

(2016) 02 KL CK 0173
In the High Court Of Kerala
Case No : W.P. (C) No. 38059 of 2015

Malabar Builders India Pvt. Ltd.

APPELLANT

Vs

Revenue Divisional Officer (Sub Collector), Kozhikode and
Others

RESPONDENT

Date of Decision : 29-02-2016

Acts Referred:

Constitution of India, 1950 — Article 14

Kerala Building Tax Act, 1975 — Section 10, Section 11, Section 11(1), Section 9

Citation : (2016) 2 KHC 162 : (2016) 2 KLT 75

Hon'ble Judges : A.K. Jayasankaran Nambiar, J.

Bench : Single Bench

Advocate : N. Subramaniam, M.S. Narayanan, P.T. Girijan, Usha Narayanan and Neenu Pavithran, Advocates, for the Appellant; R. Ranjith, Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Jayasankaran Nambiar, J.—1. The petitioner is aggrieved by Ext. P11 notice that has been issued by the 1st respondent informing the petitioner that, as a precondition for maintaining Ext. P9 appeal preferred by the petitioner, against Ext. P7 order of assessment under the Kerala Building Tax Act, the petitioner would be required to pay the 1st instalment of the tax amount that was assessed on the petitioner by Ext. P1 assessment order. The challenge in the writ petition is against this condition that has been imposed by the 1st respondent as a precondition for considering the appeal preferred by the petitioner before him. It is the stand of the learned counsel for the petitioner that, inasmuch as in Exts. P7 assessment order and P8 demand notice, the petitioner has been assessed to building tax in an amount of Rs. 17,42,100/-, and the said amount is directed to be paid in four equal quarterly instalments of Rs. 4,35,525/- falling due on 25/09/2015, 25/12/2015, 25/03/2016 and 25/06/2016 respectively, his liability to pay tax would commence only from 25/09/2015, and therefore, an appeal preferred by him before the 1st respondent on or before 25/09/2015 would not

be required to be accompanied by any instalment of the tax confirmed against the petitioner. The learned counsel would rely on the provisions of Section 11 of the Kerala Building Tax Act read with Rule 10 of the Kerala Building Tax Rules and Rule 14 of the Kerala Building Tax (Plinth Area) Rules. He would also place reliance on the decision of the Division Bench of this Court in *Francis v. Revenue Divisional Officer*, 1989 KHC 62 : 1989 (1) KLT 550 : 1989 (1) KLJ 395 : 1989 (1) KLN SN 94 A. wherein at paragraph 8 it is found as follows:

"8. 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 Section 9, 10, 11(1) taken along with Rule 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 23/09/1988, the first instalment had fallen due. A fair and reasonable construction of Section 10, 11(1) and Rule 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(1) 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 instalment of tax will be due or payable on the date of filing the appeal. The assessee can, after the payment of such instalment 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(1) 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 instalment. 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 a 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 *Anant Mills v. State of Gujarat*, , AIR 1975 SC 1234 at p. 1249-para 40-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.

xxxx xxxx xxxx

xxxx xxxx xxxx

The right of appeal is the creature of a 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 that liability or the fulfilment 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 & Jawahar v. Collector of Customs*, , AIR 1988 SC. 2010 : (1988) 4 SCC 402, the Supreme Court stated in Para 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 fulfilment of these conditions that the right becomes vested and exercisable to the appellant....."

Per contra, the learned Government Pleader would submit that there is no illegality in Ext. P11 notice issued by the 1st respondent inasmuch as the 1st respondent has only directed the petitioner to pay the 1st instalment of tax as a condition for maintaining the appeal before him.

2. I have heard the learned counsel for the petitioner and the learned Government Pleader for the respondents. On a consideration of the facts and circumstances of the case and the submissions made across the bar, I find that, the statutory prescription with regard to the maintaining of an appeal before the Appellate Authority is found in Section 11 of the Kerala Building Tax Act, 1975. As per the proviso to Section 11(1), no appeal shall lie unless the building tax has been paid. Rule 10 of the Kerala Building Tax Rules mandates that the appeal against the orders of assessment shall be in Form-7 and that the said appeal shall be accompanied by the original or certified copy of the order appealed against and the original or certified copy of the receipt obtained for payment of the entire amounts assessed. Rule 14 of the Kerala Building Tax (Plinth Area) Rules indicates that every appeal against the order of assessment under the Kerala Building Tax Act shall be in Form-10, and that every appeal shall be accompanied by the original or the certified copy of the order appealed against, and the original or certified copy of the receipt obtained for the payment of the 1st instalment of the building tax. The provisions of the Kerala Building Tax (Plinth Area) Rules have to be read in the back drop of the amendment to the whereby the basis of assessment to building tax was switched over from the capital value of the building to the plinth area of the building. Accordingly, the provisions now in force are the Kerala Building Tax (Plinth Area) Rules and the issue that is to be considered is whether the payment that is to be made, and the certified copy of the receipt that is to be produced by the petitioner along with appeal, is in regard to the payment of the 1st instalment of building tax. I note in this connection that the stand of the petitioner is that he had filed the appeal

before the date stipulated in the demand notice served on the petitioner for payment of the 1st instalment of the tax amount. The question therefore is whether it could be said that the petitioner had become liable to pay the 1st instalment amount before the date mentioned in the demand notice for payment of the 1st instalment of the tax amount. While the learned counsel for the petitioner would vehemently contend that till the date specified in the demand notice for the payment of the 1st instalment, it could not be stated that the 1st instalment of the tax had become due, I am of the view that the said contention of the learned counsel for the petitioner would tantamount to doing violence to the express provisions of the statutory provisions and object thereof. In my view, when there is a tax amount assessed on the petitioner, as evident from the assessment order passed, and the demand notice issued pursuant thereto permits the payment of the amounts in instalments, there is only a facility granted to the petitioner to pay the tax amount in instalments on the various dates as mentioned in the demand notice. In other words, while the tax amount assessed on the petitioner becomes due from the petitioner, from the date of communication of the order of assessment, the petitioner is given only a facility of payment of the due amounts in instalments, the statutory provision making it clear that if the instalment amounts are not paid on the respective due dates, the petitioner would also have to pay interest at a specified date on those amounts which fall due on the specified due dates. In the context of the appeal preferred by the petitioner, therefore, the amount due from the petitioner on the date of filing the appeal would be the first instalment amount, which the petitioner is required to pay on or before the date mentioned for payment of the same in the demand notice. In other words, the instalment due dates mentioned in the demand notice have to be construed as the last date by which the respective installment amounts have to be paid without incurring a further liability for interest on the said amounts. The instalment due dates cannot be construed as the dates from which the liability of the petitioner to pay the amounts arises. Accordingly, the 1st instalment amount would be due from the petitioner from the date of the communication of the order of assessment till the date, mentioned in the demand notice, for payment of the said instalment. Thereafter, the dues of the petitioner would be computed in accordance with the dates fixed for the subsequent instalments, the petitioner becoming liable to pay the dues fixed for the 2nd instalment, 3rd instalment and 4th instalment respectively, between the due date fixed for the immediately prior instalment and the date fixed for the particular instalment. Accordingly, I am of the view that, although, the petitioner had filed this appeal before the Appellate Authority before the last date stipulated for payment of the 1st instalment of the tax assessed on him, the appeal would have to be necessarily accompanied by proof of remittance of the 1st instalment, which in my view had already fallen due from date of the assessment order. I, accordingly, find no reason to interfere with Ext. P11 notice issued to the petitioner, and the writ petition in its challenge against the said notice therefore fails, and is accordingly dismissed.

Taking note of the submission of counsel for the petitioner that he has produced necessary documents, for establishing his contention that the building has to be assessed not as a single unit but as comprising of individual apartments, I make it clear that on the petitioner making payment of the 1st instalment of tax assessed on him, the 1st respondent Appellate Authority shall consider the documents produced by the petitioner to substantiate his contentions on merit, and deal with the said documents while passing final orders in the appeal preferred by the petitioner. The 1st respondent shall pass final orders in the appeal, after hearing the petitioner, within a period of two months from the date of compliance by the petitioner of the formalities required for maintaining the appeal. The petitioner shall pay the 1st instalment of tax assessed on him within three weeks from today and, on the petitioner making the said payment, the recovery steps for recovery of the balance amounts of tax confirmed on the petitioner by the assessment order, shall be kept in abeyance till such time as orders are passed by the 1st respondent as directed, and communicated to the petitioner.