

THE HON'BLE SRI JUSTICE M.S.K. JAI SWAL

WRIT PETITION No.26400 of 2008

ORDER:

This writ petition is filed questioning the impugned notice, dated 05.08.2008 issued by the respondent to Shri Eduji Shorabji Shenoy, by and under which, the respondent called upon the addressee to pay a sum of Rs.1,00,000/- plus a further sum of Rs.37,00,000/- for converting the bungalow of the respondent, which is under occupation of the petitioner, from residential purpose to commercial purpose.

2. Heard the learned counsel on either side and perused the record.

3. The petitioner is in occupation of part of Bungalow, bearing No.174, situated at Boinpally, Secunderabad as tenant and the bungalow is being used as godown to store his decorative items. He has been paying the agreed rent and taxes since more than 10 years to his landlord. According to the petitioner, the said bungalow belongs to M/s.late Khan Bahadur Edulji S.Chenoy Trust, but not to the respondent. The provisions of Section 244 of Cantonments Act, 2006 (hereinafter referred to as "the Act") are not applicable to the facts of the case. The respondent, earlier, issued a notice on 13.02.2001, proposing to revise the assessment for the period from 01.04.2000 to 31.03.2003, which clearly shows that the property was made into commercial and the annual rental value was revised from Rs.7,600/- to Rs.4,25,600/- and the tax being collected from the year 2000. Hence the petitioner prays to set aside the impugned notice.

4. The respondent filed counter denying the averments of the writ petitioner. The property in question was recorded in the general land register prepared and maintained by the Defence Estate Officer as old grant. The grant was given under Order No.179 of Governor General-in-Council of 1836. The 1836 order expressly provided that the title to the land cannot be transferred, but only the occupancy rights can be given in respect of the land. The Government can resume the land and there is a restriction imposed on the holder of the occupancy right that the property can be utilized only for residential purpose and not for any other purpose. The Cantonment Act, 2006 came into force with effect from 17.12.2006 and as per the special provision, no person without the written permission of the Board or otherwise than in conformity with the condition, if any, shall use the building for any other purpose other than the purpose for which the building was erected. The holder of occupancy right is not entitled to let out a portion of the old grant bungalow on lease to any 3rd party without permission of the Government of India, which is the owner of the land. As per the grant order, the status of the petitioner is that of a trespasser to the property as no prior permission of Central Government was obtained. The records maintained by Defence Estate Officer did not manifest that the holder of occupancy right is a trust. The alleged lease transaction between the petitioner and the alleged trust is disputed in toto. The petitioner has no *locus stani* or any *de jure* right to invoke the extraordinary jurisdiction of this court and hence prays for dismissal of the writ petition.

5. The learned counsel for the petitioner submits that the impugned notice cannot be sustained for more than one reason. It is submitted that the notice has been issued without following the procedure

and without finding the petitioner guilty of the violation, the respondent proceeded to impose penalty of Rs.1,00,000/- and Rs.10,000/- per day, which was quantified to Rs.38 lakhs. He further submits that it is not known as to from what date the alleged violation is being taken into consideration.

6. The learned counsel for the petitioner further submits that as long back as in the year 2001 the respondent has revised the property tax for the property in question and enhanced the property tax treating it as commercial Auto Garage, and vide the proceedings dated 13.02.2001 in file No.TS/Tri.Asst/J/817, the existing annual rental value of the property in question was enhanced from Rs.7,600/- to Rs.4,25,600/- and this was done on the ground that the said property is being put to commercial use as Auto Garage, as has been mentioned in the Column 'Remarks'. It is not disputed that the landlord of the premises in question is paying the property tax regularly. If that be the case, how can the respondent in the year 2008, vide the impugned notice, dated 05.08.2008 contend that the landlord of the premises has been carrying on commercial activities in the said bungalow and changed the nature of use from residential to commercial without seeking prior approval of the Cantonment Board. He further submits that the impugned notice further states that since there is contravention of Section 244 (1) of the Act, notice was issued on 02.08.2007, and since there was no response, the occupant of the premises, i.e., the petitioner as well as the landlord have been called upon to pay fine of Rs.1,00,000/- and additional fine of Rs.10,000/- per day, which was quantified at Rs.38 lakhs.

7. The learned counsel for the petitioner further submits that the respondent is not competent to straight way impose the fine without there

being a finding of guilt to be recorded by the competent authority. According to the learned counsel, a plain reading of Section 244 (2) of the Act makes it very clear that before proceeding to impose the substantive fine of Rs.1,00,000/- and Rs.10,000/- for each day of contravention, there shall be conviction, but not otherwise. The learned counsel for the petitioner in support of this submission relied upon a judgment of a Division Bench of the High Court of Punjab & Haryana in *Jarnail Singh v. Cantonment Board*¹ wherein it is clearly laid down that a person, who is to be fined, has to be convicted first and then order of fine is to be passed and such an order could have been passed by following the principle of natural justice.

8. On the other hand, the learned senior counsel appearing for the respondent-Board submits that the petitioner has no *locus standi* to file the writ petition on the ground that she is only tenant and the notice has been issued to the landlord, i.e., Shri Eduji Shorabji Shenoy. He further submits that since there was continuous contravention of the provisions of the Act, inasmuch as the premises in question has been put to commercial use, the authority has passed the impugned order, after issuing the notice, for which there was no response. The learned counsel further submits that there is no force in the submission of the petitioner that before proceeding to impose the fine, as has been done, there needs to be a conviction from a competent court and that the word 'conviction' has been used in the Act, not in the sense of criminal jurisprudence, but it was the conviction in the minds of the authorities and they are convinced that there has been violation and hence the fine was imposed. The learned counsel further submits that the word "shall on conviction" contained in

¹ 2011 SCC Online P&H 15848

Section 244(2) of the Act only means that the authorities should be convinced about the truth of the contravention. The learned counsel has taken me to the provisions of the Act, according to which, nowhere it is mentioned for the violation of Section 244 (1) of the Act there needs to be any complaint to the jurisdictional Magistrate of first class as is the case with some other provisions of the Act. Therefore, the learned counsel submits that the impugned notice has been issued in accordance with law and it does not warrant any interference.

9. The question of *locus standi* shall first be considered. There is no dispute that house bearing No.174 GLR Sy.No.531 is in the name of Shri Eduji Shorabji Shenoy. It is also admitted fact that part of the said house has been let out to the petitioner Dinaz Noria. The impugned notice is issued to the landlord Shri Eduji Shorabji Shenoy, but a copy thereof is marked to the occupant of the premises, i.e., the petitioner. It is not disputed that as per the provisions of Section 322 of the Act if the owner of the property to whom the notice was issued failed to comply with the notice, the person in occupation, either full or part of it, is liable to pay the amount. In other words, the liability to pay the demanded amount is firstly on the owner and if it is not complied with, the Board may recover the same from the occupier of the premises, and therefore, the copy of the impugned notice is marked to the occupier, i.e., the petitioner as well. Therefore, it cannot be said that the petitioner has no *locus standi* to challenge the impugned notice.

10. The Cantonments Act, 2006 has come into force from 18th December, 2006 and it has repealed the Cantonments Act, 1924. The Act intended to amend the law relating to the administration of cantonments with a view impart greater democratisation, improvement of their financial

base to make provisions for developmental activities and for matters connected therewith or incidental thereto.

11. Section 244 of the Act reads as under:

“Section 244 in The Cantonments Act, 2006

244. Restrictions on use of buildings.-

(1) No person shall, without the written permission of the Board or otherwise than in conformity with the conditions, if any, of such permission,-

(a) use or permit to be used for human habitation any part of a building not originally erected or authorised to be used for that purpose or not used for that purpose before any alteration has been made therein by any work executed in accordance with the provisions of this Act and the bye- laws made thereunder;

(b) change or allow the change of the use of any land or building;

(c) convert or allow the conversion of one kind of tenement into another kind.

(2) Any person who contravenes the provisions of sub-section (1) shall on conviction be punishable with a fine which may extend to one lakh rupees and in the case of continuing contravention with an additional fine of rupees ten thousand for every day during which the contravention continues after the date it comes to the notice.”

12. If there is a change in use of any building or it is converted into another kind of tenement, in contravention of the provisions of Section 244 (1) of the Act, punishment there for is provided under sub-Section (2) of Section 244 of the Act. A bare reading of the above provision makes it clear that before the authorities proceed to punish the person who contravened the provisions of Sub-Section (1) of Section 244 “shall on conviction” be punishable with a fine, which may extend to one lakh rupees and in case of continuing contravention with an additional fine of Rs.10,000/- for every day. What is the effect of the word “shall on conviction” is to be seen so as to sustain or nullify the impugned notice.

13. As noted above, the premises in question was converted from residential to commercial as long back as prior to February, 2001, as is

evident from the fact that the property tax to the said premises has been enhanced the annual rental value from Rs.7,600/- to Rs.4,25,600/- per annum on the ground that the said premises is being put to commercial use as Auto Garage etc., which means, even prior to February, 2001 the premises in question was being put to use for commercial purpose. After having revised the property tax of the said premises on the ground of it is being put to commercial use, more than 7 years thereafter, i.e. on 05.08.2007 the respondent has issued the impugned notice, calling upon the owner of the premises and the occupier of the premises to pay a sum of Rs.38 lakhs within a period of 7 days.

14. According to the respondent, before visiting the petitioner with the above punishment, a notice was issued on 02.08.2007, calling upon the petitioner to restore the building to the original status and 7 days time was given. In the counter affidavit, it is specifically mentioned that the notice was issued on 02.08.2007 and after expiry of 7 days, by 09.08.2007, the respondent issued the demand notice on 05.08.2008. The petitioner denies having received any such notice and the respondent has not produced any proof to show that the said notice was issued and served on the petitioner or the owner. It may also be stated here that before issuing the impugned notice, no enquiry whatsoever was conducted for determining the alleged contravention. It is noticed from the record that the contravention, if any, took place prior to February, 2001 and the respondent has taken note of it and enhanced the property tax for the said property considerably. When a contravention took place more than 7 years prior to the impugned notice, the respondent wanted to initiate fresh action and visit the owner and the occupier with huge penalty an enquiry need to be conducted to ascertain as to when the

violation or contravention took place and whether it requires to be punished deterrently by imposing the fine of Rs.10,000/- for every day during the period of continuing the contravention. After having issued the notice on 02.08.2007, the respondent did not initiate any further steps and after waiting for more than one year, passed the impugned order, imposing a huge penalty of Rs.38 lakhs. This is in violation of the principles of natural justice and the fairness which is required to be exhibited by the respondent.

15. The impugned notice is challenged on the ground that it is issued without first determining the guilt or otherwise of the petitioner of the alleged violation. Without a finding of guilt, the authorities cannot proceed to punish the owner or occupier of the premises. Emphasis is laid on the words "shall on conviction" which precedes the word punishable with in sub-Section (2) of Section 244 of the Act. What is meaning of the word "shall on conviction"? A perusal of the provision of the Act do not lay down that when there is any contravention of the nature as contained in sub-section (1) of Section 244 of the Act, a complaint need to be made to a judicial authority for recording conviction. However, when the Legislature in its wisdom has used the word specifically in Sub-Section (2) of Section 244 of the Act, without defining it, the ordinary meaning that has to be assigned to the word has to be taken into consideration. In criminal jurisprudence, the word 'conviction' means that a person need to be tried of an alleged violation or offence and only on being found guilty thereof, a finding of conviction is to be recorded and process of sentencing follows. Without recording a finding of guilt, there cannot be a conviction and without there being conviction, there cannot be a

sentence. The word 'conviction' has been defined in various dictionaries as under:

Cambridge English Dictionary:

The fact of officially being found to be guilty of a particular crime, or the act of officially finding someone guilty:

*Since it was her first conviction **for** stealing, she was given a less severe sentence.*

*He has a long record of previous convictions **for** similar offences.*

*The conviction **of** the three demonstrators has caused public outrage locally.*

Merriam Webster Dictionary

1:the act or process of finding a person guilty of a crime especially in a court of law

2a :the act of convincing a person of error or of compelling the admission of a truth

b :the state of being convinced of error or compelled to admit the truth

3a :a strong persuasion or belief

b :the state of being convinced

OXFORD DICTIONARY

1A formal declaration by the verdict of a jury or the decision of a judge in a court of law that someone is guilty of a criminal offence.

'she had a previous conviction for a similar offence'

2A firmly held belief or opinion.

'she takes pride in stating her political convictions'

with clause 'his conviction that the death was no accident was stronger'

2.1 *mass noun* The quality of showing that one is firmly convinced of what one believes or says.

'she had been speaking for some five minutes with force and conviction'

Collins Dictionary:

1. countable noun [usu N that]

A **conviction** is a strong belief or opinion.

It is our firm conviction that a step forward has been taken.

Their religious convictions prevented them from taking up arms.

2. uncountable noun

If you have **conviction**, you have great confidence in your beliefs or opinions.

'We shall, sir,' said Thorne, with conviction.

3. to carry conviction

4. countable noun

If someone has a **conviction**, they have been found guilty of a crime in a court of law.

He will appeal against his conviction.

The man was known to the police because of previous convictions.

16. In this connection, the judgment of the Division Bench of the High Court of Panjab & Haryana in *Jarnail Singh v. Cantonment Board* (1 supra), relied on by the petitioner has direct bearing, in which the same provision, i.e., Section 244(1) of the Act fell for consideration and the Division Bench has categorically laid down that a bare perusal of the aforesaid provision indicates that a person, who is to be fined, has to be convicted first and then order of fine is to be passed and such an order could have been passed by following the principle of natural justice. The above decision further lays down that since the petitioners were not heard and they were not provided an opportunity to defend themselves, passing of the impugned notice is in contravention of the principles of natural justice.

17. In the instant case, as stated above, a show cause notice is claimed to have been issued by the respondent on 02.08.2007, but no document in support of this has been produced. The petitioner denies having received any such notice. Though a 7 days time was given in the said notice, the respondent did not act for more than one year and also allowed the contravention to continue and thereafter, passed the impugned order. There is nothing on record to show that any opportunity was afforded to the owner or occupier to put forth their case or they were heard before imposing the huge penalty of Rs.38 lakhs.

18. The learned counsel for the respondent vehemently argued that the word "shall on conviction" contained in Section 244 of the Act do not have the meaning of there being a conviction by a competent court, but what is all that is required is that the authorities should be convinced of

the truth of the imputation and thereafter, the authority can proceed to punish the person, who contravened the provisions. The learned counsel submits that there is no need for any conviction by a competent court.

19. As already stated, even though the Act provides for imposing punishment by way of fine in different sections, in none of the sections, it is mentioned that the punishment can be imposed after conviction. For instance, Section 102 of the Act provides for interest to be levied when the notice issued under Section 100 of the Act is not complied with within 30 days. It says that if the notice of demand issued under Section 100 of the Act is not complied with within 30 days, the person to whom the notice is issued, shall be liable to pay by way of interest, in addition to the sum and other charges for each complete month from the date of expiry of the period of 30 days.

20. Section 166 of the Act provides that whoever fails to make to the Chief Executive Officer any report which he is required to make by Section 164 or Section 165 shall be punishable with fine which may extend to one thousand rupees.

21. Section 333 of the Act provides that whoever, in any case in which a penalty is not expressly provided by this Act, fails to comply with any notice, order or requisition issued under any provision thereof, or otherwise contravenes any of the provisions of this Act, shall be punishable with fine which may extend to five thousand rupees, and, in the case of a continuing failure or contravention, with an additional fine which may extend to five hundred rupees for everyday during which he has persisted in the failure or contravention.

22. Section 324 of the Act provides for the method of recovery, wherein it is stated as under:

“(1) Notwithstanding anything elsewhere contained in this Act arrears of any tax, and any other money recoverable, including rent on land and buildings due or damages and fine due under leases or licences executed by or in favour of a Board or the Defence Estates Officer under this Act or the rules made thereunder may be recovered together with the cost of recovery either by suit or on application to a Judicial Magistrate having jurisdiction in the cantonment or in any place where the person from whom such tax, rent or money is recoverable may for the time being be residing, either by the distress and sale of movable property of such person, or by the attachment and sale of immovable property of that person, which is within the limits of the jurisdiction of such Judicial Magistrate, or by both these methods, and shall, if payable by the owner of any property as such, be a charge on the property until paid:

Provided that the tools of artisans, growing crops upto the value of five thousand rupees and implements and cattle used for the purposes of agriculture shall be exempt from such distress or sale.

(2) An application to a Judicial Magistrate under sub-section (1) shall be in writing and shall be signed by the President or Vice-President of the Board or by the Chief Executive Officer or the Defence Estates Officer or the Officer Commanding the Station or any other officer authorized by any of these officers, but shall not require to be personally presented.

(3) Upon receiving the application, the Judicial Magistrate referred to in sub-section (1) may take action for the recovery of the amount of tax, rent or money from the person specified in the application as if such amount were a fine recoverable under a sentence passed by him and the provisions of sections 421 and 422 of the Code of Criminal Procedure, 1973 (2 of 1974), shall, so far as may be, apply to the recovery of such amount:

Provided that the recovery of no such amount shall be made by the arrest or detention in prison of the said person.”

23. When the provisions of the Act are perused minutely, what is noticed is that in none of the provisions which prescribe for visiting any person with punishment of fine either initially or continuing the word “shall on conviction” is used. Only in sub-section (2) of Section 244 of the Act, such a provision is made. When the Parliament has enacted the

statute by making special reference to the word 'conviction', it cannot be said that the said word has not been used in the sense in which it is understood, but only the meaning that can be given to that word is that the authorities should be convinced about the violation. If that was the case, in every provision of the Act, which provides for punishment with fine and for continuing offence, it is obligatory on the part of the respondents that they should be convinced that there was violation or contravention before proceeding to impose the fine. The intention of the Legislature appears to be that since Section 244(2) of the Act prescribes for huge punishment, i.e., Rs.1,00,000/- plus Rs.10,000/- for every day in case of continuing contravention, probably it was expected that the authorities should give an opportunity to the violator and after affording adequate opportunity, there should be a finding of guilt so as to mulct the occupier with continuing violation. In determining the said aspect, if the person who is proceeded against can satisfy the authorities that there is no contravention, the authorities cannot proceed to punish, as stated in Section 244 (2) of the Act.

24. For instance, in the instant case, the conversion from residential to commercial has been made much prior to February, 2001 and accordingly, the respondent has enhanced the property tax, treating the property in question as commercial property. More than 7 years thereafter, the respondent cannot turn round and say that the said contravention requires visiting the person with a punishment, as contemplated under sub-section (2) of Section 244 of the Act. Therefore, a detailed enquiry has to be carried out before imposing such huge penalty and since nothing has been done in between issuance of show cause notice on 02.08.2007 and issuing the impugned notice on

05.08.2008, it can be said that the respondent has violated the rule of law and not acted in accordance with the principles of fair play and natural justice.

25. In view of the foregoing discussion, the impugned notice cannot be sustained and the same is liable to be set aside.

26. The Writ Petition is accordingly allowed. Needless to say that it is open to the respondent to proceed against the owner or occupier of the premises in question, in accordance with law, after affording an opportunity of being heard to them and after recording a finding of guilt, if there is material therefor. No order as to costs.

Pending miscellaneous petitions, if any, shall stand closed in consequence.

Date: 20th October, 2017
Dsr



M.S.K.JAI SWAL, J