

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE DAMA SESHADRI NAIDU

SATURDAY, THE 17TH DAY OF DECEMBER 2016/26TH AGRAHAYANA, 1938

WP(C).No. 8112 of 2010 (L)

PETITIONER(S):

REV. MSGR, PHILIP NJARALAKKATT
MANAGER, MAR SLEEVA COLLEGE OF NURSING, PALAI,
CHERPUNKAL PO, 686 584.

BY ADVS.SRI.BABY ISSAC ILLICKAL
SRI.ISAAC KURUVILLA ILLIKAL

RESPONDENT(S):

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1. STATE OF KERALA, REPRESENTED BY ITS
CHIEF SECRETARY TO GOVERNMENT, GOVERNMENT SECRETARIAT,
THIRUVANANTHAPURAM.
 2. SECRETARY,
LOCAL ADMINISTRATION DEPARTMENT, GOVERNMENT SECRETARIAT,
THIRUVANANTHAPURAM.
 3. KIDANGOOR GRAMA PANCHAYATH,
REPRESENTED BY ITS SECRETARY, KIDANGOOR PO, KOTTAYAM DISTRICT.

R,R3 BY ADV. SRI.V.G.ARUN
R,R-1 BY ADV. SYAMJI RAM, GOVERNMENT PLEADER
R,R3 BY ADV. SRI.T.R.HARIKUMAR

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
17-12-2016, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

WP(C).No. 8112 of 2010 (L)

: 2 :

APPENDIX

PETITIONER'S EXHIBITS:

- EXT.P1 : PHOTOCOPY OF THE ORDER OF AFFILIATION DATED 02.11.2009.
- EXT.P2 : PHOTOCOPY OF ORDER OF RECOGNITION BY THE INDIAN NURSING COUNCIL DATED 30.09.2009.
- EXT.P3 : PHOTOCOPY OF THE SANCTIONING ORDER DATED 20.01.2010 ISSUED BY THE KERALA NURSES AND MIDWIVES COUNCIL.
- EXT.P4 : PHOTOCOPY OF THE RETURN FILED BY THE PETITIONER DATED 02.08.2008 UNDER THE PANCHAYATH RAJ ACT AND RULES.
- EXT.P5 : PHOTOCOPY OF THE REVENUE RECOVERY DEMAND NOTICE SERVED ON THE PETITIONER DATED 11.02.2010.
- EXT.P6 : PHOTOCOPY OF THE PROTEST LETTER SUBMITTED BY THE PETITIONER BEFORE THE 3RD RESPONDENT DATED 05.08.2008.

RESPONDENTS' EXHIBITS:

- EXT.R3(a) : COPY OF THE RECEIPT EVIDENCING TO THE PAYMENT OF BUILDING TAX BY THE PETITIONER DATED 05.08.2008.

//TRUE COPY//

P.A. TO JUDGE

DAMA SESHADRI NAIDU, J.

W.P. (C) No. 8112 of 2010

Dated this the 17th day of December, 2016.

JUDGMENT

In Perspective:

A Trust runs a nursing college; college buildings are exempted from building tax. But the college paid the tax in the previous year. In the next year, it objected to the Grama Panchayat's demand. In response, the Grama Panchayat has initiated coercive steps to realize the building tax. Aggrieved, the college assails the Grama Panchayat's action. These issues arise: 1. Has the whole building been exempted or only a part of it directly connected with 'educational purpose'; 2. Has the college been estopped from questioning the Grama Panchayat's action for it paid the tax in the previous year; 3. Has the petitioner acquiesced in the Grama Panchayat's demand for tax? None of these issues, I hold, sustains

itself against the petitioner.

Brief Facts:

2. The petitioner is the Manager of a Nursing College run by an Educational Trust. The third respondent is the Grama Panchayath in the territorial limits of which the petitioner's College is situated. In the course of time, the Grama Panchayath issued Ext.P5 revenue-recovery demand notice insisting that the petitioner should pay ₹1,53,411/- as building tax for the year 2009-2010. Aggrieved, the petitioner filed this writ petition.

3. To be more specific, 'Palai Diocesan Medical Educational Trust' owns and manages 'Mar Sleeve College of Nursing'. The College has been taxed, and the Trust is answerable. But the Grama Panchayath had issued Ext.P5 notice to the petitioner, instead of either the College or the Trust. So the petitioner filed the writ petition, describing himself as the Manager of the College, though. The technicality that the Trust, a legal entity, or the College, in the

alternative, ought to have filed the writ petition may not weigh us down. Disregarding the technicality, I may proceed further.

4. The College received its affiliation through Ext.P1 dated 02.11.2009 from the Mahatma Gandhi University and recognition through Ext.P2 dated 30.09.2009 from the Indian Nursing Council, New Delhi. The College constructed a building to accommodate classrooms and a hostel, as well as the administrative wing of the college. Concluding that the petitioner had failed to pay the building tax, the Grama Panchayath issued Ext.P5 revenue-recovery demand notice. The notice seems to be under Rule 14 of the Kerala Panchayath Raj (Taxation, Levy, and Appeal) Rules, 1996 (“the Rules”).

Submissions:

(a) The Petitioner’s:

5. Sri Isaac Kuruvilla Illikal, the learned counsel for the petitioner, has submitted that Ext.P5 violates Rule 8 of the Rules,

which mandates service of bills as a pre-condition before the Grama Panchayath could invoke Rule 14 of the Rules. He has also contended that under Section 207(c) of the Panchayat Raj Act ('the Act'), a college building comprehensively stood excluded from building tax, at least, until the provision suffered an amendment on 07.10.2009.

6. The learned counsel, in elaboration of his submissions, has also submitted that the Grama Panchayat has not followed Rule 3 of the Rules: the Grama Panchayat ought to have passed a resolution determining the levy of tax before it could demand that tax. Absent the tax determination, the Grama Panchayat must have taken no coercive steps on the premise the taxpayer has failed to pay the tax.

7. Eventually, the learned counsel has taken me through the counter affidavit filed by the Grama Panchayat. According to him, the Grama Panchayat wants to sustain itself on the strength of the judgment rendered by this Court in ***Josegiri Hospital v. Government***

*of Kerala*¹. But in *Unity Hospital (P) Ltd. v. State of Kerala*², a Full Bench of this Court, submits the learned counsel, declared *Josegiri Hospital per incuriam*.

8. To sum up his submissions, the learned counsel has submitted that Ext.P5 notice cannot be sustained for the Grama Panchayath lacks the statutory backing. In other words, the notice is *ultra vires* of the authorities, and they cannot demand any tax from the petitioner.

(b) The Respondent's:

9. *Per contra*, the learned Standing Counsel for the Grama Panchayat has submitted that the Grama Panchayat levies building tax under Section 203 of the Act. According to him, the Rules that govern the building tax are the Kerala Panchayath Raj (Building Tax and the Surcharge thereon) Rules, 1996, which have been framed under Sections 203 and 208, r/w Section 254 of the Act.

10. Drawing my attention to Rule 6 (2) of the Rules, the

¹ . 2008(3) KLT 627

² . 2011(1) KLT 236 (F.B)

learned Standing Counsel would contend that an assessee should remit the entire tax by 31st October of that financial year. Here the petitioner, contends the learned Standing Counsel, failed to pay the tax; the petitioner's failure compelled the Grama Panchayat to initiate coercive steps.

11. In elaboration of his submissions, the learned Standing Counsel has also contended that the petitioner, in fact, paid the building tax for the year 2008-2009. So the petitioner is estopped from contending that the college has been exempted from paying tax. The petitioner, in the Standing Counsel's words, has acquiesced in paying the tax. Eventually, he submitted that the petitioner has an efficacious alternative remedy under Section 276(5) of the Act or Rule 10 of the Rules.

12. Summing up his submissions, the learned Standing Counsel has submitted that if one were to assume that the petitioner had been exempted from paying the tax, given the amendment to Section

207of the Act on 07.10.2009, he ought to have paid the tax for the balance period of that particular taxing year, at least. During the course of his submissions, the learned Standing Counsel, I must observe, has given up his defence that the demand was under the Kerala Panchayath Raj (Building Tax and the Surcharge thereon) Rules 1996; instead, he focused on the pleas of estoppel and acquiescence.

Petitioner's Reply:

13. In reply, the petitioner's counsel has submitted that the petitioner had paid building tax for the year 2008-2009 under protest, as is evident from Ext.P6 protest letter.

14. Heard Sri Isaac Kuruvilla Illikkal, the learned counsel for the petitioner, the learned Government Pleader, and the learned Standing Counsel for the third respondent, apart from perusing the record.

Issues:

I. The petitioner's college has a building; part of it accommodates the classrooms; and another a hostel. Under Section 207 of the Kerala Grama Panchayat Act, buildings used for educational purposes were exempted from building tax. Is the whole building excepted from tax or only that part of the building used purely for 'education purpose' exempted?

II. The petitioner paid tax for the previous year. In the next year he objected to the Grama Panchayat's demand for tax. Has the petitioner been estopped from negating his tax liability?

III. By paying the tax in the previous year, has the petitioner acquiesced in the Grama Panchayat's demand for tax, or waived his right to assert himself against the tax-imposition?

IV. Does the petitioner have an alternative remedy?

Discussion:

Issue No.1:

15. As seen from the statutory scheme of the Act, Section 203 of the Act empowers the Grama Panchayat to levy property tax. Indisputably, clause (c) of Section 207 of the Act has exempted, among other things, the educational institution from paying tax. That exemption was in vogue until Section 207 suffered an amendment on 07.10.2009. The unamended provision, to the extent relevant, reads

as follows:

“Section 207 (c): Buildings including hostels under the ownership and use of educational institutions recognised by Government, public buildings used for charitable purposes of providing shelter to destitutes and animals and libraries and playground open to public.”

16. In fact, from 07.10.2009, only hospitals treating patients free of cost have been exempted from tax, Cess, etc.

Precedential Position:

Josegiri Hospital:

17. As has been rightly contended by the petitioner’s counsel, this Court’s decision in *Josegiri Hospital* was declared *per incuriam* in *Unity Hospital*—rendered by a Full Bench.

18. To begin with, in *Josegiri Hospital* the petitioner was running a Nursing School in the ground and the first floor of a building; it accommodated students in the second and third floors. The petitioner maintained that the whole building was used for educational purpose: to run a nursing school. In other words, he claimed tax exemption for the building under Section 3(1)(b) of the

Act. But the Government passed an order declaring that the petitioner should pay tax for the second and third floors of the building. A Division Bench of this Court has held that the activities which are integral, immediate, and proximate to the education of students would come within the meaning of the expression 'educational purpose' under Section 3(1)(b) of the Act. And the 'education purpose' would not include dormitory, boarding house, or hostel.

Unity Hospital:

19. A Full Bench of this Court, under identical facts, took a different view in *Unity Hospital*: education is a separate head; nothing indicates that, to claim exemption for a building used for educational purpose, education should be rendered free. Though education is not a business, it involves collection of reasonable tuition fees as well as hostel charges if accommodation is provided. Since exemption is available for all buildings used for educational

purposes, exemption would be available even if charges are levied from students for coaching as well as for hostel facilities.

20. In the end, the Full Bench has held that buildings owned by educational institutions for providing hostel accommodation to students qualify for exemption under clause (b) of Section 3(1) of the Act. But it has sounded a note caution observing that all buildings accommodating students do not qualify for building tax exemption because there are so many buildings constructed by various people around educational institutions which do not have hostel facility. Those individuals let out the buildings to students. So the private agencies letting out buildings is a commercial activity, whether tenants are students or not. In other words, only hostel buildings owned by educational institutions will qualify for exemption under clause (b) of Section 3(1) the Act. *Josegiri* was overruled.

Issues Nos.II & III:

Has the petitioner been estopped from negating his tax liability, or has he acquiesced in the Grama Panchayat's demand for tax or

waived his right to assert himself against the tax-imposition?

21. I may refer to the Grama Panchayat's other contentions: that the petitioner was estopped from contending that the College had been exempted; that the petitioner had also acquiesced, for he had paid the building tax for the year 2008-2009. I am afraid the pleas are unsustainable for more than one reason.

Estoppel, Waiver, and Acquiescence:

22. To delineate the semantic significance of these expressions, I may refer to *Black's Law Dictionary*,³ which defines "estoppel" as voluntary relinquishment or abandonment—express or implied—of a legal right or advantage. The party alleged to have waived a right must have had both knowledge of the existing right and the intention of forgoing it.

23. The lexicon quotes William R. Anson's⁴ lyrical lines: "The term waiver is one of those words of indefinite connotation in which our legal literature abounds; like a cloak, it covers a multitude of

³ 9th Ed.

⁴ Principles of the Law of Contract 419 (Arthur L. Corbin ed., 3d Am. ed. 1919).

sins." It also quotes from Restatement (Second) of Contracts:⁵

"'Waiver' is often inexactly defined as 'the voluntary relinquishment of a known right.' When the waiver is reinforced by reliance, enforcement is often said to rest on 'estoppel.' . . . Since the more common definition of estoppel is limited to reliance on a misrepresentation of an existing fact, reliance on a waiver or promise as to the future is sometimes said to create a 'promissory estoppel.' The common definition of waiver may lead to the incorrect inference that the promisor must know his legal rights and must intend the legal effect of the promise. But . . . it is sufficient if he has reason to know the essential facts."

24. Cynical sounding are Robert E. Keeton & Alan I. Widiss⁶, who said, "Waiver is often asserted as the justification for a decision when it is not appropriate to the circumstances." E. Allan Farnsworth⁷, on the other hand, observes: "Although it has often been said that a waiver is 'the intentional relinquishment of a known right,' this is a misleading definition. What is involved is not the relinquishment of a right and the termination of the reciprocal duty but the excuse of the nonoccurrence of or a delay in the occurrence of a condition of a duty."

25. Further, an "implied waiver", according to Black's, is a

⁵ § 84 cmt. b (1979)

⁶ Insurance Law § 6.8, at 719 (1998).

⁷ Contracts § 8.5, at 561 (3d ed. 1999).

waiver evidenced by a party's decisive, unequivocal conduct reasonably inferring the intent to waive. "An implied waiver may arise where a person has pursued such a course of conduct as to evidence an intention to waive a right, or where his conduct is inconsistent with any other intention than to waive it. Waiver may be inferred from conduct or acts putting one off his guard and leading him to believe that a right has been waived. Mere silence, however, is no waiver unless there is an obligation to speak."⁸

26. As to “estoppel”, the lexicon, defines it to be (1) a bar that prevents one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true; (2) a bar that prevents the relitigation of issues; (3) an affirmative defense alleging good-faith reliance on a misleading representation and an injury or detrimental change in position resulting from that reliance. "Estoppe," the lexicon quotes Lord Coke, 'cometh of the French word estoupe, from whence the English word stopped; and it

⁸ 28 Am. Jur. 2d Estoppel and Waiver § 160, at 845-46 (1966).

is called an estoppel or conclusion, because a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth.' Estoppel may also be defined to be a legal result or 'conclusion' arising from an admission which has either been actually made, or which the law presumes to have been made, and which is binding on all persons whom it affects."⁹

27. John H. Wigmore¹⁰ observes: "In using the term 'estoppel,' one is of course aware of its kaleidoscopic varieties. One reads of estoppel by conduct, by deed, by laches, by misrepresentation, by negligence, by silence, and so on. There is also an estoppel by judgment and by verdict; these, however, obviously involve procedure. The first-named varieties have certain aspects in common. But these aspects are not always interpreted by the same rules in all courts. The institution seems to be flexible."

28. Acquiescence, pure and simple, is a person's tacit or passive

⁹ Lancelot Feilding Everest, Everest and Strobe's Law of Estoppel 1 (3d ed. 1923).

¹⁰ the Scientific Role of Consideration in Contract," in Legal Essays in Tribute to Orrin Kip McMurray 641, 643 (1935), as quoted in Black's Law Dictionary

acceptance; implied consent to an act. *Oxford Dictionary of Law*¹¹ cautions that care must be taken, in law, to distinguish between mere knowledge of a situation and positive consent to it. For example, in the defence of *volenti non fit injuria* an injured party will not be regarded as having consented to a risk simply because he knew that the risk existed. According to *Bouvier's Law Dictionary*¹², the acts of acquiescence which constitute an implied election, must be decided rather by the circumstances of each case than by any general principle.

29. Everyone has a right to waive an advantage or protection which law seeks to give him/her, holds the Supreme Court in ***Jaswantsingh Mathurasingh v. Ahmedabad Municipal Corpn.***¹³ Illustratively, the Apex Court says if a notice is issued and no representation was made by either the owner, tenant, or a sub-tenant, it would amount to waiving an opportunity, and such person cannot

¹¹ 5th Ed.

¹² 6th Ed.

¹³ 1992 Supp (1) SCC 5 at page 15

be permitted to turn round to say that the authority has not complied with one statutory provision or another. In fact, *Jaswantsingh Mathurasingh* draws a line of distinction between waiver and estoppel. It holds that although the principle of waiver is akin to the principle of estoppel, the difference, however, is that estoppel is not a cause of action; it is a rule of evidence. But waiver is contractual and may constitute a cause of action. It is an agreement between the parties and a party fully knowing of its rights has agreed not to assert a right for a consideration.

30. In *Municipal Corpn. of Greater Bombay v. Hakimwadi Tenants' Assn.*¹⁴, the Supreme Court, on the other hand, has observed that, to constitute waiver, there must be voluntary and intentional relinquishment of a right. The essence of a waiver is an estoppel and where there is no estoppel, there is no waiver. Estoppel and waiver are questions of conduct and must necessarily be determined on the facts of each case.

¹⁴ 1988 Supp SCC 55 at page 65

31. In *Estoppel by Conduct and Election* by Mr. Justice K.R.Handley¹⁵, acquiescence as equitable defence has been elaborated upon thus:

“Acquiescence after the event is an equitable defence when inaction, delay, and other facts make it inequitable for the claimant to enforce his rights. This defence and an estoppel by representation overlap when the claimant by his conduct represents to the defendant that he has abandoned his rights or does not intend to enforce them In such a case there could be an estoppel if the defendant was thereby induced to change his position. This defence is connected with that of laches and does not depend on an estoppel.

32. In *Goldsworthy v Brickwell* the plaintiff had granted a tenancy of his substantial farm to the first defendant, and made him a partner. The first defendant later bought out the plaintiff, who was in turn later reconciled with his only son. The son, in fact, previously had had some considerable involvement with the farm. The plaintiff gave a general power to the son, who then sought to set aside the transactions as having been obtained by undue influence. On the issue of acquiescence, Nourse LJ observed, “[a]cquiescence in its proper sense . . . involves a standing by to as to induce the other

¹⁵ Pp.195-96, Ed.2013, Thomson-Sweet & Maxwell

party to believe that the work in assented to. In this sense . . . acquiescence can bear a close resemblance to promissory estoppel.”

33. First, any of the common law or equity principles of estoppel, waiver, or acquiescence is a matter of pleading and proof. The person setting up any of these defences alone has the evidentiary burden. And waiver can be only absent public interest. Further, waiver or acquiescence is in relation to common law or a statutory right. Second, no one can waive a fundamental right, nor can he acquiesce in its breach. As to a constitutional right, contrasted with a fundamental right, it goes half-way—stands between the two extremes: waiver and adherence. In other words, the waiver must be express and unambiguous.

34. Evidently, Ext.P6 is a letter of protest the petitioner submitted, when the college had been compelled to pay the building tax for the year 2008-2009. Further, Article 265 of the Constitution of India is emphatic: neither the Government nor any governmental

agency, including the local self-government, can impose tax without an express authority of law. It is too well established a principle of law to be caviled about that there can be no estoppel against a statute—more particularly, against a constitutional mandate.

35. Here, Section 203 (c) (unamended) clearly exempts the college building from tax. The very demand by the Grama Panchyat is beyond its powers: without any statutory basis. *Ultra vires*. So I hold that the petitioner's paying the tax earlier—even without protest, for instance—could not come in the petitioner's way to raise a plea, and successfully at that, against the college being compelled to pay the building tax. Thus, the Grama Panchayath's plea on the count of either acquiescence or estoppel must fail; and, in fact, it has failed.

Issue No.IV:

Alternative Remedy:

36. Now, I may examine the Standing Counsel's further

contention that the petitioner has an efficacious alternative remedy either under Section 276(5) of the Act or Rule 10 of the Rules. It is, again, trite to observe that once an authority exercises power not conferred on him, such exercise is plainly *ultra vires* of that authority. Once any executive action lacks the statutory sanction, that action can be challenged even collaterally on the principle of *ultra vires*. Well established is the legal principle that the self-imposed limitation under Article 226 on the alternative remedy cannot be invoked in the face of the authority's lacking the power—that is, *ultra vires*. I am, therefore, constrained to hold that the writ petition is maintainable, and the challenge the petitioner has laid is equally sustainable.

37. When queried whether the petitioner continued to pay the building tax for the succeeding years given the amendment to Section 207 on 07.10.2009, the petitioner's counsel submitted that the very provision was challenged comprehensively in W.P.(C) No.

5935 of 2015. And the writ petition is still pending. Then it may be meet to mention that the petitioner's obligation to pay tax depends on the outcome of W.P.(C) No. 5935 of 2015. About the balance period of the taxing-year 2009-2010, for the amendment came into effect only in the middle of the year, the Grama Panchayath is free to proceed under law, subject to the outcome of W.P.(C) No. 5935 of 2015.

The writ petition is allowed, and Ext.P5 is set aside. No order on costs.

**DAMA SESHADRI NAIDU,
JUDGE.**

rv

W.P.(C.) No.8112/2010

-23-