

Shirly Vs. State of Kerala

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Court : Kerala

Decided On : Nov-05-2003

Reported in : 2006(2)KLT306

Judge : K.A. Abdul Gafoor and; J.M. James, JJ.

Acts : [Constitution of India](#) - Article 14; Kerala Building Tax Act, 1975 - Sections 5, 5(1) and 5(2); Kerala Buliding Tax (Amendment) Act, 1992; Kerala Finance Act, 1993

Appeal No. : O.P. No. 12580 of 1993

Appellant : Shirly

Respondent : State of Kerala

Advocate for Def. : S. Soman, Government Pleader

Advocate for Pet/Ap. : K. Prabhakaran, Adv.

Judgement :

K.A. Abdul Gafoor, J.

1. The matter relates to assessment of building tax, construction which has been admittedly completed in the year 1981. There is no dispute regarding the liability to pay tax. The only dispute is the mode of assessment-whether it has to be as per

the rate prevailing as on the date of completion of the building or on the date of completion of the assessment proceedings.

2. Section 5 of the Kerala Building Tax Act, for short 'the Act', is the charging provision. Until 10.2.1992, Sub-section (1) of Section 5 was as follows:

Subject to other provisions contained in this Act, there shall be charged a tax (hereinafter referred to as 'Building Tax') at the rate specified in the schedule in respect of every building, the construction of which is completed on or after 1st day of April, 1973, and the capital value of which exceeds Rs. 20,000.

This was the law prevailing when the petitioner completed the construction of the building. Admittedly by the respondents in the counter affidavit, proceedings for assessment of her buildings had commenced in terms of the said provision, and a hearing was conducted on 21.12.1989. The husband of the petitioner at the time of hearing, raised certain objection with respect to the basis for assessment collected by the Verification Officer including as to the land value. By reason of that, the assessment was delayed. By that time, Act 3 of 1992 was enforced with effect from 10.2.1992 amending Section 5 of the Act. Sub-section (1) of Section 5 of the Act such amended is as follows:

Subject to the other provisions contained in this Act, there shall be charged a tax, (hereinafter referred to as the 'building tax'), based on the plinth area, at the rate specified in the Schedule of every building, the construction of which is completed on or after the appointed day.

3. On the basis of the schedule, there was disparity in the rates of tax to be assessed. Sub-section (2) of Section 5 was also amended by Act 3 of 1982. It was as follows:

In the case of any building, the construction of which is completed prior to the appointed day, the assessee shall be liable to pay Building Tax, as if the Kerala Building Tax (Amendment) Act, 1992, has not come into force, provided, further that if the assessment is not initiated or completed, in such cases, before the appointed day, the assessee may by an application in writing addressed to the

assessing authority, ought to be governed by the provisions in Sub-section (1) within such period, as the Government may specify in this behalf and thereupon the assessee shall be liable to pay the Building Tax, if the construction of the building is completed on or after the appointed day.

4. The appointed day is 10.2.1992, the date with effect from which the amendment as per Act 3 of 1992 has been enforced. Going by Sub-section (2) as amended from 10.2.1992, the owner of the building who had completed construction before 10.2.1992, had the liability to pay the tax as per the unamended provision, but he had an opportunity of opting to be governed by the amended provision upon specific application submitted to the assessing authority. In this case, the petitioner did not opt so. There is no case for the respondent that he had so opted. Therefore, even after 1992 amendment, his case ought to have been governed by the rate as specified in the unamended provision in Section 5(1) of the Act.

5. The proceedings were being continued, while so, by Kerala Finance Act, 1993, (Act 13 of 1993) Sub-section (2) of Section 5 of the Building Tax Act was again amended. It reads as follows:

In the case of any building, construction of which is completed prior to the appointed day, but the assessment of which has not been initiated or completed or against which appeal or revision has been filed, building tax shall be assessed on the basis of the plinth area at the rate specified in the schedule.

This is effective from 1.4.1993. The assessment in respect of the building of the petitioner, the construction of which was completed in the year 1992, had not been finalised, even on 1.4.1993. It was finalised only as per Ext.P5, based on Sub-section (2) as amended by Finance Act 13 of 1993, applying the rates in terms of schedule as newly introduced in 1992. The only way out for the assessing authority for an assessment order passed after 1.4.1993, subsequent to the enforcement of Finance Act, 1993, in respect of a building the construction of which is completed before 10.2.1992, was to assess building tax applying the schedule as amended. It is in the above circumstances, the petitioner has come up with this petition, challenging Ext. P5 assessment order without resorting to the statutory remedy of appeal, simultaneously challenging Sub-section (2) of Section

5 of the Act, as introduced by Finance Act 13 of 1993.

6. It is contented that the petitioner is not responsible for the inordinate delay in completing the assessment for about more than 12 years. The counter-affidavit, it is contented, also does not dispute the completion of the construction of the building in the year 1981. The counter affidavit further discloses that the assessment proceedings had been initiated even before 1992 amendment and that the petitioner had duly appeared before the assessing authority for a hearing on 21.12.1989, wherein the husband of the petitioner objected to the land value. This necessitated further verification by the assessing authority. But that verification was not completed in time. Merely because of that inaction on the part of the assessing authority, the petitioner shall not suffer, it is contented. The petitioner did have the liability to pay tax in respect of the construction of the building as per the law in force, as on the date of completion of the construction. So Sub-section (2) as amended by Act 13 of 1993 is concerned, it is arbitrary, mulcting on him more liability to pay tax in respect of a building completed in 1991 applying the schedule brought on the statute book in the year 1992. This causes pecuniary loss on the petitioner having adverse consequences. Therefore the provision is arbitrary.

7. It is contented by the Government Pleader that the assessment in respect of the petitioner's building has not been completed until Act 13 of 1993 had been brought into force. Therefore, any assessment effected after enforcement of Act 13 of 1993 shall be based on the provisions contained in Sections 5(1) and (2) read together. Necessarily, the petitioner has to pay tax in terms of the schedule introduced in 1992. There arises no arbitrariness in the matter.

8. Taking into account the aforesaid facts and the liability that is caused on the petitioner, we are satisfied that by reason of the delay on the part of the department, the petitioner shall not suffer. Even as per Sub-section (2) as amended in 1992, had the assessment been completed immediately, the petitioner would not have been mulcted with the liability in terms of the amendment effected with effect from 10.2.1992. Because, the amended provision will be applicable only to those who specifically opt for the same as per Sub-section (2) as existed before

1993 amendment. There is no reason to take away that benefit by 1993 amendment, it is contented.

9. In this case, the petitioner has been burdened by Ext. P5 to pay more tax, only because of the lethargy and laxity on the part of the assessing authority right from 1981 until 20.8.1993, when Ext.P5 order has been passed. A person who had completed construction of the building in 1981 cannot be mulcted with the liability to pay tax as has been prescribed in the year, 1992. Option given is taken away by 1993 amendment. It is arbitrary so far as the persons like the petitioner are concerned. Therefore, the amendment does not consider a situation of lethargy and laxity on the part of the assessing authority, and thus prejudices the assessee, like the petitioner, who had been vigilant to get the tax assessed immediately after the construction, as in this case. Therefore, we have no hesitation to declare Sub-section (2) of Section 5 as introduced by Act 13 of 1993 of Kerala Finance Act, 1993, is ultra vires being arbitrary and consequently offending Article 14 of the [Constitution of India](#). Consequently, we declare so.

13. Consequently, Ext. P5 loses its legal basis, and the assessing officer, the second respondent has to complete the assessment, on the basis of the law prevailing as on the date of completion of the construction of the building. The assessment shall be completed, at any rate, within four months from the date of receipt of a copy of this judgment with due notice to the petitioner.

The Original Petition is disposed of as above.

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