

(1998) 06 KL CK 0045

In the High Court Of Kerala

Case No : O.P.No. 17172 of 1997-T and 7528 of 1998-U

Pioneer Shopping Complex (P) Ltd.

APPELLANT

Vs

The Tahsildar, Kochi

RESPONDENT

Date of Decision : 25-06-1998

Acts Referred:

Kerala Building Tax Act, 1975 — Section 5

Citation : AIR 1999 Ker 239

Hon'ble Judges : P. Shanmugam, J

Bench : Single Bench

Advocate : P. Radhakrishnan and Meera K, for the Appellant; C.E. Unnikrishnan, Govt. Pleader, for the Respondent

Judgement

P. Shanmugam, J.—Both the original petitions were filed by a Private Limited Company dealing, promoting and constructing buildings. The brief facts are as follows: The petitioner was granted a lease for 29 years of an extent of 50.10 cents in survey No. 843 of Ernakulam Village within Cochin Corporation limits by the Greater Cochin Development Authority for the purpose of construction of a multi-storeyed building. The plan submitted by the petitioner was approved by the G.C.D.A. comprised of construction of commercial area in Phase I and construction of residential flats in Phase II. The commercial area in phase I consisted of 93 shops which was completed in about 1989. The construction of Phase I (II), namely, residential flats were started in the year 1992 and was completed in about 1995. The completion certificate was issued by the Corporation in 1997.

2. The Kerala Building Tax Act, 1975 provides for the levy of tax on building. Section 7 of the Act obliges the owner of every building the construction of which is completed to furnish a return in the prescribed form to the assessing authority. Section 5, the charging Section imposes a tax based on the plinth area at the rate specified in the schedule on every building. "Building" has been defined u/s 2(e) as follows:

"(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 or any shed constructed principally of mud, bamboos, leaves, grass or thatch or a latrine which is not attached to the main structure."

Explanation 2 which is relevant for the purpose is extracted below :

"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."

3. "Residential building" has been defined u/s 2(1) as follows :

"(1) "Residential building" means a building or any other structure or part thereof built exclusively for residential purpose including outhouses 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."

Section 5, the charging section speaks of completion of construction for the levy. Sub-section (6) states that the building tax shall be payable by the owner of the building. Explanation to Sub-section (6) states as follows :

"For the purposes of this Act, the construction of a building shall be deemed to have been completed when it is ready for occupation or has been actually occupied, whichever is earlier."

Therefore, the incidence of tax is the completion of the building.

4. Petitioner has put up a multi-storeyed building comprising of 93 commercial shops and 68 residential flats, in a single structure as a builder/assignor. Petitioner has been assessed to building tax on the basis that the building was completed before the appointed day and they are the owners.

5. The only question that arise for consideration is whether the petitioner's building is to be treated as a single unit for the purpose of assessment or whether each shop and flat are to be treated as a separate independent unit? This question assumes importance for the reason that for the residential buildings up to 100 sq. metres, there is no liability for tax. For above 100 sq. metres, tax is determined depending upon the extent of the plinth area. Therefore, it will be advantageous to the assessee, if the buildings are treated as a separate unit to claim exemption or lease rates of building tax.

6. The case of the petitioner in the first O.P. Is that the building consists of different apartments owned by different persons and the cost of the construction was met by all such persons jointly. From the records furnished and the argument of the learned counsel for the petitioner in the first O.P. the following facts emerged :

(1) Petitioner is the owner of the property under 99 years lease of 50.10 cents.

(2) Petitioner applied for approval of building plan and obtained it in their name.

(3) Petitioner has undertaken the construction and completed it. From the terms and conditions for allotments of flats Ext. P9, it is seen that the building that was sought to be allotted and sold are multi-storeyed building complex called "Pioneer Towers". The flats are to be allotted subject to the conditions, namely, that there should be an application accompanied by remittance of Rs. 10,000/- and the petitioner company shall have the discretion of the allotment. The allotment is made on provisional and tentative basis. The allottee shall pay the price of the flat in six instalments and if the applicant fails to pay any such instalment, the proposed allotment shall be cancelled. Therefore, the flats will be allotted to the flat owners only after payment of all the instalments due. The allottees shall not assign, under-let or part with possession of the allotted premises without written permission as per Clause 15. Clause 18 says that the right of the allottees is heritable but not alienable without the permission from the petitioner company/owners. The assignment deed Ext. P8 describes the petitioner as the assignor-cum-builder and the allottee as the assignee. The petitioner/assignor is entitled to put up construction but the assignor agrees to permit the assignee to hold the same and put up construction. According to the petitioner himself, the shop buildings were completed in the year 1989 and residential building work started in the year 1992 and was completed in 1995. Whereas even the sample assignment deed is dated 8-11-1996 (Ext. P8). From the petitioner's own stand and averments, the purchaser never came into the picture before the building was completed. By Ext. P1 petitioner has submitted 165 numbers of returns. The Tahsildar by Ext. P2 dated 8-8-97 required the petitioner to produce the documents and order from the local body and the approved plan and sanctioned order from the local body. Petitioner took time to produce the same and subsequently wrote Ext. P5 letter dated 28-8-97. The case of the petitioner is that u/s 5(6) of the Act, the Building Tax shall be paid by the owner of the building and the petitioner is not the owner of the building. They have undertaken to produce documents executed by various parties. Petitioner could not produce registered documents to substantiate this contention. Hence the respondent passed the assessment order on 2-9-97 holding that the petitioner had constructed the building and treating him as the owner of the building and building tax amounting to Rs. 35,01,000/- was determined on the petitioner. The case of the petitioner is that the respondent had not taken into consideration the fact that he is a developer and had acted only as a builder and the entire ownership of building is vested with various applicants. According to him, agreements were made prior to construction. The residential building cannot be treated as commercial. It is further argued that the entire building was treated as a commercial building and assessed on the higher rate of tax. From the drawing submitted, it would prove that there are 68 residential flats and 93 shops. Therefore, the whole assessment is illegal.

7. The stand of the petitioner that the whole building does not belong to him and belonged to different flat owners is given a go by in O.P. 7528/98. The said

Original Petition was filed challenging the proceedings of the Intelligence Officer (IB), A.I.T. & S.T. Ernakulam imposing a penalty for the failure to pay the sales tax. Both these Original Petitions were filed by one G. Jayaprakash, the Manager of the Company. In the second O.P. It is stated as follows :

"Here the petitioners are selling the immovable property, "the flat" as a whole, and immovable property will not come under the definition of "goods"."

In the 2nd case the contention is that the petitioner Company entrusted the construction of the flats to M/s. Simplex Concrete Piles (India) Ltd. and they are the registered dealers. It is stated in paragraph 7 of the Original Petition that the cement purchased by the petitioner is for the construction of their own flats and for which no tax can be levied. In ground-A it is stated that the flats constitute immovable property. The specific stand of the petitioner in the second O.P. that they are the owners of the building consisting of flats and they are selling the flats as a whole is emphasised by the learned counsel appearing in the second O.P. categorically that the building was constructed by and on behalf of the petitioner company and they are the owners and are selling the flats as such to the various purchasers. They are also paying stamp duty on those sales.

8. After going through the records and hearing the arguments, it is not clear beyond any doubt that the petitioner company after obtaining lease over the land, obtained a building plan in their own name and put up flats as their own. The construction of the flats were completed in the year 1989 and 1995. It is not in serious dispute that all the flat owners got their sale deeds only after construction was completed and that they have not come before construction. In other words, the construction did not depend upon the purchases of various flats. Some persons would have applied while the building was in progress and many would have purchased the flats only subsequent to the completion of the building. In order to show that the cost of construction of the building was met by all the flat owners jointly so as to claim that they are separate buildings for the purpose of Building Tax Act, there must be sufficient evidence acceptable before the authority.

9. In *Ummerkutty v. State of Kerala*, (1994) 1 KLT 781 a learned Judge of this Court held that the liability is cast the moment construction is complete. It was as follows :

"The taxable event under the Act is the construction of the building. It is the completion of the construction that gives rise to the liability under the Act. The liability is cast the moment the construction of the building is complete. It is the owner, (which includes the title holder of the property at the time of completion of the construction), who is called upon by Section 7 to file the return within two months of the date of completion of the construction. The liability under the Act is thus fastened on the person who completed the construction. As pointed out earlier, others also are made liable, including the current owner, but the liability of the original owner is not in any manner discharged by his transferring the

building. The petitioner thus became liable for payment of the building tax due as soon as the building was constructed in 1984. The delay on the part of the assessing authority in quantifying the tax does not absolve the petitioner of his liability u/s 5 of the Act. It is nowhere provided that a person on whom a liability has been cast by Section 5 on his completing the construction of the building and who is obliged to file the return u/s 7. Is exonerated from liability the moment he transfers the building."

The principle laid down in the above case squarely applies to this case. The materials and documents in their case unmistakably points towards the petitioner as the owner of the building at the completion of construction. Of course, if different persons join together to put up one multi-storeyed flats independently with sufficient evidence to show the construction by themselves, the conclusion may be different. The fact of subsequent transfer of interest in land may not be relevant in such a case.

10. From the facts, it is not in dispute that not all these 68 flat owners and 93 shop owners were not available at the time of either starting of the construction or completion of the construction. It will be closing the eyes to the reality, if we are to accept the stand of the petitioner in O.P. 17172/97 that it is the flat owners who have put up the construction. Though the assessment deeds and agreements states so, the factual position is entirely different, as admitted by the petitioner himself in O.P. 7528/98 to the effect that they are the owners of the whole building and the flats were sold subsequently. Therefore, the first contention that the petitioner is not the owner of the building fails. For the second contention that for the purpose of building tax, petitioner cannot be treated as an owner of the building, no evidence has been furnished either before the authority or before me to the effect that the building was put up jointly by different owners and the construction was made by the persons jointly. The 3rd contention, viz., that the entire building assessed as commercial, cannot be sustained. Under the Building Tax Act, "residential building" means building or structure which are built exclusively for residential purposes. In this case, the owner, namely, the petitioner has put up the building both commercial shops and residential building. Therefore, there are two categories of assessment, one is residential building and other buildings. In this case, it has to be assessed as other buildings since the building is not the building exclusively for residential purpose. The definition of "residential building" also includes the out-houses or garages appurtenant to the building for more beneficial enjoyment of the main building. Therefore, the inclusion of the garage for the purpose of the plinth area cannot be held to be illegal.

11. Learned counsel for the petitioner referred to a decision of this Court in *Balu v State of Kerala*, (1994) 2 KLT 42 wherein the learned Judge has taken the view that each of the apartments or flats will be deemed to be a separate building. The view of the learned Judge stands approved in *Kurian George v. Tahsildar*, (1995) 2 KLT 457. According to the learned Judge, the explanation is only to

encourage the construction of apartments and flats and to alleviate the burden that will otherwise fall heavily by assessing the entire building as one unit. In this case, petitioner, a registered private company, is doing the building business as a commercial venture and profit making. Even for subsequent transfers, the company is getting 10% of the cost. The flat owners never became owners till the last instalment paid. Obviously, after completion only the various allottees become the owners. Whereas as per the Act, the moment the building is complete, liability is cast on the owners. Therefore, on facts, this judgment will not apply to this case. In *Parur Tourist Home v. State of Kerala*, (1993) 1 KLT 932 this Court held that the assessment shall contain the reasons for it and the basis thereof.

12. These judgments in my view will not apply to the facts of the case on hand in the light of the clear stand taken by the petitioner in O.P. 7528/98 as dismissed above. As far as the present case is concerned, the assessment has to go by the plinth area and the rate has been specified. Therefore, the order is in the prescribed form. No further reasoning is required as it is only the question of calculation. Once the petitioner is held to be the owner of the building and the plinth area is determined based on the approved plan, unless it is disputed, the assessment has to be only a question of calculation. Therefore, there is no question of giving reasons in this case. For all these reasons, O.P. 17172/97 fails and is dismissed.

13. In O.P. 7528/98, petitioner has challenged the proceedings of the Intelligence Officer taken u/s 45A. The case of the petitioner is that they are not executing any contract work or engaged in the sale of any goods. But the officer on verification of the books of account found that the petitioner has purchased cement and that they have delivered it to the contractor. In the reply, it is admitted that the petitioner has agreed to purchase the cement for the purpose of use in the construction of flats and the cement was agreed to be supplied to the contractors. Therefore, it was held that they are in the business of buying and supplying goods.

14. As against the impugned order, petitioner has got an effective alternative remedy by way of revision u/s 36 and a further revision before the Board of Revenue u/s 38 of the K.G.S.T. Act. Petitioner in O.P. 7528/98 is also prepared to go before the revisional authority.

In the above circumstances, without going into the merits of the case, the Original Petition 7528/98 is disposed of giving liberty to the petitioner to move the revisional authority against the impugned order (Ext. P1).