropriate interim orders, on motion by the assessee, regarding the payment of tax assessed and due. So, it is open to the assessee who has filed the appeal to move the appellate authority for directions to keep in abeyance the further instalments due or for passing other appropriate orders which will meet the ends of justice, as by postponing the date of payment of future instalments. The appeal should be filed within a period of thirty days from the date of service of the notice of demand. Ordinarily, not more than one quarterly installment of tax will be due or payable on the date of filing the appeal. The assessee can, after the payment of such installment which has become due, move the appellate authority along with the appeal or even later, for keeping in abeyance the payment of subsequent instalments or for extension of the dates for paying the instalments due. In this view of the matter, we read the proviso to section 11(I) of the Act, in the following manner:

Provided that no such appeal shall lie unless the building tax has been paid shall only mean "Provided that no such appeal shall lie unless the building tax due then has been paid.

The building tax due on the date of filing of the appeal will ordinarily be the first quarterly installment, In this case, it was so. The appellant's plea that the assessee is required to remit or pay the entire, building tax assessed is not justified. In this connection, we should state that the right of appeal is the creature of statute. If, any person aggrieved by an order of assessment, wants to avail the statutory right of appeal, he should conform to the provisions of the Statute in that behalf. We are of the view, that the provision for payment of the amount due, as per the assessment order, before filing the appeal is not open to any attack. We should remember that the Court permits a greater latitude to the discretion of the Legislature, in the matter of taxation laws. The State is allowed to pick and choose districts, objects, persons, methods and even rates for taxation if it does so reasonably. As to how the assessed tax should be collected is largely a question of policy. The Court would be slow to interfere with the legislative discretion in the matter. The above position in law is settled by a series of decisions of the Supreme Court. Dealing with the requirement about the deposit of the amount, as a condition precedent to the entertainment of an appeal, the Supreme, Court of India in *The Anant Mills Co. Ltd. Vs. State of Gujarat and Others*, -stated the law thus:

.....The requirement about the deposit of the amount claimed as a condition precedent to the entertainment of an appeal which seeks to challenge the imposition or the quantum of that tax, in our opinion, has not the effect of nullifying the right of appeal, especially when we keep in view the fact that discretion is vested in the appellate Judge to dispense with the compliance of the above requirement. All that the statutory provision seeks to do is to regulate the exercise of the right of appeal. The object of the above provision is to keep in balance the right of appeal, which is conferred upon a person who is aggrieved with the demand of tax made from him, and the right of the Corporation to speedy recovery of the tax. The impugned provision accordingly confers a right of appeal and at the same time prevents the delay in the payment of the tax. We find ourselves unable to accede to the argument that the impugned provision has the effect of creating a discrimination as is offensive to the principle of equality enshrined in Article 14 of the Constitution.

The right of appeal is the creature of statute Without a statutory provision creating such a right the person aggrieved is not entitled to file an appeal. We fail to understand as to why the legislature while granting the right of appeal cannot impose conditions for the exercise of such right. In the absence of any special reasons there appears to be no legal or constitutional impediment to the imposition of such conditions. It is permissible, for example, to prescribe a condition in criminal cases that unless a convicted person is released on bail, he must surrender to custody before his appeal against the sentence of imprisonment would be entertained. Likewise, it is permissible to enact a law that no appeal shall lie against an order relating to an assessment of tax unless the tax had been paid.

Such conditions merely regulate the exercise of the right of appeal so that the same is not abused by a recalcitrant party and there is no difficulty in the enforcement of the order appealed against in case the appeal is ultimately dismissed. It -is open to the legislature to impose an accompanying liability upon a party upon whom a legal right is conferred or to prescribe conditions for the exercise of the right. Any requirement for the discharge of the liability or the fulfillment of that condition in case the party concerned seeks to avail of the said right is a valid piece of legislation.....

More recently, in *Vijay Prakash D. Mehta and Another Vs. Collector of Customs (Preventive), Bombay*, , the Supreme Court stated in paragraphs 9 and 13 as follows:

9. Right to appeal is neither an absolute right nor an ingredient of natural justice the principles of which must be followed in all judicial and quasi-judicial adjudications. The right to appeal is a statutory right and it can be circumscribed by the conditions in the grant

13.....If the Statute gives a right to appeal as such upon certain conditions, it is upon fulfillment of these conditions that the right becomes vested and exercisable to the appellant....."

8. In the light of the above, we have no hesitation to uphold the proviso to section 1) (1) of the Kerala Building Tax Act, as legal and valid. The argument to the contrary is devoid of substance. The decision in *D.G. Gose and Co. (Agents) Pvt. Ltd. Vs. State of Kerala and Another*, is relevant in this regard. For the same reasoning, we should hold that the right of appeal is only "he creature of a statute. The regulatory provisions in that behalf cannot be attacked as rendering the right of appeal illusory

9. The appellant's counsel next argued that the order of assessment and the notice of demand (Exts. PI and PI (a) are illegal. We decline to entertain the said plea. The appellant has got a right of appeal from Exts. PI and PI (a) before the first respondent. The statute has provided an equally efficacious remedy to obtain relief, in case the appellant is aggrieved against Exts. PI and PI (a) orders. In such circumstances, we are of the view that the appellant is not justified in invoking the extra-ordinary discretionary jurisdiction of this Court under Article 226 of the Constitution of India to assail Ext. PI and PI (a). In this case, the appellant has resorted to the statutory remedy by filing an appeal, vide Ext.P2. The appellant should pursue such remedy. It should be remembered that the remedy under Article 226 of the Constitution of India is not a concurrent one. (See- *Mc. Dowells case*) (1985 KLT 428).

10. Lastly, the appellant's counsel contended that the first respondent erred in returning Ext P2 appeal on the ground "that the building tax amount due has not beer, paid"". It should be stated that the first respondent himself has only stated that the building tax amount due has not been paid. The amount due on the date when the appeal was filed was only the first installment. In the light of our

interpretation of the relevant sections and rules of the Kerala Building Tax Act and Rules, we should state that the first respondent was justified in his view that the installment which has already fallen due should have been paid. Regarding the step, which the first respondent ought to have taken in the matter, we are of the view that the first respondent should not have returned the appeal memorandum to the appellant. The words occurring in the proviso to section 11(1) on the Act, to the effect that "no such appeal shall lie unless the tax has been paid" only means that the "appeal will not be held to be properly filed until the tax has been paid". Dealing with a similar provision occurring in Section 30 (1) of the income tax Act 1922 Supreme Court of India in Commissioner of Income Tax, Bombay City I Vs. Filmistan Ltd., stated the law thus:-

In our opinion the meaning of the words no appeal shall lie" in the proviso is not that no memorandum of appeal can be presented. All that it means is that the appeal will not be held to be properly filed until the tax has been paid. If, for instance the memorandum of appeal is filed on the 20th day, i. e. 10 day before the period of limitation expires and the tax is paid within the rest of the 10 days, the appeal will be a proper appeal it will be within time and no question of limitation will arise but if the tax is paid after the period of limitation has expired it will be taken to have been filed on the day when the tax is paid even though the memorandum of appeal was presented earlier and within the period of limitation. The question will then have to be decided whether there was sufficient cause for condonation of delay and that is exactly what the Tribunal had ordered and that in our opinion is the effect of the proviso to section 30(1) read with sub-section (2) of section 30 of the Act.

The first respondent should have posted the appeal for hearing and should dispose of the appeal as per the state of affairs that existed on that day. If no installment was due on the date of filing of the appeal and the appellant had filed a petition to dispense with the payment of the tax assessed or had moved for extension of time for payment, the appellate authority should consider that aspect before passing orders in the appeal. If, on the day when the appeal was filed, any installment has fallen due and the appellant had paid the installment which has fallen due and has prayed for extension of time or for dispensing with the deposit of the further amounts due, that should be considered before disposing of the appeal. Even if the appeal has been filed without paying the installment that has fallen due, it was open to the appellant to remit the installment which has already fallen due on any day before the appeal is actually heard and pray for treating the appeal as one filed on the day when the tax was paid. Then, it is for the appellate authority to consider, whether there was sufficient cause for condonation of the delay. This is so, since the appellate authority has got the power to admit an appeal even if it is not filed within a period of thirty days, as per section 11(3) of the Act. The appeal will be deemed to have been filed on the day when the arrears of instalments due are paid. Analogous provision in Sales Tax Act considered -- Lalta Prasad Khinni Lal Vs. The Asstt. Commissioner (Judl.) Sales Tax, Kanpur and Another, also

11. In the light of the above, we hold that the first respondent erred in returning the appeal memorandum to the appellant.

12. Now, we are concerned with the order that has to be passed in the writ appeal. The learned single Judge has given sufficient time to pay the instalments, that were already due on the day when the Original petition was filed in this court. At the time of the disposal of the writ appeal, three quarterly instalments have fallen due. If all the three instalments are remitted on or before 25th of March, 1989, the first respondent shall accept the appeal memorandum to file and post it for hearing to a near date. The appeal should be deemed to have been filed on the day when the three instalments are fully paid, within the time extended by us, i.e. on or before 25th March, 1989. Then, it is for the appellate authority to consider, whether there was sufficient cause for the appellant in not presenting the appeal within the time allowed by law and exercise the discretion vested in him u/s 11(3) of the Act. We dare say, that in view of the fact that the scope of the various statutory provisions were not clearly settled by any authoritative decision of this Court or of the Supreme Court, in the peculiar facts and circumstances of this case, the appellate authority shall exercise the discretion vested in him u/s 11 (3) of the Act liberally. It is open to the appellant, either to remit the 4th installment, as stated in Exts. P1 and P1 (a), or move the appellate authority for appropriate relief in that matter. The appellant is not entitled to any further relief in this writ appeal. The writ appeal is disposed of, as above.