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**(2004) 03 KL CK 0044**  
**In the High Court Of Kerala**  
**Case No : Writ Petition (C) No. 31647 of 2003**

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| Girilal               | Vs | APPELLANT  |
| Corporation of Cochin |    | RESPONDENT |

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**Date of Decision :** 19-03-2004

**Acts Referred:**

Kerala Building Rules, 1984 — Rule 18, 21(12), 5  
Kerala Municipalities Act, 1994 — Section 410  
Travancore-Cochin Interpretation and General Clauses Act, 1125 — Section 23

**Citation :** (2004) 2 KLT 251

**Hon'ble Judges :** K. Balakrishnan Nair, J

**Bench :** Single Bench

**Advocate :** Jacob Mathew Manalil, for the Appellant; K. Ramakumar, T. Ramprasad Unni, Noble Mathew and Babu Varghese and M.A. Thomaskutty, Government Pleader, for the Respondent

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## Judgement

K. Balakrishnan Nair, J.—The petitioners are the owners of residential flats in a multistoreyed building named "Kannarkat Condominium", constructed by the 7th respondent, which is a partnership firm. Presently, the said building has eight storeys with 16 flats. In this Writ Petition, the petitioners challenge Ext.P1(A) exemption order issued by the Government in favour of the 7th respondent under Rule 5 of the Kerala Building Rules, 1984 and also Ext.P10(B) permit issued by the Corporation of Cochin, based on that Government Order. The brief facts of the case are the following:-

2. The petitioners and the Managing Partner of the 7th respondent were colleagues in the Indian Navy. When the 7th respondent started the construction of a residential building complex named "Kannarkat Condominium", the petitioners purchased one flat each. The construction of 8 floors of the building was completed in the year 2001 and presently, the petitioners are residing there. They submit, the various facilities promised by the builder were not, in fact, provided and therefore, some disputes are pending between them and the builder, before the Consumer Disputes Redressal Forum and the Civil Court.

Recently, the 7th respondent started construction of additional floors above the existing building to make it a 19 storeyed building. The petitioners submit, there are no sufficient amenities for the existing occupants of the building and if additional floors are constructed, their life will become miserable. There is no sufficient water for the use of the residents. The road leading to the building is a narrow road. The area where the building is constructed, is prone to seismic activity and consequential earthquakes. The present structure itself is in danger. So, the construction of additional floors to the existing building will be a threat to the life and property of the residents of the building and also of those in the neighbourhood, it is submitted. After the filing of the Writ Petition, the petitioners amended it, incorporating the challenge against Ext.P1(A) exemption order of the Government issued under Rule 5 of the Kerala Building Rules, 1984 and also Ext.P10(B) permit issued by the Corporation. According to them, Ext.P1(A) has been issued without adverting to any of the relevant matters liable to be considered u/s 410 of the Kerala Municipality Act, 1994. It is a non-speaking order. No reasons are given for granting exemption from the operation of the Building Rules.

3. Respondents 1 and 2 have filed a counter affidavit, resisting the prayers in the Writ Petition. The 7th respondent has filed a counter affidavit, supporting the impugned orders. In the said affidavit, it is submitted that the petitioners have moved this Court with ulterior motives. They were, aware that the 7th respondent is going to construct a building with 19 floors. Knowing this, the petitioners have purchased and occupied the flats. There are proceedings pending before the Civil Court for settlement of accounts and balance payment of land value, in which the petitioners are parties and in order to escape from the liability to pay the balance amount, it is submitted, they have filed this Writ Petition. The Government have validly granted the exemption and the Corporation, on the strength of it, has validly issued the permit. It is also submitted, the challenge against the Government Order Ext.P1(A) issued in 1996 is highly belated. Further, they are estopped from challenging the construction of additional floors, as they knew that they are purchasing a flat in a building complex, which will have 19 floors. The petitioners have filed reply affidavits to the counter affidavits filed on behalf of the Corporation and the builder. After the amendment of the Writ Petition, the 7th respondent has filed an additional counter affidavit.

4. Heard Shri.Jacob Mathew Manalil, learned Counsel for the petitioners, Shri.Noble Mathew, learned Standing Counsel for respondents 1 and 2 learned Government Pleader Shri. M.A. Thomaskutty, appearing for respondents 4 to 6 and Shri. K. Ramakumar, learned Counsel appearing for the 7th respondent. The main ground urged by the petitioners against Ext.P1 (A) Government Order is that the same has been issued without referring to the relevant matters, which, the Government are bound to consider in the light of Section 410 of the Kerala Municipality Act, 1994. Relying on the decision of this Court in "Tajudin v. District Collector, Kannur" 1996 (2) KLT 525 and the decision of the Apex Court in V.M.

Kurian Vs. State of Kerala and Others, it is submitted that Ext.P1(A) is ab initio void. The order has been passed by the Government, ignoring the views of the Corporation of Cochin and the Chief Town Planner. For deviating from their views, no reason is forthcoming. It is also submitted that the exemption was granted in 1996 for a construction to be made then. The said exemption cannot be used in the year 2003 for the grant of Ext.P10(B). So, even assuming Ext.P1(A) is valid, still, the permit issued based on it recently, is illegal. In support of this submission, reliance is placed on the repeal of Section 410 of the Kerala Municipality Act and Rule 5 of the Kerala Building Rules, 1984. It is also contended that the site, where the building was constructed, comes within the CRZ zone, but the permit was granted without getting clearance from the Ministry of Environment and Forests, New Delhi. The 7th respondent would submit that the petitioners have purchased the flats, knowing fully well that a 36 unit housing complex is being built, with 19 floors. After purchasing the flats with open eyes, they cannot turn round and contend that further constructions should not be made. They are estopped from doing that. Further, the challenge against Ext.P1 (A) is untenable, owing to delay and laches. The permit, having been issued based on Ext.P1 (A) order, is legal and valid, it is contended.

5. Before going into the validity of Ext.P1(A), I will deal with the preliminary objection raised by the 7th respondent on the ground of delay and estoppel. On the basis of Ext.P1 (A), the permit for an 8 storeyed building was granted and the construction of the same was completed in 2001. On the basis of Ext.P1(A), a new permit is issued in May 2003, to construct the balance floors. So, the challenge made against Ext.P1(A), to the extent it enables the issue of Ext.P10(B) permit, cannot be said to be belated. Further, there can be no estoppel against the statute. If Ext.P1(A) has been issued contrary to the statutory provisions, as and when the same is used to issue a building permit the petitioners can challenge it. Therefore, I am not inclined to accept the preliminary objection raised on behalf of the 7th respondent and I am considering the matter on merits.

6. The learned Government Pleader has made available to me, the file relating to the issuance of Ext.P1(A). A perusal of the file would show that the Secretary of the Greater Cochin Development Authority forwarded the application for exemption stating - "May be considered on merit". The Secretary of the Cochin Corporation had stated that the application should be rejected as the proposed plan violates various provisions of the Kerala Building Rules. The Chief Town Planner recommended the grant of permit for a ten storeyed building (ground floor + 9 storeys), subject to 7 conditions. In the face of the said recommendation, the Government passed the exemption order, granting permission for the construction of a 19 storeyed residential apartment, subject to the conditions suggested by the Chief Town Planner for the construction of a 10 storeyed building and also subject to the two additional conditions regarding the provision for (1) one tap for drinking water supply in each flat alone will be allowed and (2) the construction of a mini sewage treatment plant. The

Government have not given any reason for ignoring the views of the Corporation of Cochin and the Chief Town Planner. Neither the Chief Town Planner nor the Corporation was consulted before passing the above order, deviating from their views. The relevant portion of Ext.P1(A) Government Order reads as follows:-

"Under Rule 5 of Kerala Building Rules, 1984 and in consultation with the Local Authority and Chief Town Planner, Government are pleased to exempt the construction of 19 storeyed (Ground + 18 + Roof) residential apartment building in Sy. No. 899/1,2,3, 1465/2,3 of Poonithura Village in Kochi Corporation from Rules 15(3)(a) & 15(5), 17(2), 18, 21(12) of the said Rules as per the plan submitted by them subject to the following conditions:-

1. The party should make their own arrangement for the supply of water except for drinking purpose.
2. The party should make their own arrangement for the disposal of solid waste from the building.
3. Approval of Fire Force Department and Airport Authority is to be obtained.
4. The construction of the building should not make any harm to the safety of the neighbouring residences and should satisfy Section 410 of the Kerala Municipality Act, 1994.
5. A fire escape stair is to be provided.
6. The structural design of the building should conform to Rule 25(6)A and B.
7. If the site is in the CRZ Zone, clearance from the Ministry of Environment and Forest is to be obtained.
8. Only one tap per apartment for the supply of drinking water will be allowed.
9. The builders themselves should set up mini sewage treatment plants for the disposal of sewage from the flats.

This order is not a sanction to start work. Before starting the construction, development permit from Greater Cochin Development Authority and building permit from Kochi Corporation should be obtained."

Section 410 of the Kerala Municipality Act reads as follows:-

"410. Power of Government to grant exemption : Notwithstanding any thing contained in this Act and the Rules made thereunder, the Government may, by order, for reasons to be stated therein, exempt the construction of any building from all or any of the provisions of this Chapter or the Rules made thereunder subject to such conditions or restrictions as may be specified in such order:

Provided that while granting exemption, the Government shall have due regard to the right of privacy, the right to light and air and the right of easement of the neighbour and the right of the public in general and the problems of traffic, flood

and rain:

Provided further that no such exemption shall be granted to construct a building or structure whether temporary or permanent in any land abutting any National Highway, State Highway or District roads or other important roads within a minimum distance of three metres from the boundary of the land owned by the person who sought exemption:

Provided that in the case of a building existing at the commencement of the Act, the necessary exemption from the above said three metre limit may be granted by the Government for the construction of the first floor or second floor or both upon such building."

Interpreting the said provision and Rule 5 of the Kerala Building Rules, 1984, this Court, in the decision in Tajudin 's case mentioned above, held as follows:-

"After the commencement of the Act, power to grant exemption can be exercised by the Government only in accordance with Section 410 read with Rule 5 of the Rules. u/s 410, while issuing an order of exemption, Government has to state reasons for granting exemption in its order. Order can also be issued only on some conditions or restrictions which have to be specified in the order itself. While granting exemption, Government shall have due regard to the right of privacy, right to light and air, right of easement of the neighbour, right of the public in general and the problems of traffic, flood and rain. Therefore, apart from showing reasons in the order granting exemption, order also should show, the Government have bestowed their attention to the right of privacy, right to light and air, right of easement of neighbour, right of the public in general and the problems of traffic, flood and rain."

The Honourable Supreme Court had occasion to consider the above statutory provisions in V.M. Kurian's case mentioned above. In the said decision, the Apex Court held that the favourable recommendations of the G.C.D.A. and the Chief Town Planner are necessary for granting exemption from the operation of the Rules. In that context, the Apex Court held as follows:-

"A perusal of Rule 5 shows that an application for exemption from the provisions of the Rules is required to be processed through GCDA and the Chief Town Planner. The Rule further requires that the application is to be forwarded to the State Government along with the specific recommendations of GCDA and the Chief Town Planner. The question, therefore, that arises for consideration is whether in the absence of any recommendation by GCDA and the Chief Town Planner, the State Government was competent to grant exemption from the operation of the Rules for construction of a high-rise building. The dictionary meaning of the word "recommend" is "to advise", "to praise or commend". In P. Ramanatha Aiyar's Law Lexicon, the meaning of the word "recommendation" is "a statement expressing commendation or a message of this nature" or suggests fit. It is true that the word "recommendation" is not defined in the Rules. If we do not go by the word "recommendation", as suggested by learned counsel for

the 5th respondent and " found that there is no conclusive meaning of the word "recommendation", we are of the view that in such a situation, the meaning of the word has to be understood in the context of the provisions of the Rules and the object behind such Rules. The Rules with which we are concerned here provide for regulation and construction of a building in an urban area. The object behind the Rules is maintenance of public safety and convenience. The Municipal Corporation, GCDA and the Chief Town Planner are entrusted with the functions and duties for carrying out development and regulation of building in the urban area. These are the authorities on the spot who have special and technical knowledge to advise the Government whether public safety and convenience requires dispensing with the provisions of the Rules while permitting construction of an eight-storeyed building. Thus, the meaning of the word "recommend", when read in the context of the Rules shows that it means "giving of a favourable report opposed to an unfavourable one. We, therefore, find that recommendations by GCDA and the Chief Town Planner are sine qua non for granting exemption from operation of the Rules by the State Government. In the absence of such recommendations, the State Government was not legally justified in granting exemption from operation of the Rules for construction of a high-rise building. However, the position would be different where GCDA and the Chief Town Planner give an unfavourable report on irrelevant or extraneous ground and in that case, the Government can call for a fresh report for meeting the viewpoint of GCDA and the Chief Town Planner. Here, what we find is that there were neither recommendations by GCDA and the Chief Town Planner, nor the State Government obtained any fresh report to contradict the viewpoint of GCDA and the Chief Town Planner while granting exemption from operation of the Rules for constructing a high-rise building. We are, therefore, of the view that the impugned orders suffer from serious legal infirmity."

Going by the above authoritative pronouncement of the Apex Court, it is mandatory to get favourable recommendation from the G.C.D.A. and the Chief Town Planner for granting exemption. If the Government feel that those authorities failed to give the recommendations on irrelevant grounds, it can call for fresh reports from them. In the case on hand, though the recommendations, especially that of the Chief Town Planner, were not favourable, the Government simply decided to grant exemption as applied for by the builder. Further, several mandatory Rules have been exempted for this high-rise building. The Rules from which exemption was granted include Rule 18 and Rule 21(12) of the Kerala Building Rules, 1984. Rule 18 says that the maximum height of a building shall not exceed 1.5 times the width of the street abutting plus 1.5 times the front yard. Rule 21(12) concerns with fire escape stair cases. Exemption has been granted from these Rules, which have been held to be mandatory, by the Apex Court in the Judgment in V.M. Kurian's case. The relevant portion of the said Judgment on this point reads as follows:-

"Under the Rules, there is restriction with regard to the maximum height of the building. The building should not be constructed exceeding 1.5 times the width of

the street abutting plus 1.5 times the front yard. Before the High Court, the 5th respondent gave an affidavit that he would convert the ground floor of the building for purposes of car parking. The said affidavit could not have been entertained as the ground floor had already been constructed and let out. Most surprising is that the requirement of having provision towards protection from fire hazards was also dispensed with. The minimum width of the staircase as required under Rule 21(11)(b) also got dispensed with. This shows that the Rules which are mandatory in nature and are required to be complied with for construction of a high-rise building were allowed to be dispensed with. Observance and compliance with the Rules is for public safety and convenience. There cannot be relaxation of the Rules which are mandatory in nature and cannot be dispensed with especially in the case of a high-rise building. The position may be different in the case of one or two-storeyed building where there are minor deviations from the Rules, which do not affect the public safety and convenience. In the present case, we find that the deviations are of high magnitude, which are contrary to public safety and convenience. We are, therefore, of the view that the order passed by the State Government exempting the provisions of the Rules for constructing an eight-storeyed, building was contrary to the mandatory provisions of the Rules and therefore, is not sustainable in law."

In view of the above legal position. Ext.P1(A) order and Ext.P10(B) permit issued based on that order, are unsustainable in law.

7. The petitioners have yet another valid-contention also : Section 410 of the Kerala Municipality Act, 1994, enabling the Government to grant exemption has been deleted with effect from 24.3.1999. The new Building Rules, namely, the Kerala Municipality Building Rules were enforced with effect from 1.10.1999. The said Rules do not contain any provision for exemption. So, according to the petitioners, Ext.P1(A) is no longer valid after 1999. I find considerable force in this submission, in view of Section 23 of the Interpretation and General Clauses Act. After the repeal of Section 410 of the Kerala Municipality Act and the Kerala Building Rules, 1984, Ext.P1(A) order cannot survive after 1999. Ext.P1(A) was issued in 1996 professedly under Rule 5 of the Kerala Building Rules, 1984. The same will survive after 1.10.1999, if only there is a provision in the Kerala Municipality Building Rules, 1999, enabling the Government to grant exemption. Admittedly, there is no provision in the new Rules, empowering the Government to grant exemption. In the light of Section 23 of the Interpretation and General Clauses Act, any order under the repealed Rules will survive, if the said order could have been issued under the new Rules. This view is supported by the principles laid down in the decision of this Court in "Sherthallai Sreenarayana Medical Mission General Hospital Damodaran Krishnan Unni" 1975 KLT 572. "Further, now, a building can be constructed only in accordance with the 1999 Building Rules. Ext.P1(A) grants exemption from 1984 Building Rules. So, Ext.P10(B) permit granted in May 2003 based on Ext.P1, (A) is unsustainable in law. In this view of the matter, the delay in challenging Ext.P1(A) will not affect

the challenge of the petitioners against Ext.P10(B).

8. Any one of the reasons mentioned above is sufficient to quash Exts.P1(A) and P10(B). Accordingly, they are quashed. The 8 floors already constructed and completed in the year 2001 shall not be affected by the quashing of Fxt.PI(A). But, the new construction recently made on the strength of Ext.P10(B) will have to be demolished.

9. This Writ Petition was filed on 8.10.2003 and this Court, on 8.12.2003, passed an order, stating that the 7th respondent can continue the construction at its risk. This Court, again, passed an order on 16.1.2004, stating that the further construction will be subject to the result of the Writ Petition and at the risk of the 7th respondent and if any sale is made, of the apartments constructed, the purchaser shall be alerted about the interim order of this Court. In view of the above position, the present construction, if any, made during the pendency of the Writ Petition, need not be saved. Respondents 1 and 2 shall take consequential action in the light of the quashing of Ext.P10(B) permit.

The Writ Petition is disposed of as above. There will be no order as to costs.