

(2012) 06 KL CK 0124

In the High Court Of Kerala

Case No : Writ Petition (C) No. 11766 of 2012

Vinu C. Chacko

APPELLANT

Vs

Tahsildar

RESPONDENT

Date of Decision : 04-06-2012

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : (2012) 4 KLJ 56 : (2012) 4 KLT 171

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

Bench : Single Bench

Advocate : C. Prabin Benny, for the Appellant; Noble Mathew, Sr. Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

P.R. Ramachandra Menon

1. The area occupied by a "car porch" is not liable to be reckoned as plinth area under S. 2(k) of the Kerala Building Tax Act, by virtue of exclusion under the proviso to S. 6 of the Act and also by virtue of the law declared by a Division Bench of this Court in Subhashchandrababu Vs. State of Kerala, . Question is, will it tilt the balance in any manner, if the owner of the building is having "two garages" attached to the building and whether the respondents are justified in saying that only "one" of the two garages will be eligible for exemption. Yet another question involved is whether the assessment finalised by the concerned authorities is liable to be re-opened, merely on the basis of the "audit objection", when the assessment was completed in a different manner. The petitioners are joint owners of the property and the building constructed therein. It is stated that altogether 8 members were there in the family, pursuing independent avocations of their own. The building was actually having a plinth area of 275.69 sq. metre and upon completion of the construction of the building, it was assessed by the first respondent, who passed Ext. P1 order dated 27.3.2008, fixing the tax liability under S. 5 of the Kerala Building Tax Act at Rs. 7800/-,

which is stated as satisfied.

2. Quite after a long time, the petitioners were served with Ext. P2 notice/proceedings dated 13.10.2009, observing that there was some "audit objection" with regard to the assessment made and as per the opinion of the auditing authority, the area occupied by only "one" car porch was liable to be excluded from the reckonable plinth area. Since the building was having two car porches, the area occupied by one of the car porches was objected and in turn the plinth area was enhanced to 310.08 sq. metre. Accordingly, the liability was re-fixed under S. 5 as Rs. 12,600/- and the petitioners were directed to satisfy the balance amount of Rs. 4800/- besides fixing and demanding the "luxury tax" under S. 5A at the rate of Rs. 2000/- per year, vide Ext. P3 demand notice dated 13.10.2009.

3. Being aggrieved of the above re-assessment, the petitioners approached the appellate authority by filing appeal dated 30.10.2009. Referring to the "audit objection" and pointing out the eligibility to have exemption only in respect of "one" car porch, interference was declined and the appeal was dismissed. Met with the situation, the petitioners approached the revisional authority as well, who sought to sustain the impugned orders, observing that the Statute only refers to the term "car porch/garage" to be excluded and not "car porches/garages". Since the Statute only uses the "singular" and not "plural", interference was declined and the Revision Petition was dismissed as per Ext. P6 order dated 5.5.2012., which is under challenge in this Writ Petition.

4. Based on the submissions made from either side that the matter only involves proper interpretation of the relevant provisions of law and binding judicial precedents and since it was submitted across the Bar that there was no factual dispute and no counter affidavit was necessary, it was heard, as agreed.

5. The learned Counsel for the petitioners submits that the liability has to be fixed on the basis of the actual plinth area and what would constitute the plinth area is defined under the Statute and explained by this Court on many an occasion. This being the position, that part of the area, which admittedly is a "car porch", is not liable to be reckoned for fixation under any circumstance. Reliance is sought to be placed on the decision rendered by a Division Bench of this Court in Subhashchandrababu Vs. State of Kerala, and the judgments dated 25.2.2009 in W.A. No. 2597 of 2007 and 23.7.2010 in W. A. No. 1570 of 2006, also contending that there cannot be any re-assessment, merely based on the "audit objection".

6. The learned Government Pleader appearing for the respondents submits that "luxury" is a matter of relative concept and the position may differ from one case to another. In the case of the petitioners, admittedly, they are having "two car porches" and the statute reckons only the minimum necessity while providing the benefit of exclusion. A person who can afford to have two cars cannot be heard to say that he is not enjoying any "luxury". How the matter has to be

viewed or considered, is stated as explained by this Court also, when the challenge against the constitutional validity of S. 5A was mooted before this Court, leading to the judgment reported in *Koshy P. John Vs. State of Kerala*, . Paragraph "5" of the said judgment reads as follows:

5. The next question raised by the petitioners is as to whether residential building with 3000 and above sq. fts. plinth area can be treated as "luxury" falling under Entry 62 of the State Lists under the Seventh Schedule. As already stated, "luxury" is not defined in the Act and going by the literal or common parlance meaning, luxury referred is in relation to commodities, services and even assets. The one shade of meaning in dictionary i.e., literal meaning shows that a "building" itself can be an item of luxury. In other words, among other things, an asset itself can be called a luxury. It is also to be noticed that accommodation in a hotel attracts luxury tax under the Luxury Tax Act itself. All that the Legislature has not done is to extend it to accommodation in residential houses of a particular type. Apart from certain items of services, goods or assets which are essentially not required for one's living and could be exclusively treated as items of luxury. It is also a relative concept and there can be luxury in anything and everything; that is when the quality or standards of any things transcends or exceeds the limits of requirement for reasonable living or even moderate comforts. Luxury certainly does not cover something which is required for bare existence. In the Luxury Tax Act "luxury" covers accommodation and a commodity or service that ministers comfort or pleasure. In *A.B. Abdul Kadir and Others Vs. State of Kerala*, the Supreme Court held that "tobacco" is an article of luxury. A residential building by itself cannot be treated as luxury and is only a bare necessity for anyone, though the millions of Indians living in miserable conditions and sleeping under the shades of trees, streets and in thatched sheds may call a proper house with walls and roof a luxury! Luxury is therefore only a relative and objective concept and is not just subjective. Houses may range from hut to palace. Luxury in respect of hotel accommodation contemplated in the Luxury Tax Act is with reference to daily rent which of course is directly proportional to the facilities, comforts, location, etc. The Legislature, so far as residential houses are concerned, decided to draw the line of distinction between luxury and non-luxury apartments based on the plinth area limit. The buildings that attract luxury tax under S. 5A are residential buildings having plinth area of 3000 sq. fts. and above. In the annual budget, the estimated collection of revenue in the year of introduction of the levy was at Rs. 20 lakhs the rate of tax being Rs. 2,000 per building. Therefore, the number of building with 3000 sq. fts, and above plinth area expected to be completed in the year 1999 as estimated by the Government was only 1000 numbers in the State. This itself indicates that statistics with the Government show that only very limited buildings are constructed with such large plinth area. Further it is common knowledge that houses with 3000 sq. fts, and above plinth area are fairly large houses with 3 or 4 bed rooms and all other facilities including garage, outhouse etc. Going by the common knowledge, construction cost of such houses alone range from Rs. 15 to

20 lakhs depending on the nature of construction besides land cost. Therefore, the Legislature has identified the class of asset in the form of residential building valuing from Rs. 15 lakhs and above as an item of "Luxury" and the persons with capacity to spend around Rs. 15 lakhs and above for the construction of a house apart from the cost of land, as people enjoying the luxury of owning and or enjoying such accommodation. Since there can be luxury in assets like residential buildings, I do not think the classification of building with plinth area above 3000 sq. fts., as luxury building is unreasonable or arbitrary.

7. The learned Government Pleader submits that the above dictum was confirmed by a Division Bench as per the decision in *Sudhakaran Vs. State of Kerala and Another*, . Reliance is sought to be placed on paragraph "5" of the said verdict as well, which reads as follows:

5. It was then contended that the levy of luxury tax on the basis of plinth area is illegal. It was strenuously urged that the word "luxury" has not been defined in the Act and, therefore, the levy of luxury tax on the residential buildings having a plinth area of 278.7 square metres or more is clearly arbitrary and violative of Art 14 of the Constitution. It is true that the term "luxury" has not been defined in the Act but that does not, in our opinion, invalidate the legislation. Whenever the Legislature enacts a Statute, it normally defines certain terms used therein assigning to them a specific meaning in the definition clause but it is not necessary that every word used in the statute has to be given a specific meaning, It is well settled rule of law that a word used in a statute if not defined therein has to be given its ordinary meaning as understood in common parlance or defined in the English dictionary. For the purpose of levying luxury tax on residential buildings, the legislature in its wisdom did not think it necessary to define that "luxury" means. The Legislature has classified all the residential buildings into two categories (i) those with less than 278.7 square metres as plinth area and (ii) others having a plinth area of 278.7 square metres or more. The Legislature further treats the buildings with a plinth area of 278.7 square metres or more as "luxury buildings" and has made them exigible to luxury tax. On the other hand, a building having a plinth area of less than 278.7 square metres is regarded as a necessity and the Legislature in its wisdom has kept such buildings out of the purview of luxury tax. When such is the scheme of the Act, there was hardly any need to define what luxury means for the purpose of levying luxury tax on residential buildings. The object of the Legislature appears to tax the luxury buildings and leave out those which are a necessity for the common man. The word "luxury" is a relative term and what may be a luxury for a poor man may be a necessity for another. The Legislature is the best judge of the needs of the people and if it thinks that the buildings with a plinth area of less than 278.7 square metres is a necessity for the common man, the classification is reasonable and cannot be described as irrational or arbitrary so as to warrant interference by this Court. The total estimated collection of revenue from the levy of luxury tax in the year of introduction was twenty lakhs as stated in the annual budget. The rate of tax is rupees two thousand per

building. It, therefore, follows that the total number of buildings with a plinth area of 278.7 square metres or more expected to be completed in the year 1999 was only one thousand in the entire State. This clearly shows that the buildings with such a large area are very limited in the State. In the background of these statistics, the classification of the residential buildings on the basis of plinth area of less than 278.7 square metres and those with plinth area of 278.7 sq. metres or more is wholly justified.

8. True, there cannot be any dispute that the concept of "luxury" varies from case to case and what is "luxury" for a poor man, may be a "necessity" for others. But here, the question is whether the statute draws any distinction with reference to the number of garages attached to a building or prescribes any ceiling in the area, so as to take out one or such portion of the garage from the purview of the "plinth area" or to be included as part of the plinth area, more so, when the statute says that the garage or such other space, which is not for residential use shall not be forming part of the plinth area. S. 6 is the relevant provision, which is extracted below:

6. Determination of plinth area: The plinth area of a building for the purposes of this Act, shall be the plinth area of the building as specified in the plan approved by the local authority or such other authorities as may be specified by Government in this behalf and verified by the assessing authority in such manner as may be prescribed.

Provided that the plinth area of a garage or any other erection or structure appurtenant to a residential building used for storage of firewood or for any non-residential purpose shall not be taken into account for determining the plinth area of that building.

9. It is evident from the "proviso" to S. 6, that the area of a building occupied by garage, area used for storing firewood or such other space not for any residential use, shall not constitute "plinth area". In fact, the term "plinth area" is defined under S. 2(k) of the statute which reads as follows:

(k) "plinth area" means the area included in the floor of a building and where a building has more than one floor the aggregate area included in all the floors together.

The issue considered by both the Single Bench as well as the Division Bench of this Court, when the constitutional validity of S. 5A was subjected to challenge, was whether there could be any classification for the purpose of taxation based on the plinth area and with reference to source of power derived from Entry 62 of List II of 7th Schedule. After an exhaustive analysis, it was held by the Bench, that the challenge raised against the provision was not correct or sustainable and the provision contemplating "luxury", in respect of a building having an area of more than 278.7 Sq. metre (3000 sq. feet) was very much on the basis of reasonable classification and hence no interference was warranted. In other words, it was observed that, in the case of all buildings which were having an

area of more than 3000 sq. feet (which was observed as a matter of seldom affair in the State), was held as a matter of "luxury" and legislative wisdom of the law making authorities in this regard or the policy in this regard was held as not liable to be intercepted by this Court.

10. Coming to the case in hand, the question is something different. There is no dispute with regard to the manner in which the plinth area has to be reckoned. It has necessarily to be in terms of S. 6, with reference to plinth area. But then, the question is what constitutes the plinth area. By virtue of the proviso to S. 6, the area occupied by "garage" is not liable to be reckoned. The legal position in this regard stands declared by the decision rendered by a Division Bench of this Court in Subhashchandrababu Vs. State of Kerala, . Here also, there is no dispute on either side. Disputed question is, how many car porches could be excluded or whether it could be said that, if the car porch is having a bigger size, upto what portion or area could be reckoned for the purpose of exemption or to be included as part of the plinth area. Reading of the provision gives a clear idea that no such distinction is sought to be made by the statute. The area which is used as a "garage/car porch" or used for storage of firewood or for such other non-residential use, is not liable to be reckoned as part of the plinth area of the building. To put it more clear, the extent of the "garage/car porch", whatever may be its size, cannot attract or call for a different situation, to satisfy the tax liability, in so far as the entire area continues to be as "garage" itself, without any change in identity.

11. The point can be analysed and appreciated from a different angle as well. Let us think of persons in a family who are living in a building, which is having an actual plinth area of less than 278.7 sq. meter, compromise with their daily needs and in sufficiency of adequate space within such building, but use the areas constructed outside the building as "two car porches" in their attempt to make livelihood or otherwise. There may be circumstances where a "big car porch", fit enough to accommodate two or three vehicles may be there and the number of vehicles that can be parked inside the garage is not a matter of consideration under the proviso to S. 6; nor is there any bar with reference to the maximum measurement or area which would attract or exclude the application of the said provision. If this be the position, the statute also does not make any reference or place any bar as to the construction of "two separate car porches" attached to the same building and if the car porches continue to be "car porches", they are not liable to be included, notwithstanding the exclusion clause in the form of "proviso" to S. 6.

12. There is no case for the respondents that one of the car porches constructed by the petitioner is put to some other use or for the beneficial enjoyment of the petitioner, as part of the residential building or that it has lost the colour and characteristics as a "garage". As a matter of fact, the factual position that the area constitutes a car porch itself stands accepted by the assessing authority, who completed the assessment by passing Ext. P1 assessment order way back in

the year 2008. It was subsequently that the same was sought to be modified, based on the "audit objection", whereby one of the two car porches was excluded, while the other was included. The only reason offered by the assessing/appellate authority is that there was "audit objection". The revisional authority goes one step ahead and says that the statute uses the word "garage" and not "garages". Since the reasoning offered by the revisional authority does not appear to be palatable at all to this Court; when it is quite fundamental that the words used in a statute either in "singular" or "plural" shall have the same meaning in respect of the other. So is the position with regard to the expressions referring to the gender of a person as well and the General Clauses Act can be pressed into service, to meet the challenge.

13. With regard to the concept of "luxury" as projected by the respondents, the position can be illustrated in the following manner: There may be a family, who is residing in a building having an area of less than 278.7 sq. metre, where the husband may be eking out the livelihood by engaging himself as a driver by taking out a car on rent, on monthly basis or otherwise, keeping the car in one garage attached to the building. Similarly, in the earnest desire to maintain and support the family consisting of five or six children, who are all students, the wife also may be engaged as a driver of an auto rickshaw or some other vehicle possessed by her in a similar manner and she also has to keep the said vehicle either in the same garage or in the nearby garage. The number of vehicles so possessed or kept in the garage does not tilt the balance in any manner, so as to deny the benefit flowing from the mandate under the statute by holding that such persons, when are using "two" garages, are leading a luxurious life. If any such distinction is to be made, it is for the law making authorities to amend the statute. In so far as the proviso to Section 6, with regard to determination of plinth area, is categoric in saying that the area occupied by a "garage" is not liable to be reckoned as part of the plinth area, it is absolute and the extent of the garage or the number of the garages attached to the building, cannot have any role to play. In the above circumstance, the observations made by the authorities in the concerned orders revising Ext. P1 are not liable to be sustained.

14. With regard to the course and proceedings, it is also relevant to note that the assessment was completed under the relevant provisions of law, by passing Ext. P1. It was only with reference to the "audit objection" that the proceedings were sought to be modified/varied by the assessing authority, by passing Exts. P2 and P3. This, of course was done without any notice to the assessee and thus in clear violation of the principles of natural justice. The proceedings are liable to be struck down on this score alone. Yet another aspect to be noted is that, after finalizing the assessments as per Ext. P1 order passed in the year 2008, the proceedings were sought to be re-opened, based on the "audit objection". Whether such course was open to be pursued, is the next point. Once the assessment is finalised, it is of course, open for the respondents/authorities to have assessed such other areas also, which escaped assessment, if at all any additional construction have been effected by the assessee in terms of S. 5(4). If

any error "apparent on the face of the records" is there, then also it is open for the respondents to step in, invoking the power and jurisdiction under S. 15, for rectifying the same. But for the above two courses, the statute does not contemplate any "re-assessment", so as to have it substituted in place of the former; more so based on any "audit objection". The course and proceedings pursued by the respondents under similar circumstances, effecting reassessments merely based on "audit objection" has been deprecated by this Court, as per the decisions in W.A. Nos. 1570 of 2006 dated 23.7.2010 and W.A. No. 2597 of 2007 dated 25.2.2009.

In the above circumstance, this Court finds that the petitioner is entitled to succeed. Accordingly, the impugned orders are set aside. The Writ Petition is allowed, sustaining Ext. P1 and the liability already satisfied by the petitioner in tune with Ext. P1. No cost.