

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE ANTONY DOMINIC
&
THE HONOURABLE MR. JUSTICE SHAJI P. CHALY

FRIDAY, THE 31ST DAY OF JULY 2015/9TH SRAVANA, 1937

W.A.No. 2047 of 2012 () IN WP(C).18054/2007

AGAINST THE JUDGMENT IN W.P.(C) 18054/2007 of HIGH COURT OF KERALA DATED
01-08-2012.

APPELLANT(S)/RESPONDENTS:

1. THE TAHSILDAR (ASSESSING AUTHORITY),
TALIPARAMBA TALUK, KANNUR.
2. THE DISTRICT COLLECTOR,
KANNUR.

BY SPECIAL GOVERNMENT PLEADER, SRI. SEBASTIAN CHEMBAPPILLY

RESPONDENT(S)/PETITIONER:

C.H.KUNHAMINA,
W/O. KURIKALE SADULI, VELLUR AMSOM, KANDOTH DESOM,
PERUMBA, PAYYANNUR, KANNUR DISTRICT.670 307.

BY ADVS. SRI.M.V.AMARESAN
SRI.V.N.RAMESAN NAMBISAN

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 13-07-2015, THE COURT
ON 31.07.2015 DELIVERED THE FOLLOWING:

P.T.O.

**ANTONY DOMINIC
&
SHAJI P. CHALY, JJ.**

W.A.No.2047 of 2012

Dated this the 31st day of July, 2015

JUDGMENT

Shaji P. Chaly, J.

This writ appeal is preferred against the judgment dated 01.08.2012 in W.P.(C) No.18054 of 2007, by which the learned Single Judge set aside Ext.P5 order dated 23.02.2006 of the 1st Appellant under the Kerala Building Tax Act, 1975 (hereinafter referred to as "the Act") and declared that the Respondent is not liable to satisfy any amount in respect of building tax assessment already completed vide Ext.P1 order in March, 2001.

2. Brief facts leading to the case are as follows:

The Respondent's husband constructed a building having a plinth area of 455 Sq. mts. in the property belonging to him. He was issued an order under Sec.9 of the Act, fixing the total tax liability at Rs.27,000/-. The said demand was satisfied by the Respondent. Thereafter, respondent was served with Ext.P2 order dated 9/2003, demanding an amount of

Rs.54,000/- under the Act. Admittedly, the said order was preceded by Ext.P2(a) demand issued under Sec.15(3) of the Act. By Ext.P2, after giving credit to Rs.27,000/- already paid by him, Respondent was directed to remit balance amount of Rs.27,000/- in two monthly installments.

3. The Respondent challenged Exts.P2 and P2(a) demand notices by filing W.P.(C) No.40036 of 2003 before this Court and the writ petition was disposed of on 19.05.2004, holding that the 1st Respondent therein had not stated any justification for revision of assessment and the mistake sought to be corrected. The 1st Respondent therein was directed to issue notice to the respondent stating the provision under which the assessment was sought to be revised, the basis of revision of tax proposed, revision of assessment and giving her an opportunity to file written reply within two weeks from the date of production of a copy of the said judgment. It was further directed that a revised assessment shall be issued after hearing the respondent and the order so issued will substitute Ext.P2 order. The petitioner was also given the opportunity to contest the demand on the ground of limitation up to the date of Ext.P2 and it was further clarified that if the demand was

time barred as on the date of Ext.P2, this revised proceedings will be treated as time barred, which question also was ordered to be considered by the Tahasildar.

4. Thereafter, as per the direction contained in Ext.P3 judgment, notice dated 21.12.2004 was issued to the Respondent directing her to appear for hearing on 29.12.2004. She entered appearance on 29.12.2004 and sought time for filing objection and accordingly, the hearing was posted to 03.01.2005, on which date, the Respondent had filed an objection contending that there are no reasons assigned in the notice so as to rectify the original order passed by the 1st Appellant and also stating that the proceedings initiated pursuant to the referred notice issued bearing No.3/875/04 was time barred. She also contended that the building is not liable to be re-assessed. Thereafter Ext.P5 order was passed by the 1st Appellant dated 23.02.2006, explaining the circumstances from the date of Ext.P1 order and up to Ext.P4 objection submitted by the Respondent dated 03.01.2005. It was stated in Ext.P5 order that on 03.01.2005, the Respondent entered appearance before the 1st Appellant and stated that notice dated 21.12.2004 issued to her did not contain

sufficient details, that a fresh notice dated 06.01.2005 was issued to the Respondent and that the Respondent failed to submit any reply to the same and thereupon, Ext.P5 order was passed holding the Respondent liable to pay the tax as per Ext.P2 rectified order. It is thus aggrieved, the Respondent had preferred the writ petition.

5. The 1st Appellant has filed a counter affidavit explaining about the issuance of Ext.P1 demand and subsequent developments including the judgment rendered by this Court. It was stated that the 1st Appellant had complied with the directions contained in Ext.P3 judgment of this Court. It is also contended in the counter affidavit that in the detailed notice issued on 06.01.2005, the Respondent was informed that the Panchayat in which the building is situated is a Special Grade Panchayat and the rectified assessment order was issued to correct the mistake in the computation of tax. It is stated that the Respondent did not respond to the notice and Ext.P5 order was passed by the 1st Appellant. The 1st Appellant has also contended in the counter affidavit that the mistake committed while issuing Ext.P1 assessment order is rectifiable by invoking Sec.15 of the Kerala Building Tax Act and further

that there is no limitation applicable in the facts and circumstances of the case, contending that the original assessment order was issued on 03.03.2001 and the rectified order Ext.P2 was issued during 9/2003 and thus Ext.P2 order was issued within a period of three years. It was further contended that as per Ext.P3 judgment, Ext.P2 order of rectification is protected since the learned Single Judge in Ext.P3 judgment has held that the plea of limitation is available only up to the issuance of Ext.P2 rectification order. To this counter, respondent has filed a reply denying the statements and reiterating the contentions put forth in the writ petition, which was allowed by the impugned judgment.

6. We heard the learned Special Government Pleader appearing for the appellants and the learned counsel appearing for the Respondent.

7. The learned Single Judge while allowing the writ petition, held thus:

(1) there is no error apparent on the face of the record which is susceptible to rectification as provided under Sec.15 of the Act.

(2) That in Ext.P1 order or in Ext.P5 (mistakenly shown

as Ext.P4), there is no reference to the fact that the Panchayat in which the building is situated is a Special Grade Grama Panchayat; and

(3) That since the rectification order itself is to be passed within a period of three years from the date of original assessment order and since Ext.P5 order was passed after three years of Ext.P1 order of assessment, is barred under Sec.15 of the Act.

8. The learned Single Judge has also held that Ext.P2 order being an invalid order, the plea of limitation is to be appreciated with reference to Ext.P5 and that therefore the respondent was entitled to succeed on that ground also. Accordingly Ext.P5 order was quashed and it was declared that the respondent is not liable to pay any tax, other than the tax already paid as per Ext.P1.

9. We have gone through the pleadings in the writ petition as well as the appeal memorandum, the counter affidavit filed by the 1st appellant in the writ petition, perused the documents produced and appreciated the rival contentions raised by the parties.

10. According to us, the answer to the question of limitation is dependent on Ext.P3 judgment rendered by the learned Single Judge, where it was held that if Ext.P2 rectification order was barred by limitation then the respondent is entitled to get the benefit of limitation prescribed under Sec.15(1) of the Building Tax Act. We notice that in Ext.P3 judgment, the learned Single Judge has not set aside Ext.P2 rectification order dated 9/2003, but has held that the said order was issued without providing reasonable opportunity to the petitioner to contest the proceedings as contemplated under Sec.15(1) of the Act. Accordingly, learned Single Judge directed the 1st appellant to issue notice with regard to the circumstances under which Ext.P2 happened to be passed, receive objection to the same and thereafter pass a detailed order explaining the circumstances under which Ext.P2 order was passed. It is true that in Ext.P3 judgment even though a time-table was prescribed by the learned Single Judge, the said stipulation was not followed by the 1st appellant.

11. Therefore, before proceeding further with other aspects, we think, it is only appropriate that the question of error apparent from the face of the record and limitation

prescribed under Sec.15(1) which were directed to be considered by the learned Single Judge in Ext.P3 judgment, are to be dealt with. For this purpose, Sec.15 of the Act is extracted hereunder:

“15. **Rectification of mistakes.**-- (1) The appellate authority or the revisional authority may, at any time within three years from the date of an order passed by it on appeal or revision, as the case may be, and the assessing authority may, at any time within three years from the date of any assessment or order passed by it, or its own motion, rectify any mistake apparent from the record of the appeal, revision, assessment or order, as the case may be, and shall, within the like period, rectify any such mistake which has been brought to its notice by an assessee:

Provided that no such rectification shall be made which has the effect of enhancing an assessment or reducing a refund unless the assessee has been given a reasonable opportunity of being heard in the matter.

(2) Where any such rectification has the effect of reducing the assessment, the assessing authority shall make any refund which may be due to such assessee.

(3) Where any such rectification has the effect of enhancing the assessment or reducing a refund, the assessing authority shall serve on the assessee a notice of demand in the prescribed form specifying the sum payable; and such notice of demand shall be deemed to be issued under Section 10 and the provisions of this Act shall apply accordingly.”

12. On a reading of Sec.15(1), it is categoric and clear that in order to invoke the power of rectification, an error must be apparent "from" the record of the appeal, revision, assessment or order. Therefore, it is not the error that is apparent on the face of the record, but the error should be "from" the record of the case. According to us, while passing Ext.P1 order, the 1st appellant overlooked the fact that the Panchayat in which the building is situated is a Special Grade Panchayat attracting higher rate of tax. This is an error apparent from the record. Even the failure to take into account a particular fact, is an error apparent from the record and therefore, the error so committed is an error apparent 'from' the face of the record.

13. The learned Single Judge has considered the issue, as if it is the error apparent on the face of the record, whereas under Sec.15(1) of the Act, the error apparent is "error apparent from the record". Therefore, as we have already answered, the failure to take note of a particular aspect is an error apparent from the record and in our view, the finding rendered by the learned Single Judge with respect to that aspect cannot be sustained.

14. It was also found by the learned Single Judge that there is absolutely no reference to the status of the Panchayat anywhere in Ext.P4 or as to the rate of tax applicable in respect of the concerned Panchayat for fixing the quantum of liability. The Respondent herself has not disputed that the building is situated in a Special Grade Grama Panchayat. Tax due is fixed under the schedule to the Act taking into account the status of the local body. So also, the contention raised by the Respondent all through out was that there are no reasons assigned in Ext.P2 rectification order to enhance the tax. Such a contention, according to us, is not a denial of the fact that the building is situated in a Special Grade Grama Panchayat. All these indicate the error in the proceedings apparent from the record, which could be rectified.

15. Now the question is whether the order of rectification was passed within a period of three years from the date of the original assessment order. Apparently, Ext.P1 order is dated 1/2001 and Ext.P2 rectification order was passed on 9/2003, which admittedly is within the three year period prescribed under Sec.15(1) of the Act. Therefore, Ext.P2 rectification order was passed within the time limit

allowed under Sec.15 of the Act. Even though the said rectification order was challenged in the writ petition and in Ext.P3 judgment rendered, the learned Single Judge did not set aside Ext.P2 rectification order, but only directed the authority concerned to issue notice explaining the circumstances under which the rectification order happened to be passed under Ext.P2, receive the written reply, hear the petitioner and thereafter take a decision on the circumstances leading to Ext.P2 rectification order. According to us, such a course was presumably adopted by the learned Judge with the intention of safeguarding the public money involved in the subject matter.

16. While considering the plea of limitation, the learned Single Judge held that Ext.P2 order was passed by the 1st appellant within a period of three years as contemplated under Sec.15(1) of the Act. Thereafter, the learned Judge proceeded to hold that even though the same was within the period of limitation, Ext.P2 order being an invalid order, the same cannot be taken into account and the plea of limitation was considered in the light of Ext.P5 impugned order. In our view, the validity of Ext.P2 could not have been adjudicated since

Ext.P3 judgment passed in the earlier round of litigation, has attained finality. In that circumstances, once Ext.P2 was found to be within the period of limitation, in view of the finality that Ext.P3 judgment has attained, the case of limitation should have been held against the Respondent. Therefore, that finding in the judgment under appeal cannot be sustained.

17. For all these reasons, we set aside the judgment of the learned Single Judge and allow the appeal preferred by the State, sustaining Exts.P2 and P5 orders, and thereby dismiss the writ petition filed by the 1st Respondent.

The writ appeal is allowed accordingly.

Sd/-
**ANTONY DOMINIC
JUDGE**

Sd/-
**SHAJI P. CHALY
JUDGE**

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P.S. to Judge

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