

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU**

WP(C) No. 158/2022
CM No. 613/2022

Pronounced on: 29 .07.2022

Meenakshi Chouhan & anr.Petitioner(s)

Through :- Mr. Rohit Kohli, Advocate

V/s

Jammu Municipal Corporation and othersRespondent(s)

Through :- Mr. S. S. Nanda, Sr. AAG

**Coram: HON'BLE MR. JUSTICE TASHI RABSTAN, JUDGE
HON'BLE MR. JUSTICE WASIM SADIQ NARGAL, JUDGE**

JUDGMENT

Wasim Sadiq Nargal-J

- 01.** The petitioners are aggrieved of sealing of their property consisting of three halls, one each at ground floor, first floor and second floor, constructed over the plot of land bearing H. No. 84 B/B, Gandhi Nagar, Jammu; sealed vide notice bearing No. JMC/CEO/594-96 dated 02.01.2018 issued under Section 8 (1) of the Jammu and Kashmir Control of Building Operations Act, 1988. It is the specific case of the petitioners that no such notice was ever served upon petitioners. The petitioners are the husband and wife, as such, are aggrieved of the notice impugned, having common cause of action and, therefore, they have preferred the present petition, jointly.
- 02.** The Petitioner No. 1 is the owner in possession of plot of land measuring 20 ft. x 80 ft. along with triple storey building consisting of one hall measuring 20 ft. x 60 ft at each floor constructed on the

said plot of land bearing No. 84 B/B, Gandhi Nagar, Jammu. It is the specific case of the petitioners that the aforementioned triple storey building consisting of one hall measuring 20 ft x 60 ft at each floor and land appurtenant thereto was purchased by petitioner No. 1 from its erstwhile owner namely Sh. Raman Aggarwal and Smt. Neena Aggarwal vide sale deed dated 24.03.2015 duly registered by the Sub-Registrar (Sub-Judge), Jammu on 25.03.2015. It has been pleaded that on the backside of the land purchased by petitioner No. 1, there is a piece of land measuring 10 ft x 30 ft which was purchased by petitioner No. 2 from its erstwhile owners namely Sh. Raman Aggarwal and Smt. Neena Aggarwal vide Sale Deed dated 24.03.2015 duly registered by the Sub-Registrar (Sub-Judge), Jammu on 25.03.2015.

- 03.** The specific case of the petitioners is that since no notice was ever served upon them before sealing of the building, as such, immediately, after the property owned and possessed by the petitioners got sealed, they approached Respondent No. 3 & 4 for issuance of the copies of the said notice/order so as to enable them to initiate appropriate legal proceedings. Further, it is the specific case of the petitioners that, constrained by dilatory tactics of Respondent No. 3 & 4, Petitioner No. 1 filed an application before the Commissioner, Municipal Corporation, Jammu and the Joint Commissioner, Municipal Corporation, Jammu for issuance of certified copies of the said notice/order and consequently, Petitioner No. 1 was provided the xerox copies of the said notice/order. The

specific stand of the Petitioners is that the building was sealed by Respondent No. 3 by virtue of impugned notice No. JMC/CEO/594-96 dated 02.01.2018 having been issued under Section 8(1) of the Jammu and Kashmir Control of Building Operations Act, 1988. Though the said notice alleged to have been issued in the name of Petitioner No. 2 but, in fact, the same was never served upon Petitioner No. 2. Besides that, the impugned notice dated 02.01.2018 contained a recital that action under Section 7(1) of the Act was initiated but as per the stand of the petitioners that even the said notice was never served upon them.

- 04.** The specific stand of the Petitioners is that after getting Xerox copies of the notice from the concerned authorities, the Petitioners have preferred an appeal under Section 13 of the Jammu and Kashmir Control of Building Operations Act, 1988 before the Jammu & Kashmir Special Tribunal, Jammu, which was dismissed by virtue of order dated 23.01.2019 holding that the appeal against the order passed under Section 8(1) of the Jammu & Kashmir Control of Building Operations Act, 1988 was not maintainable. For facility of reference, the operative portion of the judgment dated 23.01.2019 is reproduced as under :-

“The Tribunal cannot extend the legislative intent of the provisions of the Act. Once the appeal provision is not provided in the Act the same cannot be entertained irrespective of the fact that the order passed by the authority is unjustified and illegal. The merits of the case can be seen only if the Forum has the authority to entertain and proceed with the appeal.”

The learned counsel for the appellant has referred to AIR 2009 Supreme Court 195, judgments passed in OWP No. 1352/2012 titled Sh. Krishan Chander Bandral v. The State of Jammu and Kashmir & Ors decided on 05.10.2012 and OWP No. 338/2013 titled Navneet Mahajan v. Municipal Corporation, Jammu & Ors. and 2015(3) JKJ 420: 2015 Legal Eagle 44 titled Kanav Khajuria & Ors. v. State of J&K & Ors. decided on 22.05.2015 but the same are not applicable in the present case as they do not deal with the jurisdiction of the Tribunal to entertain the appeal against the order passed under Section 8(1) of the Act. The Tribunal has authority or not to entertain the appeal against the order passed under Section 8(1) of the Act is clinched in 2014(3) JKJ 717 in case titled Building Operation Controlling Authority v. Tarvinder Kour. The Hon'ble High Court has held as under:

“The point is no longer res integra that the appeal is creature of statute and can be filed only when authorized by the statute. Admittedly, in this case, no appeal is authorized to be filed against order passed under Section 8(1) of the Act of 1988, which provision of the said Act authorizes the competent authority to order for sealing of premises. Sub section (3)(b) of Section 8 provides that the seal shall not be removed except under an order made by the Authority concerned under this Act or in terms of order passed in an appeal under this Act. The power of sealing of premises in terms of Section 8(1) of Act of 1988 is to ensure that the illegal construction which is commenced is halted in its tracks. The purpose underlying conferring power of sealing is to ensure that there is no violation of the civic law and no person is permitted to reap the benefits of illegal action.”

In view of the above discussion and the authority of the Hon'ble High Court, the Tribunal has no hesitation in holding that, the appeal filed against the impugned order is not maintainable before the Tribunal. The appeal is dismissed.”

5. The Ld. Counsel for the Petitioners, Mr. Rohit Kohli, vehemently argued that notice under Sections 7(1) and 8(1) of the J&K Control of Building Operations Act of 1988, was never served upon the petitioners and the building of the petitioners was sealed without

affording an opportunity of being heard to them, which is in violation of the principles of natural justice. Besides, the petitioners have taken the specific ground that the notice impugned has been issued merely on assumption as no commercial activity has been started by the petitioners in the said building, as alleged in the said notice. Besides that, it is also the specific stand of the petitioners that nowhere in the notice, it has been specified that what work has been started which led the respondents to the conclusion that the building would be put to commercial use and in absence of that, the notice impugned, as per the petitioners, had been issued without verifying the ground position and without applying mind, as such, deserves to be quashed.

6. The Learned counsel has further argued that the language used in the impugned notice is self contradictory as in the first paragraph of the notice, it has been stated that Petitioner No. 2 has started the work to put the building for commercial use and in paragraph No. 2, it has been alleged that said illegal use of the building for commercial activity will affect the planned development of Jammu City and as such, contravenes the provisions of master plan and zoning regulations. As per the petitioners, the notice impugned has been issued without application of mind just to harass the petitioners. He further argued that in absence of any reason specifying the details with regard to commercial activity allegedly being carried by the petitioners, the notice impugned issued in a hasty manner requires to be set aside.

7. The Ld. Senior Additional Advocate General, Mr. S. S. Nanda appearing on behalf of the respondents, has taken a specific stand that the petitioners were renovating the building for commercial use which has necessitated the respondents to seal the building for the purpose of carrying out the provisions of the Act. Learned Sr. AAG has justified the action of the respondents being genuine and in the interest of public as the construction raised by the petitioners on the set back of the plot area falls within the realm of major violation and requires to be demolished. As per the stand of the Respondents, the building was sealed under Section 8 of the Act which provides powers to the competent authority to seal an unauthorized building without issuing any notice under Section 7 of the Act for preventing any dispute as to the nature and extent of such erection or re-erection or work. Mr. Nanda, learned Sr. AAG has also taken a specific stand while filing the detail objections. Relevant portion of which is reproduced as under:-

- A. *“That the plot measuring 60’x90’ was initially allotted by the Government of Housing and Urban Development Department to one Sh. Nanak Chand for the construction of residential house in Gandhi Nagar, Housing colony, Jammu. Virtually the plot Area possessed by Sh. Nanak Chand was 100’x60’ by which he had acquired 10’x60’= 600’ more area of housing Board land for which J&K Housing Board has given notice to vacate such land. It looks from the sale deed that Sh. Nanak Chand had constructed the house, building as per the common building plan sanctioned by the Government Department of HUD at the onset of Gandhi Nagar Housing Colony.*
- B. *That one Sh. Som Nath Gupta purchased the plot area of 30’x90’ along with residential Building situated at 84 B/B Gandhi Nagar vide sale deed dated 16.05.2011. Sh. Som Nath Gupta applied for building permission which was sanctioned vide No. 535/BS/11 dated 26.07.2011 to take up the addition and alteration work to the existing building consisting of ground floor, 1st floor and 2nd floor. Sh. Som Nath Gupta*

violated the provision of the sanction plan, action under section 7 of the act was taken against Sh. Som Nath Gupta. Sh. Som Nath Gupta converted the residential building into commercial building. The matter is subjudice before the Hon'ble High Court in writ petition No. 19 of 2013 titled Building Operation Controlling Authority Vs Som Nath Gupta.

C. That Kamlesh Kumar Gupta S/o Sh. Nanak Chand sold the half of the plot area 30'x90' along with double storied building to Sh. Raman Aggarwal and Smt Neena Aggarwal. Sh. Raman Aggarwal S/O Ramniwal Aggarwal & Smt. Neena Aggarwal W/o Sh. Raman Aggarwal sold the plot area of 20'x80" (1600 sft) along with building to Mrs. Meenakshi Chouhan W/o Sh. Anil Chouhan vide sale deed dated 25.03.2015. Sh. Anil Chouhan S/o Sh. Ramesh Kumar Chouhan purchased 10'x30' (300 sft) area of plot No. 84 B/B from Sh. Raman Aggarwal S/o Sh. Ramniwal Aggarwal and Smt. Neena Aggarwal W/o Raman Aggarwal."

8. We have gone through the impugned show cause notice issued under Section 8(1) of the Act dated 02.01.2018 and it would be apt to reproduce the language used in the notice with a view to decide the controversy in question:-

"Whereas, it has been reported that one Sh. Anil Chouhan S/o Sh. Romesh Chouhan started the work to put the building for commercial use without the permission of Jammu Municipal Corporation at 84 B/B Gandhi Nagar, Jammu and;

Whereas, action under section 7(1) of the control of Building Operation Act, 1988 was initiated for converting the building into commercial one against the land use of the area;

Whereas, the said illegal use of building for commercial activity seriously effects the planned development of Jammu City and contravenes the provisions of Mater Plan and the zoning regulations;

Whereas, in the facts and circumstances of the case I am satisfied that the premises are required to be sealed;

Now, therefore, in exercise of powers vested in me under section 8(1) of J&K State Control of Building Operation Act, 1988 read with resolution No: 1st Dated:21.05.2010 published in the

Government Gazette dated: 2nd Jan 2014 I hereby direct the sealing of premises for the purpose of carrying out the provisions of this Act, and I therefore, direct for the sealing of the mentioned premises under this Act, immediately.”

9. On the perusal of the impugned notice, it is not apparent as to the nature of work, the petitioners have commenced which led the respondents/authorities to conclude that the building would be put to commercial use, nor is it forthcoming from the record nor the details of the commercial activities have been specified in the impugned show cause notice. Before proceeding further, it would be apt to reproduce Section 8 of the Act:-

“8. Power to seal unauthorised construction.—(1) *It shall be lawful for the Authority concerned, at any time, before or after making an order of demolition under Section 7 to make an order directing the sealing of such erection, re-erection or work or of premises in which such erection, re-erection or work is being carried on or has been completed for the purpose of carrying out the provisions of this Act, or for preventing any dispute as the nature and extent of such erection or work.*

(2) *Where any erection, re-erection or work on any premises in which any erection, re-erection or work is being carried out, has or, have been sealed, the authority concerned may for the purpose of demolishing such erection or work in accordance with the provisions of this Act, order such seal to be removed.*

(3) *No person shall remove such seal except,--*

- (a) *under an order made by the Authority concerned under sub- section (2); or*
 (b) *under an order made in an appeal under this Act.”*

10. It is indisputable that the Building Operation Controlling Authority is empowered to pass an order of sealing in appropriate cases. However, exercise of such power rests upon the nature of allegations justifying such exercise. Each and every violation of building permission would not justify invoking the power to seal

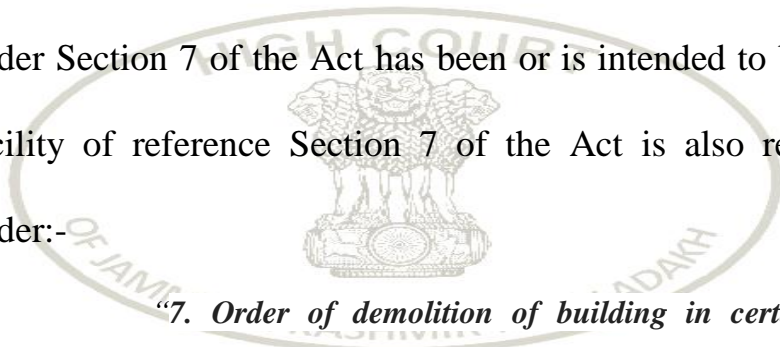
the premises with the order of demolition followed by. In the present case, the Respondents, without specifying the commercial activity being carried by the petitioners, have issued the impugned notice of sealing way back on 02.01.2018, by holding that the petitioners have converted the building into commercial one against the land use of the area. On the face of it, there is no allegation of erection or re-erection of the building as defined in Section 2(9) of the Act. For facility of reference, Section 2(9) of the Act, is reproduced as under:-

“2(9) “erect or re-erect” any building includes--

- (a) any material alteration or enlargement of any building;*
- (b) mooring or installing of any boat or house-boat in the river or lake falling within the jurisdiction of any Authority;*
- (c) the conversion by structural alteration into a place for human habitation of any building not originally constructed for human habitation;*
- (d) the conversion into more than one place for human habitation of a building originally constructed as on such place;*
- (e) the conversion of two or more places of human habitation into a greater number of such places;*
- (f) such alteration of a building as affects an alteration in its drainage or sanitary arrangements or affects its stability;*
- (g) the addition of any room, building, out-house or other structure to any building;*
- (h) the construction of a wall adjoining any street or land not belonging to the owner of the wall, of a door opening on to such street; and*
- (i) reconstruction of a building or a portion thereof, by means of props, commonly known as “PAND-PAND” in Kashmir Valley.”*

11. The point which is involved in the present petition in the peculiar facts and circumstances of the case would be whether the change of

user (misuse of a building from residential to commercial or vice versa) in violation of the permitted land use as per the master plan for an area to which the act applies would fall within the ambit of unauthorized 'erection or re-erection' as contemplated under Section 7 of the Act read with Section 8 of the Act. Before proceeding further, it would be pertinent to mention that Sections 7 and 8 of the Act are interlinked, inasmuch as, sealing order can be issued in respect of such erection or re-erection about which action under Section 7 of the Act has been or is intended to be taken. For facility of reference Section 7 of the Act is also reproduced as under:-



“7. Order of demolition of building in certain areas—(1)

Where the erection or re-erection of any building has been commenced or is being carried on or has been completed without the permission referred to in Section 4 or in contravention of any condition subject to which any permission has been granted, the Authority shall issue a notice in writing calling upon the person to show cause within a period of 48 hours, why the building should not be altered or demolished as may be deemed necessary to remove the contravention.

(2) The Authority shall cause the notice to be affixed on the outer door of some conspicuous part of the building whereupon the notice shall be deemed to have been duly served upon the owner or the occupier of the building.

(3) If the person to whom the notice has been given refuses or fails to show cause within a period specified under sub-section (1) or if after hearing that person, the Authority is satisfied that the erection or re-erection of the building is in contravention of the provisions of this section, the Authority shall by order direct the person to demolish, alter or pull down the building or part thereof so far as is necessary to remove the contravention within a period not exceeding five days as may be specified in the order and if the person fails to comply with the direction, the Authority may itself cause the erection or re-erection to be demolished after the expiry of the said period and may for that

purpose use such Police Force as may be necessary which be made available to him by the Police Department on requisition.

(4) All expenses incurred for such demolition shall be recoverable from the owner and/or the occupier in the same manner as arrears of land revenue.”

12. From a conjoint reading of Sections 7 and 8 of the Act, it is manifestly clear that Section 7(1) of the Act provides for issuance of show cause notice and Section 7(3) of the Act provides for passing the demolition order, if the show cause notice is not replied or the reply is not satisfactory. It also provides for hearing the person to whom the notice has been issued before issuing demolition order under Section 7(3) of the Act. It is a specific stand of the petitioners that no notice whatsoever in terms of Section 7 of the Act has ever been issued to them. It is also a specific stand of the petitioners that the Xerox copies of the said notice under Section 8 of the Act was provided to them pursuant to their written application and on the other hand, the building was sealed without providing them an opportunity of being heard as no notice whatsoever, has been served upon them before resorting to the power of sealing their building.
13. Where any action or an order which is likely to have consequence or depriving a person from legal possession of the property, is to be taken or is to be passed by a statutory authority, an opportunity of hearing should be given to him or her firstly and only thereafter, such order could be passed. The principles of natural justice requires, in the minimum, that no person shall be condemned

unheard before passing any order, which violates his/her rights. Depriving a person from his property without adopting due course of law amounts to violation of his constitutional right as enshrined in the Constitution of India. In the present case, the petitioners have been deprived from using their building by the act of sealing the premises by the respondents without hearing them which amounts to violation of their rights.

14. Besides that, Section 8(1) of the Act by using the term such erection, re-erection makes abundantly clear that an order of sealing can be issued only in respect of those erection or re-erection, about which action under section 7 of the Act is called for. The order of sealing, however, can be issued at any time and even before initiating the action under Section 7 of the Act. In this context, a Co-ordinate Bench of this Court in **Nazir Ahmed Mir vs. State of J&K's** case (OWP No. 875/2013) decided on 20.12.2013 has already held that while recognizing authority's power to issue order of sealing before initiating action under Section 7 of the Act, has clearly held that this power is conditional and immediately, after issuing the order of sealing, competent authority would be duty bound to initiate action in terms of Section 7 of the Act. Thus, the power of sealing the premises under Section 8 of the Act is directly related to power under Section 7 of the Act and can be exercised only when mischief under Section 7 of the Act is attracted.
15. A perusal of the record reveals that while issuing notice under Section 8(1) of the Act with regard to the sealing of the premises of

the petitioners, no opportunity of being heard was given to the petitioners and even no show cause notice was ever served upon them and consequently, depriving the petitioners from their property without adopting due course of law amounts to violation of their rights as enshrined in the Constitution of India and, thus, the act of sealing the premises by the respondents without hearing them by virtue of impugned notice amounts to violation of their constitutional as well as statutory rights.

16. Besides that, no reasons whatsoever have been specified with regard to commercial activity being carried by the petitioners nor the respondents have specified the reason that how the petitioners have put the building for commercial use. There is no whisper in the impugned notice with regard to any erection, re-erection or work of premises in which such erection, re-erection or work is being carried on as envisaged under Section 8 of the Act. Apparently, the notice impugned has been issued without application of mind and without assigning any reason as envisaged under Section 8 of the Act and, therefore, the powers resorted by the respondents in sealing the premises of the petitioners under Section 8(1) of the Act cannot sustain the test of law.

17. The law has been settled by the Hon'ble Supreme Court in its judicial pronouncements that "*no person shall be deprived of his/her property saved by authority of law or procedure established by law as right to property is a **human right** and also a*

constitutional right under Article-300-A of the Constitution of India. Article-300-A provides that no person shall be deprived of his/her property save by authority of law. The State cannot dispossess a citizen of his property except in accordance with the procedure established by law. To forcibly dispossess a person of his private property without following due process of law, would be violative of **human right**, as also the constitutional right under Article-300-A of the Constitution of India.

18. We are fortified by the view in ***Hindustan Petroleum Corpn. Ltd. v. Darius Shapur Chenai, (2005) 7 SCC 672*** wherein Hon'ble Supreme Court has held as under:-

“6. ... Having regard to the provisions contained in Article 300A of the Constitution, the State in exercise of its power of "eminent domain" may interfere with the right of property of a person by acquiring the same but the same must be for a public purpose and reasonable compensation therefor must be paid.”

19. In ***P. N. Padmamma v. S. Ramakrishna Reddy, (2008) 15 SCC 517*** Hon'ble the Supreme Court has held as under:-

“21. If the right of property is a human right as also a constitutional right, the same cannot be taken away except in accordance with law. Article 300A of the Constitution protects such right. The provisions of the Act seeking to divest such right, keeping in view of the provisions of Article 300A of the Constitution of India, must be strictly construed.”

20. In ***Delhi Airtech Services (P) Ltd. V. State of U.P., (2011) 9 SCC 354***, Hon'ble the Supreme Court has also held as under:-

“30. It is accepted in every jurisprudence and by different political thinkers that some amount of property right is an indispensable safeguard against tyranny and economic oppression

of the Government. Jefferson was of the view that liberty cannot long subsist without the support of property. "Property must be secured, else liberty cannot subsist" was the opinion of John Adams. Indeed the view that property itself is the seed-bed which must be conserved if other constructional values are to flourish, is the consensus among political thinkers and jurists."

21. In ***Jilubhai Nanbhai Khachar v. State of Gujarat, 1995 Supp (1)***

SCC 596, Hon'ble the Supreme Court has observed as under:-

"48. In other words, Article 300A only limits the powers of the State that no person shall be deprived of his property save by authority of law. There has to be no deprivation without any sanction of law."

22. In a democratic polity governed by the rule of law, the State by no stretch of imagination can deprive a citizen of his/her property without the sanction of law, besides complying with the procedure envisaged in the statutory provision. The State being a welfare State governed by the rule of law cannot arrogate to itself a status beyond what is provided by the statute. The Hon'ble Supreme Court, in ***State of Haryana vs. Mukesh Kumar, 2011 (10) SCC 404*** has held that *"the right to property is now considered to be not only a constitutional or statutory right, but also a **human right**. Human rights have been considered in the realm of individual rights such as right to shelter, livelihood, health, employment etc. Human rights have gained a multi-faceted dimension"*. Also, the Hon'ble Supreme Court in cases titled ***Tukaram Kana Joshi v. MIDC, (2013) 1 SCC 353*** and ***K. T. Plantation (P) Ltd. v. State of Karnataka, (2011) 9 SCC 1*** held that:-

"The right to property ceased to be a fundamental right by the Constitution (Forty Fourth Amendment) Act, 1978, however, it

continued to be a human right in a welfare State, and a Constitutional right under Article 300 A of the Constitution. Article 300 A provides that no person shall be deprived of his property save by authority of law. The State cannot dispossess a citizen of his property except in accordance with the procedure established by law”.

23. In the light of what has been discussed above, the notice impugned dated 02.01.2018 is hereby quashed/set aside and the respondents/authorities are directed to de-seal the premises of the petitioners with immediate effect. However, the quashment of the impugned notice shall not confer any right on the petitioners to make or continue with any unauthorized erection or re-erection to the building/premises of the petitioners.

24. The Respondents/Authorities are not precluded to take appropriate action under law (if the situation so warrants) strictly in conformity with Sections 7 & 8 of the J&K Control of Building Operations Act of 1988, after providing an opportunity of being heard to the petitioners.

(Wasim Sadiq Nargal)
Judge

(Tashi Rabstan)
Judge

Jammu
29 .07.2022
Ram Murti

Whether the judgment is speaking : *Yes*
Whether the judgment is reportable : *Yes*