IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE THOTTATHIL B.RADHAKRISHNAN
&
THE HONOURABLE MR.JUSTICE K.HARILAL

THURSDAY, THE 5TH DAY OF FEBRUARY 2015/16TH MAGHA, 1936

WA.No. 259 of 2013 () IN WP(C).727/2013

AGAINST THE JUDGMENT IN WP(C) 727/2013 of HIGH COURT OF KERALA DATED 17-01-2013.

APPELLANT/WRIT PETITIONER:

CHITRADEVI T.A.,
"CHAITHRAM", CHATHANOOR.P.O., (VIA) PERINGODE,
THIRIMITTAKODU, PALAKKAD-679 535.

BY ADV. SRI.T.A.RAJAGOPALAN

RESPONDENT(S)/RESPONDENTS:
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1. STATE OF KERALA,
REPRESENTED BY THE PRINCIPAL SECRETARY, REVENUE,
GOVERNMENT SECRETARIAT,THIRUVANANTHAPURAM-695 001.

2. DISTRICT COLLECTOR,
CIVIL STATION, PALAKKAD-678 001.

3. TAHSILDAR,
TALUK OFFICE, OTTAPALAM, PALAKKAD-679 101.

BY GOVERNMENT PLEADER SRI. LIJU V. STEPHEN

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 30/1/2015, THE COURT ON 5/2/2015 DELIVERED THE FOLLOWING:

THOTTATHIL B. RADHAKRISHNAN &
K. HARILAL, JJ.

W.A. No.259 of 2013

Dated this the 5th day of February, 2015

JUDGMENT

Harilal, J.

The appellant herein is the petitioner and the respondents are the respondents in W.P.(c) No.727 of 2013 on the files of this Court challenging Exts.P1 and P2 proceedings passed by the 3rd respondent and Ext.P5 order passed by the 2nd respondent herein. Exts.P1 and P2 are the proceedings under Secs.5 and 5A of the Kerala Building Tax Act, 1975 (for short 'the Act') by which the 3rd respondent assessed the plinth area of the appellant's building and claimed ₹4,800/- as building tax and ₹2,000/- as luxury tax respectively. The said amount was demanded on the assessment that the total plinth area is 284.39 M^2.

2. It is the definite case of the appellant that the total

plinth area of the building is 236.49 M^2 only and the 3rd respondent, the Assessing Authority, went wron by including the car shed and the firewood storage shed in calculating the total plinth area.

3. Aggrieved by Exts.P1 and P2, though the appellant filed a revision before the 2nd respondent, the 2nd respondent dismissed the revision on a finding that the car shed is not liable to be excluded in view of the decision of this Court in W.P.(c) No.15526 of 2004 and firewood storage shed is not liable to be excluded as the same was originally constructed as a bathroom. Though, the appellant has submitted an application before the 1st respondent invoking the revisional jurisdiction under Sec.14 of the Act, in the year 2006, no order has been passed so far.

4. In the above circumstances, the petitioner preferred the above writ petition with a prayer to call for the records leading to Ext.P5 and quash Exts.P1, P2 and P5. But the learned single Judge of this Court dismissed the writ petition in limine on a finding that by Ext.P5 order, the revision was dismissed on 7/2/2006 and the proceedings under the Act have attained finality as early as on 7/2/2006. Therefore, at

this distance of time, the petitioner cannot challenge Exts.P1 and P2 proceedings and Ext.5 order. The legality and propriety of the said judgment dismissing the writ petition, without considering the merits of the case, is under challenge in this Writ Appeal.

5. Heard the learned counsel for the appellant and the learned counsel for the respondents. The learned counsel for the petitioner advanced arguments challenging the judgment dismissing the writ petition in limine without considering the contentions on merits. According to him, the single Bench of this Court failed to exercise jurisdiction vested in it. The learned counsel cited the decision reported in Subashchandrababu v. State of Kerala [ILR 2006 (2) Kerala 214] and pointed out that according to this decision laid down by the Division Bench of this Court, car shed and structure used for storage of firewood shall be liable to be excluded from the total plinth area. It is also pointed out that, as per Ext.P6 sketch prepared at first by the Village Officer and Annexure-E, the relevant extract of the building register, the total plinth area is only 261.398 M^2. The sum and substance of the argument is that had the car shed and

firewood storage shed been excluded, the total taxable plinth area would have been 236.49 M^2 only.

6. Per contra, the 3rd respondent contended that the measurement made by the authority is in accordance with the statutory requirements under Sec.6 of the Act. At the time of measurement, the car shed and firewood storage shed were not liable to be excluded from the total plinth area, in view of the decision of this Court in W.P.(c) No.15526 of 2004. That apart, in view of the above decision, the Government also withdrew the earlier Circular dated 14/11/2005 by which the car shed and firewood storage shed were excluded in the calculation of the total plinth area.

7. At the outset, we find that though, the statutory revision was dismissed as on 7/2/2006, the application filed before the 1st respondent under Sec.14 of the Act challenging the said order passed in revision is still pending before the 1st respondent, despite the long lapse of more than 7 years. In the above circumstance, the appellant can be justified in approaching this Court, seeking interference under Article 226 of the Constitution of India. In the above view of the matter, the grievance projected in the Writ Appeal deserves

to be considered on merits.

8. Though, the matter in dispute centers around a factual issue concerning rival claims as to the extent of taxable plinth area, this issue is seen arose from the question whether car shed and firewood storage shed shall be liable to be excluded in calculating the total taxable plinth area. Going by Ext.P2, it is seen that the car shed and the firewood storage shed were included in calculating the total plinth area in view of the decision of this Court in Chandramohan v. Revenue Divisional Officer (2005 (1) KLT 593). But, as rightly pointed out by the learned counsel for the petitioner, the said decision has been overruled by the decision in Subashchandrababu v. State of Kerala [ILR 2006 (2) Kerala 214 = 2006 (2) KLT 189]. In this decision, the Division Bench of this Court held as follows:

> "8. A conjoint reading of the proviso to S.5(5) and S.6 along with the clarificatory letter dated 2.12.2003 would show that <u>the plinth area of the garage of a residential building shall not be added on to the plinth area of that building, so also any other erection or structure appurtenant to a residential building used</u>

for the purpose of storage of firewood or for any non-residential purpose. The finding of the learned single Judge that garage of a residential building is not eligible for exemption under the proviso to sub-s.(5) of S.5 and S.6 cannot be sustained. The reasoning of the learned Judge that garage would be added on to the plinth area only when it is used for other purposes like storage of firewood cannot be sustained. Learned Judge has placed considerable emphasis on the expression “appurtenant” placing reliance on Black's Law Dictionary, which, in our humble view, is totally misplaced. The expression “garage” used in the proviso is unconnected with the second category of cases which refers only to erection or structure used for storage of firewood or any other non residential purpose.

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

> shall not be taken into account for determining the plinth area of a residential building. Writ Appeals are therefore allowed and the Writ Petitions are disposed of as above. Assessing authorities would make fresh assessment under S.5 and 5A as per the above declaration. Judgment of the learned single Judge would stand set aside".

9. With the above view, coming to the instant case, it could be seen that the case of the respondents is that the total plinth area, including car shed and firewood storage shed is 284.39 M^2. The building having an area above 278.78 M^2 is eligible for imposing luxury tax under Sec.5A of the Act. It is true that the exact area extending the car shed and firewood storage shed is not specifically shown in the impugned proceedings or order or sketch. But the appellant claimed that the total plinth area excluding car shed and firewood storage shed is 236.49 M^2 only. The 3rd respondent has not disputed the said claim in his counter affidavit. However, the total extent of the plinth area shown in Annexure-E, pertaining building tax and Ext.P6 sketch prepared by the Village Officer is 261.39 M^2 only. Obviously,

it is discernible from the pleadings in the counter affidavit filed by the 3rd respondent as well as the reasonings in Ext.P5 order passed by the 2nd respondent that the appellant has become liable to pay a luxury tax under Sec.5A of the Act, when the are extending the car shed and firewood storage shed was also included in the total plinth area. Put it differently, the respondents have no case that even if the said items are excluded, the plinth area taxable under Sec.5A of the Act would be above 278.78 M^2. In the above view, we are sure, without a re-measurement, that if the car shed and the firewood storage shed are excluded, the total taxable plinth area would be below 278.78 M^2 and as such the appellant is not liable to pay luxury tax under Sec.5A of the Act.

10. Consequently, we set aside Exts.P1, P2 and P5 and declare that the appellant is not liable to pay luxury tax for the said residential building. The 3rd respondent shall initiate fresh proceedings to levy tax under Sec.5 of the Act for levying tax for the area, excluding car shed and firewood storage shed. If the appellant had already remitted the amount quantified as tax under Ext.P1, she is entitled to get

back that portion of the amount which was levied for the area extending the car shed and firewood storage shed.

11. We notice that proceedings under Sec.14 of the Act is also pending before the 1st respondent on the application of the petitioner, which was filed in the year 2006 and no order has been passed so far, despite long lapse of seven years. In such circumstance, the petitioner was constrained to approach this Court under writ jurisdiction. The 3rd respondent in his counter affidavit also admitted that the said proceedings are still pending before the 1st respondent. Since we have taken a decision on the disputed issue which was pending for the last more than one decade, the proceedings now pending before the 1st respondent will stand dropped.

This Writ Appeal is allowed accordingly.

Sd/-
(**THOTTATHIL B. RADHAKRISHNAN, JUDGE)**

Sd/-
(K. HARILAL, JUDGE)

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//true copy// **P.S. to Judge**