

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

WP(C) No. 1411/2022
CM No. 3399/2022
CM No. 6095/2022
c/w
CCP(S) No. 308/2022
CM No. 3953/2022

Pronounced on :- 19.12.2023

Dr. Rubina Hakak

.... Petitioner/Appellant(s)

Through:- Mr. Shakir Haqani, Advocate

V/s

Commissioner Srinagar
Municipal Corporation & ors.

.....Respondent(s)

Through:- Mr. Moomin Khan, Advocate for R-1
to 4.
Mr. G. A. Lone, Advocate with Mr.
Mujeeb Andrabi, Advocate for R-5

CORAM : HON'BLE MRS. JUSTICE SINDHU SHARMA, JUDGE

JUDGMENT

01. This writ petition is against the order dated 24.05.2022 passed by the Jammu and Kashmir Special Tribunal, Srinagar in an appeal File No. STS/6621/2022 titled *Mohammad Farooq Sarif vs Commissioner, Srinagar Municipal Corporation, Srinagar*.

02. The respondent No. 1 issued building permission in favour of respondent No. 5 vide Order No. 487 of 2021 dated 30.11.2021 for construction of semi basement plus three storeyed residential house with basement as parking, ground floor a professional office and rest of floors as residential along with erection of compound walling on a plot of land comprising survey No. 344-min situated at Estate Hyderpora site at House No. 3, Hyderpora Srinagar.

03. The Chief Enforcement Officer, after receiving complaint from the petitioner, reported that respondent No. 5 has not maintained the proper set back as per the permission from his own land towards rear side as well as water canal/drain is not his own property as he has dumped debris in the said canal/drain, therefore, they request the Enforcement Officer South to visit the site and take the matter with Joint Commissioner Planning for keeping permission in abeyance till the permittee will maintain proper setback towards rear side.

04. The respondent No. 3 took notice of the violation of the building permission and issued a demolition notice on 12.05.2022 under Section 253(1) of the Jammu and Kashmir Municipal Corporation Act. The respondent No. 1, issued the demolition notice on the ground that construction was raised in violation of the building permission dated 30.11.2022 by way of deviation in the basement floor towards the rear side. The respondent No. 5 filed an appeal against the notice of demolition dated 12.05.2022 before the learned Jammu & Kashmir Special Tribunal (hereinafter to be referred to as 'the Tribunal') at Srinagar.

05. The petitioner, being the neighbour of respondent No. 5 was aggrieved of the construction raised towards the east of the plot of the petitioner. According to the petitioner, the respondent No. 5 had started construction of huge commercial complex in a residential area under the garb of professional office under the cover of building permission in violation of the rules and bye laws. It is also submitted that the respondent No. 5 has also failed to maintain the setbacks as prescribed in the building permission and had constructed 118 sft. area more than the permitted area of 1881 sft. The petitioner also filed a revision petition against the

building permission dated 30.11.2022 to respondent No. 5 before the J&K Special Tribunal.

06. The Tribunal, vide its order dated 24.05.2022, on the submission of respondent No. 5 that in the process of applying for revised building permit in order to regularize deviation of 118'-0" caused in the basement and constituted less than 10% of the total built up area, directed the respondent No. 5 to make an application for grant of revised building permit and consideration of the same, and directed no construction only on the deviation portion till then. The operating part of the order reads as under: -

“...The counsel appearing for the appellant submits that the appellant is in the process of applying for revised building permit in order to regularize the deviation of 118'-0" caused in the basement, which accordingly to him constitutes less than 10% of the total built up area and directed the appellant to make an application for grant of revised building permit within a week's time and the application shall be considered by the competent authority and dispose of within the prescribed time frame. Till such time, no construction shall be undertaken by the appellant on the deviation portion of the construction and operation of the impugned demolition notice shall remain stayed.”

07. The petitioner is aggrieved of the order of learned Special Tribunal on the ground that the Tribunal has exceeded jurisdiction vested in it by permitting respondent No. 5 to go ahead with the construction except the deviation portion without considering the gross violation of building permission committed by respondent No. 5, with regard to the permissible area of construction.

08. The learned Tribunal without addressing the specific issue of deviation of the plinth and nature of violation of the building permission directed the applicant to file an application for grant of revised building

permission within one week from issuance of the order. The Tribunal failed to appreciate that merely on the submission of respondent No. 5, direction was issued to file an application for revision of building permission and its consideration without considering and deciding the issue whether such an application, in view of deviation was maintainable.

09. The order has been passed by the Tribunal despite the demolition notice issued by respondent Nos. 1 to 4 specifically stating that respondent No. 5 has violated the building permission by raising construction over an area of 1881 sft., thus, deviating by 118 sft. and also not maintaining the rear set back. The respondent Nos. 1 to 4 in their objections have stated that respondent No. 5 has committed deviation while construction of the structure and made deviation in the permitted area of 118 sft. Instead of permitted 1881 sft. The setback on the rear side which was to be maintained is 10'-3"/13'-11" was maintained on spot at 3'-6". These deviations resulted in demolition notice dated 12.05.2022 to respondent No. 5.

10. The appeal filed by respondent No. 5 was against the order of demolition dated 12.05.2022 in terms of the Section 253(1) of the Jammu and Kashmir Municipal Corporation, Act 2000. The Tribunal while deciding the appeal of the petitioner against the demolition notice dated 12.05.2022 had to first consider whether the demolition notice was in accordance with the provisions of Act and whether there was any violation on the part of respondent No. 5 of the building permission, and whether the violation is major or minor in nature. The direction to respondent No. 5 to make an application for revised building permit and its consideration without first and adjudicating whether violations are of

the nature which can be considered for regularization.

11. The respondent No. 5, pursuant to order dated 26.05.2020, moved an application before the Commissioner, Srinagar Municipal Corporation seeking revised building permission for 118 sft. of the deviation portion which according to him is less than 10% of total build up area and can be considered for regularization as per J&K Unified Bye Laws of 2002 under Bye Law No. 27. It is submitted by him that this application is being filed by him in compliance to the order of the learned Special Tribunal and sought consideration of the same in the light of the directions of the Tribunal. Thus, the Tribunal without finally adjudicating the nature of violations and merely on the statement of the respondent No. 5, could not have directed the filing of application or its consideration under revised permission.

12. In view of the aforesaid facts and circumstances of the case, the impugned order dated 24.05.2022, is set aside. The Tribunal is directed to decide the appeal expeditiously. Till such time as the appeal is decided, status quo as on date be maintained.

13. As a consequence thereof, proceedings in the contempt petition are also closed.

14. Disposed of.

(SINDHU SHARMA)
Judge

SRINAGAR

Vishal
19.12.2023

<i>Whether the order is speaking</i>	:	<i>Yes/No</i>
<i>Whether the order is reportable</i>	:	<i>Yes/No</i>