CASE NO.:
Appeal (civil) 1307 of 2005

PETITIONER:
M. Ahammedkutty Haji

RESPONDENT:
Tahsildar, Kozhikode Kerala and Ors.

DATE OF JUDGMENT: 18/02/2005

BENCH:
Ruma Pal & C.K. Thakker,

JUDGMENT:
JUDGMENT

Thakker, J.

Leave granted.

The present appeal is filed by the appellant against the judgment and order passed by the Division Bench of the High Court of Kerala in Writ Appeal No. 2575 of 1999 dated on 3rd November, 2003. By the said order, the Division Bench confirmed the orders passed by the assessing authority, confirmed by the District Collector, Kozhikode and also confirmed by a single Judge of the High Court of Kerala in O.P. No. 14720 of 1994 on 15th October, 1999.

Few facts for the purpose of deciding the controversy raised in the present appeal may now be stated. The appellant herein constructed a Shopping Complex bearing Door Nos. 6/499 to 6/537 in Kozhikode Corporation in the year 1987. The appellant filed return under the Kerala Building Tax Act, 1975 (hereinafter referred to as 'the Act') for assessment of building tax for the said building. The assessing authority quantified capital value at Rs. 12,32,820 and determined building tax payable by the appellant at Rs. 97,032 by an order dated 15th February, 1988. The said assessmemt was made on an assumed rental basis submitted by the appellant. The order stated that as per the return in Form II submitted by the appellant, and on enquiries conducted by the assessing authority it had been shown that the building had been constructed by the appellant after 1st April, 1973. According to the assessing authority, the appellant was required to pay building tax of Rs. 97,032. He was, therefore, asked to pay the said amount of tax as per details mentioned in the schedule to the 'Notice of Demand'. The case of the appellant is that he had paid the said amount. Subsequently, however, the local authority fixed capital value of building at Rs. 42,84,000 and annual value at Rs.4,28,400. Proceedings were, therefore, initiated under sub-section (1) of Section 15 of the said Act by the assessing authority for rectification of mistake in the assessment order dated 15th February, 1988. The appellant was called upon to show-cause as to why the rectification of mistake should not be made and after affording opportunity of hearing to the appellant, an order was passed on 5th February, 1991 and he was asked to pay Rs. 4,02,150 as building tax on the basis of the valuation fixed by the local authority. Being aggrieved by the said order, the appellant filed revision before the District Collector. Since the revision was not disposed of by the District Collector, the appellant filed O.P. No. 3443 of 1991 in the High Court of Kerala. The High Court directed the District Collector to decide the revision. The revision was then dismissed by the Collector upholding the revised assessment order. Against the order, the appellant filed O.P. 14720 of 1994 which came up before the single Judge of the High Court of Kerala. After considering the contentions raised by the appellant as well as the respondent, the learned single Judge dismissed the petition. Further appeal before the Division Bench also met with the same fate. The final order has been challenged by the appellant in this Court.

We have heard learned counsel for the parties. The learned counsel for the appellant contended that an order of assessment passed by the first respondent on 5th February, 1991 fixing capital value at Rs.42,84,000 and annual value at Rs. 4,28,400 and directing the appellant to pay tax of Rs. 4,02,150 is clearly wrong and unsustainable. It was urged that the initial order dt. 15th February, 1988 passed by the assessing authority under sub-section (3) of Section 6 of the Act was legal and valid and in accordance with law. The said order could not, therefore, have been rectified under sub-section (1) of Section 15 of the Act and all proceedings were illegal. It was also urged by the learned counsel that since the capital value of the building was not determined by the local authority under sub-section (1) of Section 6 of the Act, exercise undertaken by the assessing authority under sub-section (3) of Secton 6 of the Act by no means could be said to be without jurisdiction. The counsel submitted that an error of law and of jurisdiction had been committed by the first respondent in invoking Section 15 of the Act. Section 15, the counsel submitted, has limited application for rectification of mistakes. It does not permit the authorities to re-fix annual value on the basis of different mode. Since there was no mistake, much less a mistake apparent on the face of the record, resort to Section 15 of the Act was uncalled for and the order passed by the assessing authority and confirmed by the District Collector and the High Court are liable to be set aside.

Learned counsel for the respondents, on the other hand, supported the order passed by the assessing authority and confirmed by the District Collector as well as by the High Court. It was submitted that no assessment could have been made under sub-section (3) of Section 6 of the Act by the assessing authority. The said provision had no application to the facts of the case as the building was newly constructed one and the Corporation (local authority) was required to fix annual value for the first time. The power of assessing authority under sub-section (3) of Section 6 of the Act was limited and could be exercised only in the cases covered by sub-section (2), sub-section (3), or sub-section (4) of Section 5 of the Act. The cases did not relate to newly constructed buildings but applied to repair, improvement or additional construction of the buildings already in existence. Since the building in question was newly constructed in 1987, i.e. after 1st April, 1973, the assessing authority could not have invoked sub-section (3) of Section 6 of the Act. Section 15 of the Act had been rightly invoked for rectification of the mistake. The appellant had been given an opportunity of hearing and only thereafter the order was passed by the first respondent on 5th February, 1991 ordering him to pay building tax on the basis of fixation of capital value and annual value by the local authority. The said order was thus legal, valid and in accordance with law. The order passed by the assessing authority was rightly confirmed by the District Collector and by the High Court and no interference is warranted.

Having considered the rival contentions of the parties, we are of the opinion that the order of assessing authority, confirmed by the District Collector as well as by the High Court do not deserve interference.

We have been taken to the relevant provisions of the Act by the learned counsel for the parties. Section 2 is a definition clause. Clause (g) thereof defines ‘‘local authority’ which includes Municipal Corporation. In clause (d), ‘‘assessing authority’ is defined as an authority appointed under Section 4 of the Act. ‘‘Capital value’ of a building is defined in clause (f) as the value arrived at by multiplying the annual value of a building by sixteen. (It was stated that originally the multiplier was 16 but it was reduced to 10 by amendment in 1981). ‘‘Annual Value’ of a building is defined in clause (a) as ‘‘the gross annual rent at which the building may at the time of completion be expected to let from month to month or from year to year.’

Section 5 is the charging section. The relevant part thereof reads as under :

> 5. Charge of building tax. - (1) Subject to other provisions contained in this Act, there shall be charged a tax (hereinafter referred to as ''building tax') at the rate specified in the Schedule in respect of every building the construction of which is completed on or after the 1st day of April, 1973, and the capital value of which exceeds twenty thousand rupees.
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> (2) Every major repair of, or improvement to, a building constructed before the 1st day of April, 1973, made on or after that date shall be liable to the building tax at the rate referred to in sub-section (1) on the difference between the capital value of the building before effecting the major repair or improvement, as the case may be, and the capital value of the building after effecting the major repair or improvement.
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> (3) A building the construction of which is completed on or after the 1st day of April, 1973, and which is not liable to be taxed under the provisions of this Act on account of its having a capital value of not more than twenty thousand rupees, shall become liable to be so taxed if the capital value of the building subsequently increased to more than twenty thousand rupees by new constructions or additions or combinations or as a result of repairs or improvements to the buildings.
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> (4) Where the capital value of a building which has already been taxed under this Act is subsequently increased by more than ten thousand rupees by new constructions or additions or combinations or as a result of repairs or improvements, building tax shall be computed on the capital value of the building including that of the new constructions or additions or combinations or, as the case may be, of the building as so repaired or improved, and credit shall be given to the tax already levied.

Section 6 lays down method of determination of capital value. Sub-sections (1) to (3) are relevant and may be reproduced :

> Determination of capital value - (1) For determining the capital value for the purpose of this Act, the annual value of a building shall be the annual value fixed for that building in the assessment books of the local authority within whose area the building is situate.
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> (2) Notwithstanding anything contained in sub-section (1), if the assessing authority is of opinion that the annual value fixed for a building in the assessment books of the local authority is too low, it may, after giving the person or persons affected thereby an opportunity of being heard, fix the annual value of the building.
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> (3) Where the local authority has not fixed value of a building in any case falling under sub-section (2) or sub-section (3) or sub-section (4) of Section 5 within a period of six months after completion of the repair or improvement or the construction or addition or combination, as the case may be, the assessing authority may, after giving the person or persons affected thereby an opportunity of being heard and after informing the local authority concerned, assess the annual value of the building.

Sub-section (4) of Section 6 requires the assessing authority to have regard to the factors mentioned therein.

Section 15 (1) enables the appellate authority, revisional authority or assessing authority, as the case may be, to rectify any mistake apparent from the record. The proviso to the said sub-section, however, provides for giving reasonable opportunity of being heard to the assessee if such

rectification would result in either enhancement of assessment or reduction of refund.

Section 16 deals with cases of revision of building tax when annual value is revised by a local authority.

In the case on hand, the first respondent authority had exercised power under Section 15 of the Act. According to the respondents, the action taken and order passed by the assessing authority on 15th February, 1988 in fixing capital value and annual value and directing the appellant to pay building tax on that basis in the exercise of power under sub-section (3) of Section 6 of the Act was not warranted by law and the mistake was required to be rectified under Section 15. The counter argument of the appellant is that since the local authority had not exercised power of determining capital value and annual value under sub-section (1) of Section 6 of the Act, the action taken by the assessing authority under sub-section (3) of Section 6 was legal, valid and in consonance with law. The said action could not have been made subject matter of Section 15 in the purported exercise of power of rectification of mistakes. The action of the assessing authority was illegal and unlawful. According to the appellant, proviso to sub-section (1) of Section 16 of the Act bars revision of assessment made under sub-section (2) or sub-section (3) of Section 6 of the Act.

To us, it is clear that the action of the local authority as also of the assessing authority was legal, valid and within the powers conferred on them by the statute. Whereas Section 5 is charging section, Section 6 deals with determination of capital value. It is not in dispute that the building was completed in 1987 and the capital value exceeded Rs. 20,000 and hence the provisions of the Act would apply to the said building. For determining the capital value, it is the local authority within whose area the building is situate to fix annual value of the building under sub-section (1) of Section 6 of the Act. Sub-section (2) of the said Section enacts that notwithstanding anything contained in sub-section (1), if the assessing authority is of the opinion that the annual value fixed for the building in the assessment books of the local authority is too low, it may fix annual value of the building after affording opportunity to the person or persons affected thereby. Sub-section (3) of Section 6, in our opinion, would apply only to those cases where the local authority has not fixed the annual value of the building in any case falling under sub-section (2), sub-section (3) or sub-section (4) of Section 5 within a period of six months after the completion of repair, improvement, construction, addition or combination as the case may be. A conjoint reading of sub-sections (2), (3) and (4) of Section 5 and sub-section (3) of Section 6 makes it clear that power of assessing authority is limited to the cases of repair, improvement, construction, additions or combination of a building already in existence and it does not extend to a totally new building or a building constructed for the first time and to which the Act applies. In our view, the submission of the respondents is well founded that in cases of newly constructed buildings, the assessing authority cannot exercise power under sub-section (3) of Section 6 of the Act and hence, the order passed by the assessing authority i.e. Tehsildar, Kozhikode on 15th February, 1988 was wholly without jurisdiction. If it is so, rectification of mistake by the assessing authority in exercise of power under Section 15 of the Act on the basis of the action of the local authority under sub-section (1) of Section 6 of the Act would be legal and lawful.

According to the appellant, sub-section (3) of Section 6 is not limited in its application to cases falling under sub-section (2), (3) or (4) of Section 5 but also applies to any construction of a building. The appellant submitted that Section 6 (3) should be read thus;

‘‘Where the local authority has not fixed the annual value of a building..... within a period of six months after the completion of the ..... construction..... the assessing authority may, after giving

the person or persons affected thereby an opportunity of being heard and after informing the local authority concerned assess the annual value of the building"

We must frankly admit that we are unable to agree with the above submission. Apart from the fact that a court of law cannot rewrite a statutory provision, acceptance of the argument of the appellant would be destructive to the scheme of the Act making sub-section (1) of Section 6 nugatory. The interpretation sought to be suggested by the appellant virtually deprives the statutory power of the local authority of determining capital value of a building situate within the area of such local authority. The contention is, therefore, rejected.

We are equally satisfied that the assessing authority was wholly justified in invoking Section 15 of the Act and in exercising the power of rectification of mistake apparent on the record.

The expression ''any mistake apparent from the record" used in sub-section (1) of Section 15 of the Act cannot be defined scientifically, precisely or exhaustively and should be determined in the light of the facts and circumstances of each case. It is, however, well settled that an error can be said to be an error apparent on the face of the record, if it is patent, manifest or self evident. If one has to travel beyond the record to see whether the judgment or order is correct or not, the error cannot be described as an error apparent on the face of the record.

As observed by this Court in Hari Vishnu Kamath v. Ahmad Ishaque, [1955] 1 SCR 1104, an error apparent on the record must be one which is manifest on the face of the record. But the Court proceeded to state that the real difficulty is not so much in the statement of principle as in its application to the facts of a particular case.

Again, in Syed Yakoob v. Radha Krishnan, [1964] 5 SCR 64, this Court stated that it is neither possible nor desirable to attempt either to define or to describe adequately cases of errors which can appropriately be described as errors of law apparent on the face of the record. Whether or not an impugned error is an error of law apparent on the face of the record must always depends on the fact and circumstances of each case and upon the nature and scope of legal provision which is alleged to have been misconstrued or contravened.

In M.K. Venkatachalam, I.T.O. and Anr. v. Bombay Dyeing and Manufacturing Co. Ltd., [1959] SCR 703, the Income Tax Officer passed an order of assessment on October 09, 1952, and assessed the respondent under the Income Tax Act 1922. By the said assessment order, respondent was given credit for certain amount. The Act was thereafter amended and was give retrospective effect from April 01, 1952. Under the said amendment the respondent was entitled to a lesser amount. A notice was, therefore, issued to the respondent to refund a part of the amount by rectifying the mistake in the order of assessment allowed earlier. Aggrieved by the notice, the respondent filed a petition in the High Court of Bombay under Article 226 of the Constitution prohibiting the Income Tax Authorities from enforcing the rectified order and demanding the amount. According to the High Court, the mistake was not a mistake apparent on the face of the order and hence, could not have been rectified. The Revenue approached this Court.

Observing that the retrospective operation of the Act resulted in recovery of a part of the amount and the demand by the Revenue was legal and valid, this Court held that the demand could not be said to be illegal or unlawful. The Court observed that if a mistake of fact apparent from the record from the assessment order could be rectified, there was no reason why a mistake of law which was glaring and obvious could not similarly be rectified. ''Prima facie it may appear somewhat strange that an order which was good and valid when it was made should be treated as patently invalid and wrong by virtue of the retrospective operation of the Amendment Act.

But such a result was necessarily involved in the legal fiction about the retrospective operation of the Amendment Act.'' A notice issued by the Income Tax Officer calling upon the respondent to pay a part of the amount was hence legal and could not have been quashed by the High Court.

In Master Construction Co. (P) Ltd. v. State of Orissa and Anr., [1996] 3 SCR 99, this Court had an occasion to consider the ambit and scope of Rule 83 of the Orissa Sales Tax Rules, 1947 which enabled the Commissioner of Sales Tax to correct an arithmetical or clerical mistake or any error apparent on the face of the record.

Speaking through Subba Rao, J. (as his Lordship then was), the Court stated;

''An arithmetical mistake is a mistake of calculation; a clerical mistake is a mistake of writing or typing. An error arising out of or occurring from an accidental slip or omission is an error due to a careless mistake or omission unintentionally made. There is another qualification, namely, such an error shall be apparent on the face of the record, that is to say, it is not an error which depends for its discovery, on elaborate arguments on questions of fact or law. The accidental slip or omission is an accidental slip omission made by the court. The obvious instance is a slip or omission to embody in the order something which the court in fact ordered to be done. This sis sometimes described as a decretal order not being in accordance with the judgment. But the slip or omission may be attributed to the Judge himself. He may say something or omit to say something which he did not intend to say or omit. This is described as a slip or omission in the judgment itself. The cause for such a slip or omission may be the Judge's inadvertence or the advocate's mistake. But, however, wide the said expressions are construed they cannot countenance a re-argument on merits on questions of fact or law, or permit a partly to raise new arguments which he has not advanced at the first instance.''

In T.S. Balaram v. Volkart Brothers, Bombay, [1972] 1 SCR 30, while interpreting Section 154 of Income Tax Act, 1961, this Court indicated that a mistake apparent on the record must be an obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points on which there may conceivably be two opinions.

Our attention was also invited to certain decisions rendered by the High Court of Kerala.

In Aradhana Lodge v. Tahsildar, (1990) 1 KLT 33, a single Judge of the High Court considered the ambit and scope of Section 15 of the Act. In that case, the petitioner was initially assessee on the basis of capital value at Rs.8,58,000 as against a returned figure of Rs. 4,50,000. In appeal by the assessee, the order was set side and the matter was remanded for fresh calculation of capital value. During the course of fresh determination, additional material was sought to be relied upon. The High Court held that scope of Section 15 was not 'unduly wide' and it had limited application. Even if there was mistake in assessment and another view was possible, it would not make the assessment vitiated so as to invoke Section 15 of the Act.

Yousef v. State of Kerala, (1993) 2 KLT 59 is of no help to the appellant. There the High Court dealt with difference between reopening of an assessment and rectification of mistake apparent from the record. Drawing the distinction between the two, the High Court observed :

''The Act nowhere provides for the reopening of an order, and to substitute it with a fresh order on a different basis. There is no provision in the Act akin to S. 147 of the Income Tax Act, 1961 or S.19 of the Kerala General Sale Tax Act, 1963. Such a provision is significant by its absence in the Act. S.15 which is invoked in this case is analogous to S. 154 of the Income Tax Act, 1961 and S.43 of the Kerala General Sales Tax Act,

1963. There is a distinct difference between the reopening of an assessment and the rectification of any mistake in it, apparent from the record. The consequence of re-opening an assessment is to set aside the original order of assessment and to substitute it with another order of assessment, in accordance with law. In the case of rectification of a mistake, the order which is vitiated by the mistake continues to subsist, and operate, but with the mistake in it rectified. A provision for re-opening an assessment has to be specifically conferred as the finality which, otherwise attaches to it stands affected by the reopening. Ordinarily, the authority passing the order becomes functus officio once the assessment is completed, unless the statute in question vests him with further power either to reopen it, or to rectify any mistake in it. Either way, he has to function strictly within the parameters of that power. Therefore, and in the absence of any provision in the Act to reopen an assessment, the power which could be exercised by the statutory authorities is only to rectify any mistake apparent from the record and not to reopen an assessment changing the basis of it, or to substitute another assessment in its place. A mistake to be so rectified must be apparent from the records, and not with reference to extraneous materials, and this is crucial in the exercise of the jurisdiction under S.15.'

In Kurian George v. Tehsildar, (1995) 2 KLT 457, after referring to several decisions of this Court as well as of the High Court of Kerala, the Division Bench laid down certain principles applicable for exercise of power under Section 15 of the Act.

In Karunakaran Nair v. Tehsildar, (2000) 2 KLT 705, the High Court observed that under guise of exercising power of rectification, the authority cannot make a reassessment.

In our view, the authorities had not exercised power for reassessment or had enhanced tax by adopting a different mode, method or manner. The learned single Judge of the High Court had considered various decisions which were cited before him and in paragraph 6 of the judgment, he observed:

''In the case on hand, admittedly the petitioner had constructed a new shopping complex. So, the charging provision that should be applied in Section 5(1) and Section 5(2) and (4) have no application. If that be so, sub-section (3) of Section 6 also cannot apply, for, sub-section (3) as already stated, is with reference to the matters covered by sub-section (2), (3) and (4) of Section 5 of the Act only. sub-section (2) of Section 6 also cannot apply because first there is no assessment by the local authority and secondly the annual value of the building fixed by the local authority is more than the amount determined as annual value on rental basis. So, the only provision that should have been applied by the local authority for determining the capital value of the building is sub-section (1) of Section 6 of the Act. Since there was no assessment of the building by the local authority at the time of original assessment proceedings, the assessing authority ought to have waited for the annual value to be fixed by the local authority. The adoption of the rental basis for completion of the original assessment in the above circumstances is without jurisdiction and is mistake apparent from the record of this case.'

We are in agreement with what has been stated by the learned single Judge. The said reasoning was confirmed by the Division Bench. Since the case relates to a new building and as the local authority (Kozhikode Corporation) had not determined the capital value in the assessment books of the local authority under sub-section (1) of Section 6 of the Act, the assessing authority (Tehsildar, Kozhikode) could not have exercised the power under sub-section (3) of Section 6 of the Act. The said provision has limited application to case covered by sub-sections (2), (3) or (4) of Section 5 to a building already in existence and there was repair, improvement, construction, addition or combination afterwards. The said provision does not enable or empower the assessing authority to assess

those buildings which are newly constructed and covered by sub-section (1) of Section 6 of the Act as the assessing authority had no power to deal with such new buildings. As the order passed on 15th February, 1988 by the assessing authority was without jurisdiction, it was open to the said authority to exercise the power of rectification of mistake on the basis of determination of capital value by the local authority and the action was taken in compliance with proviso to sub-section (1) of Section 15 of the Act after observing the principles of natural justice by giving reasonable opportunity of being heard to the appellant assessee in the matter. The action taken by the assessing authority cannot be said to be illegal or unlawful. Neither the District Collector nor the High Court could be said to have exceeded the jurisdiction in confirming the order passed by the assessing authority and we see no infirmity therein.

For the foregoing reasons, the appeal deserves to be dismissed and is accordingly dismissed. Having regard to the facts and circumstances of the case, however, there shall be no order as to costs.