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**(2010) 06 KL CK 0128**

**In the High Court Of Kerala**

**Case No : Writ Petition (C) . No. 14449 of 2010**

Sreerosh Properties (P) Ltd.

APPELLANT

Vs

State of Kerala

RESPONDENT

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**Date of Decision : 17-06-2010**

**Acts Referred:**

Kerala Building Tax Act, 1975 — Section 5, 5A

**Citation : (2010) 4 KLT 5**

**Hon'ble Judges : P.R. Ramachandra Menon, J**

**Bench : Single Bench**

**Advocate : C. Ajith Kumar, for the Appellant; Mathew George Vadakkal, Government Pleader, for the Respondent**

**Final Decision : Allowed**

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## **Judgement**

P.R. Ramachandra Menon, J.—Whether the course pursued by the assessing authority under the Kerala Building Tax Act, i.e. second respondent in assessing the "building tax" and "luxury tax" u/s 5 and 5 A respectively, treating the whole building, consisting of ground floor and 12 other floors constructed by the petitioner/builder using the funds provided by the prospective purchasers, is liable to be treated as a single unit, to fix the tax liability or whether the same has to be assessed separately, is the issue involved in this case.

2. The petitioner, who is a builder, entered into a joint venture agreement with the land owner to construct the building as aforesaid, making use of Ext.P1 building permit issued by the concerned local authority in the name of the landowner. Altogether, 31 flats were constructed as separate apartments with separate entries and amenities, of course providing common amenities as provided and the project was given shape to, on the basis of separate construction agreements as well as separate agreements to convey undivided interest in the land.

3. The specific case of the petitioner is that, by virtue of the joint venture

agreement, "6" flats had to be constructed and allotted to the land owner, while "25" flats come within the purview of the assignment of the builder. The aforesaid 25 flats were constructed on the basis of the funds provided by the prospective customers and the construction was completed accordingly, on the basis of which, Ext.P7 occupancy certificate was issued. The case projected by the petitioner that, the apartments had to be assessed separately at the hands of the prospective owners was not fully accepted by the assessing authority, who passed Ext.P19 assessment order. The grievance of the petitioner is that, separate assessment in respect of "19 flats" has been accepted; whereas the authority sought to assess "six" flats constructed and allotted in favour of the land owner and the remaining "six" flats (out of 25), taking the entire area as a single unit, fixing the tax liability jointly upon the petitioner/builder/landowner and the six different persons named therein who are the allottees of the concerned flats. The reason given to have pursued such a course is that, in the case of persons shown in serial numbers 20 to 25, the conveyance of the undivided interest in the land is taken place only after effecting the construction and hence that the separate assessment is not possible in their names. With regard to the serial numbers 26 to 31, these are six flats constructed and allotted in the name of the land owner by name Lakshmikutty Amma. It is stated that, even though the said flats have been earmarked in the name of the land owner, no separate documents have been produced by the petitioner/builder, to have effected separate assessment. Accordingly the total liability was fixed as Rs. 2,35,290/-towards "building tax" u/s 5 and also as to the liability to pay "luxury tax" u/s 5 A.

4. The respondents have filed a statement pointing out that, the building permit was issued by the local authority in the name of the land owner. The "19 flats" were transferred in the name of "19 persons" even before starting the construction of the building and that the municipality/local authority has issued separate occupancy certificate to those 19 persons. Accordingly, the assessing authority/second respondent has completed assessment separately in the name of the above 19 persons as per the proceedings dated 29.3.2010, which does not form the subject matter of challenge in this Writ Petition. With regard to the remaining flats, it is stated in para.4 of the statement that, sale deeds of "six flats" were executed only in the year 2009 and the remaining "six flats", which has been simply allotted to the land owner Lakshmikutty Amma, without any agreement, which made the assessing authority to treat the entire portion as above as a single unit, finalizing the assessment as per Ext.P19, which is sought to be justified.

5. The learned Counsel for the petitioner submits that, the observation made by the assessing authority that no documents were produced by the petitioner/builder to sustain the allocation of "six flats" of the building is not correct or sustainable. Reference is also made to item No. 7, joint venture agreement mentioned in Ext.P14 forwarding letter submitted before the assessing authority, producing all the relevant documents. It is without any regard to the same, that

the adverse observation has been made by the assessing authority, which hence is per se wrong and unsustainable.

6. With regard to the remaining "six flats", the learned Counsel submits that the construction has been effected on the strength of Exts.P2 to P6 construction agreements in the case of "5 flats" allotted in the name of "five" different persons and the mode of payment is also clearly specified in the said agreements. Only in the case of Exts.P2 and P3, one or two installments have been specified as the last installments to be effected after issuance of Ext.P7 occupancy certificate. But, this does not have any sanctity or significance as the sale deeds were executed, conveying the undivided interest in respect of the concerned persons, as borne by Ext.P8 to P12 sale deeds, which have been executed on payment of the entire sale consideration in respect of the undivided interest over the land, as well as the satisfaction of the entire amount in respect of the construction, which was provided by the concerned purchasers, though the latter part is not separately mentioned in Exts. P8 to P12 sale deeds. In any view of the matter, the only reason stated for rejecting the contention of the petitioner to have separate assessment at the hands of "5" different persons (with regard to the remaining "one flat", there being no dispute for the petitioner/builder, for which, liability to remit the tax, if any, upon the builder, is rather conceded as discernible from Ext.P19 order) is that the conveyance of the undivided interest in land was effected only after the construction. The learned Counsel placed reliance on the decision rendered by this Court in *Balu v. State of Kerala* 1994 (2) KLT 42 to contend that, the date of registration of the sale deed involving the conveyance of the undivided interest on land does not have any relevance at all, with regard to the necessity to have separate assessment, availing the benefit of "Explanation-II to 2 (e)" of the Kerala Building Tax Act, This being the position, this Court finds that, the reasoning given by the assessing authority in Ext.P19, to sustain the same, to have effected joint assessment at the hands of all concerned, including the concerned purchasers, builder as well as the land owner is not correct or sustainable, which requires reconsideration.

7. With regard to the "six flats" allotted in the name of the landowner, the learned Government Pleader submits that, there is no document to show that they were constructed by using the funds provided by the landowner or any other persons and the construction was made by the builder himself. But here, it has to be borne in mind, with reference to the specific case and contents of "joint venture agreement" and also the undisputed facts, that the property belonged to the land owner and as per the joint venture agreement the construction was to be effected by the builder; out of which "six flats" had to be allotted to be the share of the land owner. In other words, value of the "six flats" allotted to the land owner constitutes the "sale consideration" payable to the builder, in respect of the land secured from the landowner for effecting the construction; which was left at the hand of the builder well in advance. Since, the landowner has obtained the above "six flats" together, the assessing authority may be justified in assessing the said six flats together at the hands of the land owner, which

however is a matter to be considered by the assessing authority after hearing the concerned land owner. To put it short, the course pursued by the assessing authority to have assessed the above "six flats" belonging to the land owner, also at the hands of builder, vide Ext.P19, does not appear to be correct or sustainable.

8. As mentioned hereinbefore, with regard to the remaining "one flat" mentioned as serial No. 22 in Ext.P19 (in the name of Dr. Rajendran Valsalan), there is no dispute for the builder, to have it assessed at the hands of the builder.

9. In the above circumstances, this Court finds that the matter requires to be considered afresh, by the assessing authority. Accordingly, the impugned order is set aside. The second respondent is directed to reconsider the assessment in respect of the flats at serial Nos. "26 to 31" at the hands of the landowner; the flat at serial No. 22 at the hands of the petitioner/builder and the remaining "5" flats at serial Nos. 20,21 and 23 to 25 at the hands of the concerned owners of the building, after issuance of notice to all concerned and subject to verification of the facts and figures. The proceedings as above shall be finalized, in accordance with Jaw, as expeditiously as possible, at any rate within two months from the date of receipt of a copy of this judgment.

The Writ Petition is allowed. No cost.