

(2011) 12 KL CK 0017

In the High Court Of Kerala

Case No : Writ Petition (C) . No. 11255 of 2006

M-Far Hotels Ltd.

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 03-12-2011

Acts Referred:

Kerala Panchayat Raj (Building Tax and Surcharge) Rules, 1996 — Rule 12, 4, 6, 6(2), 6(4)

Kerala Panchayat Raj Act, 1994 — Section 209E, 25(1), 42, 9(1)

Citation : (2012) 1 KLJ 356 : (2012) 1 KLT 66

Hon'ble Judges : S. Siri Jagan, J

Bench : Single Bench

Advocate : V.M. Kurian, A.V. Thomas, Mathews B. Kurian and K.T. Thomas, for the Appellant; S. Chandrasenan and Government Pleader (Noble Mathew), for the Respondent

Judgement

S. Siri Jagan

1. This Writ Petition relates to demand for building tax under the Kerala Panchayat Raj Act from the petitioner. The petitioner is a company running a five star hotel within the jurisdictional limits of the 2nd respondent Panchayat. By a notice dated 28.6.2001, the petitioner was directed to pay building tax of Rs. 29,81,600/- under the Kerala Panchayat Raj Act and Rs. 1,49,080/- as library cess for the period from 1.4.2001 to 31.3.2002. Against the demand, the petitioner filed a revision petition before the Standing Committee on Taxes of the Panchayat, which was disposed of by order dated 27.7.2001 reducing the tax and cess to Rs. 26,83,414/- and Rs. 1,34,172/- respectively. On appeal, the Panchayat Committee, by resolution dated 25.8.2001, reduced the same further to Rs. 22,36,200/- and Rs. 1,11,810/- respectively. The petitioner filed a further appeal to the Deputy Director of Panchayats, which was disposed of by Ext.P1 order dated 14.1.2002, directing the Panchayat to fix the tax as directed therein. The petitioner challenged the said order in O.P.No.7137/2002 and obtained Ext.P2 order of stay. During the pendency of the Original Petition, demand

notices were issued fixing the tax as Rs. 16,75,217/-, the recovery as per which, was stayed by Exts.P3 and P4 interim orders on payment of 50% of the amounts demanded. The petitioner complied with the condition for the interim orders. Challenging Ext.P1 order, the petitioner filed Ext.P5 appeal before the Government and, by Ext.P6 judgment, this Court permitted the petitioner to withdraw the Original Petition on the submission of the learned Government Pleader that the said appeal would be disposed of within two months, with a further direction that the demand for tax pending shall not be enforced till the Government passes orders on the appeal. Pursuant thereto, Ext.P7 order dated 7.12.2004 was passed by the Government, dismissing the petitioner's appeal. Against the same, the petitioner filed Ext.P8 review petition before the Government, which was entertained by the Government and Ext.P9 order dated 23.12.2005 was passed, the operative portion of which reads as follows:

On considering all the facts and circumstances of the case, Government come to the conclusion that the tax in this case shall be fixed as per rule 6(4) of the Kerala Panchayat Raj (Building Tax and Surcharge thereon) Rules 1996 since the rooms are let out on daily rental basis and that the tariff shall be calculated presuming that the 151 rooms are let out for 100 days in a year for Rs. 2200/- per day. No separate tax shall be levied for the utility area (reception, visitors' lounge etc. in the ground floor) and the open spaces which are used by the customers of the Hotel and for which no rent is collected separately.

Hence Government are now hereby direct the Marudu Grama Panchayat to re-assess the building tax of Messers. M-Far Hotel according to the facts mentioned above.

Pursuant thereto, the 3rd respondent passed Ext.P10 order dated 6.3.2006, the operative portion of which reads as follows:

In accordance with the said order, Ext. P11 demand notice dated 10.3.2006 was issued demanding building tax for the periods from 2001-02 to 2004-05 and 2005-06 with penal interest thereon. It is under the above circumstances, the petitioner has filed Writ Petition seeking the following reliefs:

- a) issue a writ of certiorari or other appropriate writ, order or direction quashing Ext.P9 order passed by the 1st respondent.
- b) issue a writ of certiorari or other appropriate writ, order or direction quashing Ext.P10 order and Ext.P11 demand notice issued by the 3rd respondent.
- c) declare that the petitioner is not liable to pay penal interest a (sic) demanded, in Ext.P11 notice.

2. The petitioner raises three contentions. The first is that the hotel building is not a building that is ordinarily let out and, therefore, the assessment has to be made under Rule 4(ii) of the Kerala Panchayat Raj (Building Tax and the Surcharge Thereon) Rules, 1996, and not under Rule 6(4) thereof as directed in Ext.P9. The second is that even assuming that Ext.P9 is valid, in Ext.P10, by

assessing the area other than the rooms let. out, separately, the respondents 2 and 3 have violated the direction in Ext.P9. The third is that since interest u/s 209E being expressly made penal in nature, the same can be imposed only if the petitioner has deliberately refused to pay the tax, and in this case, since the non-payment of balance tax was on account of stay granted by this Court, no penal interest is leviable on the petitioner. It is also contended that since the demand was raised only by Ext.P11, the penal interest is payable only from the date of issue of Ext.P11 and not before. In support of the contention that for the period when recovery of tax was stayed by the court no interest is payable, the petitioner relies on the decision of the Supreme Court in Consolidated Coffee Ltd. v. Agricultural Income Tax Officer ((2001) 1 SCC 278).

3. Although separate counter affidavits have been filed by the Government and the Panchayat, the same do not effectively controvert any of the contentions of the petitioner. In the counter affidavit of the Government, they justify the demand for penal interest on the ground that the same is compensatory in nature and, therefore, the decision relied on which relates to a penal provision is not applicable to the facts of this case. The counter affidavit of the Panchayat finds fault with the petitioner for filing several appeals, Writ Petition, revision petition and a review petition only for protracting the recovery of tax and according to the Panchayat, the review petition was not maintainable.

4. Arguments of the counsel on both sides also progressed the same lines as in the pleadings, the petitioner raising questions of law as to whether without any deliberate defiance of law penal interest can be levied and the respondents failing to meet those arguments. Therefore, the Court was forced to decide the issues raised, without any effective assistance from the respondents.

5. I have bestowed anxious consideration to the issues raised. The first question is as to, for the assessment, which of the two provisions, viz. Rule 4(ii) or Rule 6(4) is applicable to the assessment in question. Rule 4 reads thus:

4. Assessment of Annual Rental Value:- The net annual rental value of buildings shall be deemed to be the gross annual rent received, or that may be received, when it is let out on rent monthly or annually less a deduction of ten per cent of such annual rent and the said deduction shall be deemed to be in lieu of the expenses towards maintenance or any other account whatever;

Provided that in the case of, --

(i) a Government building; or

(ii) a building, under the category of those that are not ordinarily let out on rent and the gross annual rent of which cannot, in the opinion of the Standing Committee, be estimated; the annual rental value shall be assessed as six per cent of the total estimated value of the appurtenant land and the estimated present cost of construction of the building less a reasonable amount for depreciation which shall in no case be an amount less than twenty per cent of

such cost:

Provided further that where the annual value of any building is attributable partly to the use of such building or any part thereof for the display of any advertisement or advertisements, the value of such building may, for the purpose of assessing tax thereon, be fixed as if the building or part thereof were not used for the display of such advertisement or advertisements.

Rules 6 reads thus:

6. The Standing Committee shall, once in every five years, fix the tax payable annually and the owner shall, in two half yearly instalments, pay the same:- (1) The rental value of any building, for the purpose of building tax shall be fixed by the Standing Committee with the assistance of the Secretary or of the Panchayat Officials holding technical post:

Provided that the annual rental value of any building for which the members of the Standing Committee are liable to pay, the tax shall be fixed by the Panchayat with the assistance of the Secretary or the Officer holding technical post.

(2) The Standing Committee shall, once in every five years, fix the annual rental value of the building and shall levy the building tax thereof and the owner of the building, on which the tax has been levied, may remit the same in two equal annual instalments:

Provided that the entire tax for a financial year shall be remitted every year before the thirty-first day of October of that financial year. During the period of initial preparation of the tax assessment registers and on the completion of the general revision, the tax shall be remitted on or before the last date shown in the bill issued under Rule 12.

(3) The increase in tax, in the general revision, for the buildings included in the previous assessment and not subjected to renovation, extension etc. shall not exceed twenty-five percent for the terraced buildings and ten per cent for those roofed with tiles, sheets and other materials.

(4) The tax in respect of those establishments let out on daily rent like lodges. Kalyanamandapam. halls etc. shall be fixed on the basis of the amount collected as daily rent-In the case of such buildings, fifty percent of the total amount of rent collected shall be deducted towards electricity, furniture and service charge and tax shall be levied on the presumption that they are let out at least for one hundred days in a year.

(5) The Secretary shall record in writing the annual value or capital value fixed by the Standing Committee and the tax payable thereon in the registers maintained for the purpose in the Panchayat Office. The following informations in so far as the same may be collected in respect of every taxable item, shall be recorded in such registers.

(a) name of the owner;

- (b) name of the occupier;
- (c) designation if any of the owner or occupier;
- (d) name of the ward and street if any, in which it is situated and the house name and any survey number or other number thereof;
- (e) the annual value or capital value as the case may be; and
- (f) the amount of tax payable.

(6) The Secretary shall, immediately on completion of the tax assessment, keep the assessment register of every ward signed by the Chairman of the Standing Committee after adding up the amount of taxes and recording the same in figures and words.

(7) The Standing Committee shall once in five years, completely revise the tax registers in respect of building tax.

(8) The Standing Committee may, in case any renovation or new addition has been made to a building on which tax has been levied, after a general revision thereof, alter or make modification in the annual rental value or in the amount of tax of the building. Such modification shall be deemed to have taken effect on the first day of the year of making the same:

Provided that when the modification is made in any year after the date of publication of public notice under Rule 7, it shall have effect only from the succeeding year.

(underlining supplied)

I do not have to think twice to conclude that what is applicable is R. 6(4) and not R. 4(ii) for the reason that R.6(4) is expressly made applicable to establishments let out on daily rent like lodges and the petitioner's hotel building cannot come under the category of those that are not ordinarily let out insofar as admittedly rooms of the building are in fact let out on daily rent. Although the counsel for the petitioner feebly argued that the building is not a lodge, I am satisfied that R.6(4) is the most appropriate provision applicable to the petitioner's building for assessment of building tax, and in the context in which the word "lodge" is used, the same applies to buildings where rooms are let out on daily rent. Therefore, I repel the first contention raised by the petitioner.

6. On the second issue also, I am inclined to hold against the petitioner. Of course, in Ext.P9, the Government have directed that no separate tax shall be levied for utility areas like reception, visitors' lounge etc. in the ground floor. Of course, those areas which the guests of the hotel use as part of their accommodation should be included in the rent paid for the accommodation. But there are other areas, which are not used solely by the guests who pay rent for the rooms. There are other areas like the bar, restaurant etc. which are used by the public as well. But the Panchayat ought to have revealed the basis on which

they have assessed the building tax for other areas as Rs. 1,41,267/-. But since, compared to the building tax of Rs. 12,55,766/- for the rooms the tax assessed for other areas is comparatively very small, taking into account the fact that this litigation has been going on for the last more than ten years, I am not inclined to interfere with the same at this point of time, especially since it cannot be said to be arbitrary or unreasonable.

7. That takes us to the last question, which is the most vexing of the three and relates to demand for penal interest. Penal interest is leviable under. Section 209E of the Panchayat Raj Act, which reads thus:

209E. Recovery of tax payable.- Notwithstanding anything contained in this Act, any amount payable under the provisions of this Act, rules or bye-laws, is not paid on the due date, shall be recovered together with penal interest at the rate of one per cent per month from the due date:

Provided that no penalty shall be recovered on any amount that has become payable or payable in a half year, if it is paid in the same half year.

This question itself has two parts. First is as to whether penal interest is leviable, when the failure to pay is on the basis of stay orders passed by this Court. The second is as to with effect from what date penal interest is payable, if it is payable.

8. I am of opinion that the answer to the first question essentially depends upon the nature of the levy. The section speaks of penal interest. But the nature of the levy cannot be decided merely on the basis of the word "penal" used in the section. The same has to be decided on the basis of the nature, character and content of the levy. Interest can be either compensatory or as a penalty or both. Payment of building tax under the Kerala Panchayat Raj Act is a statutory obligation. Section 209E provides that if the tax is not paid on the due date, the same shall be recovered together with penal interest at the rate of 2% per month, which is 24% annually. In this connection, it must be noted that the Kerala Panchayat Raj Act does not separately provide for any interest simpliciter as against "penal interest" for delayed payment. Panchayats are statutory autonomous bodies on whom numerous statutory duties and obligations for the development of the Panchayat and welfare of the people vest. For discharging those duties the Panchayats require funds. They also require money to pay salary to their employees and to maintain their establishments, for which also they require considerable amounts of money. Their main source of funds is the revenue generated through taxes, licence fees and other levies. If payment of such levies is delayed or defaulted, the Panchayats would be deprived of the use of the money statutorily due to them. Consequently, there would be delay in discharging of their statutory functions. In fact more and more cases are coming up before this Court, in which, retired employees of Panchayats and Municipalities complain of non-payment or delay in payment of retirement benefits in which the defence of the Panchayats and Municipalities is that of lack

of funds. In fact in contempt cases for non-compliance with directions to pay retirement benefits also they take the defence of lack of funds. Therefore, wherever statutory levies by local bodies are defaulted or delayed, they are entitled to be compensated for the delay which can only be through levy of interest. Therefore, I am of opinion that one object of levying statutory interest is to compensate the local bodies for the loss of use of the money statutorily due to the local bodies. But if the rate of such interest is exorbitant, by normal standards, then it would acquire penal character also to the extent it exceeds normal standards. The measure of the normal standard can very well be taken as the rate at which nationalised banks advance money to borrowers. Therefore, to the extent the rate of interest is that at which nationalised banks lend money to borrowers, interest is compensatory. When the rate exceeds the lending rate of nationalised banks it acquires the character of a penalty.

9. In this case the interest rate is 24%. The average normal rate charged by nationalised banks these days for advancing money can be roughly taken as 12%. Therefore, I am of opinion that up to 12%, interest levied u/s 209E is compensatory and the rest is penal in character. In this connection I note that subsequently the said Section has been amended to bring down the rate to 1% per month which is 12% per annum.

10. I am also of opinion that statutory compensatory interest is payable, notwithstanding whether the delay in payment of the same was on account of stay granted by appellate authorities and courts for the obvious reason that it is compensatory in nature. Just because the assessee was able to protract payment of the same by obtaining stay from appellate authorities and courts, such compensatory interest does not cease to become payable.

11. But the case is different in the case of penal interest. A penalty can be imposed for failure to carry out a statutory obligation only if the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest or acted in conscious disregard of the obligation. This legal position has been settled by the Supreme Court in the context of sales tax legislation as early as in 1970 in the decision of *The Right Rev. Bishop S.K. Patro and Others Vs. The State of Bihar and Others*, wherein, in para. 7 the Supreme Court has held thus:

7. Under the Act penalty may be imposed for failure to register as a dealer: Section 9(1) read with Section 25(1) (a) of the Act. But the liability to pay penalty does not arise merely upon proof of default in registering as a dealer. An Order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a

consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute. Those in charge of the affairs of the Company in failing to register the Company as a dealer acted in the honest and genuine belief that the Company was not a dealer. Granting that they erred, no case for imposing penalty was made out.

(underlining supplied)

In the context of Income Tax law the Supreme Court has also settled the issue as to whether, when the recovery is stayed by the Court, for non-payment of the tax, interest, penal in nature would be payable, in Consolidated Coffee Ltd's case (supra) relied upon by the petitioner. In paragraphs 7, 8 and 9 which read thus:

7. Section 42 speaks of an assessee in default. The question, therefore, is : can an assessee be said to be in default during the period for which an order of stay of recovery of the tax due from him is operating? The answer is indicated in the proviso to sub-section (2) itself. Sub-section (2) empowers the collection of tax from an assessee in default as if it were an arrear of land revenue and as if it were a fine imposed by a Magistrate under the Code of Criminal Procedure. The proviso says that where an assessee or other person has appealed or applied for revision of any order made under the said Act and has complied with an order made by the appellate or the revising authority in regard to the payment of tax, no proceedings for recovery under sub-section (2) may be continued until the disposal of the appeal or revision. Thus, there is recognition that during the period the stay is in operation recovery of the tax cannot be effected. It cannot be effected because the order of stay has placed the demand for the tax in abeyance. During the period of the stay, therefore, the assessee is not in default.

8. As has been pointed out by this Court in Kanoria Chemicals and Industries Ltd. and Others Vs. U.P. State Electricity Board and Others, , an order of stay may be made in different ways but the effect thereof is the same, namely, that for the period during which an order of stay operates, the order that is stayed does not exist in the eye of the law. Once the stay is vacated, the order is resuscitated and may then be executed. For the period of stay, therefore, the assessee cannot be said to be in default of the orders stayed and, therefore, no penalty in that behalf can be imposed.

9. Our attention was invited by learned counsel for the taxing authorities to the judgment in the case of Kanoria Chemicals and Industries Ltd. and Others Vs. U.P. State Electricity Board and Others, just referred to, as relevant to a case of penalty. That was a case that related to late payment surcharge/interest on an amount due. The question was whether such late payment surcharge/interest was penal in nature and, therefore, could not be recovered, having regard to the stay of recovery thereof granted by an appropriate authority. This Court did not

accept the argument that it was penal but, having regard to the fact that the rate of late payment surcharge seemed penal and the facts and circumstances of the case, it reduced the assessee's obligation in respect thereof. We cannot, based upon the aforesaid judgment or otherwise, accept the submission of learned counsel for the taxing authorities that the penalty contemplated by S. 42 is not analogous to a late payment surcharge/interest. A late payment surcharge/interest is necessarily compensatory in character. A penalty is a punishment.

But that decision cannot be cited as an authority for the proposition that that compensatory interest is not payable when there is a stay by Courts, as is clear from paragraph 9 thereof. It may also be noted that the Income Tax Act provided for interest both compensatory and penal separately unlike the Panchayat Raj Act and the Supreme Court upheld demand for the compensatory interest and set aside demand for penal interest provided for, separately.

12. Therefore, I am of opinion that the 24% interest contemplated by Section 209E (as it then stood) was both compensatory and penal in nature in the proportion of 12% each. But when it was reduced to 12% it ceased to be penal in nature despite the use of the expression "penal interest". I am of opinion that the Government would do well to make it expressly clear by amendment of the Statute itself.

13. Going by the law as laid down above, the petitioner is certainly bound to pay 12% compensatory interest for the delay in payment. But insofar as the penal part of the interest, since this Court had granted conditional stay of recovery, condition of which has been complied with by the petitioner, for the period when there was a stay either from the Court or the appellate authority, the petitioner is not bound to pay the penal interest of 12%.

14. Lastly, it has to be decided as to from what date interest is payable. The petitioner would contend that the same is payable only from the date when the revised bill, Ext.P11, was issued to them, since the revised demand became due only then. u/s 209E interest is payable if the amount payable is not paid on the "due date". Therefore, the question to be answered is when is the due date, general procedure for assessment of taxes under the Panchayat Act is laid down in the Kerala Panchayat Raj (Taxation, Levy and Appeal) Rules, 1996 (General Rules, for short). The procedure for assessing building tax is prescribed by the Kerala Panchayat Raj (Building Tax and Surcharge) Rules, 1996 (Building Tax Rules, for short). Under Rule 8 of the General Rules and Rule 12 of the Building Tax Rules, a bill has to be issued to the person from whom it is due. But under the proviso to Rule 6(2) the entire tax for a financial year shall be remitted every year before the 31st day of October of that financial year. In this case, the petitioner admits in the writ petition that the 2nd respondent intimated the petitioner that the yearly building tax on the hotel building and library cess are fixed at Rs. 29,81,600/- and Rs. 1,49,080/- respectively for the period from 1.4.2001 to 31.3.2002 by notice dated 28.6.2001. Therefore, going by the proviso to Rule 6(2), for the year 2001-02, the due date for payment is

31.10.2001. Of course, the petitioner thereafter filed appeals and a writ petition against the demand. But at no time was there any challenge against the liability to pay building tax and the challenge was solely against the method of assessment and the quantum. Therefore, the due date for payment of the building tax arose every year on the 31st of October. Simply because the petitioner challenged the quantum, the tax was revised and ultimately demand was raised for the revised tax by Ext.P11 only on 10.3.2006, does not make the due date 10.3.2006. As such, I am of opinion that the liability to pay interest for the tax due every year arises from the 1st day of November of that year. Therefore, I do not find any merit in the contention of the petitioner on the question as to the date from which the liability to pay interest arises.

In view of the above findings, the Writ Petition is disposed of as follows:

- (a) The validity of Exts.P9 and P10 orders are upheld.
- (b) That part of Ext.P11, whereby interest is demanded at the rate of 24% per annum is quashed. It is declared that the petitioner is liable to pay the compensatory interest only, at the rate of 12% per annum.
- (c) It is further declared that the interest on the building tax for each year is payable from the 1st of November of that year.
- (d) The 3rd respondent shall issue a revised bill for amounts due in accordance with the above directions
- (e) There will not be any order as to costs.