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ibrahim Vs. the State of Kerala

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Court : Kerala

Decided On : Nov-11-2013

Judge : Honourable Mr.Justice K.Surendra Mohan

Appellant : ibrahim

Respondent : The State of Kerala

Judgement :

IN THE HIGH COURT OF KERALAAT ERNAKULAM PRESENT: THE HONOURABLE MR.JUSTICE K.SURENDRA MOHAN MONDAY,THE11H DAYOF NOVEMBER201320TH KARTHIKA, 1935 WP(C).No. 19692 of 2013 (J) ---------- PETITIONER: ---------- IBRAHIM S/O.PUTHIYAPURAKAL IBRAHIM, KANNUR, THANE KANNUR DISTRICT. BY ADV. SRI.G.SREEKUMAR (CHELUR) RESPONDENT(S): ---------- 1. THE STATE OF KERALA REPRESENTED BY THE SECRETARY TO THE GOVERNMENT LOCAL SELF GOVERNMENT DEPARTMENT, GOVT. SECRETARIAT THIRUVANANTHAPURAM-695001.

2. THE KANNUR MUNICIPALITY REPRESENTED BY ITS SECRETARY,MUNICIPAL OFFICE KANNUR-679001. R1 BY GOVERNMENT PLEADER SRI RINNEY STEPHEN CHAMAPARAMBIL R2 BY ADV. SRI.K.K.CHANDRAN PILLAI (SR.) R2 BY ADV. SRI.THOMAS JAMES MUNDACKAL THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON1111-2013, THE COURT ON THE SAME DAY DELIVERED THE

FOLLOWING: WP(C).No. 19692 of 2013 (J) ---------- APPENDIX PETITIONER(S)' EXHIBITS ---------- EXHIBIT P1 : TRUE COPY OF THE PROCEEDINGS OF THE SECOND RESPONDENT DT.21-5-2010. EXHIBIT P2 : TRUE COPY OF THE NOTICE DT.10-10-2011. EXHIBIT P3 : TRUE COPY OF THE REPLY GIVEN BY THE PETITIONER DT.12-10-2011. EXHIBIT P4 : TRUE COPY OF THE TAX RECEIPTS ISSUED TO THE PETITIONER DT.10- 10-2011. EXHIBIT P5 : TRUE COPY OF THE NOTICE OF THE SECOND RESPONDENT DT.11-11- 2011. EXHIBIT P6 : TRUE COPY OF THE COMMUNICATION OF THE FIRE AND RESCUE SERVICE DIVISIONAL MAIN OFFICE, MEENCHANTHA, KOZHIKODE DT.22-6-2011. EXHIBIT P7 : TRUE COPY OF THE

JUDGMENT
IN WPC31145OF 2011 DT.19-12-2012 OF THIS COURT. EXHIBIT P8 : TRUE COPY OF THE

ORDER
PASSED BY THE SECOND RESPONDENT DT.23-7-2013. EXHIBIT P9 : TRUE COPY OF THE OBJECTION ALONG WITH THE DETAILS SUBMITTED BY THE PETITIONER BEFORE THE SECOND RESPONDENT DT.21.10.13. EXHIBIT P10: COPY OF RECEIPT ISSUED BY THE SECOND RESPONDENT DT.21.1013. RESPONDENT(S)' EXHIBITS: NIL TRUE COPY P.A.TO JUDGE dsn K.SURENDRA MOHAN, J.

---------- W.P.(C)No.19692 Of 2013
---------- DATED THIS THE11h DAY OF NOVEMBER, 2013

JUDGMENT
The petitioner has constructed a building pursuant to a building permit issued by the 2nd respondent-Municipality. After the construction was completed, the ground floor and first floor were initially found to be in order, completion and occupancy certificates were issued to him and his tenants commenced occupation of the said portions. However, with respect to the 2nd and 3rd floors of the building, though construction is complete, occupancy certificate has not been issued. Instead, the

petitioner's construction has been treated as an unauthorised construction and the same has been subjected to assessment under Section 242 of the Kerala Municipality Act, 1994('the Act' for short). The allegation against the petitioner is that, he had inducted tenants into the said portions, even before a completion certificate or occupancy certificate was issued to him. For the above reason, the said floors have been treated as unauthorised constructions and assessed under Section 242 of the Act. WPC.No.19692/13 -2- 2. The petitioner had earlier approached this Court by filing W.P.(C)No.31145/2011. The same was finally disposed of by Exhibit P7 judgment dated 19.12.2012 directing the 2nd respondent to treat the order that was under challenge therein as a show cause notice, to consider the objections of the petitioner and to pass fresh orders thereon, in accordance with law. Accordingly, Exhibit P8 order has been passed on 23.7.2013. The said order is under challenge in this Writ Petition. As per Exhibit P8, the petitioner has been again assessed under Section 242 of the Act and a total amount of Rs.71,46,841/- (Rupees Seventy One Lakhs Forty Six Thousand Eight Hundred and Forty One only) has been demanded from him. The petitioner has submitted Exhibit P9 objections to Exhibit P8, which is pending before the 2nd respondent.

3. According to Sri Sreekumar G.(Chelur), the entire second and third floor portions of the building had not been let out to tenants as alleged, before occupancy certificate was issued to him. Only certain portions thereof had been so let out. He has given the details of each portions of the building in Exhibit P9. The assessment made under Section 242 of the Act is proceeded on the basis that the entire second and third floor portions had been given WPC.No.19692/13 -3- on rent, which according to the counsel, is factually incorrect and unsustainable.

4. A larger contention is also raised, that the construction made by the petitioner being not in violation of the building permit issued to him or the provisions of the Act and the Rules thereunder, is not liable to be assessed under Section 242 of the Act. Therefore, he seeks the issue of appropriate orders setting aside Exhibit P8. It is further stated that the petitioner has made payment of an amount of Rs.15 lakhs pursuant to the direction in Exhibit P7 judgment. He has remitted an additional amount of Rs.8,60,979/- thereafter, which is the half yearly tax due from

him as per Exhibit P8. Therefore, given credit for the said amount, the amount demanded in Exhibit P8 is required to be suitably modified and corrected. He disputes the liability to pay any penalty as demanded by the 2nd respondent, for the reason that his construction is in fully conformity with the Acts and the Rules.

5. Senior Counsel Sri K.K.Chandran Pillai appears for the 2nd respondent. According to the learned Senior Counsel, the original sanction granted to the petitioner was for the construction of a four storied building. The ground floor and first floor were WPC.No.19692/13 -4- constructed initially and completion certificate as well as occupancy certificate was issued in respect of the completed portions. They were, thereafter, let out to various tenants. With respect to the 2nd and 3rd floor portions, without obtaining either a completion certificate or an occupancy certificate, the petitioner had inducted tenants into them. The said act was absolutely unauthorised and therefore the said portions were treated as unauthorised constructions and assessed under Section 242 of the Act. According to the learned Senior Counsel, the illegal act of the petitioner was detected upon a Vigilance inspection. The petitioner had challenged the initial order before this Court and in accordance with the direction contained in Exhibit P7, the matter was considered again and Exhibit P8 order has been passed. According to the counsel, Exhibit P7 is perfectly justified and does not call for any interference by this Court.

6. Heard.

7. Section 242 of the Act reads as follows: "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 WPC.No.19692/13 -5- 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 sub-section (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 licensee." 8. A perusal of the above provisions shows that the same is to apply to a situation "where any person has unlawfully WPC.No.19692/13 -6- constructed or reconstructed any building". In the present case, it is not in dispute that the petitioner's construction is not an unlawful one. The same has been constructed in accordance with the building permit and plan sanctioned by the Municipality. There is also no allegation that there is any violation of any of the provisions of the Act and the Rules. Section 242 of the Act further makes it clear that "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 that would have been paid, had the said building been constructed lawfully together with twice the amount, towards the property tax of the building constructed unlawfully with effect from the date of completion or utilisation." Therefore, the levy of property tax under this provision is contemplated with respect to such building that has been constructed unlawfully. The penalty of twice the amount of property tax that may be levied on a lawful construction, is also permitted to be levied only on an unlawful building. The petitioner's building not being an unlawful construction is therefore not liable to be assessed under Section 242 of the Act. For the above reason, the penalty assessed on the petitioner is unsustainable. It is

held so. WPC.No.19692/13 -7- 9. The petitioner has a further contention that no portions of the 2nd and 3rd floors had been rented out to tenants before the issue of an occupancy certificate or completion certificate. Therefore, the portions that had not been given on rent were in any view of the matter not liable to be assessed to property tax. Since it is an admitted fact that the petitioner had inducted tenants into the 2nd and 3rd floor portions of the building, even before a completion certificate or an occupancy certificate was issued to him, it has to be held that the petitioner had started utilising the building, much prior to the date of issue of the said certificates. Therefore, the petitioner cannot disclaim liability to pay property tax in respect of those portions of the building that had been let out, even before an occupancy certificate or completion certificate was issued to him. Therefore, assessment of the said portions to property tax by the 2nd respondent cannot be found fault with. If, as contended by the petitioner, in Exhibit P9 objections, some of the portions of the disputed floors had not been let out on rent, he is also entitled to claim exemption of such portions from the assessment to property tax. However, it is a matter that would have to be ascertained by the 2nd respondent on the basis of WPC.No.19692/13 -8- factual data that would have to be produced before the said authority, to his satisfaction. Therefore, the said exercise is left open to be undertaken by the 2nd respondent, while considering Exhibit P9.

10. In view of the above, it is necessary that the 2nd respondent considers the factual data, if any, that is available and makes a fresh assessment of the disputed building portions to property tax in accordance with law. The petitioner shall be at liberty to produce materials to support his contentions in Exhibit P9. However, as a condition for permitting such a reconsideration, the petitioner would have to pay a further portion of the tax that has been assessed, at the rates in Exhibit P8, since the same is not disputed. The petitioner shall, therefore, remit a further amount of Rs.15 lakhs (Rupees Fifteen Lakhs only) to the Municipality as a condition for such reconsideration. This Writ Petition is therefore disposed of with the following directions. (i) The regular assessment in respect of the building has become final, since there is no challenge against the same by the petitioner. WPC.No.19692/13 -9- (ii) The 2nd respondent shall consider Exhibit P9 objections to the assessment in respect of the 2nd and 3rd floors of the petitioner's building made under Section

242 of the Act and the said portions shall be assessed on regular basis, but with effect from the date of occupation thereof by the tenants. Appropriate orders in this regard shall be issued by the 2nd respondent, after affording an opportunity of being heard to the petitioner and permitting him to produce additional documents in support of his case, if sought for. (iii) As a condition for fresh consideration that has been ordered, the petitioner shall remit a further amount of Rs.15 lakhs (Rupees Fifteen Lakhs only) to the 2nd respondent within a period of three weeks. WPC.No.19692/13 -10- (iv) The amounts paid pursuant to the orders of this Court shall be subject to the final assessment that is to be made by the 2nd respondent. Sd/-(K.SURENDRA MOHAN) JUDGE. dsn

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