

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

**OWP No. 824/2012
CM No. 6283/2024
IA Nos. 1154/2012, 2090/2012 & 1/2015**

Building Operation Controlling
Authority

.....Appellant(s)/Petitioner(s)

Through: Mr. Rajnish Raina, Advocate

Vs

Des Raj and anr.

..... Respondent(s)

Through: Mr. Rajiv Kumar Sharma, Advocate

Coram: HON'BLE MR. JUSTICE JAVED IQBAL WANI, JUDGE

**ORDER
18.12.2024**

1. The instant petition has been filed by the petitioner herein under Article 226 of the Constitution seeking quashing of order dated 26.03.2012 passed by respondent 2 herein.
2. The facts giving rise to the filing of the instant petition reveal that the petitioner herein had issued notice dated 14.08.2001 under Section 7(1) of the Control of Building Operation Act, 1988 (For short 'the Act') against respondent 1 herein, alleging in the said notice that he/respondent 1 herein has **unauthorizedly laid a slab upon raised pillars and also constructed one room over the said slab without obtaining permission under and in terms of Section 4 of the Act, while alleging further that the said construction is in contravention of the conditions subject to which the permission has been granted** requiring respondent 1 to show cause within a period of 48 hours from the date of service of the notice as

to why Khilafwarzi should not be demolished. The said notice dated 14.08.2001 has been followed by demolition order issued by the petitioner herein on 30.08.2001 under Section 7(3) of the Act, stating therein that respondent 1 herein has failed to show cause to the notice dated 14.08.2001, as such, called upon respondent 1 to demolish the unauthorized construction.

3. Aggrieved of the aforesaid demolition order issued by the petitioner herein, respondent 1 herein preferred an appeal before respondent 2 on 04.09.2001, *inter alia*, stating there in the said appeal that his father had got 3 Marlas of government land allotted in his favour in the year 1963 and that the room alleged to have been constructed was existing there 30 years back and that no new construction has been raised by him and that the said construction including the existing shop is not against the Municipal Bye-Laws and that the notice/demolition order has been wrongly issued against him.
4. The respondent 2 herein upon considering the said appeal and after taking into account the stand taken by the petitioner herein, in terms of the impugned order dated 26.03.2012 allowed the appeal and ordered regularization of unauthorized structure raised by respondent 1 herein comprising of 375 sqft. @Rs. 15/- per sqft.
5. The petitioner herein has challenged the impugned order in the instant petition on multiple grounds including on the ground that the order impugned suffers from serious infirmities as respondent 1 has covered the whole land area for construction in violation of the Master Plan without maintaining any setbacks thereof.

6. **Objections** have not been filed by the respondents to the petition.

Heard learned counsel for the parties and perused the record.

7. It is significant to mention here in the first instance that during the pendency of the instant petition, respondent 1 has died and consequently, respondent 3 herein pursuant to a motion laid before this Court for impleadment, came to be impleaded as respondent by this Court in terms of order dated 01.01.2013 owing to the fact that respondent 3 had claimed to have purchased the offending construction from respondent 1 herein.
8. Perusal of the record would reveal that the petitioner herein while issuing the notice under Section 7(1) of the Act dated 14.08.2001 has failed to specify there in the said notice in specific terms as to what violation had been committed by respondent 1 herein while raising the construction in question, in that, the said notice in the first place alleges construction to have been raised unauthorizedly, in the second place the notice provides that the construction is in contravention of the conditions subject to which the permission has been granted. The aforesaid position manifestly signifies that the petitioner herein while issuing the notice in question have been unaware about the nature of the violation allegedly committed by respondent 1 qua the construction in question, although the petitioner in the said notice had alleged that a slab has been laid by respondent 1 on the pillars raised and one room has been constructed there on the said pillars, yet neither in the said notice dated 14.08.2001 nor in the demolition notice dated 30.08.2001, the petitioner herein has detailed out as to when such pillars were raised and slab thereon was laid and a room thereon was constructed. Both the show cause notice dated 14.08.2001 as

also the demolition order dated 30.08.2001 on deeper and closer examination reveals that the same are in cyclostyled form with blanks which blanks have been filled up by the petitioner mechanically and without application of mind.

9. Be that as it may, further perusal of the record available on the file in general and the impugned order in particular would reveal that the respondent 2 herein while considering the appeal of respondent 1 has taken into account the facts pleaded by respondent 1 there in the appeal as also the report submitted by the petitioner before it in which report, as well, the petitioner have had spelt out the multiple alleged unauthorized act by respondent 1 one being construction of one shop and staircase in the ground floor and one room over the said shop in the first floor after cutting sloppy land along with the road and dismantling the retaining wall constructed by the PWD (R&B) Department inasmuch as the said construction being 27 feet away from the central line of the road as against the 40 feet provided by the Master Plan also being allegedly in violation of the Ribbon Development Act besides that the respondent 1 also laid a balcony projection overhanging the road in the first floor.

The aforesaid factual allegation have had never been referred either in the notice issued under Section 7(1) nor in demolition order issued under Section 7(3). The respondent 2 yet has taken into consideration all those factual assertions in exercise of its appellate powers and has consequently ordered regularization of the construction raised by respondent 1 herein by duly compensating the petitioner herein while imposing a regularization fee for overall construction of 375 sqft. @Rs. 15/- sqft.

10. Having regard to the aforesaid facts and circumstances inasmuch as the case set up by the petitioner in the instant petition wherein essentially determination of complicated and disputed questions of facts are being urged by this Court in exercise of extraordinary writ jurisdiction in presence of the provisions of Section 15 of the Control of Building Operation Act which section provides for finality of the orders passed by the appellate authority and forbids the calling in question of such orders in any suit, application or execution proceedings, this Court in view of settled position of law laid down in case titled as “***Administrator Municipality Jammu vs. M/s K.C. Hotels Pvt. Ltd. and ors.***” reported in ***AIR 1995 JKJ 85*** is not inclined to display indulgence and exercise discretion.

A reference here to Para 20 of the aforesaid judgment of the Division Bench of this Court would be advantageous and appropriate and same provides as under:-

“20. In this appeal, we are not expected to go into a question of fact as to what sort of violation has been committed in raising of construction, and if any, whether it was as pre-sanctioned plan or revised plan, and whether it was minor or major in nature. All these things have been well considered by the Tribunal, which was required to go into such questions. The Tribunal has after a thorough inquiry come to the conclusions on a question of fact and recorded a finding about the nature of the violation, and regularized it under law by compounding the same. The Tribunal, in our opinion, is fully competent to compound the violation, keeping in view its nature, and if it is so, the learned single Judge has not erred in upholding the findings of the Tribunal. The learned single Judge also appears to have considered the matter in its entirety in coming to the conclusion that the violations were of minor nature. As a matter of fact, strictly speaking, the writ jurisdiction of the High Court could not be invoked in such matters, as the dispute was in substance relating to a question of fact. The Tribunal is the final arbiter in such matters. It appears to us a unique case where the Municipality itself has filed a writ petition against the order of Tribunal, perhaps to cover up its lapses and omissions/commissions. The writ jurisdiction

is invoked mainly where fundamental rights are infringed. However, for violating of legal rights too, such jurisdiction may be invoked provided alternate remedy is not available. In the present case, the alternate remedy has already been availed of and even then on a disputed question of fact writ jurisdiction is sought to be invoked. Not only, that, now Letters Patent appeal too has been filed and at the expenses of badly needed funds of the Municipality. It appears to us to be a litigation of attrition only for the purpose known to the Municipality only.”

11. Viewed thus, for what has been observed, considered and analyzed hereinabove, the instant petition fails and is **dismissed**.
12. **Disposed of** along with all connected applications.

(Javed Iqbal Wani)
Judge

Jammu
18.12.2024
Neha-II

