

(2013) 04 KL CK 0034
In the High Court Of Kerala
Case No : W.A. No. 36 of 2013

Varghese

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 03-04-2013

Acts Referred:

Plantations Labour Act, 1951 — Section 15

Citation : (2013) 2 ILR (Ker) 1025 : (2013) 2 KHC 489 : (2013) 2 KLT 831

Hon'ble Judges : K.M. Joseph, J;K. Ramakrishnan, J

Bench : Division Bench

Advocate : Jacob P. Alex and Joseph P. Alex, for the Appellant; Sebastian Champappally, for the Respondent

Final Decision : Dismissed

Judgement

K. Ramakrishnan, J.—This appeal is filed by the petitioners in W.P. (C) No. 24527/2008. The Writ Petition was filed for quashing Ext. P4 order and Order No. 4361/05/J/K. Dis. dated 8.3.2007 passed by the 3rd respondent appellate authority and to issue a writ of mandamus or any other writ, commanding the 4th respondent assessing authority to reassess the building tax in accordance with law. The appellants are the promoters of a residential complex namely, Poonchoni Gardens at Chengannur, a building consisting of 30 flats, separate units, was constructed in Survey Nos. 230/4, 230/13 and 231/8 in Block No. 18 of Chengannur Village, utilising the funds of the prospective purchasers, after entering into written agreements with them. Separate sale deeds were executed in favour of each purchaser, assigning the title over the respective flats and over 1267/36280 undivided shares in the property wherein the flats situate. Each flat is a separate residential building for all purposes. The apartment complex is comprised of separate units and each unit is independently being held by the respective owner. The 4th respondent had assessed the residential complex as a single unit as per Ext. P1 order dated 1.3.2004, directing the appellants to pay an amount of Rs. 7,36,200/-. Ext. P2 demand notice was also issued to them,

directing to pay the amount. The appellants submitted Ext. P3 reply, stating that the building was incomplete and that the building is not a commercial building, but a residential building and also requesting to assess each residential unit separately and fix the tax accordingly. Thereafter, the appellants remitted an amount of Rs. 1,84,050/-, being the first instalment payable and filed an appeal before the third respondent. The third respondent found that the plinth area of the building is not 4243.65 m² but 4718.9 m² and remanded the matter to the assessing authority to re-assess the building tax. Accordingly, the 4th respondent issued a fresh order of assessment, fixing the tax payable as Rs. 8,22,600/-, deducting Rs. 1,84,050/- already remitted, directing to remit the balance amount. Thereafter, the appellants remitted Rs. 21,600/- and again filed an appeal against that order before the third respondent. The third respondent, had by order dated 8.3.2007, found that the building is a residential building and that has to be treated as a single unit and directed respondent No. 4 to assess the tax accordingly, by setting aside the earlier order passed by the assessing authority and remanded the same for that purpose. The order passed by the 4th respondent was not served on the appellants. After remand, the 4th respondent had issued notice to their advocate, who appeared for them earlier and without giving any opportunity on the basis of the orders of the third respondent, assessed the building tax and passed Ext. P4 order, fixing the tax payable as Rs. 5,40,600/-, deducting Rs. 2,05,650/- already remitted and directing to pay Rs. 3,34,950/- towards building tax in four instalments and imposing luxury tax @ Rs. 2,000/- for the year 2003-04. Aggrieved by the same, the appellants filed the Writ Petition before this court, to quash the order passed by the third respondent and also for issuing a writ of mandamus directing the 4th respondent to reassess the building in accordance with law.

2. A counter affidavit was filed on behalf of the third respondent, contending as follows: The petition is not maintainable. The petitioners constructed a building in Survey Nos. 230/4, 230/13 and 231/8 in Block No. 18 of Chengannur Village. The 4th respondent Tahsildar, who is the assessing authority, assessed the building and an amount of Rs. 7,36,200/- was imposed towards tax for a plinth area of 4243.65 m² under category "other building" as per Ext. P1 order No. BT-179/03 dated 1.3.2004. Aggrieved by the order, the assessee preferred an appeal before the appellate authority and the appellate authority, after considering the same, directed reassessment of the building, fixing the plinth area as 4718.9 m² on the basis of the inspection conducted by respondents 3 and 4. Accordingly, the assessing authority, after enquiry, passed a revised assessment order. The assessee again preferred an appeal against the revised order of assessment before the third respondent. A hearing notice was served on the petitioners on 13.2.2007 to attend the hearing on 17.2.2007, but they were not present on that day and the case was adjourned to 7.3.2007. On 7.3.2007 also, the petitioners were not present, however, on 8.3.2007, the counsel for the appellants filed argument notes. After considering the notes of argument submitted by the counsel for the assessee and the report of the Tahsildar and

other reliable records produced by the appellants (appellants have produced 25 agreements alleged to have been entered into between the prospective purchasers and the assesseees in respect of each flat in the complex, the accounts alleged to be maintained by the appellants regarding payment of the amount towards the cost of construction by each prospective purchaser and also the assignment deeds executed by the appellants in favour of the persons, who executed the agreements with a view to prove that it is a separate unit to be assessed as the purchasers have contributed the amount for the construction of each flat), the appellate authority found that those documents are not sufficient to prove the case of the assessee and treated the building as a single unit and remanded the case to the assessing authority to assess the building as a single unit. Thereafter, the 4th respondent conducted a hearing on 18.4.2007 and 26.6.2007 and assessed the building as a single unit and imposed a tax of Rs. 5,40,600/- and also a luxury tax of Rs. 2,000/- for the year 2003-04. There is nothing on record to show that the assesseees will come under Explanation (2) to S. 2(e) of the Kerala Building Tax Act (hereinafter referred to as the Act) and so, the authority was perfectly justified in assessing the amount as done and no interference is called for and prayed for dismissal of the Writ Petition.

3. After hearing both sides, the learned single Judge, by the impugned order, found that there is nothing on record to show that the building was constructed by utilising the amounts contributed by the prospective purchasers so as to treat this as different units in respect of those purchasers and dismissed the Writ Petition. The learned single Judge also found that there is no violation of the principles of natural justice as notice had been issued and opportunity of hearing had been afforded to the appellants and in spite of that, the appellants failed to prove their case. Aggrieved by the same, the present appeal is filed by the appellants, dissatisfied petitioners.

4. Heard Sri. Jacob. P. Alex, learned counsel for the appellants and Dr. Sebastian Champappally, the learned Special Government Pleader (Taxes) and perused the files produced by the learned Special Government Pleader (Taxes), of the assessing authority and the appellate authority.

5. The points that arise for consideration are:

- i. Whether there was any violation of the principles of natural justice committed by the assessing authority or the appellate authority, before passing the impugned order ?
- ii. Whether the appellants are entitled to get their flats assessed as different units as claimed by them ?

6. The learned counsel for the appellants argued that the assessing authority as well as the appellate authority have not properly considered the documents produced and there is no reason given for not relying on those documents produced to prove the case of the appellants. Further, in the decision reported in Pavan Kumar P. Vs. State of Kerala and Others, = Pavan Kumar P. Vs. State of

Kerala and Others, , it has been held that irrespective of the number of owners owning the apartment building, each flat is to be assessed as a separate building. However, no notice has been issued to the purchasers as required in the decision reported in *Bavasons Constructions v. State of Kerala* (2007 (3) KLT 101). So, according to him, the authorities have not properly considered these aspects and the appellants must be given an opportunity to prove their case.

7. On the other hand, the learned Special Government Pleader (Taxes) argued that the documents produced are concocted documents created subsequently and those documents were not produced at the first instance and the conduct of the appellants will go to show that there is no possibility of any such agreement being entered into between the prospective purchasers and the appellants, as claimed by them. So, according to him, the authorities were perfectly justified in passing the impugned order and no interference is called for with the said order.

8. A Full Bench of this Court in the decision reported in *The District Collector, The Revenue Divisional Officer and The Tahsildar Vs. V.K. Sreekumari Kunjamma*, , has held that separate assessment of each and every flat is called for, only in respect of constructions covered by Explanations (1) and (2). In the decision reported in *Pavan Kumar v. State of Kerala* (supra), relied on by the learned counsel for the appellants, it has been held that when Explanation (2) is applied to the apartment building, there is no scope for assessment of part of such building other than as separate apartment, irrespective of the number of owners, owning the apartment building, each flat is to be assessed as a separate building. That was a case where the land owner and the builder had entered into an agreement regarding construction of flats in the building, agreeing to provide certain flats to the land owner as consideration for the land assigned to the builder and thereafter, when the building was assessed in the name of the builder and the joint owners separately, that was questioned by the land owner and this court found that in the case where the land owner and the builder entered into an agreement regarding the construction of flat and the allotment of such flats to the owner of the building, then, it will be deemed to be a contribution made by the owner of the land for construction of the building and thereby it falls under Explanation (2) to S. 2(e) of the Act.

9. So, in this case, admittedly, the entire land belongs to the appellants and they have decided to construct a building complex and obtained the requisite permits for the same. According to the Department, after completion of the building in the year 2003, they sold the flats to several persons and as such, they are not entitled to get the benefit of the Explanation (2) to S. 2(e) of the Act.

10. Section 2(e) defines a building 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 1 - In the case of buildings constructed for providing housing accommodation for workers and their families residing in plantations, in pursuance of Section 15 of the Plantations Labour Act, 1951, (Central Act 69 of 1951), or buildings constructed under the Government of India Subsidised Housing Scheme for industrial workers, each part of a building providing or intended to provide accommodation for a worker or a worker and his family shall be deemed to be a separate building.

Explanation 2 - 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.

It is clear from Explanation 2 that in order to claim the benefit of the Explanation, it must be proved that the building consists of different apartments/flats owned by different persons and the cost of construction of the building was made by all such persons jointly. Only if this condition is fulfilled, it can be treated as a separate building for the purpose of assessment of tax. This was so held by the Full Bench of this Court in *District Collector v. Sreekumari Kunjamma* (supra).

11. It is true, in the decision reported in *Bavasons Constructions v. State of Kerala* (supra), this Court has given the procedure to be followed in such cases, which reads as follows:

The assessing authorities shall consider the claim relating to each flat and render a separate speaking decision with reference to each flat. A common order can be passed for each residential complex. But, in that order, there should be separate finding regarding each flat/ apartment. In case any flat is remaining unallotted, the assessment in respect of such flat shall be made, treating the builder as the owner. In case in relation to a particular flat, sufficient materials are not produced to support the claim for the benefit of Explanation 2 to S. 2(3), then also, the assessment shall be made, treating the building as the owner of the apartment. While making separate assessments of the flats, the common area shall also be divided on pro rata basis, so that the entire built up area of the building is assessed to building tax. The petitioners shall also furnish the correct addresses, as far as possible, of the allottees of the flats to the assessing authorities. The assessing authorities shall afford an opportunity of being heard to the petitioners-builders and the individual flat owners and pass final orders in the matter, as far as possible, before 30.07.2007. They shall, as stated earlier, deal with the assessment relating to every flat/apartment separately, with reference to the documents produced.

In the decision reported in *Sreerosh Properties (P) Ltd. Vs. State of Kerala*, , it has been held that if under a joint venture agreement, the land owner is allotted six plots by the builder, the entire building cannot be assessed at the hands of

the builder. Conveyance with regard to the undivided interest in land transfer subsequent to construction of flats is irrelevant in deciding the applicability of the Explanation 2 to S. 2(e) of the Act.

12. From the dictum laid down in the above decisions, it is clear that it is for the assessee to prove that the cost of construction of each flat was shared by each flat owner so as to bring each flat as a single building under Explanation (2) to S. 2(e) of the Act.

13. In this case, it is seen from the file produced by the assessing authority and the appellate authority that the petitioner had submitted a return in Form II and in that, the date of completion of construction of the building was mentioned as 7.9.2003. Further, in the proceedings of the Municipality, when extension was granted, it was mentioned that the construction was of a lodge building and the permit was extended for a period of three years from 22.1.2002. Notices were issued to the petitioner to attend the hearing on 10.11.2003, but the petitioner did not appear. So, the assessing authority took the plinth area of the building as 4243.65 m² and fixed the tax payable as Rs. 7,36,200/-. Even prior to that, an opportunity was given to the appellants to submit their evidence on 29.1.2004 and this notice was seen received by one Sri. R.N. Sukumaran on behalf of the first appellant. Thereafter, the appellants filed an appeal before the 3rd respondent and the third respondent, by order dated 28.2.2005, found that the plinth area of the building is 4718.9 m² and not 4243.65 m² and only 7 sale deeds, out of 30 flats were" produced and they were dated between February and March 2004 and the building was completed in September 2003. Considering these facts, the appellate authority remanded the case to the assessing authority for re-assessing the building. In spite of opportunities given, no documents were produced before the assessing authority by the appellants. So, the assessing authority had passed a revised assessment order, taking the plinth area of the building as 4718.9m², fixing the tax payable as Rs. 8,22,600/- and deducting Rs. 1,84,050/- already paid, directed the assessee to pay Rs. 6,38,550/-. Thereafter, the appellants remitted Rs. 21,600/- and filed an appeal before the third respondent. There, he had produced the agreements alleged to have been entered into between the parties in the year 2000 and the list of persons to whom he had sold the flats. It starts from 2.9.2004 to 15.10.2005. He had also produced certain documents alleged to be the accounts maintained by them, relating to the payment of amounts paid by each flat owner towards the cost of construction. But, it may be mentioned here that none of those documents will go to show as to how the amounts were paid and it is only a self serving document prepared by the appellants alone. So the accounts alleged to have been maintained by the appellants regarding payment of the amount, cannot be considered as a genuine one and that was not produced at the first instance as well. Further, in the agreements produced also, there is nothing mentioned as to how and when each instalment has to be paid by the prospective purchaser. Further, in the sale deeds executed subsequently also, there is no mention made about the agreement entered into between the parties and the amounts paid on

each occasion. But, a reading of the sale deed produced, will go to show that it was an instant sale made after the completion of the building and there is no indication made in the document that the prospective purchasers had contributed any amount earlier for the construction of each flat so as to bring them within Explanation (2) of S. 2(e) of the Act. In spite of opportunities given, the appellants did not utilise the opportunities to prove their case. Further, even if an opportunity is given, on the basis of the documents produced by the appellants themselves, it is not going to help the appellants as well to prove their case further. Further, it is also seen from the records that a brochure of the project of the appellants has been produced which will show that all the 30 flats are ready-to-occupy-flats and there is no invitation for purchasing the flats to be constructed. If there was actually an agreement entered into between the appellants and the prospective purchasers regarding the flats to be constructed, prior to the construction of the flat and they had contributed towards the amounts for the construction of the flats independently, then, there was no necessity for the appellants to launch such a brochure after the completion of the building. That also will go to show that the case put forward by the appellants that contributions were made by the owners of the flats for the purpose of construction and as such, each flat has to be valued separately, cannot be accepted. The dictum laid down in the decision reported in *Bavasons Constructions v. State of Kerala* (supra) relied on by the learned counsel for the appellants, is not applicable to the facts of this case. So, considering the circumstances of the case and the discussions made above, we do not think that there is any merit in the appeal and the order passed by the learned single Judge is not liable to be interfered with. The assessing authority as well as the appellate authority have, on the basis of evidence, correctly assessed the tax and that does not call for any interference as well and the appeal is liable to be dismissed.

In the result/the appeal is dismissed.