

(2000) 08 KL CK 0036

In the High Court Of Kerala

Case No : O.P. No's. 80, 4031, 4468, 9469 and 10304 of 1990, 517, 6960 and 11647 of 1991 and 1433, 3364 and 3944 of 1992

Lissy Lyju and Another

APPELLANT

Vs

Tahsildar and Others

RESPONDENT

Date of Decision : 18-08-2000

Acts Referred:

Kerala Building Tax Act, 1975 — Section 2

Citation : AIR 2001 Ker 82

Hon'ble Judges : M. Ramachandran, J;J.B. Koshy, J

Bench : Division Bench

Advocate : C.T. Joseph, George C. Menacherry and Sobha Mathew, for the Appellant; V.V. Asokan, Govt. Pleader, for the Respondent

Judgement

Koshy, J.—All these original petitions are filed challenging the orders of assessment under the Kerala Building Tax Act, 1975 (hereinafter referred to as "the Act). The buildings in question, though integral ones, portions of which are alleged to belong to various persons separately and they claimed separate assessment in their names. Their claim is based upon the definition of "building" in Section 2 (e) of the Act as well as Explanation 2 to the above sub-section. It is also submitted that tax is payable by the owner and if a separate ownership in separate flat, apartment or separate portions is proved, there should be separate assessment based upon the definition of "owner" as well as the liability to pay tax. These buildings are also commercial buildings and a contention was raised by the Revenue that, in any event, Explanation to Section 2 (e) of the Act is not applicable to commercial buildings. Considering the various contentions, the learned single Judge referred these matters to the Division Bench following the reference order which we quote below ;

"An important question relating to the, interpretation of explanation 2 to Section 2 (e) of the Kerala Building Tax Act, 1975 arises for consideration in these cases. The buildings in question, though integral ones, are alleged to belong to various

persons in portions and these persons claimed separate assessments under the Act over the portions alleged to belong to them. There are cases where a single building has been put up on land belonging in co-ownership to various persons and the portions are different floors of the building and are claimed as belonging to each under some arrangement between them; cases where the building is claimed as belonging even to persons who do not have any ownership in the land, but who claim to have contributed to the construction and thereby claim an identified portion of the building as their own; there is also a case where the building is alleged to have been constructed on land lying contiguous of various owners, with the respective portions separated by common walls, but a common hall is put in the upstairs. All these raise complicated questions of law, particularly the last one mentioned as to how the assessment of the entire building is to be completed.

2. Incidentally, in some of these cases, the question of capital value is also involved. I am only referring to it as a question arising in these cases, but the question which requires serious consideration is the question of joint ownership and the interpretation of explanation 2 to Section 2(e) of the Act. I may also mention that in many of these cases the buildings concerned are shopping complexes and the question will arise whether portions thereof can be treated as apartments or to which alone reference is made in Explanation 2 mentioned earlier.

Having regard to the complexity of the questions involved. I refer these cases for decision by a Division Bench."

2. Before going through the merits of the matter, we may refer to the provisions in S. 2 (e) of the Act is as follows :

"2 (e) "building" means a house, outhouse, garage, or any other structure, or part thereof, whether of masonry, bricks, wood, metal or other material but does not include any portable shelter or any shed constructed principally of mud, bamboos, leaves, grass or thatch or a latrine which is not attached to the main structure."

"Owner1 is defined u/s 2 (1) as follows :

" "Owner" includes a person who for the time being is receiving, or is entitled to receive, the rent of any building, whether on his own account or on account of himself and others or as an agent, trustee, guardian or receiver for any other person or who should so receive the rent or be entitled to receive it if the building or part thereof were let to a tenant;"

Section 2 (1) was added to the definition clause with effect from 10-2-1992 defining "residential" building" which is as follows :

"(1) residential building means a building or any other structure or part thereof built exclusively for residential purpose including out-houses or garages appurtenant to the building for the more beneficial enjoyment of the main

building but does not include hotels, boarding places, lodges and the like".

Before amendment with effect from 10-2-1992, building tax was assessed based on the capital value of the building. Thereafter, method of assessment is based on the plinth area. Two rates of tax are provided after the amendment for "residential buildings" and other buildings.

3. Section 7 compels the owner of the building to file return in the prescribed manner and Section 9 deals with assessment and owner has to file a return in the prescribed manner.

4. Contention of the petitioners is that the building includes part of the building u/s 2 (e) and Explanation 2 further explained the above stating that If different apartments are owned by different persons and the cost of construction of the building is met by all such persons jointly, each such apartment shall be deemed to be a separate building. It is argued that there is no distinction between "commercial building" and residential building" in the main section. Considering the definition of "owner" and method of assessment, it is argued that if part of the building owned separately and can be used independently. It should be assessed separately. On a reading of the provision as a whole especially considering the object and method of assessment etc. only such an inference can be made. Explanation only makes the matter clear that if there are different apartments or flats, they should be assessed separately even if it is jointly owned and Explanation 2 cannot restrict the meaning of definition "building". According to the Revenue, a very wide definition of "building" is given only to show that part of the building also should be included as a building and while assessing in the capital value method or plinth area method, value or area of part of the building also should be included. Explanation 2 is actually an exemption given and it should be strictly constructed and it grants exemption only to apartments and flats and apartments and flats refer only to residential buildings and not commercial buildings and Explanation 1 also gives exemption for accommodations given to workers under the Factories Act or Plantations which shows that exemption is only for residential building.

5. Before we go into the details of the case, we may also refer to some of the points referred by both sides regarding the principles of interpretation. It is argued that the first and most elementary rule of construction is literal construction. The object of all interpretation is to ascertain the intention of the Parliament and intention of the Parliament should be deduced from the language used. What is intended by the Legislature has to be found out by the words actually they have expressed. When no definition is given in the Act and when the words are not clear or unequivocal only, the problem of interpretation arises.

6. It is held by the Supreme Court in Commissioner of Income Tax, Andhra Pradesh Vs. Taj Mahal Hotel, Secunderabad, that the words used in the State should be construed in the popular sense. The Supreme Court held as follows:

"6. Now it is well settled that where the definition of a word has not been given,

it must be construed in its popular sense if it is a word of every day use. Popular sense means "that sense which people conversant with the subject matter with which the statute is dealing, would attribute to it."

In this Act, the word "flats" and "apartments" are not defined and building itself is defined in an inclusive way . In *Ramavatar Budhaiprasad Etc. Vs. Assistant Sales Tax Officer, Akola*, the Supreme Court had considered the question whether betel leaves will come under the heading "Vegetable" and held as follows :

"(4)But it was submitted that betel leaves are vegetables and therefore they would be exempt from Tax under item 6. Reliance was placed on the dictionary meaning of the word "vegetable" as given in Shorter Oxford Dictionary where the word is defined as of or pertaining to comprised or consisting of, or derived, or obtained from plants or their parts. But this word must be construed not in any technical sense nor from the botanical point of view but as understood in common parlance. It has not been defined in the Act and being a word of every day use it must be construed in its popular sense "that sense which people conversant with the subject matter with which the statute is dealing would attribute to it."

It is well settled that the Act should be read as a whole considering all the provisions of the Act as held *Attorney General v. Brown* (1920) 1 KB 773. This is an elementary rule that construction should be made of all the parts together and not of one part only by itself.

7. In taxing statutes imposing pecuniary burden on the assessee, the provisions of the Act should be strictly construed. In taxing statutes one has to look solely on what is normally said. There is no equity about a tax and there is no presumption as to tax. A burden of tax can be imposed by clear and unambiguous provisions. In *A.V. Fernandez Vs. The State of Kerala*, the Supreme Court held as follows : (Para 29)

"In construing fiscal statutes and in determining the liability of a subject to tax one must have regard to the strict letter of the law and not merely to the spirit of the statute or the substance of the law. If the Revenue satisfied the Court that the case falls strictly within the provisions of the law, the subject "can be taxed, if, on the other hand, the case is not covered within the four corners of the provisions of the taxing statute, no tax can be imposed by inference or by analogy or by trying to probe into the intentions of the legislature and by considering what was the substance of the matter."

The same view was expressed in *Commissioner of Sales Tax, Uttar Pradesh Vs. The Modi Sugar Mills Ltd.*, . It was also pointed out that even though there is no equity for taxation, if there is ambiguity or two views are possible, then one which is favourable to the assessee should be considered. In this connection, we refer to the decision of the Supreme Court reported in *M/s Mysore Minerals Limited, M.G. Road, Bangalore Vs. The Commissioners of Income Tax, Karnataka, Bangalore*, where it was held that if two views are possible, one which is

favourable to the assessee should be taken. Based upon the decision of the Supreme Court, in Commissioner of Income Tax, Bangalore Vs. J.H. Gotla, Yadagiri, it was held as follows :

"Though equity and taxation are often strangers, attempts should be made that these do not remain always so and if a construction results in equity rather than in injustice, then such construction should be preferred to the literal construction."

8. It was contended that if the word "apartment" refers to building for residential purposes, the word "flat" is used not with the same meaning. In State Level Committee and another Vs. M/s. Morgardshammar India Ltd., the Supreme Court held that surplusage should not be preferred as two expressions used cannot mean the same thing. If the two means the same thing subsequent expression will become surplusage. In Aswini Kumar Ghosh and Another Vs. Arabinda Bose and Another, also it was held that the words in the statute should not be brushed aside as being surplusage.

9. Again, it was argued that Explanation to Section 2 (e) cannot restrict or enlarge the definition of word "building" in Section 2. Explanation is used to explain the meanings in the words contained in the section which became part and parcel of the enactment and the explanation cannot restrict the scope of the section. Normally, an explanation is made to harmonize or clear up any ambiguity in the main section and the words in the Explanation cannot be taken. Therefore, it is argued that separate flats and apartments separately owned by different persons should be assessed separately even on the basis of the main section. They also cited the decision of the Supreme Court in Dr. M.K. Salpekar v. Sunil Kumar Shamsunder Chaudhari AIR 1988 SC 1841 where it was held that when the section deals, with two categories of cases, residential and non-residential accommodation, an explanation to the section which is limited in scope to one category, namely, residential accommodation, cannot affect the scope of the section with reference to second category, namely, non-residential accommodation. It was also pointed out that since part of the building also can be called as building, considering the fact that owner has to pay the tax, a part of the building owned by the owner is separate building as per the definition of Section 2 (e). In this connection, they also cited the decision in Notified Area Committee Nangal Township Vs. Bhakra Management Board, Chandigarh and Others, that row of quarters or bungalows in one block allotted to different persons shall be considered as separate for the purpose of house tax under the Municipalities Act. Hence the definition of building as such should be taken into account.

10. Now, we may refer to the decision rendered by the Kerala High Court regarding the same point, that is, regarding the assessment of multi-storeyed building considering the definition of Section 2 (e) and Explanation. In the decision reported in Balan v. State of Kerala (1990) 1 KLT 428 the Court was considering the assessment of a building constructed by seven co-owners. It was

held as follows :

"6. The cumulative effect of the charging Section 6 is that every building that is constructed after 1st day of April 1973 and the capital value of which exceeds rupees seventy five thousand is liable to building tax. What then is a building for the purpose of levy of the tax. The word "building" is defined in the Act and therefore the building which would be made the subject-matter of the assessment shall satisfy the requirements prescribed by the definition. I shall now read the definition :

"Section 2 (e) :

"Building" means a house, out-house, garage, or any other structure, or part thereof, whether of masonry, bricks, wood, metal or other material, but does not include any portable shelter nor any shed constructed principally of mud, bamboos, leaves, grass or thatch or a latrine which is not attached to the main structure."

Of the two explanations appended to this definition, Explanation 2 is relevant, it reads :-

"Where a building consists of different apartments or flats owned by different persons and the cost of construction of the building was met by all such persons jointly, each such apartment or flat shall be deemed to be a separate building".

This explanation says that where a building consists of different apartments or flats owned by different persons and the cost of construction of such building was met by such persons jointly, each such apartment or flat, by a fiction, has been treated as a separate building. It is thus clear that but for this fiction introduced by this Explanation a building which consists of different apartments or flats owned by different persons, as they admittedly have met the cost of construction jointly, also would have been treated as a single unit for the purpose of levying the building tax. In other words this Explanation suggests that no other building the cost of construction of which is met jointly by several persons, can be treated as separate units for the purpose of levying the building tax. That is the intention of then legislature is clear from this Explanation. If that be the position the building in dispute which was constructed for the purpose of using it as a theatre necessarily has to be treated as one unit for the purpose of levying the tax even assuming the cost of construction of the building is met jointly by the petitioners. The scheme of the Act, in my view, does not warrant a decision to the contra."

There, the Court was considering the question of a single theatre, that is, one theatre not separate by meats and bounds and held that since seven persons jointly constructed a single building, it can be assessed only as one building.

11. Next decision cited was the decision of T.L. Viswanatha Iyer, J. reported in Bhattathiripad v. Tahsildar (1994) 1 KLT 790. There, it was multi-storeyed building constructed jointly by owners. The portion of the building claimed by each member stands on his share of the land. Even though it was one common

building separate portions of the building were owned by different persons. It was held as follows :

"6. The consolidation of nineteen returns into one, and the assessment of the entire building as a single unit, is also not warranted either in law or on the facts of this case. As per the partition effected between the parties, which is recorded in Ext. P1, each of the nineteen persons is entitled to a defined identified portion of the 77.5 cents of land. Nothing has been pointed out to discredit the genuineness of the oral partition or its validity. The portion of the building claimed by each member stands on his share of the land. It is true that the entire building is one in the sense that it is a continuous one with common walls separating the portions of two adjoining owners. But otherwise, each of the nineteen persons is the owner of the shop rooms standing on the share of the property allotted to him. In such circumstances, I am of the opinion that even without resort to Explanation 2 to Section 2 (e) of the Act, the portions of the building belonging to each are liable to be assessed only separately and not as one single consolidated building. Building is defined in Section 2 (e) as Including a part thereof and therefore the total structure comprising of sixty seven shop rooms, though structurally one, constitutes different buildings in the hands of the respective owners, for the purposes of the Act. This is not a case where the structure is put up on co-ownership property, with each one of the co-owners claiming a portion of the building as his, though the land on which that portion stands is held in co-ownership.

This is a case where each of the owners is the owner of the building as well as the land on which it stands, so that his title to the building is absolute and complete. He is the exclusive owner thereof. None of the owners' portions of the structure, has any right over the portions of the building held by the others. The building in its entirety does not belong to the nineteen persons together, merely because they are owners of portions thereof, any more than it can be said that street-house in a Palakkad Agraharam or elsewhere belongs jointly to all the citizens of the village. Since each of the nineteen persons is the owner of separate defined portion of the building with full title thereto, it has to be assessed in his hand separately. The assessment of the building in the hands of all the nineteen owners as a consolidated unit is not warranted by the provisions of the Act. As I stated earlier, this result follows even without resort to Explanation 2 to Section 2 (e), the applicability of which was disputed by the Government Pleader."

There, the Court was considering a commercial building and was of the opinion that even without resorting to Explanation 2 to Section 2 (e) each portion of the building can be assessed separately.

12. Another decision cited is S. Balu v. State of Kerala 1994 KLJ 278. There it was held that assessment of multi-storeyed building consisting of 22 residential flats should be assessed separately. It was held as follows :

"3.The building is an integral one consisting of twenty two flats. It is a multistoreyed one. The land belongs to the various flat owners in co-ownership, after the transfer effected to them of the undivided interest in the land, the transfer being effected after the construction of the flats was complete. What Explanation 2 lays down is that if a building consists of different apartments or flats owned by different persons, and the cost of construction of the building is met by such persons jointly, each apartment or flat shall be deemed to be separate building. The ingredients of the Explanation are : (a) the existence of a building; (b) that building must consist of different apartments or flats; (c) the apartments or flats must be owned by different persons and (d) the cost of construction of the building should be met by such persons jointly. If these ingredients concur, each of the apartments or flats will be deemed to be a separate building, though the building is one structurally and there is an integral connection between the various parts of the building. The Explanation in effect splits an otherwise integral unit or building into multiple buildings, liable to be assessed separately. It would have been otherwise going by the main part of the definition alone. Evidently, this has been done to encourage construction of apartments and flats and to alleviate the burden that will otherwise fall heavily by assessing the entire building as one unit."

According to His Lordship, this Explanation was added to encourage construction of apartments and flats and to alleviate the burden that will otherwise fall heavily by assessing the entire building as one unit. It was also held that even if the interest in land and ownership is transferred subsequent to the construction of the flat, it should be assessed separately. Here, we are not considering transfer of the interest after the construction. In all these cases under consideration buildings are commercial buildings and buildings were constructed by co-owners. A Division Bench of this Court in *Kurian George v. Tahsildar* (1995) 2 KLT 457 : (1995 AIHC 6198) held that when a building is constructed consisting of separate and distinct apartments or flats jointly by a group of persons, each flat or apartment shall be treated as a separate building if each one of the co-owners claims a portion of the building as his and each of the co-owners is the owner of that portion of the building having absolute title to it. The decision reported in *Bhattathiripad's* case (1994 (1) KLT 790) (*supra*) was approved in the above decision of the Division Bench and *Balan's* case was distinguished as that was a case of construction of a single theatre. A decision under the Kerala Buildings (Lease and Rent Control) Act, 1965 is also cited to show that one shop room in a row of shop rooms can be a building for the purposes of that Act, that is, *Madal Gopalan v. Rohini* 1977 KLT 386 by *v. Khalid J.* (as he then was). The Division Bench was considering a commercial building.

13. We may now analyse the case referred to us in the background of the principles of interpretation referred earlier and also considering the decisions cited before us. Before going into the details of the facts, to understand the popular meaning of the term "apartment" and "flat" as appearing in Explanation 2 to S. 2 (e), we may refer to various meanings given in standard dictionaries. It

is true that popular meaning may not be the same as that was given in the dictionary. As held by Krishna Iyer, J. Dictionaries are not dictators of statutory construction. *The State Bank of India Vs. Shri N. Sundara Money*, But it is permissible to refer to dictionaries to find out the meaning of the word as is understood in common parlance subject to the scheme, context and legislative intention of the Act. Apartment is mainly a term used in America for residential units. Apartment and Apartment House are defined in Black's Law Dictionary as follows :

"Apartment: A part of a house occupied by a person, while the rest is occupied by another, or others. As to the meaning of this term, see *people v. Clair*, 38 Cal. 137."

"Apartment House : A building arranged in several suites of connecting rooms, each suite designed for independent housekeeping, but with certain mechanical conveniences, such as heat, light, or elevator services, in common to all families occupying the building."

"Apartment" and "Apartment House" are defined in Webster's Illustrated Contemporary Dictionary as follows :

"Apartment : One of several rooms or suites of rooms in one building equipped for housekeeping."

"Apartment house : A multiple dwelling building divided into a number of apartments."

In Oxford Encyclopaedia Dictionary, three meanings are given for the word "Apartment". They are :

- "1. A room in a building; a division in a house, separated from others by partitions;
2. A set or suite of rooms; and
3. A compartment."

"Apartment House" is defined in Encyclopaedia Britannica as follows :

"Apartment House, called Block of Flats in Great Britain, a building containing more than one dwelling unit, each designed for housekeeping. These units may be grouped in many ways and vary in size, appointments, and facilities, providing a wide variety of living accommodations capable of satisfying the requirements of many different types of families."

Even though in certain dictionaries it is stated that part of a house also can be called an apartment, generally, it refers to a residential unit in a building complex or in a hotel where a family can independently live. In Kerala Apartment Ownership Act, 1983 "apartment" is defined as follows :

" "apartment" means a part of the property intended for any type of independent

use, including one or more rooms or enclosed spaces located on one or more floors (or part or parts thereof) in a building, intended to be used for residential purposes and with a direct exit to a public street, road, or highway or to a common area leading to such street, road or highway;"

From the totality of circumstances, one can come to the conclusion that the word "apartment" is mainly used for residential accommodation and not for commercial rooms. Therefore, the word "apartment" in Explanation 2 may not apply to commercial complex. But, in the explanation, the word "flat" is also used. According to Black's Law Dictionary a "flat" means :

"A floor or separate division of a floor, fitted for housekeeping and designed to be occupied by a single family. Cent. Dict. A building, the various floors of which are fitted up as flats, either residential or business."

Under the Webster's Illustrated Contemporary Dictionary, a "flat" means : "A set of rooms on one floor or apartment." it is not stated that it should be for residential purposes whereas the Black's Law Dictionary points out that "flats" can be used for business purposes also. According to Webster's Revised Unabridged Dictionary, it may refer to "a floor, loft, or storey in a building." it also shows that it can include "a floor of a house, which forms a complete residence in itself." Jowitt's Dictionary of English Law refers to a "flat" as "a separate self-contained dwelling unit." However, that was based on the decision of *Murgatroyd v. Tresarden* (1947) KB 316 on interpretation of a flat as used in Housing finance Act. 1972 and that is not a general definition. In Oxford Dictionary it is defined as follows:

"Floor, storey, suite of rooms usually on one floor forming complete residence."

Even though the term "flat" can be referred to a separate apartment unit, on a reading of Black's Law Dictionary "flat" can be used for business also and not for residence alone. An independent part of house can be called a flat if it can be independently used. If apartment and flat can have the same meaning it was not necessary for the Legislature to use the word "flat" after "apartment" in Explanation 2 to Section 2 (e), If such is the interpretation, the word "flat" becomes surplusage. As mentioned in *Corpus Juris Secundum*, the term "flat" can be used in different senses and a flat in its original etymological sense is a floor in a building or a portion of such a floor.

14. The learned advocates appearing for the assessee pointed out various advertisements showing that flats are available for rent for business purposes as well as residential purposes. It is stated that an independent floor or part of the floor of a building if it can be independently used it can be a flat irrespective of the user whether it is residential or commercial. Considering the scheme of the Act, the present popular meaning in India for the term "flat" etc. we are of the opinion that unlike the apartment, flat need not be for residential purpose only as defined in Black's Law Dictionary. It can be for business purposes also. Therefore, the term "flat" used in Explanation 2 to Section 2 (e) is not limited to

residential purposes only but also for commercial purposes.

15. As held by the Supreme Court in *Dr. M.K. Salpekar v. Sunil Kumar Shamsunder Chaudhari* MR 1988 SC 1841 explanation cannot restrict the scope of the main term "building". Apart from the explanation which is intended to help the co-owners who are constructing flats and apartments jointly, if a separate definite portion of the building is owned separately by a person and can be used separately it can be assessed separately. Section 2 (e) makes no difference between commercial or residential building. It specifically mentions part of the building also and the assessment is on the owner of the building. Act has to be interpreted as a whole. Part of the building if independently, can be used with separate door and with independent access and separately owned it can be assessed separately even without the aid of explanation especially considering the definition of "owner" and assessment is in respect of the owner of the building. Flats and multi-storeyed buildings are jointly made by co-owners considering the exorbitant cost and reducing the expenses. However, if the building is not coming under the explanation of Section 2 (e), such buildings or independent self-sufficient portion of the building cannot claim assessment as a separate building unless the owner has got ownership in separate definite portion of the building which has got independent access. In other words, if it is jointly owned by several persons, it cannot be stated that it is a separate building and each part should be owned by separate persons for claiming separate assessment unless one will come under the Explanation. We affirm the decision in *Bhattathiripad v. Tahsildar* (1994) 1 KLT 790 and agree with the Division Bench reported in *Kurian George v. Tahsildar* (1995) 2 KLT 457 : (1995 AIHC 6198).

16. We have answered the reference in general. Each assessment depends upon the facts of each case. Whether the portion of the building claimed for assessment is a separate unit, whether it is constructed by co-owners, whether each portion is separately owned by co-owners, whether benefit of the explanation to Section 2 (e) can be claimed by joint owners, whether annual value fixed by the Municipal authorities can be accepted etc. have to be decided on the facts of each case. In none of these cases, assessing authority considered these questions in detail. There are questions of annual value involved in some cases. Some of the cases were decided even without a hearing. Therefore, we are of the opinion that a fresh hearing should be granted and fresh orders should be passed by the assessing authority in all these cases. The amounts paid towards tax either as per the interim orders of this court or as a condition precedent in filing the appeal etc. Should be adjusted only after passing final orders. The impugned orders are set aside with freedom to pass fresh order. Assessing authorities are directed to reconsider the matter and pass fresh orders with notice to the parties.