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***HON'BLE SRI JUSTICE P.NAVEEN RAO**

+WRIT PETITION No.38916 of 2013

% 19-03-2015

Khaja Kutubuddin Khan s/o late Khaja Moinuddin Khan
R/o 699, Khaja Mansion,
Road No. 36, Jubilee Hills, Hyderabad and another

... Petitioners

Vs.

\$ The Secunderabad Cantonment Board,
Court compound, S P Road,
SEcunderabad
Rep by its Chief Executive Officer and others

.... Respondents

!Counsel for the petitioners : Sri V.V.N.Narayana Rao

Counsel for the Respondents: 1) Sri Y.V.Ravi Prasad, senior counsel
for Respondents 1 and 2

2) Assistant Solicitor General for
Respondents 3 and 4

<Gist :

>Head Note:

? Cases referred:

1. 1995 (1) ALD 1 (FB)
2. W.A No. 44 of 2013 dated 22.1.2013
3. (2011) 4 SCC 180
4. (2009) 8 SCC 339
5. 2007 (1) ALT 161
6. 2000 (6) ALD 17
7. 2004 (3) ALD 660
8. 1999 (3) ALD 10
9. (2004) 3 SCC 553
10. 2006 (3) APLJ 41 (HC)
11. 2006 (3) APLJ 41 (HC)
12. (2013) 5 SCC 336
13. (2013 (5) SCC 357
14. 2007 (3) ALD 116
15. (2009) 15 SCC 705
16. (1991) 4 SCC 379

HONOURABLE SRI JUSTICE P. NAVEEN RAO

WRIT PETITION No. 38916 of 2013

ORDER:

Petitioners claims to be owners of property bearing No. 221/B, Club Road, Secunderabad, having purchased the same vide registered sale deed document No. 1533 of 1973 dated 29.7.1973. Petitioners aver that vendor of the petitioner purchased the said property in a Court auction. In the said premises theatre by name 'Dream Land' was functioning. On 12.10.1989 petitioners applied for conversion of the theatre in to a marriage hall. No objection certificate was granted to the petitioners on 6.6.1990 and accordingly the marriage hall was established and was functioning for long time. On 6.4.2001 notice under Section 185 of Cantonment Act 1924 (referred to as Old Act) was issued alleging that unauthorized constructions were made on the premises and direction was issued to remove the same. Aggrieved thereby, petitioners filed appeal before the Appellate Authority on 12.7.2001 and Appellate Authority granted stay. On 25.11.2013 the entire structures were demolished. Challenging the said demolition this writ petition is instituted. Petitioners seek issuance of writ of mandamus and to declare the action of the respondents in demolishing the structures of the said premises without notice and without following due process of law, contrary to the provisions of the Cantonment Act, 2006 (referred to as new Act) and in violation of Article 300- A of the constitution of India. Petitioners also sought consequential directions to second respondent to pay compensation towards cost of structures demolished on 25.11.2013.

2. Heard Sri V.V.N.Narayana Rao learned counsel for petitioners, Sri Y.V.Ravi Prasad, learned senior counsel appearing for respondents 1 and 2, learned Assistant Solicitor General for respondents 3 and 4.

3. Sri V.V.N. Narayana Rao, learned counsel for petitioners contends that procedure followed in demolishing the property of the

petitioners is illegal, violative of the provisions of the Cantonment Act and amounts to arbitrary exercise of power and authority.

4. Learned counsel for petitioners contends that petitioners converted the theatre into function hall after obtaining due permissions and has been operating the function hall since the year 1990 and thus it cannot be said that petitioners made illegal constructions and operating the function hall without permission.

5. Learned counsel for petitioners further contends that when notice under Section 185 of the Old Act (Section 248 of new Act) was issued directing the petitioners to remove the unauthorized structures, petitioners preferred appeal and Appellate Authority granted stay. The appeal is pending. During the pendency of the appeal, no further action can be taken by the Cantonment Board.

6. Learned counsel for petitioners vehemently contended that even if appeal is dismissed, petitioners are still entitled to notice under Section 320 of the new Act (Section 256 of old Act) before demolition is taken up. Earlier notice issued under Section 256 of the Old Act in the year 2001 cannot be relied upon to demolish after long lapse of time straight away without further notice; such action amounts to arbitrary exercise of power depriving the right of enjoyment of property of the petitioners. On account of such demolition the function hall is not operational causing severe hardship and suffering to petitioners. Learned counsel for petitioners further contended that having regard to the fact that constructions were made in the year 1990 after obtaining permissions and function hall has been in operation, the respondent Board ought to have exercised power vested in it under 1st proviso to Section 248 of new Act (Section 185 of new Act) for composition in the first instance before resorting to demolition.

7. Division Bench of this Court in 3 ACES Vs MUNICIPAL CORPORATION OF HYDERABAD^[1] dealing with the issue of unauthorized constructions and demolitions thereon, laid down detailed guidelines to be followed by authorities concerned, Clauses 1 and 3 (III) of para 36 of the

judgment mandates putting the property owner on notice in advance and giving opportunity. The mandate of law laid down by this Court is also not followed in the case of petitioners without any justifiable reason or cause.

8. Learned counsel for petitioners further contended that once appeal is filed, there is automatic stay and no action can be taken against the subject matter of the appeal, which is clearly discernable from the provisions contained in Section 342 of new Act.

9. In support of his contentions learned counsel for petitioner Sri V.V.N. Narayana Rao, relied on following decisions:

NARINDER KUMAR DHINGRA Vs SECUNDERABAD CANTONMENT BOARD^[2], DELHI DEVELOPMENT AUTHORITY Vs. RAM PRAKASH^[3], NATIONAL THERMAL POWER CORPORATION LIMITED Vs. MAHESH DUTTA AND OTHERS^[4], MD. SHABIR AHMED Vs ZARRAR BIN ABDULLA^[5], J.K. TRADERS, HYDERABAD Vs STATE OF A.P^[6], TULJARAM SINGH (DIED) BY L.Rs Vs DISTRICT COLLECTOR, HYDERABAD^[7], K.SEETHARAMA DASS Vs SIKILE MOSES AND OTHERS^[8], ABL INTERNATIONAL LTD Vs EXPORT CREDIT GUARANTEE CORPORATION OF INDIA LTD AND OTHERS^[9], S. PRABHAVATHI Vs. ROHINI KILARU AND ANOTHER^[10], S. PRABHAVATHI Vs. ROHINI KILARU AND ANOTHER^[11]

10. Sri Y.V. Ravi Prasad, learned senior counsel appearing on behalf of the respondent Board submitted that on 27.7.2000 preliminary notice was issued directing the petitioners to stop unauthorized constructions. On 6.4.2001 notice under Section 185 of the Old Act (Section 248 of new Act) was issued directing the petitioners to remove unauthorized constructions. On 23.5.2001 final notice under Section 256 of the Old Act (Section 320 of the new Act) was issued and instead of complying with the said directions, petitioners filed appeal on 12.7.2001. In view of issuance of

notice under Section 256 of the old Act on 23.5.2001, proceedings under Section 185 of the old Act would not survive. Learned senior counsel contended that insofar as Section 256 of the Old Act (corresponding to Section 320 of new Act) read with Schedule V of both Acts, it is evident that there is no provision of appeal against notice issued under Section 256. Thus consequential action taken by the respondent Board is valid and legal and it does not amount to arbitrary exercise of power.

11. Learned senior counsel further contended that no authorization was issued to the petitioners for conversion of cinema theatre into a function hall. The alleged 'no objection certificate' was signed by Health Superintendent, who is no way concerned with issuance of 'no objection certificate' for conversion of existing property to any other use. This would clearly show that in the guise of obtaining some 'no objection certificate' illegally, petitioners have converted the cinema theatre into a function hall, undertook additional constructions without obtaining due permissions.

Having given sufficient time to petitioners to voluntarily remove illegal structures, consequential action was taken. He therefore contended that it is not a case where petitioners were not afforded opportunity of hearing. He further contended that neither in the affidavit filed in support of the writ petition nor in the reply affidavit filed by the petitioners to the counter affidavit of the respondents, there was any mention of issuance of 'no objection certificate' by Medical Superintendent as now brought on record. If the petitioners obtained valid certificate, there is no justification not to mention about such certificate and it appears to be a fabricated document. He further contended that the Cantonment Board seriously dispute the fact of grant of 'no objection certificate' to petitioners and unless it is established that petitioners were granted permission by competent authority for such conversion, the conversion of the building into a function hall becomes illegal and further constructions made also become illegal.

12. Learned senior counsel further contended that in fact it was not even a cinema theatre but a residential building was converted as function hall; such conversion imposes serious burden on civic infrastructure and

various aspects are required to be examined before granting permission. As no formal application was made to the competent authority, the issue was never examined regarding the feasibility to grant such permission and under the guise of a bogus certificate claimed to have been issued by a wholly unconcerned person i.e., Health Superintendent, such illegal conversion was made. There can not be a direction for regularization of illegal constructions and principle of equity is not attracted in case of unauthorized constructions.

13. He contended that there is no violation of fundamental rights nor right vested under Article 300-A of the Constitution of India. The entitlement of the petitioners on the property claimed to have been owned by them is not affected; the action taken is only against illegal constructions made which is within the powers vested in the Cantonment Board. Much before the date on which the action to demolish the property was taken, the appeal filed by the petitioners was dismissed, i.e., on 7.4.2003 and the said appeal is not restored though petitioners filed applications for restoration. Several notices relied upon by the petitioners are only notices for consideration of the application for restoration and as on today appeal is not restored. There is no automatic stay on filing of appeal. Section 276 of the old Act (Section 342 of the new Act) only vests discretion in the Appellate Authority to grant stay. Thus, unless Appellate Authority passes an order granting stay, the Board is competent to proceed further in accordance with the notice issued on which an appeal is filed. He further contended that time limit prescribed in Section 337 is applicable only against prosecution but not against other actions that can be taken by the Cantonment Board.

14. Learned senior counsel relied upon the following decisions:

DIPAK KUMAR MUKHERJEE Vs KOLKATA MUNICIPAL CORPORATION AND OTHERS^[12], ESHA EKTA APARTMENTS COOPERATIVE HOUSING SOCIETY LIMITED Vs MUNICIPAL CORPORATION OF MUMBAI AND OTHERS^[13], NERALLA DHANUNJAYA Vs MUNICIPAL CORPORATION OF WARANGAL AND OTHERS^[14], SHANTI SPORTS CLUB AND ANOTHER

Vs UNION OF INDIA AND OTHERS^[15], GHAN SHYAM DAS GUPTA AND
ANOTHER Vs. ANANT KUMAR SINHA AND OTHERS^[16], SUBHASHREE
DAS ALIAS MILLI Vs STATE OF ORISSA^[17]

15. As the facts on record do not disclose clearly whether appeal was restored, the stand of Appellate Authority is crucial. Several adjournments were granted to express stand by the Appellate Authority-4th respondent regarding status of the appeal. On 18.7.2014 some records were produced but said records do not disclose the status of the appeal. Having regard to the same

further time was granted. Truncated records of the office of the Appellate Authority were produced on 26.8.2014. It is stated that the relevant records are not available in the office of the Appellate Authority and Appellate Authority expressed inability to produce the entire record on the ground that some portion of the record was not handed over by the previous Appellate Authority. The records produced do not contain an order of appellate authority restoring the appeal filed by the petitioner. It appears that the petition for restoration was treated as appeal and notes in the file of the Appellate Authority disclose as if restoration petition was allowed, though no formal order was issued. Thereafter several notices were issued to the petitioners informing the dates of hearing of the appeal. Having perused the records, by order dated 26.8.2014 direction was issued to 4th respondent-Appellate Authority to file (additional) counter affidavit regarding its stand on the issue whether appeal was restored and notices issued from time to time are after the appeal was restored, for hearing of the appeal. When the matter was taken up for further consideration on 20.9.2014, learned Assistant Solicitor General reported that he did not receive further instructions from the Appellate Authority. However, as a last chance, two more weeks time was granted and copy of the order dated 20.9.14 was communicated to the Appellate Authority. In spite of granting sufficient time no (additional) counter affidavit is filed by the Appellate Authority and the right to file (additional) counter affidavit was forfeited by order dated 8.10.2014 and

matter was taken up for hearing.

16. As per the records of the Appellate Authority perused by the Court on 26.8.2014, an endorsement was made on restoration of the appeal and subsequent notices issued proceed as if they are for hearing of the appeal itself. Thus, it has to be assumed that appeal is restored and is pending consideration by the Appellate Authority.

17. While proceeding to hold that the appeal is deemed to have been pending, can it be said that the Board has acted illegally in demolishing the structures.

18. On the appeal filed by the petitioners, appellate authority granted stay on 12.07.2001. Consequent to dismissal of appeal on 7.4.2003, stay granted on 12.7.2001 stood vacated. In view of recalcitrant attitude of appellate authority restoration of appeal is presumed in favour of petitioner. Till the records are produced, no one was sure of the status of appeal. Even now full record of the case is not available with the appellate authority. In letter No. 19001/Appeal/DE dated 31.7.2009 the appellate authority informed the Secunderabad Cantonment Board that appeal is restored. There is no further communication. It is not sure when appeal is restored. Thus, in the peculiar facts of this case, it cannot be said that the Secunderabad Cantonment Board acted in high handed manner ignoring pendency of appeal when it undertook demolition of properties of petitioner.

19. There is no merit in the contention of the Board that once notice under Section 256 is issued, no appeal is maintainable against notice under Section 185. There is no such prohibition. The scheme of relevant provisions do not envisage such a course. A reading of Sections 248, 320 and 340 of the new Act (Sections 185, 256 and 274 of the old Act), it is clear that an aggrieved person can prefer appeal against notice not to undertake construction/ to remove illegal structures. Further action is warranted under Section 320 of new Act (Section 256 of old Act) if the person does not comply with the notice and does not prefer appeal. In the case on hand, petitioners have preferred appeal against notice under Section 248 of new Act (Section

185 of old Act) and it is assumed that the said appeal is pending consideration of the appellate authority. No doubt such appeal was preferred after the notice under Section 320 of new Act (Section 256 of old Act) was issued, but Appellate Authority granted stay and it is assumed that said appeal is pending. Thus, it is no more open to the Board to contend that since notice under Section 320 of new Act (Section 256 of old Act) was already issued no appeal against Section 248 of new Act (Section 185 of old Act) is maintainable and no further notice is required. Such a plea was not taken before the Appellate Authority.

20. Matter does not rest here. Admittedly, Board kept silent for more than 12 years after issuance of the notice under Section 256 of the old Act even though Board vehemently contends that appeal was dismissed on 21.3.2003 and stay is not operating. Apparently even Board has not taken steps to sensitize the Appellate Authority on its understanding that appeal is not restored nor did it ask the Appellate Authority to finalize the appeal expeditiously and allowed to keep the issue pending. SCB has not initiated action immediately after the dismissal of appeal. In letter No. 19001/Appeal/DE dated 31.7.2009 Secunderabad Cantonment Board was informed by Appellate Authority that appeal was not restored. But it choose to keep quiet for more than four years thereafter. Having regard to such long gap between the dates of dismissal of appeal and taking action to demolish the properties of petitioner, even assuming that SCB was right in its view that no appeal is pending it ought to have put the petitioners on fresh notice before taking such penal action.

21. In DELHI DEVELOPMENT AUTHORITY, DDA issued a notice demanding charges payable to it. Correspondence was exchanged between DDA and the owner of the property for some time. After 25 years DDA initiated fresh proceedings for recovery of charges including arrears for the entire period. This was assailed successfully before the Delhi High Court. Supreme Court held that even if DDA is entitled to recover charges, initiating such action after long lapse of time is held not valid. In the case on hand, whether constructions made by petitioners are unauthorized and there was

no permission to convert the premises into function hall is now pending consideration by the appellate authority. Having regard to the fact that the Board has kept quiet for considerable long time even after the dismissal of appeal for non prosecution, in all fairness the Board ought to have issued fresh notice before taking further coercive action against petitioners. The action of demolishing the structures on petitioners' property straight away without putting the petitioners on notice amounts to arbitrary exercise of power.

22. By relying on plethora of precedents, learned counsel for petitioner made forcible submissions to contend that writ court can award compensation in appropriate cases where grave illegalities committed by authorities of the State/Union of India offend the right to enjoy one's property and caused serious damage to earning capacity. On the contrary, learned senior counsel for the respondent board, relying on precedents, contended that no such relief can be granted by this court in exercise of power of judicial review. Moreover, there are serious disputed questions of fact and petitioner has to avail civil remedy.

23. According to the learned counsel for petitioners, petitioners converted the premises into function hall after obtaining permission from the competent authority of the Board. Necessary alterations were also made as a consequence to such permission granted and, therefore, the running of function hall was legal and valid and taking action to remove certain constructions made as unauthorized is illegal. Leaned counsel brought on record the alleged receipt issued by the Medical Superintendent of Board in support of his claim that such permission was granted as early as in the year 1990.

24. The said contention is strenuously opposed by the learned senior counsel. He contended that the said certificate was not originally brought on record when the writ petition was instituted and therefore there was no occasion to verify the veracity of the document. No such plea was raised in the appeal also. Learned senior counsel further submitted that as per the

procedure envisaged by the cantonment Act (old and new), the competent authority has to grant permission for conversion, or to take up alterations or to make additional structures to the existing premises. The permission for conversion of premises from one use to another use has to be in accordance with the resolution of the Board and the consequential orders to be passed only by the Executive Officer of the Board. No other authority is competent to issue such permissions. He further contended that assuming that the Health Superintendent has issued such certificate, it has no legal validity, inasmuch as the Health Superintendent is no way concerned with such issues and he has to confine to the Health and Sanitation of the Cantonment area only. No application was submitted to the Board for conversion and that the Board has no occasion to consider the desirability of the proposal of the petitioner to convert the premises into the function hall. Learned senior counsel further contended that when a premises used otherwise is to be converted into function hall, lot of issues required consideration, such as, location of the premises, the connecting roads, traffic flow and the availability of sufficient space for parking etc. and these are all important parameters required consideration in providing proper civic amenities in cantonment area. There was no occasion for the Board to consider the issues since petitioners never applied to the Board.

25. The respondent board contended that petitioners leased premises to another person to run function hall. The said person filed O.S.No.576 of 2003 against the respondent Board. Initially interim injunction against the demolition was granted as the fact that appeal filed by the petitioners was dismissed and application for restoration was filed was not disclosed. The suit was dismissed. It is therefore contended that the action of the respondent board in demolishing the illegal structures was valid.

26. These contentions would reflect that there is serious dispute with reference to obtaining of permission by the petitioners for conversion of the existing premises into function hall and making additional constructions. All the issues, such as, whether the notices were validly issued; whether permission was granted; whether the petitioners validly converted the

premises into function hall are now the subject matter of appeal before the appellate authority. Therefore, at this stage these issues cannot be gone into and finding recorded.

27. The power vested in the High Court under Article 226 of the Constitution of India is very wide and there are no fetters on exercise of extra-ordinary jurisdiction. There are only self-imposed restraints in exercising such power. The Writ Court in exercise of extra-ordinary jurisdiction under Article 226 of the Constitution of India has wide amplitude of powers to reach out wherever injustice is caused. In a given case this court is competent to grant monetary claim as a consequence to declaring an administrative decision offending the right of a person as illegal. In exercise of writ jurisdiction this court can go into disputed questions of facts also (ABL INTERNATIONAL LTD) but the relevant documents and/ or affidavits should be placed on record including counter claim for this court to determine the disputed questions (NATIONAL THERMAL POWER CORPORATION LIMITED). However, grant of relief including awarding of compensation in a Writ Petition under Article 226 is discretionary and depends on the facts and circumstances of a case.

28. As noticed earlier, there are serious disputed issues. The relevant material is not on record. The issues are subject matter of appeal. In the facts of this case petitioners should pursue appeal before the appellate authority before agitating on other issues.

29. Supreme Court held that illegal and unauthorized constructions violate municipal law and offend the fundamental and constitutional rights of other persons (DIPAK KUMAR MUKHERJEE) (cited supra) and persons violating such rights cannot plead equities and seek court's intervention (SHANTI SPORTS CLUB) (cited supra). In NERELLA DHANUNJAYA, this court held that only in cases of violation of Article 21 of the Constitution of India alone, a citizen can seek adequate compensation from this court notwithstanding the availability of civil law remedy. Having regard to

principles laid down in above cases, merely on the ground that Secunderabad Cantonment Board erred in not putting the petitioners on further notice before demolishing the structures and in the peculiar facts of this case, compensation cannot be granted straight away.

30. In the appeal filed by petitioners, the plea raised was though application with building plans were submitted no communication was given accepting or rejecting such application and therefore it is deemed that permissions were accorded. In this writ petition the contention raised is Medical Superintendent issued no objection certificate. These are inconsistent stands. Both contentions are denied by the Secunderabad Cantonment Board. In view of rival stands on the core issue, petitioners are entitled to claim compensation only if they succeed in their appeal. In such an event entire action of SCB becomes illegal and as held by this court in **J K TRADERS**, petitioners can claim compensation. As noticed from the facts of the case in **J K TRADING**, the report of enquiry commission appointed by the State Government found negligence on the part of State administration in protecting the property in issue from hooligans. Therefore, this court held that the State is vicariously liable for such negligence and awarded compensation. In this case that stage is not reached. The action of SCB in demolishing structures is subject to final disposal of appeal by the appellate authority.

31. Furthermore, though it was strenuously contended that the structures were demolished, no material is brought on record regarding the nature of constructions made, area of construction and the cost, extent of property demolished and the loss caused is not assessed. Without even placing these essential facts the petitioners are seeking to compensate for illegal demolition, leaving aside the right of respondents to controvert those facts.

32. In **GHAN SHYAM DAS GUPTA**, Supreme Court held that ***remedy provided under Article 226 is not intended to supersede the modes of obtaining relief before a Civil Court or deny defenses legitimately open in such actions*** (emphasis supplied).

33. In SUBHASHREE DAS ALIAS MILLI, on the maintainability of writ petition if there are disputed questions of fact, Supreme Court held:

“7. Having given due consideration to the contention advanced at the hands of the Learned Counsel for the Appellant, we are of the view that the claim of the Appellant under Article 226 of the Constitution of India before the High Court of Orissa, could not have been determined on the basis of disputed facts. In a case where a Petitioner/Appellant wishes to press his/her claim before a High Court under Article 226 of the Constitution of India, ***the claim raised by such a Petitioner/Appellant must be determined on the basis of the factual position acknowledged by the Respondent. This is so because a High Court in exercise of jurisdiction under Article 226 of the Constitution of India, would ordinarily not adjudicate a matter, where the foundational facts are disputed.....***”(emphasis supplied).

34. The root cause for the issue in this case is the conduct of the appellate authority. The manner in which Appellate Authority dealt with the case is much to be desired. No justification is shown as to why the appeal/application filed by petitioner is kept pending for more than 12 years. The notices issued from time to time by the Appellate Authority disclose as if Appellate Authority was treating the appeal as restored and pending, where as no proceedings are brought on record showing restoration of appeal. No such decision was communicated to petitioners and the SCB.

35. Thus, no relief as sought by petitioners can be granted at this stage. Petitioners have to seek disposal of appeal before prosecuting claim for compensation. It is open to petitioners to claim compensation before appellate authority as a consequential relief. In the facts of this case and having regard to long pendency of the issue, appellate authority should be directed to finalize the appeal expeditiously.

36. The writ petition is accordingly disposed of directing the appellate authority to decide the appeal filed by the petitioners as expeditiously as possible, preferably within a period of two months from the date of receipt of a copy of this order, after putting on notice both petitioners as well as respondent board. It is open to petitioners to raise all contentions including claim for compensation for demolishing the structures by the Secunderabad Cantonment Board without even putting the petitioners on notice while appeal is pending as well as permission to reconstruct the structures demolished and the Appellate Authority shall consider all such

additional contentions also. It is made clear that claim of compensation is left open for petitioners to agitate in appropriate proceedings. No costs. Having regard to the same, all pending miscellaneous petitions are closed.

P NAVEEN RAO,J

DATE:19-03-2015
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HONOURABLE SRI JUSTICE P. NAVEEN RAO

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[16] (1991) 4 SCC 379
[17] (2012) 9 SCC 729