

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

...

OWP no.361/2013

Pronounced on: 13.02.2025

1. Chairman, Building Operation Controlling Authority, Srinagar
2. Secretary, Building Operation Controlling Authority, Srinagar
3. Chief Enforcement Officer, SMC, Srinagar
4. Khilafwarzi Officer, SMC, Srinagar
5. Ward Officer, Ward No.22, Srinagar

.....Petitioner(s)

Through: Mr Moomin Khan, Advocate

Versus

1. Jameel Hussain Farooqi
2. Shamim Hussain Farooqi
Sons of Mohammad Yousuf Farooqi
Residents of Kalashpora S/A Karanagar, Srinagar
3. Special Tribunal of J&K, Samanderbagh, Exchange Road, Srinagar

.....Respondent(s)

Through: Mr G.A.Lone, Advocate with
Mr Muneeb Andrabi, Advocate

CORAM:

HON'BLE MR JUSTICE VINOD CHATTERJI KOUL, JUDGE

JUDGEMENT

1. Issuance of writ of certiorari quashing Order dated 11th October 2012, passed by J&K Special Tribunal ("*Tribunal*" hereinafter) in an Appeal titled as *Jameel Hussain Farooqi and another v. BOCA and others*, filed by respondents 1&2 herein against Order of Demolition dated 4th August 2012, is sought for by petitioners in the instant writ petition.
2. It is appropriate to see what petitioners state in their writ petition. Petitioners aver that building permission no.6060 of 2012 dated 2nd May 2012 was given in favour of respondents 1&2 herein to construct

a three storeyed residential house with basement floor having three shops in the ground floor. However, respondents 1&2 raised construction in blatant violation of terms and conditions of building permission. Proceedings under J&K Control of Building Operation Act, 1988 (“*Act of 1988*” for short) were initiated against respondents. Finally, order of demolition bearing no.SMC/Enf/ 624-27 dated 4th August 2012 under Section 7(3) of the Act was issued by petitioners. Respondents 1&2 preferred Appeal before Tribunal. Violations/ deviations have been compounded by Tribunal against composition fee of Rs.1,29,100/- by order impugned. Hence this writ petition.

3. Reply has been filed by respondents 1&2. They have their side of story, which is that Tribunal after enquiry and examination of case including facts involved about deviation in construction of building, has found that deviation is of minor nature. It is claimed by respondents 1&2 that petitioner no.2 with oblique motives issued Notice dated 1st August 2012, under Section 7(1) of the Act and that the said notice was never served upon respondents nor is there any proof available with writ petition to show existence of such a notice or its service upon respondents and consequently issuing of demolition is void *ab initio*. It contravenes not only principles of natural justice but also provisions of Section 7(1) of the Act. Notice of demolition has been issued just after a period of three days from the date of issuance of show cause notice allegedly issued on 1st August 2012 and, as such, there was no occasion for respondents to reply to non-existent show cause notice. Order of demolition does not in specific terms show as to what was offence or deviation or contravention made by respondents in construction of building. Building permission does not prohibit construction of concrete columns. The rough sketch showing alleged violations relate

to deviations in the setbacks on the front, rear and one side of building and there is no other violation indicated in rough sketch as it appears from writ petition and annexures attached thereto. The Tribunal has taken all aspects into consideration and in the interest of justice compounded the case, more particularly when respondents have used their own land and have not encroached upon any State land or caused any inconvenience to neighbourhood. It is also stated by respondents that BOCA did not act timely when deviations were initiated and that writ petition is a belated exercise and has been filed to cover negligence committed by petitioners and officers manning the department. Had petitioners been aggrieved, they would not have allowed construction of huge building before their very eyes as the office of SMC is hardly 20 meters away from building of respondents.

4. I have heard learned counsel for parties and considered the matter.
5. There is no denial to issuance of building permission in favour of respondents, but, for three storeyed residential house with basement floor having three shops in the ground floor. The said building was sanctioned subject to the following setbacks:
 - i. Front side of the proposed construction is to be maintained at a distance of 65'-00" from the central line of Road towards north side.
 - ii. Rear side of the proposed construction is to be maintained at a distance of 10'-00" from the nearest edge of plot towards south side.
 - iii. One side of proposed construction is to be maintained at a distance of 10'-00" from the edge plot towards east side.
 - iv. The other side of proposed construction is to be kept completely blind towards west side.
 - v. Total permitted plinth area is 1350 sqft.
6. However, respondents, in contradiction to the permission granted, have made following violations:

- i. Front side: 45' instead of 65' from the central line of road towards north side
- ii. Rear: 1' instead of 10' from the nearest edge of plot towards south side
- iii. One side: 2' instead of 10' from the edge of plot towards east side.
- iv. Other side: as per permission towards west side:
- v. Plinth area raised 2641 sqft instead of 1350 sqft.

7. It is pertinent to first go through Notice of Demolition under Section 7(3) of the Act of 1988, which reveals that Show Cause Notice under Section 7(1) was served upon respondents for commencing construction in question in contravention of terms and conditions of building permission. The deviations mentioned in the Notice are that respondents have undertaken construction of 2nd floor structure by way of concrete columns in violation of sanctioned plan over the existing two storeyed with basement structure that too constructed in violation of sanctioned plan and that the of violations with rough sketch are drawn overleaf the notice as reported by ward officer concerned. Perusal of sketch reveals that setbacks of 45 fts instead of 65 fts from the central line of road towards north side have been maintained by respondents; on rear side 01 ft. instead of 10 fts. from the nearest edge of plot towards south side, has been maintained; 02 ft. instead of 10 fts. have been maintained from the edge of plot towards east side. Worthwhile to mention here that total permitted plinth area in terms of permission was 1350 sqft. but respondents have constructed plinth area of 2641 sqft., thereby the total violation committed by respondents is 1291 sqft.

8. Worthwhile it would be to go through impugned order of the Tribunal. Perusal whereof divulges that it has been observed by the Tribunal that

respondents might have made deviations of sanctioned plan in broad day light when functionaries of petitioner-SMC were under obligation to ensure compliance of the building permission but they remained mute spectators while the construction was being raised. The Tribunal has also found that notices under Section 7(1) and 7(3) have been issued after completion of construction, which ought to have been issued at the material point of time, so that the purpose would have been achieved.

Despite observing the facts that violations have been committed by respondents in a broad day light under the nose of functionaries of SMC, the Tribunal compounded violations/deviations notwithstanding the fact that construction has been raised in gross violation of the building permission, which reflects non-application of mind on the part of the Tribunal and warrants interference. Such a practice should be stopped by the Tribunal.

9. Recently the Supreme Court in ***Rajendra Kumar Barjatya and another v. U.P.Avas Evam Vikas Parishad and others, 2024 INSC 990***, has held that unauthorised constructions cannot be legitimized merely due to administrative delays, passage of time, or monetary investments and issued a slew of directions to curb illegal constructions. It was even said by the Supreme Court that post-construction violations must trigger swift corrective action, including demolition of the illegal part and penalties for erring officials. The Supreme Court has issued a slew of comprehensive directions in larger public interest to streamline urban development and enforcement. The Supreme Court said that in a catena of decisions it has been categorically held that illegality of unauthorized

constructions cannot be perpetuated. If a construction is made in contravention of the Acts/Rules, it would be construed as illegal and unauthorized construction, which has to be necessarily demolished. It cannot be legitimized or protected solely under the ruse of the passage of time or citing inaction of authorities or by taking recourse to the excuse that substantial money has been spent on the said construction. In the ultimate analysis, the Supreme Court opined that constructions put up in violation or deviation of building plan approved by local authority and constructions which are audaciously put up without any building planning approval, cannot be encouraged. Each and every construction must be made scrupulously following and strictly adhering to the rules. If any violation is brought to the notice of the Courts, it has to be curtailed with iron hands and any lenience afforded would amount to showing misplaced sympathy.

10. The Supreme Court has also observed that unless the administration is streamlined and the persons entrusted with implementation of the act are held accountable for their failure in performing their statutory obligations, violations of this nature would go unchecked and become more rampant. *“If the officials are let scot-free, they will be emboldened and would continue to turn a nelson’s eye to all the illegalities resulting in derailment of all planned projects and pollution, disorderly traffic, security risks, etc.”.*

11. The Supreme Court issued the following directions:

- (i) *While issuing the building planning permission, an undertaking be obtained from the builder/applicant, as the case may be, to the effect that possession of the building will be entrusted and/or handed over to the*

- owners/beneficiaries only after obtaining completion/occupation certificate from the authorities concerned.
- (ii) *The builder/developer/owner shall cause to be displayed at the construction site, a copy of the approved plan during the entire period of construction and the authorities concerned shall inspect the premises periodically and maintain a record of such inspection in their official records.*
 - (iii) *Upon conducting personal inspection and being satisfied that the building is constructed in accordance with the building planning permission given and there is no deviation in such construction in any manner, the completion/occupation certificate in respect of residential / commercial building, be issued by the authority concerned to the parties concerned, without causing undue delay. If any deviation is noticed, action must be taken in accordance with the Act and the process of issuance of completion/occupation certificate should be deferred, unless and until the deviations pointed out are completely rectified.*
 - (iv) *All the necessary service connections, such as, Electricity, water supply, sewerage connection, etc., shall be given by the service provider/Board to the buildings only after the production of the completion/occupation certificate.*
 - (v) *Even after issuance of completion certificate, deviation / violation if any contrary to the planning permission brought to the notice of the authority immediate steps be taken by the said authority concerned, in accordance with law, against the builder/owner/occupant; and the official, who is responsible for issuance of wrongful completion/occupation certificate shall be proceeded departmentally forthwith.*
 - (vi) *No permission/licence to conduct any business/trade must be given by any authorities including local bodies of States/ Union Territories in any unauthorized building irrespective of it being residential or commercial building.*
 - (vii) *The development must be in conformity with the zonal plan and usage. Any modification to such zonal plan and usage must be taken by strictly following the rules in place and in consideration of the larger public interest and the impact on the environment.*
 - (viii) *Whenever any request is made by the respective authority under the planning department/local body for co-operation from another department to take action against any unauthorized construction, the latter shall render immediate assistance and co-operation and any delay or dereliction would be viewed seriously. The States/UT must also take disciplinary action against the erring officials once it is brought to their knowledge.*

- (ix) *In the event of any application/appeal/revision being filed by the owner or builder against the non-issuance of completion certificate or for regularisation of unauthorised construction or rectification of deviation etc., the same shall be disposed of by the authority concerned, including the pending appeals/revisions, as expeditiously as possible, in any event not later than 90 days as statutorily provided.*
- (x) *If the authorities strictly adhere to the earlier directions issued by this court and those being passed today, they would have deterrent effect and the quantum of litigation before the Tribunal/Courts relating to house/building constructions would come down drastically. Hence, necessary instructions should be issued by all the State/UT Governments in the form of Circular to all concerned with a warning that all directions must be scrupulously followed and failure to do so will be viewed seriously, with departmental action being initiated against the erring officials as per law.*
- (xi) *Banks/financial institutions shall sanction loan against any building as a security only after verifying the completion/ occupation certificate issued to a building on production of the same by the parties concerned.*
- (xii) *The violation of any of the directions would lead to initiation of contempt proceedings in addition to the prosecution under the respective laws.*

12. The Supreme Court in ***Rajendra Kumar Barjatya*** (supra) also directed Registrar (Judicial) of the Supreme Court to circulate a copy of the Judgment to the Registrar General of all the High Courts, so as to enable the High Courts to refer it, while considering the disputes relating to unauthorised construction, deviation/violation of building permission, plan, etc. The Registrar was also directed to circulate the copy of the said judgment to the Chief Secretaries of all the States/Union Territories. All the State/ UT Governments have also been directed to issue circulars to all the local authorities / Corporations, intimating them about the directions for strict compliance.

13. In the present case as well, the petitioners are required to take stern action against the officials/officers who were at the helm of affairs at

the relevant point of time when the violations were committed by respondents.

14.As the case in hand is squarely covered by the aforesaid judgement of the Supreme Court in ***Rajendra Kumar Barjatya*** (supra), the order impugned dated 11th October 2012 is **quashed**.

15.**Disposed of** as above.

(Vinod Chatterji Koul)
Judge

Srinagar
13.02.2025
'Imtiyaz'

Whether approved for reporting? Yes/No.

