IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE THE CHIEF JUSTICE MR. A.J.DESAI

&

THE HONOURABLE MR.JUSTICE V.G.ARUN

WEDNESDAY, THE 3RD DAY OF APRIL 2024 / 14TH CHAITHRA, 1946

WA NO. 1520 OF 2023

AGAINST THE JUDGMENT DATED 14.06.2023 IN WP(C) NO.10791 OF 2012 OF HIGH COURT OF KERALA

APPELLANTS/PETITIONERS:

1 DR.P.J.JOY
AGED 75 YEARS, DR.JOY'S HOSPITAL FOR WOMEN, THAIKOODAM, VYTTILA, KOCHI, PIN – 682 019

2 DR. ANNE JOY
AGED 73 YEARS, DR.JOY'S HOSPITAL FOR WOMEN, THAIKOODAM, VYTTILA, KOCHI, PIN – 682 019

BY ADVS KURIAN GEORGE KANNANTHANAM (SR.)

TONY GEORGE KANNANTHANAM

RESPONDENTS/RESPONDENTS:

1 THE CORPORATION OF KOCHI
REPRESENTED BY THE SECRETARY PARK AVENUE ROAD KO-CHI, PIN - 682011

2 THE SECRETARY
CORPORATION OF KOCHI, PARK AVENUE ,KOCHI, PIN - 682011

BY ADV K B ARUNKUMAR

THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON 03.04.2024, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

"CR"

JUDGMENT

Dated this the 3rd day of April 2024

A.J. Desai, C.J.

The question involved in this appeal is whether the owner and occupier of a building, who has constructed the building in tune with the building permit granted by the Corporation, can be made liable to pay the tax and penalty under Section 242 of the Kerala Municipality Act, 1994 (for short "Act"), on the ground that the building was occupied without obtaining the certificates mandated as per Rule 22 of the Kerala Municipality Building Rules, 1999 (for short "1999 Rules").

2. The short facts that arise from the record are as under: The appellants/petitioners had applied for the construction of a hospital building consisting of ground plus four floors way back in the year 2001. The plan submitted along with the application was sanctioned and the appellants issued with Ext.P1 building permit dated 25.03.2002. The appellants completed the construction of the ground floor in the year 2003 and the rest of the floors in the year 2011. Thereafter,

the appellants requested the Corporation to grant certificates as provided under Rule 22 of the 1999 Rules. In response to the said request, a communication was sent by the Corporation on 30.04.2011, asking the appellants to submit the no objection certificates issued by the Fire Force Department and the Pollution Control Board. It is the case of the appellants that, in spite of such certificates being produced in March 2012, the occupancy certificate was not issued. Meanwhile, the Corporation issued a notice on 05.01.2012 demanding property tax along with the penalty provided under Section 242 of the Act. Objections were raised by the appellants against such demand and ultimately an order was passed on 07.04.2012 (Exhibit P11). By the said order, the appellants were asked to pay the property tax as well as the penalty as provided under Section 242 of the Act. The said order came to be challenged by the appellants by filing the captioned writ petition. The respondents opposed the reliefs sought in the writ petition by filing counter affidavit. The learned Single Judge, after hearing both sides,refused to entertain the writ petition in view of the alternate remedy of appeal available under the Act. Hence, this

appeal.

3. The learned Senior Counsel Mr. Kurian George Kannanthanam would submit that the case of the Corporation all throughout has been that the building was unauthorisedly occupied and not regarding unlawful construction of the building. He would submit that the Corporation had specifically stated in the first communication (Exhibit P4) dated 30.04.2011 that the construction work has been completed in tune with the building permit No. KRP1-474/2001 dated 25.03.2022. He would submit that only if a building is constructed unlawfully, the owner can be penalised under Section 242 of the Act. He would submit that, after construction of the 1st floor and issuance of partial occupancy certificate, the nurses working in the hospital conducted in the portion for which partial occupancy certificate had been issued, used to take rest in the second floor. Terming such usage as unauthorised occupancy, the Corporation had raised the unconscionable demand for tax. He would further submit that there is no provision either in the Act or in the 1999 Rules empowering the Corporation to impose penalty if the property is occupied without obtaining

the certificates under Rule 22 of the 1999 Rules. He would submit that as per sub-section (25) of Section 2 of the Act, the term 'occupier' includes the owner who is in occupation of a building, which is the case on hand. Therefore, even if the building is occupied for some time without appropriate certificates, the authority cannot levy tax under Section 242 of the Act. He, therefore, would submit that the order impugned in the writ petition, i.e., Exhibit P11 dated 07.04.2012, is required to be quashed and set aside. He would submit that these aspects have not been properly taken note of by the learned Single Judge and therefore, the judgment impugned may also be set aside.

4. On the other hand, the learned Standing Counsel for the Corporation vehemently submitted that the Corporation has not committed any error in issuing notice under Section 242 of the Act. He would submit that the Corporation is empowered to levy tax for buildings constructed/ reconstructed or utilised unlawfully, at three times the normal property tax payable. He would submit that, when the officials of the Corporation visited the premises in question, the

building was found occupied with the permission of the appellants and that too, without obtaining the certificates to be issued by the Corporation under Rule 22 of the 1999 Rules. Therefore, he would submit that the building, even if constructed in tune with the permit, is required to be treated as one constructed unlawfully and the Corporation has rightly levied three times the property tax as stipulated in Section 242 of the Act. According to the Standing Counsel, these aspects have been correctly dealt with by the learned Single Judge and, therefore, the impugned judgment warrants no interference.

5. We heard learned Advocates appearing for the respective parties.

6. The translated version of the communication issued in response to the request made by the appellants for grant of certificates under Rule 22 of the 1999 Rules (Exhibit P4), reads as under:

"**CORPORATION OF COCHIN**

KRP1-474/01

Corporation Office, P.B.No.1016,
Ernakulam, Kochi - 682 011.
Date: 30-04-2011

NOTICE

Sub: Cochin Vyttila Region Town Planning - Building Construction - Reg. Giving occupancy.

Ref: 1. Building Permit No.KRP1-474/2001 dated 25-3-2002.
2. Application for Occupancy, dated 15-3-2011.

Since the construction of the Building in Dvn.No. 46 in Sy.No.1042/1, 2, 4 of Poonithura Village, was complete in tune with the building permit referred to as Item No.1 above, application for occupancy was submitted as per reference mentioned as Item No.2 above.

The application for occupancy can be considered only if NOC from the Fire Force Department and Pollution Control Board are produced.

Therefore you are directed to produce the NOC from the Fire force and Pollution Control Board within 30 days of receipt of this notice.

Sd/-
Asst. Executive Engineer

Dr.P.J. Joy MD
Dr. Annie Joy,
Director and Partners
Dr. Joys Hospital,
Vyttila, Cochin – 15."

7. From the above communication, it is evident that the Corporation has accepted the entire building i.e. the ground and four floors, to have been constructed in accordance with

the building permit issued to the appellants. The only demand in the said notice was to produce no objection certificates from the Fire Force Department and the Pollution Control Board. Therefore, it cannot be said that the building is unlawfully constructed.

8. In our considered opinion, construction of a building and its occupation are not the same. If a person, after completing the construction in accordance with the permit granted by the Corporation occupies the building without obtaining occupancy certificate, tax cannot be levied under Section 242 of the Act. The learned standing counsel for the Corporation having contended that in case of illegal occupancy also, tax is liable to be paid as provided under Section 242 of the Act, it is essential to read that provision carefully.

9. Section 242 of the Act reads as under:

> "**242. Levying of tax for the building constructed unlawfully.—** (1) Notwithstanding anything contained in this Act or the rules made thereunder, where any person has unlawfully constructed or reconstructed any building, such building shall without prejudice to any action that may be taken against that person, be liable to pay the sum of property tax that would have been paid, had the

said building been constructed lawfully, together with twice the amount, towards property tax of the building constructed unlawfully with effect from the date of completion or utilisation of that for any of the purpose mentioned in sub-section (2) of section 233, whichever is earlier, till the date of demolition of that building.

(2) Nothing contained in sub-section (1) shall preclude the Secretary from proceeding against such person under section 406 of the Act and the owner shall not have the right to get any compensation due to any action taken by the Secretary under this section.

(3) No building number as provided under section 380 shall be affixed to the building constructed unlawfully and they shall be given special number as prescribed. Any delay in giving special number shall not be a bar to levy property tax retrospectively under sub-section (1).

(4) Secretary shall maintain ward-wise special registers recording the survey number of the land on which the building has been constructed unlawfully, name and particulars of the owner of the land, special number given to the building, details of property tax levied and collected for the building.

(5) The Municipality shall not grant permit or licence to use the building constructed unlawfully and given a special number as provided in subsection (3) and liable to be proceeded against under section 406, for any trade, commerce or industrial purposes or any other purposes and if the Municipality has granted any permit

or licence, that shall be reconsidered and cancelled after giving notice to the owner of the building and the licencee."

10. Sub-section (1) of Section 242 leaves no room for doubt that, imposition of tax under the provision would apply only if the building is constructed/re-constructed unlawfully or such unlawfully constructed building is utilised for any of the purposes mentioned in sub-section (2) of Section 233. Although construction is not defined in the Act, reconstruction is defined under Section 2(38). The dictionary meaning of the word "construction" is "the process or method of building or making something, especially roads, buildings, bridges, etc.". The contention of the Standing Counsel for the Corporation that, utilisation of a building for any of the purposes mentioned in Section 233(2) would also attract tax and penalty under Section 242 can only be rejected, since a careful reading of the provision would show that it is not mere utilisation of a building that would attract the provision, but utilisation of an unlawfully constructed building. Therefore, in our considered opinion, the Corporation cannot charge tax under Section 242 alleging unauthorised occupation of the appellants' building. As the

order under challenge cannot be perceived as one issued under Section 242 of the Act, the finding of the learned Single Judge that the appellants have an effective alternate remedy under Section 509 of the Act cannot also be sustained.

11. When we raised a query to the learned standing counsel for the Corporation about the specific provision enabling levy of penalty for unauthorised occupation, he could not bring to our notice any such provision either in the Act or in the Rules, other than Section 242 of the Act. In this context, we also take note of Article 265 of the Constitution of India which stipulates that no tax shall be levied or collected except by authority of law.

12. Having held so, we take note of Section 233 of the Act which empowers the Corporation to levy the property tax on every building, except those which are exempted as per the provisions of the Act. Insofar as the appellants' building was occupied even prior to the issuance of the occupancy certificate, the Corporation can calculate and levy tax from the period of unauthorised occupancy.

Accordingly, the appeal is allowed, the judgment

impugned is set aside and Exhibit P11 order, quashed. The Corporation shall issue appropriate notice under Section 233 of the Act within a period of 10 days. As the appellants have already remitted some amount towards property tax based on this Court's order, the Corporation shall also furnish the appellants with the details of the deficit, if any, in the property tax remitted.

Pending interlocutory applications, if any, shall stand closed.

Sd/-

A.J. Desai
Chief Justice

Sd/-
V.G. Arun
Judge

vpv