

KERALA HIGH COURT

Kunhali Haji

Vs.

State of Kerala

O.P. Nos. 894 etc. of 1964

(P. Govindan Nair, J.)

20.11.1964

JUDGMENT

P. Govindan Nair, J.

1. These writ applications raise a common question about the validity of the Kerala Buildings Tax Act, 1961. Act 19 of 1961 (hereinafter called the Act) The validity of the Act has been questioned mainly on two grounds, firstly, it is argued that entry 49 of List II to the Seventh Schedule of the Constitution of India pursuant to which it is claimed the Act has been passed, does not enable the State Legislature to pass such a law Secondly it is urged that in any view of the matter, the Act is discriminatory and is violative of Articles 14, 19 and 31 of the Constitution.

2. Before examining these contentions, it is necessary to refer to the relevant provisions in the statute. The preamble of the Act states:

"Whereas it is expedient to provide for the levy of a tax on buildings;" and Section 2, (Definitions), defines 'building', in Sub-section (d) thereof as :

" 'building' means a house, out-house garage, or any other structure, or part thereof, whether of masonry, bricks, wood, metal, or other material, but does not include any portable shelter or any shed constructed principally of mud, bamboos, leaves, grass or thatch or a latrine which is not attached to the main structure":

And

" 'floorage' means the area included in the floor of a building, and, where a building has more than one floor the aggregate area included in all the floors together;

and 'owner' under Sub-section (f) of Section 2 means

'Owner' includes a person who for the time being is receiving or is entitled to receive, the rent of any building whether on his own account or on account of himself and others or as

an agent, trustee, guardian or receiver for any other person or who should so receive the rent or be entitled to receive it if the building on part thereof were let to a tenant;"

3. Section 3 dealing with exemptions provides under Sub-section (1)(ii) that :

"buildings used principally for religious, charitable or educational purposes or as factories or workshops"

are exempted from the provisions of the statute. Section 4 is the charging section and it is in these terms :

"4 *Charge of buildings tax.* (1) Subject to the other provisions contained in this Act, there shall be charged a tax (hereinafter referred to as 'buildings tax') at the rate specified in the Schedule, in respect of every building the construction of which is completed on or after the 2nd day of March, 1961 and which has a Floorage of one thousand square feet or more.

(2) The buildings tax shall be payable by the owner of the building.

Explanation 1. For the purposes of this section, the construction of a building shall be deemed to have been completed when it is ready for occupation or has been actually occupied, whichever is earlier.

Explanation 2. A building, which is not liable to be taxed under the provisions of this Act on account of its having a floorage of less than one thousand square feet, shall become liable to be so taxed if the Floorage of the building is subsequently increased to one thousand square feet or more as computed in the manner specified in Section 5 by constructions of additions or combinations.

Explanation 3. Where the floorage of a building, which has already been taxed, is subsequently increased by new extensions or additions or combinations, tax shall be computed on the total floorage of the building including that of the new extensions or additions or combinations, and credit shall be given to the tax already levied and collected in respect of the building before such extensions or additions or combinations."

4. Section 5 deals with 'Computation of floorage of buildings'; Section 6 with the 'return of completion of new buildings' and Section 8 about the 'assessment' to be made. Section 10 provides for 'appeal'; Section 11 for 'reference to District Court', Section 12 about 'Powers of revision of the District Collector' and the rest of the Sections, I think, are unnecessary for the purpose of deciding the questions raised in this case.

5. On the first of the grounds referred to, two contentions have been raised. Firstly it is said that the tax imposed by the statute is really a tax on 'construction of a building' or 'on extension of a building' and secondly a far more fundamental question has been mooted and this is based on the contention that a "tax on lands and buildings" (Item 19 in List I to the Seventh Schedule) has acquired a special meaning in legislative history and practice "Tax on lands and buildings" means a tax on buildings for local purposes imposed by local authorities and is a tax on the actual letting

value of such lands and buildings. They contend that such taxes cannot be imposed by the State Government for the purposes of the general revenue of the State.

6. I do not wish to deal with either of the above aspects in these writ applications, for, I feel that the petitioners are entitled to succeed on the second ground relating to discrimination.

7. Counsel contend that the imposition of tax by the statute is arbitrary and discriminatory for the following reasons:

(a) The classification of buildings into those that came into existence, after 2-3-1961 and those before that date, taxing the former and not the latter is discriminatory.

(b) The imposition of a uniform tax merely on the 'floorage' basis on buildings situated in different locations whose capital value and whose letting value have no similarity is discriminatory.

(c) That the uniform rate of tax applied to all buildings merely on the 'floorage' disregarding its quality and/or usefulness is also discriminatory.

8. There are specific averments in this regard in many of the affidavits in support of the petitions. The only answer given by the State to these averments as far as I am able to see, is in paragraph 9 of the counter affidavit filed on behalf of the 1st respondent, the State of Kerala. I extract the relevant part of paragraph 9 of the counter-affidavit.

"Fixing the tax on the basis of the floor area of the building is also reasonable and legal. The buildings situated under the same circumstances are treated alike and no discrimination is shown. Such provisions do not in any way offend Article 14 or 10(1) of the Constitution "

9. In order to understand the contention and for the purpose of determining the question as to whether Articles 14 and/or 19 or for that matter 31 have been violated, it is necessary to understand what has come to be known as the base of the tax. The entry in the Constitution relied on, as I indicated earlier, is entry 49 in List II to the Seventh Schedule of the Constitution which reads as follows:

"Taxes on lands and buildings."

10. There is another entry, entry 45 in the same list which runs thus:

"Land revenue including the assessment and collection of revenue, the maintenance of land records, survey for revenue purposes and records of rights, and alienation of revenues."

11. The particular enactment, Act 19 of 1961, is said to be passed under the entry in item 49 in List II to the Seventh Schedule of the Constitution. I will assume for the purpose of the discussion that this entry would entitle the State Government to impose a tax for the purpose of raising general revenue for the State.

12. What is meant by a tax, has been the subject of judicial decisions for a considerable length of time. It is unnecessary to refer to all those decisions; but I would refer to the meaning of the expression 'tax' as given in the American Jurisprudence. Volume 51, at p. 35

" 'Tax' A tax is a forced burden, charge, exaction, imposition, or contribution assessed in accordance with some reasonable rule of apportionment by authority of a sovereign state upon the persons or property within its jurisdiction to provide public revenue for the support of the government..."

and in the same volume at page 59, dealing with the General Indicia of Property Taxes, it is said that if the tax is computed upon a valuation of property, it is considered a property tax.

13. Further in the book, World Tax Series (India), dealing with Local Taxes on Real Property, it is said that local taxes on land and buildings are based on the annual value or ratable value. And in World Tax Series (U.K.) at page 67, it is stated that "The rental value of property provides the tax base". in the Book World Tax Series (Australia) at page 61 it is stated that "The basis of assessment in all states is the unimproved capital value of the land "

14. There are a number of decisions of the Courts in the United States that the base of taxation is the value of the property and in Corpus Juris Secundum. Vol. LXXXIV, page 151 there is this passage:

"Constitutional provisions requiring taxation to be according to value do not apply to every species of taxation; generally they apply only to property taxes".

The meaning of the word "assess" is also given in Corpus Juris Secundum, Vol LXXXIV, p. 749 as

"Assess primarily means to tax; secondarily or derivatively, to place a valuation on property for the purpose of apportioning a tax."

There are passages in Cooley on Constitutional Limitations which I consider are relevant. At page 708, it is said:

"When taxes are levied upon property there must be an apportionment with reference to a uniform standard, or they degenerate into mere arbitrary exactions".

"A tax on bicycles for the construction of bicycle paths, bicycles being within the classes of property subjected to general taxation, is void for inequality, and where such tax is assessed regardless of valuation it is invalid for like reasons".

At page 712 of the same book, it is said:

"Some other constitutions contain no provisions upon this subject;

(taxation on the basis of valuation of property) ;

But the necessity for valuation is nevertheless implied, though the mode of making it, and the periods at which it shall be made are left to the legislative discretion."

Basu in his commentaries to the Shorter Constitution, Second Edition, page 637 says:

"A municipal legislation which provides that the basis of valuation for the purpose of levying a tax on lands may be either capital or annual letting value is not ultra vires."

And in the Book, Public Finance, by Dr. Bastable, 3rd Edition, page 272 it is said:

"Most of the actual property or capital taxes are so only in name, being really paid out of the income of the persons subject to the charge".

15. I may dealing with this aspect, conclude by referring to the decision of the Supreme Court in *Kunnathat Thathunni Moopil Nair v. State of Kerala*¹, Dealing with the land tax, what Their Lordships said is:

"A tax on land or land revenue is assessed on the actual or the potential productivity of the land sought to be taxed. In other words the tax has reference to the Income actually made or which could have been made with due diligence, and, therefore, is levied with due regard to the incidence of taxation."

16. One thing is clear from the above. The base of the tax is either the capital value of the land and the buildings or the annual letting value of the land and buildings. And the theory of taxation appears to be that in order that there may be an equitable distribution of the burden of taxation, it is necessary to resort to some such method. The procedure is often, though not always, to tax the rich and let off the poor. The value of the property therefore always loomed large, and in fact, it appears to me, has been the only guiding principle on the basis of which the impost is to be made. The value of the property in a sense may be gauged with reference to the value of the income that may be earned from the property. If disregarding this basis, which seems to have been uniformly accepted in almost all the civilized countries in the world, an impost is made, it becomes an arbitrary impost which cannot satisfy the requirements of reasonableness or equality. Only a glance at the statute and the averments in the affidavits in support of these petitions is sufficient to satisfy any one that the Act purports to impose an arbitrary levy. The floorage has been defined in the statute. This has reference only to the basement excepting when there is a first or second floor. The basement has nothing to do with the quality of the building, its location, its usefulness and much less its value or for that matter, the income that can be derived from that building. A building may be located in a busy town or city. Its value will be much higher than its counterpart elsewhere due to various reasons (the cost of construction, the cost of land in which it is built etc.) and the letting value will also be different from that of a similar building situate in the country. Both have been taxed in the same manner. This has resulted in inequality. The inequality arises from lack of classification. That is the ground that has been relied on by the Supreme Court in the

¹ AIR 1981 SC 552

decision in AIR 1961 SC 552. Talking with reference to the Travencore Cochin Land Tax Act, the Supreme Court observed:

"Inequality is writ large on the Act and is inherent in the very provisions of the taxing section. It is also clear that there is no attempt at classification in the provisions of the Act. It is one of those cases where the lack of classification creates inequality".

17. It appears to me that this is another of those cases where the lack of classification has created inequality. The distribution of the burden has not been equitable. It has fallen on shoulders that cannot support it. I am aware that in the matter of taxation, there is a large discretion vested in the Legislature. It is for them to decide the person or the property to be taxed. It is for them to decide the incidence of tax, as who should be taxed and in what manner. But large as these powers are, they are still subject to the provisions in the Constitution, and if they are violative of Article 14, they cannot stand. That Articles 14 and 19 are attracted even in regard to such matters; has been ruled by the Supreme Court in the very same decision. AIR 1961 SC 552. This is one of those cases where it is not possible to sever the valid from the invalid provisions in the statute for the provisions in the Act are intertwined with the charging section, Section 4, which cannot stand for the reasons stated above.

18. In the result, I strike down the Kerala Buildings Tax Act, 1961, Act 19 of 1961 and allow those writ applications; but make no order as to costs.
Allowed.