IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE C.K.ABDUL REHIM

MONDAY, THE 2ND DAY OF MARCH 2015/11TH PHALGUNA, 1936

WP(C).No. 27316 of 2009 (H)

PETITIONER:

M/S.KAVITHA THEATRE,
M.G.ROAD, ERNAKULAM,
A REGISTERED PARTNERSHIP FIRM
REPRESENTED BY ITS MANAGING PARTNER, E.M.JOHNY.

BY ADVS.SRI.V.M.KURIAN
SRI.MATHEW B. KURIAN
SRI.K.T.THOMAS

RESPONDENTS:
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1. **GOVERNMENT OF KERALA,**
   REPRESENTED BY SECRETARY TO GOVERNMENT,
   REVENUE DEPARTMENT,
   THIRUVANANTHAPURAM.

2. **THE DISTRICT REGISTRAR (AUDIT)**
   (COLLECTOR), ERNAKULAM.

3. **THE DISTRICT REGISTRAR (GENERAL),**
   ERNAKULAM.

R1 TO 3 BY ADV. GOVERNMENT PLEADER SRI. C.S. MANILAL

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 02-03-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

AMG

W.P (c) No.27316/2009

APPENDIX

PETITIONERS' EXHIBITS

EXT- P1- TRUE COPY OF THE DOCUMENT No.3781/1998 REGISTERED BEFORE ERNAKULAM SUB REGISTRY.

EXT- P2- TRUE COPY OF THE ORDER DATED 13-10-1999 PASSED BY THE 2ND RESPONDENT.

EXT- P3- TRUE COPY OF THE JUDGMENT DATED 05-09-2002 IN CMA No.10/2000.

EXT- P4- TRUE COPY OF THE ORDER DATED 09-06-2008 IN CRP No.2058/2002.

EXT- P5- TRUE COPY OF THE STAY ORDER PASSED BY HON'BLE SUPREME COURT DATED 19-09-2008 IN SLP (C) No.22404/2008.

EXT- P6- TRUE COPY OF THE GOVT. NOTIFICATION DATED 27-03-2009.

EXT- P7- TRUE COPY OF THE CIRCULAR DATED 02-04-2009 ISSUED BY INSPECTOR GENERAL OF REGISTRATION.

EXT- P8- TRUE COPY OF THE REPRESENTATION DATED 15-09-2009 SUBMITTED BY THE PETITIONER BEFROE THE 2ND RESPONDENT.

EXT- P9- TRUE COPY OF THE ORDER DATED 21-10-2010 IN SLP No.22404/2008 PASSED BY THE HON'BLE SUPREME COURT.

EXT- P10- TRUE COPY OF THE NOTICE ISSUED BY THE 2ND RESPONDENT DATED 05-01-2011.

EXT- P11- TRUE COPY OF THE REPLY SENT BY THE PETITIONER DATED 18-01-2011.

EXT- P12- TRUE COPY OF THE RECEIPT DATED 30-09-2009 ISSUED BY THE 2ND RESPONDENT.

RESPONDENTS' EXHIBITS

NIL

True copy

P.A. To Judge

AMG

C.K. ABDUL REHIM, J.

W.P.(c) No. 27316 OF 2009

DATED THIS THE 2nd DAY OF MARCH, 2015.

J U D G M E N T

A registered partnership firm holding title over 88.740 cents of property and a 'Theatre Complex' situated therein, located on the side of M.G. Road in Cochin city, is the petitioner. Issue involved is regarding eligibility of the petitioner for compounding the demand for payment of deficit stamp duty payable on Ext.P1 instrument which was called for by the 2nd respondent through suo motu action contemplated under Section 45B of the Kerala Stamp Act, 1959, on the basis of Ext.P6 notification issued by the State Government permitting such compounding based on payment of duties in accordance with the schedule contained in the said notification.

2. History of the case is that, the property along with the 'Theatre Building' and other buildings situated therein was in the ownership of one Sri. Essa Ismail Sait @ Babu Sait. The business in running the Theater was under his proprietorship. On 14-08-1998 a partnership was

constituted by executing a Partnership Deed through which the said Sri. Essa Ismail Sait @ Babu Sait had brought the property in question into the common stock of the partnership. It is stated that the other partners inducted had contributed capital to the partnership in the form of cash. The partnership firm was registered before the Registrar of Firms under Section 58 (i) of the Indian Partnership Act, 1930; vide Registration No.2108/1998. The above said Sri. Essa Ismail Sait @ Babu Sait retired from the partnership with effect from 18-10-1998, by virtue of a re-constitution deed executed, which was also duly notified before the Registrar of Firms. According to the petitioner a nominal title with respect of the property remained with Sri. Essa Ismail Sait @ Babu Sait and the said nominal right was transferred by him to the partnership through Ext.P1 sale deed, showing a total consideration of Rs.1,00,000/- thereby paying stamp duty of Rs.13,500/- and Registration Fee @2%.

3. On the basis of the suo motu proceedings initiated by the 2nd respondent a notice under the Kerala Stamp

(Prevention of Undervaluation of Instruments) Rules 1968 was issued. After adjudication of the matter, Ext.P2 proceedings was issued by the 2nd respondent determining consideration of the transaction as Rs.19,29,70,000/- and finding that there is a deficit in the payment of stamp duty to the tune of Rs. 2,60,37,450/- and Registration Fee to the tune of Rs.38,57,400/-. The petitioner firm filed an appeal against Ext.P2 order before the District Court, Ernakulam under Section 45B (4) of the Kerala Stamp Act, 1959. Exhibit P3 is the judgment in the said appeal. The District Court found that the sale consideration set forth in Ext.P1 deed as Rs.1,00,000/- is not true and correct. But at the same time it was found that the 2nd respondent failed in ascertaining and fixing provisional sale consideration, in accordance with the procedure contemplated under Rule 4 (4) and Rule 5 of the Kerala Stamp (Prevention of Undervaluation of Instruments) Rules. Therefore Ext.P2 order was set aside and liberty was given to the 2nd respondent to continue the proceedings afresh after passing a fresh provisional order under Rule 4 after complying all statutory procedures and to finalise the same.

4. Exhibit P3 judgment passed by the District Court was subjected to further challenge at the instance of the petitioner before this court in a Civil Revision Petition. In Ext.P4 order the Revision Petition was disposed of by this court observing that it was mandatory on the part of the appellate authority to determine the value or consideration and the duty payable on the instrument based on materials available, under Rule 12 of the Kerala Stamp (Prevention of Undervaluation of Instruments) Rules, 1968. Finding that the petitioner had submitted documents in support of their contention it was observed that, the District Court has got jurisdiction to decide the issue. Further it was observed that the statute does not confer power on the appellate authority to remand a case. Hence while setting aside Ext.P3 judgment the District Court was directed to decide the appeal afresh after affording opportunity to both sides.

5. The respondents in Exts.P3 & P4 judgments (the 2nd respondent herein and another) had challenged Ext.P4 order of this court before the hon'ble Supreme Court in a

Special Leave Petition. By virtue of Ext.P5 interim order the hon'ble Supreme Court had stayed operation of Ext.P4 order of this court.

6. In the meanwhile, during pendency of the SLP the Government have introduced Ext.P6 scheme, inexercise of power conferred under Section 9 (1) (c) of the Kerala Stamp Act, 1959, providing compounding facility with respect to duties payable on instruments referred under Section 45A, B and Section 45C of the said Act. The petitioner firm submitted Ext.P8 request before the 2nd respondent, expressing willingness to settle the matter under the compounding scheme and requesting to inform about the amount which is to be paid under the scheme. Since the said request was not considered, this writ petition is filed seeking direction to respondents 2 & 3 to extent the benefit of the compounding scheme to the petitioner, in view of Ext.P6 notification and to permit the petitioner to pay a sum of Rs.12,000/- as compounding fee in accordance with Ext.P6.

7. It is pointed out that the SLP which was pending before the hon'ble Supreme Court was disposed of through Ext.P9 order dated 21-10-2010. It was observed that ends of justice will be met by directing the 2nd respondent to decide the issue of undervaluation afresh, untrammeled by any observations contained in Exts.P3 & P4 verdicts of the District Court and this court, after giving opportunity of hearing to the parties. The hon'ble Supreme Court made it clear that no opinion was expressed with respect to entitlement of the petitioner to get benefit of Ext.P6 notification issued under Section 9 (1) (c) of the Act.

8. It is further noticed that, when this writ petition came up for admission, a learned Judge of this court had passed an interim order on 29-09-2009, directing the 2nd respondent to receive from the petitioner the stamp duty payable under Ext.P6 notification, if the petitioner makes payment of the same on or before 30-09-2009. Learned counsel for the petitioner submitted that an amount of Rs.12,000/- as per item No.4 of the schedule contained in Ext.P6 notification was already paid in compliance with the

interim order, on 30-09-2009 itself as evidenced from Ext.P12 receipt.

9. Question mooted for decision is as to whether the petitioner is entitled to take benefit of the compounding scheme introduced under Ext.P6 notification. Exhibit P6 notification had permitted compounding of duties payable on instruments referred to the 2nd respondent under Section 45B, at the rates specified in the schedule contained therein. In the schedule it is stated that the compounding fee payable with respect to property having an extent above 50 cents situated in Corporation area is 6% of the stamp duty already paid or Rs.12,000/- whichever is higher. The notification further provides that the liability to pay stamp duty will stand completely discharged on payment of duty as specified in the schedule, without realising any additional registration fee. It also stipulates that the cases which were finally disposed of and referred for revenue recovery for realisation of deficit stamp duty shall also be covered, except those in which the parties have already paid the due amount in part or full. It is made clear that the benefit

under the notification will be available only for 'One Time Settlement' and it shall be effective for the period from 01-04-2009 to 30-09-2009. Exhibit P7 is a circular issued by the Inspector General of Registration. In the said circular it is clarified that the compounding facility notified under Ext.P6 will apply with respect to under valuation cases for the period from 1986 to 31-03-2009.

10. It is evident from Ext.P8 that the petitioner had approached the 2nd respondent seeking permission for compounding the matter, within the period of validity of Ext.P6 notification. It is also evident that he had approached this court in this writ petition, when the said request was not considered, within the validity period of Ext.P6 notification. Therefore the petitioner cannot be denied of the benefits under Ext. P6 notification, merely for the reason that validity period of the compounding scheme had expired. Further, it is to be noticed that, based on an interim order issued by this Court the petitioner had remitted the amount of compounding fee before expiry of the validity period stipulated in Ext. P6 notification.

Contention raised by learned Government Pleader appearing on behalf of respondents is that, during validity of Ext.P6 scheme the matter was pending before the Honourable Supreme Court and by virtue of Ext.P5 interim order the Honourable Supreme Court has stayed further actions. But it is to be noticed that Ext.P2 order passed by the 2nd respondent was set aside by the appellate court in Ext.P3 judgment. However, liberty was reserved to the 2nd respondent to finalise the matter afresh after complying with the relevant rules. Under such circumstances, after Ext.P3 judgment it cannot be said that Ext.P2 order was in force. But Ext.P3 judgment was modified in revision by this Court through Ext.P4 order. Ext.P3 judgment was set aside and the appeal was revived for fresh consideration and disposal. Under such circumstances, technically it can be found that, Ext.P2 order stood revived and it was in force and was under an appeal pending at the time when Ext.P6 notification was issued. But it is evident that operation of Ext.P4 order was stayed by the Honourable Supreme Court. The respondents have no case that any further proceedings based on Ext.P2 was pursued during pendency of the Special Leave Petition. Even assuming that Ext.P2 order had survived, the petitioner cannot be denied of the benefit of compounding scheme merely because the matter under Section 45(B) stood finalised. This is because Ext.P6 notification covers cases where final orders were already passed and the amount imposed remained as not realised. Therefore, this Court is of the considered opinion that either Ext.P3 judgment of the appellate court or Ext.P4 order of this Court in revision will in any manner preclude the petitioner from seeking benefits of the compounding scheme.

11. Another contention raised on behalf of respondents is that the matter was in seizing of the Honourable Supreme Court and there was an interim order issued by the said court. Hence consideration of the option exercised by the petitioner for compounding the matter was not possible at that point of time. It is pertinent to note that Ext.P5 interim order of stay passed by the Honourable Supreme Court was limited only to the extent of operation

of Ext.P4 order. It may not be correct to observe that all further actions in the matter was stayed by the honourable apex court. However, it cannot be said that the respondents were prohibited from considering the application for compounding. On the other hand, by virtue of exercising the right for compounding under Ext.P6 notification, the petitioner was in a manner conceding sustainability of the proceedings initiated on the allegation of under valuation. However, argument of the respondents can be justified to certain extent, that the propriety demanded them to refrain from taking any decision on the application for compounding, due to pendency of the matter before the Honourable Supreme Court. But it is evident that the Honourable Supreme Court while disposing the Special Leave Petition had clarified that it has not opined anything on the entitlement of the petitioner to get benefit of Ext.P6 notification. Therefore, it is evident that the Honourable Supreme Court had left open the matter for consideration.

12. Learned Government Pleader submitted that the question regarding eligibility of the petitioner for exercising the right of compounding, based on Ext.P6 notification, has not been considerer by the 2nd respondent, due to pendency of the matter before the Honourable Supreme Court. Therefore, it should be left open to the 2nd respondent, to take an appropriate decision in the matter considering the fact that during validity of Ext.P6 notification the matter was pending before the Honourable Supreme Court and considering the fact that the apex court had left open the issue for consideration. It is only just and proper to direct the 2nd respondent to take a decision on the subject. This is especially because this Court had permitted the petitioner to remit the compounding fee within the time stipulated, of course subject to result of this Writ Petition.

13. Under the above mentioned circumstances, this writ petition is disposed of by directing the 2nd respondent to consider Ext.P8 request and to take a decision on the application for compounding, taking note of the interim order passed by this Court on 29.09.2009 and the

consequent remittance made by the petitioner and also taking note of the observations contained in Ext.P9 order passed by the Honourable Supreme Court with respect to entitlement under Ext.P6 notification. A decision in this regard shall be taken by the 2nd respondent after affording opportunity of personal hearing to the petitioner, at the earliest possible, at any rate, within a period of six weeks from the date of receipt of a copy of this judgment.

14. Needless to observe that if it is found that the petitioner is entitled for exercising option with respect to compounding under Ext.P6 notification, the remittance made based on the interim order shall be appropriated as remittance made within the validity period of Ext.P6 notification.

Sd/-
C.K. ABDUL REHIM
JUDGE

AMG

True copy

P.A. to Judge