

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE ANIL K.NARENDRA

THURSDAY, THE 10TH DAY OF SEPTEMBER 2015/19TH BHADRA, 1937

WP(C).No. 9459 of 2012 (F)

PETITIONER:

**SHANMUGHAN, AGED 50 YEARS,
S/O. K. BALAN, KANDAMPULLY HOUSE, IRINGAPPURAM VILLAGE,
CHAVAKKAD TALUK, THRISSUR DISTRICT.**

BY ADV. SRI.RAJIT

RESPONDENT(S):

- 1. DISTRICT COLLECTOR,
THRISSUR, COLLECTORATE, AYYANTHOLE,
THRISSUR - 670 001.**
- 2. REVENUE DIVISIONAL OFFICER,
THRISSUR, COLLECTORATE, AYYANTHOLE,
THRISSUR - 670 001.**
- 3. ASSESSING AUTHORITY & TAHSILDAR,
CHAVAKKAD, THRISSUR - 682 502.**

R BY GOVERNMENT PLEADER SRI. S.SUDHEESH KUMAR

**THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 10-09-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

APPENDIX

PETITIONER(S)' EXHIBITS:

- EXHIBIT P1: TRUE COPY OF THE PLAN OF THE PETITIONER'S RESIDENTIAL HOUSE.
- EXHIBIT P2: TRUE COPY OF THE ORDER BEARING NO. A.O.NO.BT4-17129/2006 DT. 27.01.2007 ISSUED BY THE 3RD RESPONDENT TO THE PETITIONER.
- EXHIBIT P3: TRUE COPY OF THE NOTICE ISSUED BY THE 3RD RESPONDENT TO THE PETITIONER.
- EXHIBIT P4: TRUE COPY OF THE ORDER DATED 25.01.2010.
- EXHIBIT P5: TRUE COPY OF THE ORDER DATED 28.09.2010.

RESPONDENT(S)' EXHIBITS: NIL

/TRUE COPY/

P.A. TO JUDGE

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ANIL K. NARENDRA, J.

W.P.(C).No. 9459 of 2012

Dated this the 10th day of September, 2015

J U D G M E N T

The petitioner constructed a residential building in Guruvayur Municipality based on Ext.P1 building plan. According to the petitioner the total plinth area of the building is 261.68 sq. mtr. But, in the occupancy certificate issued by the Guruvayur Municipality, the total plinth area of the building is shown as 283.30 sq. mtr., which includes the car porch as well as the unenclosed area of balcony.

2. In Ext.P2 assessment order dated 27.1.2007, the 3rd respondent assessed building tax at ₹11,400/- and permitted the petitioner to pay the aforesaid amount in 2 instalments. The petitioner was also issued with Ext.P3 notice dated 27.01.2007 intimating that, since the construction of the building was completed in the year 1999, it is liable to be assessed for luxury tax, from the year 1999-2000 onwards and if the petitioner has got any objection, he has to produce the completion certificate issued by the

Municipality in respect of the building in question, within a period of one week.

3. The petitioner challenged Ext.P2 assessment order by filing an appeal before the 2nd respondent, after remitting the first instalment of ₹5,700/-. Since the said appeal filed on 19.2.2007 was not re-submitted after curing the defects, it was rejected by Ext.P4 order dated 25.01.2010. Challenging Ext.P4, the petitioner filed a revision before the 1st respondent, which ended in dismissal, on a finding that the plinth area of the building comes above 278.70 sq. mtr. and hence liable for assessment of luxury tax under Section 5A of the Kerala Building Tax Act, 1974. It is aggrieved by Ext.P5 order passed by the 1st respondent, the petitioner is before this Court in this writ petition seeking a writ of certiorari to quash Exts.P3, P4 and P5 and seeking a declaration that the respondents have to exempt the open balcony as well as car porch in the petitioner's building from assessment of tax and reassess the tax based on the plinth area after such exclusion.

4. A counter affidavit has been filed on behalf of the 3rd respondent, contending that, based on a report submitted by the Village Officer, Guruvayur that the petitioner has constructed a new

building having a plinth area of 308.08 sq. mtr., he was issued with a notice dated 31.10.2006, proposing to conduct a personal hearing on 13.11.2006. At the time of personal hearing, the petitioner raised no objection regarding the total plinth area assessed and he agreed to pay tax in two installments. The assessing authority however ordered remeasurement and in that remeasurement it was confirmed that the total plinth area is 308.08 sq. mtr. Thereupon, the 3rd respondent by order dated 27.1.2007 assessed an amount of ₹11,400/- as building tax to be paid in two quarterly installments on 27.2.2007 and 27.5.2007 respectively. The petitioner was also issued with a notice dated 27.1.2007 intimating that the building in question is liable to be assessed for luxury tax. The petitioner submitted a letter dated 12.2.2007 with a request to permit him to remit tax from 2004 onwards. Being aggrieved by the assessment of building tax, the petitioner filed an appeal dated 19.2.2007 before the 2nd respondent, after remitting the first installment. However the appeal was defective and the petitioner was directed to cure the defects, vide letter dated 18.4.2007. In the meantime, the second installment was also paid on 15.6.2007. Since the defects were not cured, the appeal was dismissed on 25.1.2010. Thereafter, the 3rd

respondent issued notice dated 9.2.2010, directing the petitioner to attend that office on 19.2.2010 along with the approved plan and completion certificate. On 19.2.2010, the petitioner attended the hearing and filed an objection stating that, the plinth area of the residential building is below 240 sq. mtr. But as per the occupancy certificate dated 3.7.2004 issued by the Guruvayur Municipality, the date of completion of the building was 10.6.2005 and the completed plinth area was 283.30 sq. mtr. In such circumstances, the petitioner was issued with an order dated 20.2.2010 directing him to remit a sum of ₹14,000/- towards luxury tax under Section 5A of the Kerala Building Tax Act and the petitioner was directed to remit the same on or before 31.3.2010. On receipt of the said order, the petitioner filed a revision before the 1st respondent on 22.2.2010. As requested by the petitioner, re-measurement of the building was conducted and the sketch prepared by the PWD Authority was produced before the 1st respondent. As per the aforesaid sketch prepared by the Assistant Engineer, PWD Building Section, Chavakkad, the area of ground floor after deduction of car porch area comes to 157.95 sq. mtr. and the area of first floor after deduction of the area of open well inside the building comes to

128.76 sq. mtr. Therefore, the total plinth area of the building comes to 286.71 sq. mtr., which is above the plinth area of 278.7 sq. mtr., which is liable to be levied luxury tax under Section 5A of the Kerala Building Tax Act. The 3rd respondent has also stated that, in the first floor of the building there is an open balcony with two sides open, with roof, which has an area of 25.02 sq. mtr. Even if, 50% of the area covered by the open balcony is excluded, the total plinth area of the building would come to more than 278.7 sq. mtr. and therefore, the building is liable to be levied luxury tax under Section 5A of the Act. In such circumstances, the 3rd respondent would contend that, the reasoning of the first respondent in Ext.P5 is perfectly legal and no interference of this Court under Article 226 of the Constitution of India is warranted.

5. The issue that arises for consideration in this writ petition is as to the legality of Exts.P2, P4 and P5 orders.

6. In Ext.P5 order, luxury tax under Section 5A of the Kerala Building Tax was levied on the building constructed by the petitioner on a finding that its total plinth area comes above 278.70 sq. mtr. The fact that, the building in question was constructed after 1.4.1999 is not in dispute. Going by the provisions of Section 5A of

the Act, if the plinth area of the building is 278.7 sq. mtr. or more, such a building is liable to be levied with luxury tax at the rate of ₹ 2,000/- per year, which was enhanced to ₹4,000/- per year by the Kerala Finance Act, 2014. The petitioner would contend that, the total plinth area of the building is below 278.7 sq. mtrs and as such it would not come within the purview of Section 5A of the Act. In view of the request made by the petitioner, when the matter was pending consideration before the 1st respondent a remeasurement of the building was undertaken. As per the sketch prepared by the Assistant Engineer, PWD Building Section, Chavakkad, the total plinth area of the building comes to 286.71 sq. mtr., out of which the plinth area of the ground floor comes to 157.95 sq. mtr., after excluding the area covered by the car shed, and that of the first floor comes to 128.76 sq. mtr.

7. Regarding exclusion of the area covered by the open balcony, the specific case of the 3rd respondent is that, exclusion of 50% of the area covered by the open balcony is not permissible under the provisions of the Kerala Building Tax Act and the Kerala Building Tax (Plinth Area) Rules. Going by clause (k) of Section 2 of the Kerala Building Tax Act, the plinth area means the area included

in the floor of a building and where building has more than one floor the aggregate area included in all the floors together. Therefore, going by the statutory provisions referred to above 50% of the area of the open balcony cannot be excluded while making assessment for levy of building tax under Section 5 of the Act or luxury tax under Section 5A of the Act.

8. It is relying on the judgment of this Court, in **Padmanabhan v. State of Kerala and others (2009 (1) KLT 295)** the petitioner is contending that, the area covered by the roof of the open balcony should be excluded while calculating the total plinth area of the building. But, in Padmanabhan's case (supra) this Court was dealing with a question as to whether the roof top cover given to the building makes the terrace beneath it also plinth area of the building and if so, whether such plinth area has to be reckoned for the purpose of assessment of building tax for the residential building under Section 5(5) read with Section 6 of the Act. This Court held that, the open terrace even after giving roof to it does not become part of plinth area used for residential purpose, since the main purpose of such a structure is to protect the building from heat and rain. However, this Court made it clear that, if such terrace in

full or part is enclosed with bricks, walls, grills, wood or the like, such enclosed area will become part of the residential area of the building for the purpose of assessment of building tax and luxury tax under the Act. Para.3 of the judgment reads thus;

"3. In order to consider the issue, this Court has to necessarily consider the relevant charging provisions contained in the statute and for easy reference, Section 5(1), Section 5(5) and Section 6 are extracted hereunder:

'Section 5. Charge of building tax. -- (1) Subject to the other provisions contained in this Act, there shall be charged a tax (hereinafter referred to as 'building tax') based the plinth area at the rate specified in the Schedule on every building the construction of which is completed on or after the appointed day.

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(5) Where there are out houses, garages or other structures appurtenant to the building for the more convenient enjoyment of the building, the plinth area of such structure shall be added on the plinth area of the main building and the building tax assessed accordingly: Provided that the plinth area of a garage or any other erection or structure appurtenant to a residential building used for the purpose of storage of firewood or for any non residential purpose shall not be added on the plinth area of the building.

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Section 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.'

There is no doubt that the structure constructed above roof top or terrace of the building is a structure in itself answering the definition of 'building' and its plinth area constitute part of plinth area of the main building. However, the question to be considered is whether the roof top cover given to the building makes the terrace beneath it also plinth area of the building and if so, whether such plinth area has to be reckoned for the purpose of assessment of building tax for the residential building under Section 5(5) read with Section 6 of the Act. After providing for inclusion of plinth area of outhouses, garages or structures appurtenant to the building for the more convenient enjoyment of the building along with the main structure, the proviso to Section 5(5) states that the plinth area of a garage or any other structure or erection appurtenant to the residential building used for the purpose of storage of firewood or for any non residential purpose, will not be added to the plinth area of the main building. Section 6

defines plinth area with reference to the provisions of the Building Rules which also do not require any permission to give protective cover to terrace which is not enclosed. Further, the same proviso to Section 5(5) is given to Section 6 which provides for determination of plinth area of a building. What is clear from above provisions is that the entire plinth area of appurtenant structures should not be added to the plinth area of the residential building for assessment. Only the plinth area of such of the appurtenant or other structures which are used for 'residential purpose' only can be added to the plinth area of the residential building. Therefore, the question to be considered is whether the terrace over the roof top when covered with roof becomes residential area. In fact, cover is given even to buildings with slanting roof, with the result it serves only as a protection to the building and there is no terrace that could be used. However, when roof is given to flat terrace building, the covered terrace portion becomes plinth area of the building. The essence of a residential building is privacy which requires enclosure, whether it be with brick, grill or shutters. In other words, an open area with roof cannot be treated as part of the residential building as it is unfit for residential purpose. Even though the terrace covered with roof may be used for several purposes such as drying of clothes, for recreational purposes, etc., such use cannot be treated as use for residential purpose. Therefore, open terrace even after giving roof to it does not become part of plinth area used for residential purpose. The main purpose of such a structure is to protect the building from heat and rain. Of late lot of people

are giving cover to their building to harvest rain water which is stored either on the top of the building or downstairs in tanks or by allowing such collected water to percolate in pits which increases availability of water in the well. A roof cover prevents absorption of heat by the building and therefore, unnecessary air conditioning is avoided. Similarly when the building is protected from heat and rain, maintenance cost is reduced and its life is also extended. In fact, concrete buildings absorbing heat in the day time and radiating the heat to the atmosphere in the night causes increase in atmosphere temperature even in the night causing discomfort not only to the occupants but to the neighbours. In fact, on account of the increased shortage of drinking water, the Government has issued Circular and in the case of some buildings, provision for collection of rain water is made mandatory. A roof cover on top of the terrace, whether it be made of metal, fibre, or tile, makes collection of clean rain water easy. Therefore, in public interest, construction of roof cover over concrete buildings is something which should be encouraged by providing all incentives by the Government. However, I make it clear that if such terrace in full or part is enclosed with bricks, walls, grills, wood or the like, such enclosed area will become part of the residential area of the building for the purpose of assessment of building tax and luxury tax under the Act. The Government Circular referred above giving contrary interpretation is declared invalid. The WP(C)s are allowed directing the Tahsildar to exclude the plinth area of unenclosed terrace, whether it be covered by roof or not. Since dispute is raised

with regard to other plinth area also in some cases, there will be direction to the Tahsildar to inspect the building, measure the plinth area and exclude the covered roof top which does not have walls or enclosures with grills or the like and make fresh assessment. The excess tax, if any, collected should be refunded without any delay.”

9. Therefore, the principle laid down by this Court in the aforesaid judgement will not in any manner support the contention of the petitioner that, 50% of the area covered by the open balcony, with two sides open, in the first floor of the building has to be excluded while calculating the total plinth area of the building for the purpose of levy of luxury tax under Section 5A of the Kerala Building Tax Act. In such circumstances, the petitioner cannot challenge levy of luxury tax on the building in question under Section 5A of the said Act. Therefore, the challenge to that effect made in this writ petition stands rejected, thereby confirming the levy of luxury tax on the building in question.

10. However, as per the sketch prepared by the Assistant Engineer concerned, when the matter was pending before the 1st respondent in revision, the total plinth area of the building, after deducting the area of car porch comes to only 286.71 sq. mtr.

Therefore, the assessment of building tax made in Exhibit-P2 taking the total plinth area of the building as 308.08 sq. mtr. will have to be reassessed appropriately, treating the total plinth area of the building as 286.71 sq. mtr., as found in Ext.P5 order dated 28.9.2010 of the 1st respondent. Appropriate steps in this regard shall be taken by the 3rd respondent, as expeditiously as possible, at any rate within a period of 3 months from the date of receipt of a certified copy of this judgment. Excess remittance towards building tax, if any, made by the petitioner shall either be refunded or adjusted towards future payments.

The writ petition is disposed of as above. No order as to costs.

Sd/-
ANIL K.NARENDRA,
JUDGE

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