

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of decision: 19th November, 2014

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W.P.(C) No. 7139/2014 & CM No.16698/2014 (for stay).

DANISH INFRATECH PRIVATE LIMITED Petitioner

Through: Mr. Sudhir Nandrajog, Sr. Adv. with
Mr. Raman Gandhi, Adv.

Versus

DELHI CANTONMENT BOARD Respondent

Through: Mr. Sunil Satyarthi, Adv.

CORAM :-

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J.

1. This petition under Article 226 of the Constitution of India, besides seeking declaration that Section 248(1) of the Cantonments Act, 2006 is unconstitutional and *ultra vires* the scheme of the Constitution of India, also seeks quashing of the notices dated 23rd September, 2013, 22nd January, 2014, 28th February, 2014 and 27th August, 2014 of the respondent under the said Section 248 (1) to the petitioner and order of restraining the respondent from proceeding to demolish the property of the petitioner as well as a direction to the respondent, to permit the petitioner to effect necessary repairs in its

property and to regularize the construction existing in the property by taking action on the building plans submitted by the petitioner.

2. The petition came up before this Court first on 27th October, 2014 when upon our enquiring from the senior counsel appearing for the petitioner as to how the writ petition in so far as seeking reliefs other than of impugning the validity of Section 248(1) supra is maintainable in the face of availability of alternative remedy of appeal, and which we were told that the petitioner had already availed of, the senior counsel for the petitioner confined the present writ petition only to the relief of challenging the *vires* of Section 248(1) supra.

3. The facts in so far as necessary on the aspect of *vires* of Section 248(1) supra are as under.

4. The petitioner claims, (i) to have in or about the year 2012 purchased property bearing no.CB 390, measuring 422 sq. yds. in the Cantonment Board Area, situated at Naraina, Delhi Cantt, Delhi – 110 010; (ii) the person from whom the petitioner purchased the property has not provided the petitioner with any sanctioned plan of the property; (iii) the old construction of the property was in the form of three floors including a basement; (iv) the petitioner immediately after the purchase of the property on 30th October, 2012, on 8th

March, 2013 submitted a site plan for sanction of the structure standing on the property; (v) after purchase of the property to have initiated repair work “which though might have been somewhat substantial since the construction at the site was very old”; (vi) that the building plan submitted by the petitioner was returned by the respondent vide letter dated 29th April, 2013 since the requisite processing fee was not enclosed; (vii) the respondent construed the same to be commencement of new construction “and has declined to sanction the building plan on this ground”; (viii) that for the work of repairs no permission is required from any authority; (ix) the officials of the respondent while visiting the property in a routine manner obstructed the said renovation work inspite of the petitioner having spent approximately Rs.4 crores on purchase of the property; (x) the respondent itself is not having any record of any sanctioned plan in its office but is alleging unauthorized construction; (xi) the petitioner stopped the works and applied to the respondent for regularization of the entire structure; (xii) the petitioner re-submitted the building plans but the respondent refused to sanction the same on the ground of unauthorized construction having already commenced and on the contrary issued notices under Section 248(1); and, (xiii) that on account of interference by the respondent the petitioner is suffering.

5. Sub-section (1) of Section 248 vires whereof is challenged, is as under:-

“248. Power to stop erection or re-erection or to demolish.- (1) The Board may, at any time, by notice in writing, direct the owner, lessee or occupier of any land in the cantonment to stop the erection or re- erection of a building in any case in which the Board considers that such erection or re- erection is an offence under section 247 and may, in any such case or in any other case in which the Board considers that the erection or re- erection of a building is an offence under section 247, within twelve months of the completion of such erection or re- erection in like manner, direct the alteration or demolition, as it thinks necessary, of the building, or any part thereof, so erected or re- erected:

Provided that the Board may, instead of requiring the alteration or demolition of any such building or part thereof, accept by way of composition such sum as it thinks reasonable:

Provided further that the Board shall not, without the previous concurrence of the General Officer Commanding- in- Chief, the Command, accept any sum by way of composition under the foregoing proviso in respect of any building on land which is not under the management of the Board.”

6. The contention of the senior counsel for the petitioner was / is that since Section 248(1) does not provide for any hearing to the owner of the property and / or to the person to whom the notice is issued for stopping erection or re- erection of a building and / or for the construction so raised to be demolished or

altered and all of which has serious consequences and since the respondent while acting under Section 248(1) is also not giving any opportunity of hearing, the same is violative of the principles of natural justice and Article 14 of the Constitution of India and is either liable to be quashed / struck down or to be interpreted so as to read therein a provision for granting an opportunity for hearing before issuing a notice directing stoppage of the work of erection or re-erection of a building or directing demolition or alteration of the construction already raised.

7. We, on 27th October, 2014 itself, invited the attention of the senior counsel for the petitioner to the dicta of the Division Bench of this Court concerning a similar provision under the Service Tax Law and reported as ***Sales Tax Bar Association (Regd.) Vs. Govt. of NCT of Delhi*** 196 (2013) DLT 270 and enquired as to why in the light thereof the said challenge should be entertained. On request of the senior counsel for the petitioner for time to study the said judgment, the matter was adjourned. We thereafter heard the senior counsel for the petitioner on the aspect of admission of this petition and reserved judgment.

8. Though Section 248(1) does not provide for any opportunity of hearing before issuing a direction for stopping the erection or re-erection of a building

which the Board considers to be unauthorized or a direction for demolition or alteration of the said unauthorized construction but the said power under Section 248(1) is to be exercised by the Chief Executive Officer of the Board (by virtue of Section 237 of the Act) and it is not in dispute that in the present case also has been exercised by the Chief Executive Officer of the respondent Board. Section 340 of the Act provides that any person aggrieved by any order described in the third column of Schedule V to the Act, may appeal to the Appellate Authority specified in the fourth column of the said Schedule. Schedule V to the Act titled “Appeals from executive orders”, at serial no.14 thereof mentions Section 248 and provides for an appeal against a notice to stop erection or re-erection or to alter or demolish a building in a civil area, to the Principal Director and against a notice to stop erection or re-erection or to alter or demolish a building in a cantonment area, to the General Officer Commanding- in- Chief, the Command of the respondent Board. Section 342 provides that on the admission of an appeal *inter alia* from a notice under Section 248 all proceedings to enforce the said notice shall be held to be in abeyance pending the decision to the appeal and that if the notice is set aside on appeal, disobedience thereof shall not be deemed to be an offence. Section 344 provides for finality of the appellate order and Section 345 provides that no

appeal shall be decided unless the appellant has been heard, or has had a reasonable opportunity of being heard in person or through a legal practitioner.

9. The position which thus emerges is that under the scheme of Cantonments Act, 2006, though no opportunity of hearing is required to be given before issuing a notice under Section 248(1) of stoppage of works of construction which in the opinion of the Board / Chief Executive Officer are unauthorized or before issuing a notice for demolition / alteration of works already unauthorizedly carried out but the noticee has been vested with a right to appeal against the said notice (within 30 days from the service thereof) to the Appellate Authority and on filing of which appeal the notice remains in abeyance / unenforceable / unactionable till the pendency thereof.

10. The Division Bench of this Court in *Sales Tax Bar Association (Regd.)* supra was concerned with Sections 30 to 35 under Chapter VI of the Delhi Value Added Tax Act, 2004 (DVAT Act) and the scheme of which Act also provided for the Assessing Officer to pass an order of assessment without giving any opportunity of hearing but provided an opportunity to the assessee to file objections and pending the decision of which objections the demand under the assessment year was unenforceable. The Division Bench of this Court held as under:-

“12. Though the argument of the counsels for the petitioners, of the assessment and imposition of penalty under Sections 32 and 33 without giving an opportunity of hearing to the assessee being contrary to the principles of natural justice, appears attractive at the outset but when the scheme of the legislation is studied, it is in fact not found so. The Act has introduced a regime of self-assessment. All the ingredients of assessment are available to the assessee himself and the return filed by the assessee on the basis thereof, is, under Section 31 given the status of an assessment. The Act thus deems an assessment at the hands of the assessee, even before the Commissioner or his delegatee conferred with the powers of assessment, have had an occasion to lay sight thereon.

13. Having provided so, Section 32 gives a similar opportunity to the Assessing Officer. Just like the assessee, under Section 31 has been given a unilateral power of assessment, the Assessing Officer also, under Section 32, if dissatisfied therewith has been conferred the power of changing the said assessment as per his best judgment. Undoubtedly no opportunity of hearing is provided to be given to the assessee at this stage. However what we have to remember at this stage is the words of Justice Krishna Iyer in **Nawabkhan Abbaskhan Vs. The State of Gujarat** (1974)2SCC121, that not all violations of natural justice knock down the order with nullity and that in Indian Constitutional law, natural justice does not exist as an absolute jural value but is humanistically read by courts into those great rights enshrined in Part III as the quintessence of reasonableness.

14. The Constitution Bench of the Supreme Court, in **Maneka Gandhi Vs. Union of India** (1978) 1 SCC 248 which is considered as the Bible on the principles of natural justice, has held that what opportunity may be regarded as reasonable would necessarily depend on the

practical necessities of the situation; it may be a sophisticated full-fledged hearing or it may be a hearing which is very brief and minimal; it may be a hearing prior to the decision or it may even be a post-decisional remedial hearing; the audi alteram partem rule is sufficiently flexible to permit modifications and variations to suit the exigencies of myriad kinds of situations which may arise.

15. The juristic policy enacted with clarity in the DVAT Act is of unilateral assessment first at the hands of the assessee and if the Assessing Officer is not satisfied therewith, then at the hands of the Assessing Officer. The Assessing Officer, of course while doing his unilateral assessment has the benefit of the assessment done by the assessee as well as any other material which may be available, and has to make the assessment to the best of his judgment. Only if the assessee remains dissatisfied with such unilateral assessment done by the Assessing Officer does the stage of 'bilateral assessment' in the form of objections under Section 74 comes into play and which undoubtedly provides for an opportunity of hearing as is being demanded by the petitioners.

17. What falls for consideration is, whether inspite of Section 74 providing for such an opportunity of hearing, can any fault be found with Sections 32 and 33 in not providing such an opportunity.

18. Though the counsels for the petitioners have argued that the remedy of objections is not available owing to Section 79 of the Act but in the face of the express provision in the explanations to Sections 32 and 33 that a person disagreeing with the notices of assessment thereunder may file an objection under Section 74 of the Act, the said contention is clearly erroneous and is not accepted.

19. The Supreme Court in **Liberty Oil Mills Vs. Union of India** (1984) 3 SCC 465 gave illustrations of situations where post-decisional hearing subserves principles of natural justice. It was held that the rule of audi alteram partem only requires that a man shall not be subject to final judgment or to punishment without an opportunity of being heard. With reference to orders of suspension without hearing, it was observed that though it may involve hardship but hearing post-suspension suffices. Even in **Ajit Kumar Nag Vs. General Manager (PJ), Indian Oil Corporation Ltd., Haldia** (2005) 7 SCC 764 it was held that the principles of natural justice are not rigid or immutable and hence they cannot be imprisoned in a straitjacket - they must yield to and change with exigencies of situations - they must be confined within their limits and cannot be allowed to run wild - while interpreting legal provisions, a court of law cannot be unmindful of the hard realities of life; the approach of the Court in dealing with such cases should be pragmatic rather than pedantic, realistic rather than doctrinaire, functional rather than formal and practical rather than precedential.

20. Prof. de Smith, the renowned author of "Judicial Review" (3rd Edition), was in **Swadeshi Cotton Mills v. Union of India** (1981) 1 SCC 664 quoted (with approval) as opining that statutory provision for an administrative appeal or even full judicial review on merits are sufficient to negative the existence of any implied duty to hear before the original decision is made; that the said approach is acceptable where the original decision does not cause serious detriment to the person affected. In the same judgment, it was enunciated that where a statute does not, in terms, exclude the rule of prior hearing but contemplates a post-decisional hearing amounting to a full review of the original order on merits, then such a statute would be construed as excluding the audi alteram partem rule at the pre-decisional stage.

21. Though Sections 32(3) and 33(2) make the additional tax if any due and penalty assessed thereunder payable immediately on such unilateral assessment but Section 35(1) though uses the words “may not proceed to enforce payment of the amount assessed”, clearly provides that the recoveries of the said amounts are not to be made until two months after the date of service of the notice of assessment. The second proviso to Section 74(1) requires an assessee preferring the objections to only pay the admitted amount of tax and liability to be paid and not the tax and/or penalty qua which objections have been preferred. Further, as aforesaid a time of two months has been given for preferring the objections. Section 35(2) again provides that where objections have been preferred, the demand under Sections 32 and 33 may not be enforced until the objection is resolved. A conjoint reading of the said provisions clearly shows that enforcement of the demand under Sections 32 and 33 if made the subject matter of objection, is dependent upon the outcome of the objections and till the objections are decided, the disputed demand under Sections 32 and 33 is not to be enforced. Though undoubtedly the third proviso to Section 74(1) has now given a power to the Objection Hearing Authority to direct the disputed tax or penalty or any part thereof also to be deposited but the very fact that the second proviso as well as Section 35(2) have also been retained along therewith on the statute book is indicative of the invocation of the third proviso being only if the circumstances so demand and not in the usual course. Moreover the order if any under the third proviso to Section 74 (1) is to be after giving an opportunity of hearing to the dealer. The contention of the petitioners that the third proviso to Section 74(1) is being invoked as a matter of routine is not only without any specific pleading and particulars but even otherwise does not constitute a ground for us to interfere with the scheme once the legislative policy is plain and clear.

*Moreover a law has to be adjudged for its constitutionality by the generality of cases it covers, not by the freaks and exceptions it martyrs (Krishna Iyer, J in **R.S. Joshi, Sales Tax Officer, Gujarat Vs. Ajit Mills Ltd.** (1977) 4 SCC 98).*

*22. In **Haryana Financial Corporation Vs. Kailash Chandra Ahuja** (2008) 9 SCC 31, the test of prejudice was applied and it was held that if there is no prejudice, an action cannot be set aside merely on the ground that no hearing was afforded before taking a decision by the authority.*

23. To our mind the scheme aforesaid of the Act does not cause any prejudice whatsoever to the assessee. In spite of our repeated calling, the counsels for the petitioners failed to substantiate the prejudice if any which the assessee suffers in having the opportunity if any required of hearing, at the stage of objections and not at the stage of assessment under Sections 32 & 33. Though the argument, of the assessee if not complies with demands under Sections 32 and 33 acquiring the status of a defaulter was raised in response thereto, but the counsels were unable to support it with any provision of law. On the contrary a reading of Section 74(1) and Section 35 clearly shows that the liability for payment of the disputed demand under a best judgment assessment under Sections 32 & 33 arises only on the conclusion of objections and which as aforesaid is after the decision on objections and not prior thereto. That being the position, the question of the assessee, during the pendency of objections having the status of a defaulter and thereby suffering any disability does not arise.

24. Even if the hearing, at the stage of objections, is to be treated as a post decisional hearing, we fail to see any effect on the efficacy thereof. Though post decisional hearing was, as aforesaid, held to be not sufficient or

effective, being held with a closed mind, after a decision has already been taken but those observations came to be made in the context of a post decisional hearing in the exercise of administrative powers. Here, the scheme of the statute itself is first allowing a unilateral assessment by the assessee, thereafter a unilateral assessment by the Assessing Officer and thereafter providing for a bilateral assessment after opportunity of hearing. With such a statutory scheme, it cannot be said that the post decisional hearing will be farcical or a sham. Moreover such hearing is in exercise of quasi judicial power and is subject to an appeal to the Tribunal. Further, it is the contention of the counsels for the petitioners themselves, that the Assessing Authority and the Objection Hearing Authority are different. It thus cannot be said that the same officer would shy away from admitting mistakes and thereby reducing the hearing to a farce.

25. *In Union of India Vs. Col. J.N. Sinha* (1970) 2 SCC 458, the Supreme Court held that if a statutory provision either specifically or by necessary implication excludes the application of any or all the principles of natural justice, then the Court cannot ignore the mandate of the legislature or the statutory authority and read into the concerned provision the principles of natural justice and that rules of natural justice can operate only in areas not covered by any law validly made and they do not supplant the law but supplement it. To the same effect is ***Madan Lal Agarwala Vs. The State of West Bengal*** (1975) 3 SCC 198.

26. The House of Lords also in ***Pearlberg Vs. Varty (Inspector of Taxes)*** [1972] 1 W.L.R. 534 held that before the Courts exercise unusual power of supplementing the procedure laid down in legislation, it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the

legislation. It was further held that one should not start by assuming that what Parliament has done in the lengthy process of legislation is unfair and that one should rather assume that what has been done is fair, until the contrary is shown. It was yet further held that where the person affected can be heard at a later stage and can then put forward all the objections he could have preferred if he had been heard on the making of the assessment, it by no means follows that he suffers an injustice in not being heard on the making of the order. Fairness was held to be not requiring plurality of hearings and it was observed that if there were too much elaboration of procedural safeguards, nothing would be done simply, quickly and cheaply.

27. Recently in **Smt. Rasila S. Mehta Vs. Custodian, Nariman Bhavan, Mumbai** (2011) 6 SCC 220 also the Supreme Court held that the fact that a statute does not provide for a pre-decisional hearing is not contrary to the rules of natural justice because the decision does not ipso facto takes away any right and the post-decisional hearing satisfies the principles of natural justice.

29. We are of the opinion that the legislature has, by the scheme aforesaid merely fixed the date on which the tax falls due. If the assessment of the tax were to await hearings, the date of assessment and hence the date on which the tax can be said to fall due may be unduly deferred. The purpose of introducing the regime of self-assessment appears to be to fix the responsibility of assessing the tax on the assessee and even if in subsequent hearings the self-assessment by the assessee turns out to be wrong and erroneous leading to further tax being found due from the assessee, the same would relate back to the date on which the assess ought to have done the self-assessment and paid tax correctly.

31. *The fact that the post decisional hearing in the present case is not with a closed mind is apparent from the contention of the petitioners themselves that the demand of ₹265 crores already stands reduced to ₹6.5 crores and may be still further reduced on completion of objections hearing.*

32. *Once the legislative scheme is not found to be in contravention of the Constitution of India or as causing any prejudice to the assesseees, this Court will not interfere therewith merely because the practioners in the field of VAT find themselves reluctant to change to the new law or because it introduces a new scheme. We therefore do not find any merit in these petitions and dismiss the same.”*

11. Though in our *prima facie* opinion the aforesaid judgment negated the challenge made to Section 248(1) on all fours but the senior counsel for the petitioner during the hearing on 5th November, 2014 purported to distinguish the provisions of the DVAT Act which were considered in the said judgment from the scheme of the Cantonments Act. It was argued that while the DVAT, Act provided for objections to the assessment made without opportunity of hearing, there is no provision in the Cantonments Act for objection, but only of appeal. It was also contended that the *pari materia* statutes being the Delhi Municipal Corporation Act, 1957 and the New Delhi Municipal Council Act, 1994 also provide for opportunity of hearing before issuing such an order. It was re-emphasized that the direction issued under Section 248 has grave

consequences and none can be allowed to suffer an order for demolition of his property without an opportunity of hearing. Reliance was placed on the judgment dated 26th May, 2014 of the learned Single Judge of this Court in W.P.(C) No.6643/2013 titled *Sanjeev Bhatiani Vs. Union of India* and in other connected petitions vide which it was held that there is nothing in the language of Section 248 that would negate such an opportunity of hearing being given and that unless such an opportunity of hearing is read into Section 248(1) of the Act, it would be open to challenge on the ground of violation of Article 14 of the Constitution of India for non-compliance of the principles of natural justice that flow from the Rule of Law and a direction for giving such an opportunity of hearing was given. It was yet further contended that the proviso of Section 248(1) also provides for the alternative of composition / compounding of unauthorized construction and for which compounding / composition, an opportunity of hearing has to be necessarily given.

12. We have considered the aforesaid contentions but do not find any substance therein. The language used in different statutes dealing with different subjects is bound to be different. However such difference in language alone cannot be a reason to not apply the ratio of a judgment on one statute, if having the same scheme as in another, while interpreting or dealing with the provisions

of another statute. In our opinion it matters not whether the hearing given after the assessment order / direction for stopping unauthorized construction and demolition thereof is given the nomenclature of objections as in the DVAT Act or of an appeal as under the Cantonments Act. The senior counsel for the petitioner could not dent the proposition that the scheme of the provisions of the two Acts is identical i.e. of making the order, whether of assessment or of stoppage / demolition of unauthorized construction which is permitted to be passed without giving opportunity of hearing unenforceable pending a post decisional opportunity of hearing provided under both the statutes. The difference in nomenclature is irrelevant.

13. Similarly, no argument, of the provisions of other statutes prevalent in the other localities of Delhi being different can be built. If that were so, the entire Cantonments Act would have been challenged on the ground of discrimination.

14. As far as the plea, of the proviso of Section 248(1) implying a hearing is concerned, we enquired from the senior counsel whether the petitioner had applied for compounding. The answer was in the negative. We are of the view that merely because a provision has been made for the Board to, instead of directing demolition / alteration of the property, compounding the unauthorized

construction, would not change the scheme of the statute. It is always open to a person served with a notice under Section 248(1), to simultaneously with preferring an appeal thereagainst also apply to the Chief Executive Officer of the Board for compounding and which order of compounding can be made in the appellate proceedings as well.

15. In fact we had during the hearing enquired from the senior counsel whether not providing for an opportunity of hearing before issuing a direction under Section 248(1) and which direction in so far as for demolishing of unauthorized construction raised, can be made within 12 months only of such unauthorized construction being raised, is likely to lead to the said time lapsing as the delays even at departmental levels in such hearing are well known and the same will act as a tool in the hands of unscrupulous officials to let off unauthorized constructions merely by delaying the hearing stage.

16. The senior counsel for the petitioner could only respond that the same cannot be a reason for not giving that opportunity of hearing.

17. We are not saying that no opportunity for compounding should be given. However in our opinion such compounding can be applied for and if permissible allowed even post issuance of the notice. Section 248 having

provided for an order for demolition of unauthorized construction to be passed within twelve months only of the completion of such construction, it is important that whenever the Chief Executive Officer finds such unauthorized construction, he immediately passes such an order so that the time for passing such an order does not expire, legitimizing the unauthorized construction.

18. Moreover, the office of the Chief Executive Officer of the Cantonment Board is a statutory office and we have no reason to presume that the power under Section 248(1) will be exercised by such a statutory office in a *mala fide* manner. As far back as in *State of West Bengal Vs. Anwar Ali Sarkar* AIR 1952 SC 75, Patanjali Sastri Chief Justice, in his minority judgment held that discretion vested in a public authority is expected to be exercised honestly and reasonably. It was further held that if the discretion is exercised improperly or arbitrarily, the administrative action may be challenged as discriminatory, but it cannot affect the constitutionality of the law. It was yet further held that whether a law conferring discretionary powers on an administrative authority is constitutionally valid or not should not be determined on the assumption that such authority will act in an arbitrary manner in exercising the discretion committed to it. However the proposition was reiterated in *Organo Chemical Industries Vs. Union of India* (1979) 4 SCC 573 as well as in *People's Union*

for Civil Liberties Vs. Union of India (2004) 2 SCC 476. Even otherwise the monster of unauthorized construction in the city has acquired and continues to acquire alarming proportions resulting in the city, rather than being planned, becoming a huge slum. Till now, one associated cantonments with systematic open areas with a lot of greenery and which is slowly reducing otherwise in the city. Alas the cantonments also are now not safe therefrom. The Supreme Court in *S.P. Chengalvaraya Naidu Vs. Jagannath* (1994) 1 SCC 1 has noticed that the Courts today are inundated with unscrupulous persons who are abusing the process of the Courts to perpetuate the menace of unauthorized construction in the city and held that time has come for the Courts to respond appropriately.

19. The order / direction under Section 248 (1), of stoppage of construction is an executive order, as is so described in the Schedule-V supra to the Act also. The action of unauthorized construction is such which has to be stopped immediately. Else, with modern technology, multistoried constructions can be raised within a matter of days. If it were to be held that the Chief Executive Officer of the respondent Cantonment Board, before even directing stoppage of the work of unauthorized construction underway, is required to give an opportunity of hearing, the unauthorized construction undertaken would be completed by the time the hearing is over and a direction / order for stoppage is

made. Similarly, since the time limit prescribed for passing a direction / order of demolition / alteration is also comparatively small i.e. of 12 months only, the said period is also likely to pass if notices giving opportunity of hearing are required to be issued and served before such a direction can be made. The Principal Director to whom appeal against a notice with respect to a building in a civil area is provided as per Section 2(zn) means the Officer appointed by the Central Government to perform the duties of the Principal Director, Defence Estates. We do not see as to what prejudice a noticee who is so directed suffers from denial of an opportunity of hearing when such noticee can always prefer an appeal and will be heard before the disposal thereof. We may notice that even the MCD and NDMC Acts supra do not provide for any opportunity of hearing before issuing an order / direction for stoppage of unauthorized construction.

20. As far as the reliance by the petitioner on *Sanjeev Bhatiani* is concerned, we may notice that the learned Single Judge in the said judgment has clarified that the same had been passed in peculiar facts and circumstances of those cases and was not to be treated as a precedent in any other case. The learned Single Judge also does not appear to have considered the provisions of Sections

340 to 345 of the Act. The reliance by the senior counsel for the petitioner on the said judgment is thus misconceived.

21. Yet another argument of the senior counsel for the petitioner was that the provisions of the Cantonments Act are different from those of the DVAT Act in as much as the remedy of appeal provided under the Cantonments Act is insufficient in the absence of any material before the Appellate Authority on the basis of which the Chief Executive Officer has issued the notice / order under Section 248(1). We are unable to agree. If the construction with respect to which notice has been issued is authorized as per the sanctioned plan, it is upon the noticee to produce such sanctioned plan before the Appellate Authority and on comparison thereof with the construction at site the Appellate Authority can reach a decision. However if it is a case of no sanctioned plan being available neither with the owner / occupier nor with the Cantonment Board, as the subject case is stated to be, it will be for the noticee who is claiming the work admittedly underway to be merely of repair, to establish before the Appellate Authority that the extent of the construction has been existing for long i.e. in any case for a period of over one year prior to the date of the notice under Section 248(1) and which in our opinion should not be difficult for an owner / occupier to establish as the owner / occupier must have

had electricity / water supply on the basis of extent of construction as well as must have paid the taxes on the basis of extent of construction.

22. The counsel for the petitioner, after the judgment had been reserved, has handed over a list of judgments with copies of judgments and to which no reference was made during the hearing. Though we strongly deprecate such practice but still for the sake of completeness deal therewith.

23. Reliance is placed on *Afzal Vs. Cantonment Board, Meerut* 2014(102) ALR 894 and on *Anil Jain Vs. Union of India* 2010 Indlaw ALL 14 in both of which notices under Section 248(1) and the appellate orders under Section 340 of the Act were struck down / quashed on the ground of being vague and without any particulars and findings. However in *Afzal* the Single Judge of the Allahabad High Court also made a *prima facie* observation that Section 248(1) “appears to be arbitrary and violative of Article 14 of the Constitution of India. Stopping construction, passing orders for alteration of the building or for demolition has grave penal consequences. Such action taken by an authority without giving notice or an opportunity of hearing would be hit by Article 14 of the Constitution of India” and held that since as per the dicta of the Supreme Court every effort has to be made by the Court to uphold the validity of the statute since invalidating a statute would be a grave step, and thus Article 14

has to be read in Section 248. Similarly in *Anil Jain* it was merely observed that proceedings under Section 248(1) can be initiated only after conclusion of the proceedings under Section 247 i.e. of prosecution for raising illegal and unauthorized construction and which proceedings were also pending in that case.

24. We, respectfully, are unable to agree with the observations made in the judgments supra and which are in any case obiter, from a reading of the judgments it does not appear that the question as has arisen before us was raised or was for adjudication. As aforesaid, in those cases the writ petitions were filed after availing of the appellate remedy.

25. The counsel for the petitioner, in the aforesaid compilation, has also referred to:-

- A. *Sri Radhy Shyam Vs. State of U.P.* JT 2011 (4) SC 524;
- B. *Competition Commission of India Vs. Steel Authority of India Limited* (2010) 10 SCC 744;
- C. *Shekhar Ghosh Vs. Union of India* (2007) 1 SCC (L&S) 247;
and,
- D. *Ram Chander Vs. Union of India* (1986) 3 SCC 103,
on the aspect of right of hearing.

26. The law laid down in the said judgments also has been considered in *Sales Tax Bar Association (Regd.)* supra and does not dent the ratio therein. We however find that a Division Bench of the High Court of Karnataka in *Cantonment Board Vs. Asif Alim Sait* AIR 2004 Kant. 158, though also held, while dealing with Section 185 of the Cantonments Act, 1924 which is identical to Section 248 of the 2006 Act, that no hearing prior to issuing a notice to stop the work of erection / re-erection of building is required to be given but proceeded to hold that hearing / opportunity is required to be given before issuing a notice to demolish. Alas, the counsel for petitioner failed to cite the same, We however, for the reasons aforesaid, are unable to concur with the latter view. Similarly, though the counsel for the petitioner has not cited but reference may also be made to *Cantonment Board, Dinapore Vs. Taramani Devi* (1992) Supp.(2) SCC 501 where the part of Section 185 of the 1924 Act which is equivalent to Section 248(2) of the present Act was for consideration. Though Section 248(2) also does not provide for any hearing or opportunity prior to issuance of notice thereunder but it was held that such hearing / opportunity has to be read as part thereof. We however have not considered ourselves bound thereby for the reason that the action under Section 248(2) is relatable to Section 58(1)(b) and which provides for an opportunity to be given

to the Cantonment Board. On that parity, we are of the opinion, opportunity was also held to be required to be given to the owner / occupier. Also, we find that the appeals subject matter of decision in *Taramani Devi* (supra) were of the year 1976 and were noted in the judgment itself to have become infructuous and perhaps were not contested also and the judgment of the High Court in appeal was merely affirmed. The matter was not looked at from the aspect as considered in *Sales Tax Bar Association (Regd.)* supra. We are also of the view that the view taken by us is as per the need of the hour. It is settled principle that law has to evolve with the changing societal requirements.

27. We therefore do not find any reason to entertain / admit this petition or to call for any response thereto. The petition is dismissed with the clarification that we were in this judgment only concerned with the challenge to the validity of Section 248(1) and any observations herein would not come in the way of challenge by the petitioner to the notices on merits before the appropriate fora.

28. The petitioner has also filed additional affidavit to the effect that the appeal preferred by it has been dismissed, again without giving any opportunity of hearing and in fact the reason given for dismissal, of the appeal having been preferred before a wrong Appellate Authority invalidate the notices under Section 248(1) also. As aforesaid we, in this proceeding, are not concerned with

the merits of the case and it will be open to the petitioner to take up the same in appropriate proceedings.

RAJIV SAHAI ENDLAW, J.

CHIEF JUSTICE

NOVEMBER 19, 2014
'pp'