S. No.

IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH AT SRINAGAR

WP(C) No. 81/2023 CM No. 130/2023 and CM No. 4554/2023

Reserved on: 26.07.2024.
Pronounced on: 27.08.2024.

Susan Khalid Aged 39 Years …Petitioner(s)
W/o Khalid Jehangir
R/o House No. 4, 30/A Christ Lane, Gupkar Road, Srinagar.

Through: Mr. Hakim Suhail Ishtiaq, Advocate.

Vs.

1. Union of India through Secretary, Ministry of Defence, New Delhi. ...Respondent(s)
2. Cantonment Board through its Chief Executive Officer, Badamibagh, Srinagar.
3. Defense Estates Officer, Badamibagh, Srinagar.

Through: Mr. Nazir Ahmad Bhat, Advocate for R 1 and 3.
Mr. Shahbaz Sikandar, Advocate for R 2.

CORAM:

HON'BLE MR JUSTICE JAVED IQBAL WANI, JUDGE

JUDGEMENT

1. Through the medium of instant petition filed under Article 226 of the Constitution, the petitioner herein besides having thrown challenge to constitutionality of Section 248 of the Cantonment Act, 2006, (for short the Act of 2006) has also challenged order No.4/07/3069/CB/BB/214/1448 dated 13.01.2023 issued by respondent 2 herein directing the petitioner herein to demolish the residential house constructed by her as same being an offence under Sections 247 and 248 of the Act of 2006.
2. Facts on the strength of which the instant petition has been maintained are that the petitioner claims to have in the year 2019 purchased land measuring 1 kanal, 2 marlas falling under survey No. 85 min and 86 min (Mutbadal/exchange of land under survey no. 94) Khewat No.1107 min and Khata No. 1396 situated at Gupkar Road Sonwar

Srinagar which land is claimed to have been obtained in exchange by the erstwhile owner from the Custodian Department in pursuance of the permission of the Government granted vide Government order No. Rev/EP/45/2014 dated 22.12.2014.

3. The petitioner herein states to have applied to the respondent 2 herein for construction of a residential house over the land in question in the month of June 2019 which application had remained un-actioned for more than a month and being in urgent need of a residential house, the petitioner claims to have constructed her residential house in terms of Section 238(6) of the Act of 2006 which provides that if an application for grant of permission is not decided within a period of one month by the Board, same shall be deemed to have been given.

4. It is being further claimed by the petitioner herein that when the construction in question was being raised, respondents herein illegally interfered with the same compelling the petitioner herein to file a civil suit before the court of Principal District Judge, Srinagar which court upon considering the matter passed an interim order on 17.06.2019 restraining the respondent Board herein from causing any interference with construction being raised by the petitioner herein.

5. It is being next claimed by the petitioner herein that though the construction in question raised came to be completed under **Deemed Permission clause**, however, as an abundant caution and to set the records straight, besides on the basis of legal advice sought and tendered to the petitioner, the petitioner applied to the respondents for regularization of construction raised.

6. It is being further stated by the petitioner that the District Magistrate Srinagar issued a notification bearing No. DMS/PS/120 dated 24.09.2019 in terms whereof the provisions of Works of Defence Act, 1903 (for short the Act of 1903) by virtue of which restrictions as provided under Section 7 of the said Act of 1903 were imposed on village Indra Nagar (Sonwar Bagh) of Tehsil South, Srinagar, which restrictions imposed came into effect from the date a notification came to be issued on 24.09.2019. The petitioner claims to have completed the construction in question except the boundary wall being under

construction as on 24.09.2019 and started residing therewith the her family.

7. It is being also stated by the petitioner herein that in the meeting of the respondent Board dated 15.10.2019 it was admitted that the petitioner herein had raised construction in which meeting, however, the case of the petitioner had been rejected on the ground that similar case of another person stood rejected on the ground that the petitioner had no locus to apply for permission being not an owner of the land overlooking the law pertaining to the transfer of ownership of an immovable property.

8. It is being further stated by the petitioner herein that in principle the rejection of the case of the petitioner herein by the respondents Board had no bearing on the construction raised by the petitioner herein as the same had been raised under the provisions of the Act of 2006 in terms of the **Deemed Permission clause** and since the respondent 2 had questioned the title of the land of the petitioner, the petitioner therefore contemplated to challenge the communication issued by respondent 2 in this regard dated 23.10.2019, however, before the same could be done by the petitioner herein the respondent 3 had filed a suit for declaration of injunction before the court of Chief Judicial Magistrate, Srinagar challenging the sale deed pertaining to the land in question executed in favour of the petitioner herein.

9. It is being further stated in the petition that in the meantime, the court of Principal District Judge, Srinagar dismissed the aforesaid suit of the petitioner herein in terms of order dated 30.12.2022 on the ground provided under Section 339(1) of the Act of 2006 whereafter the respondent 2 issued the impugned order dated 13.01.2023.

10. The petitioner herein has challenged the vires of Section 248 of the Act of 2006 in the instant petition on the ground that the same is violative of Article 14 of the Constitution, in that, it vests absolute and arbitrary power unto respondent 2 herein to direct the demolition of a construction which construction is being raised in violation of the provisions of Section 247 of the Act of 2006 and also on the premise that no mechanism has been provided therein the said provision to determine as to whether the construction is illegal or not and that

though a permission is deemed to have been granted where no action is taken by the respondents within 12 months of construction raised, yet, there being no provision for issuance of a show cause notice or providing an opportunity of being heard where the respondent Board takes an action within a period of 12 months, renders the provisions of Section 248 violative of Article 14 of the Constitution.

11. The petitioner has also questioned the impugned order dated 13.01.2023 on the ground that the same has been issued arbitrarily, without application of mind inasmuch as without being alive to the factual position and record obtaining in the matter besides that the impugned order is a stereotype lacking record of any reason therein thus, being arbitrary and illegal and that since the impugned order dated 13.01.2023 has been issued after the expiry of 12 months as provided under Section 247 of the Act of 2006, as such, the issuance of same against the construction raised by the petitioner is without jurisdiction and that the demolition of residential house raised by the petitioner with the knowledge of the respondents herein and without any demur, cannot be demolished by the respondents without providing an opportunity of hearing to the petitioner herein and even in absence of the requirements of issuance of a notice or giving an opportunity of hearing based upon the principles of reasonableness, fairness, equity and the requirement of following of the principles of natural justice being a facet of non-arbitrariness deemed to be imbedded in the Act of 2006 and Rules made thereunder, more so, when neither the said Act nor Rules framed thereunder expressly excluded the application of the principle of natural justice.

12. Respondents in response to the instant petition have filed their respective replies thereto.

13. **Respondent 2** in its reply has stated that land in question whereupon the petitioner has raised residential house is Defence Land categorized as B-3 and as such, the application for building permission submitted by the petitioner on 04.10.2019 was rejected and that respondent 2 was duty bound to interfere with the construction raised by the petitioner being illegal, however, the answering respondent was restrained from doing so by the Court of Principal District Judge,

Srinagar in terms of order dated 17.06.2019 passed in the suit filed by the petitioner and that the demolition order was issued immediately upon the dismissal of the said suit on 30.12.2022 and that in terms of Section 248 of the Act of 2006, issuance of show cause notice prior to the issuance of order of demolition is nowhere provided and as such, the action of answering respondents is in consonance with Section 248 of the Act of 2006.

14. **Respondent 3** in his reply has also stated that the land in question is Defence Land, whereupon the petitioner has raised residential house categorized as B-3 land as such, the petitioner has no title over the said land and therefore the impugned order was validly issued by the respondent 2 and that answering respondent has challenged the sale deed qua the land in question executed in favour of the petitioner before the court of Chief Judicial Magistrate, Srinagar.

Heard counsel for the parties and perused the record.

15. Appearing counsel for the petitioner while making his submissions in line and tune with the case setup by the petitioner in the instant petition would contend that in terms of Section 248 of the Act of 2006 the time limit of 12 months has been prescribed by the legislature and it is only within the said period that the respondent 2 can take an action against the construction, erection or re-erection of which it considers to be an offence under Section 247 of the Act of 2006.

Counsel for the petitioner would insist that construction raised by the petitioner stands completed prior to 04.10.2019 having been admitted by the respondents in the minutes of meeting held on 23.10.2019, therefore issuance of demolition order dated 13.01.2023 being admittedly beyond 12 months is without jurisdiction and power under Section 248 of the Act of 2006 ceased to vest in respondent 2 after the said period.

The counsel for the petitioner would further plead that the interim order passed by Principal District Judge, Srinagar dated 17.06.2019 in the suit filed by the petitioner was not impediment to respondent 2 herein to proceed against the petitioner in terms of the Act of 2006, as the said court had restrained the respondents from

interfering in the construction which restraint have had to be read to be restrained from illegal interference only and not a legal one.

16. **Per contra**, counsel for the respondent 2 contend that the court of Principal District Judge, Srinagar in terms of an interim order restrained it from interfering in the construction raised by the petitioner, as such, the impugned order could not be issued and it was only when the suit of the petitioner wherein the said interim order had been passed was dismissed by the court of Principal District Judge, Srinagar on 30.12.2022, the order dated 13.01.2023 came to be issued by respondent 2 well within 12 months from the date of order of dismissal of the said suit.

17. The counsel for the respondent 3 while opposing the submissions of counsel for the petitioner in tune with the reply filed to the petition endorsed the submissions of counsel for the respondent 2 made in opposition to the submission of counsel for the petitioner.

18. **It is settled principle of law** that Court cannot prevent statutory authority from performing its statutory duties cast upon it by the statute. Thus, whenever an order of injunction is passed by the court in a matter as had been done in the instant case being the interim order dated 17.06.2019 passed by the Principal District Judge, Srinagar in the suit filed by the petitioner herein, the said interim order in law, has to be read as an order restraining illegal interference in the construction raised by the petitioner and not restraint put against the statutory authority respondent 2 herein forbidding it from performing of a statutory duty or functions.

19. Perusal of the record would reveal that interim order dated 17.06.2019 supra was subject to objections, providing an opportunity to respondent 2 herein to seek its vacation or modification which liberty seemingly has not been availed by respondent 2 before the court below, instead the respondent 2 seemingly has interpreted the said interim order to be a permanent prohibition upon it from proceeding against the petitioner herein which interpretation cannot by any sense of imagination said to be legal or correct, in that, the respondent 2, in law, was free to take action against the petitioner herein warranted under the provisions in terms of Act of 2006 and the respondent 2

having failed to take such an action under these circumstances cannot shift the burden of its negligence and inaction upon the court below which passed the interim order. Indisputably the respondent 2 has slept over the matter till the suit filed by the petitioner herein got dismissed on 30.12.2022 and thereafter invoked the powers enshrined under Section 248 of the Act of 2006.

A reference hereunder to the provisions of Section 248 of the Act, 2006 becomes imperative which reads as under: -

> *"248. Power to stop erection or re-erection or to demolish.—(1) A 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:*
>
> *....*
> *...."*

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A bare perusal of the aforesaid section 248 tends to show that it provides a time limit for issuance of a notice directing demolition of a construction i.e. within 12 months of the completion of such construction/erection or re-erection. The said Section 248 neither provides for extension of said time limit nor envisages any situation or empowers the authority to issue notice beyond the said stipulated period of 12 months. Even no such extension can be read into the said provision.

A reference in regard to above judgment of the Division Bench of High Court of Delhi passed in case titled as **"Danish Infratech Private Limited V. Delhi Cantonment Board"** reported in **AIR 2015 Del 38** would be relevant wherein following has been observed:-

> *"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."*

A further reference to the judgment of the Apex court passed in case titled as **"Shiv Shakti Cooperative Housing Society Nagpur V. M/s Swaraj Developers and Ors"**, reported in **2003 (6) SCC 659** would be relevant wherein at para 19 following came to be held: -

> *19. It is well settled principle in law that the Court cannot read anything into a statutory provision which is plain and unambiguous. A statute is an edict of the Legislature. The language employed in a statute is the determinative factor of legislative intent. Words and phrases are symbols that stimulate mental references to referents. The object of interpreting a statute is to ascertain the intention of the Legislature enacting it. (See Institute of Chartered Accountants of India v. M/s Price Waterhouse and Anr. (AIR 1998 SC 74)) The intention of the Legislature is primarily to be gathered from the language used, which means that attention should be paid to what has been said as also to what has not been said. As a consequence, a construction which requires for its support, addition or substitution of words or which results in rejection of words as meaningless has to be avoided.*

20. Having regard to the facts and circumstances noticed in the preceding paras, inasmuch as, the above position of law, it is manifest that the respondent 2 herein cannot of its own extend the time frame provided under Section 248 of the Act of 2006, more so, when there was no prohibition put by the Principal District Judge Srinagar, against the exercise of power of the respondent 2 herein provided under said Section 248, as also, when the respondent 2 herein admittedly has been negligent. Therefore the only inescapable conclusion that could be drawn in the facts and circumstances of the case is that the impugned order dated 13.01.2023 has been issued by respondent 2 beyond the period prescribed under Section 248 of the Act of 2006 rendering the same illegal having been issued without any power, competence and jurisdiction.

21. Insofar as the issue of the title of the land in question whereupon the petitioner herein has raised construction and in respect of which the impugned order of demolition dated 23.01.2023 has been issued by respondent 2, is concerned this Court refrains from making any observations in this regard in view of the fact that the suit in connection therewith filed by respondent 3 herein against the petitioner herein is pending before the Chief Judicial Magistrate Srinagar leaving it open to the parties to contest the same while

making it clear that any observations made hereinabove shall not be construed to have been made in respect of the title of the land in question and shall be deemed to have been made alone for the purposes of disposal of the instant petition, having no bearing on the said suit.

22. Furthermore considering the fact that this court has concluded and held that the impugned order dated 13.01.2023 has been issued by respondent 2 without any power, authority and jurisdiction, this court does not feel a need to deal with the question of constitutionality of Section 248 of the Act of 2006 leaving it open to be decided in an appropriate case.

23. For what has been observed, considered and analyzed hereinabove the instant petition succeeds and is accordingly disposed of as follows: -

    (i) By issuance of a writ of Certiorari, the impugned order dated 13.01.2023 issued by respondent 2 is quashed.

    (ii) By issuance of a writ of Mandamus respondents are commanded to refrain from causing any interference with the construction of residential house in question raised by the petitioner herein.

24. Disposed of.

(JAVED IQBAL WANI)
JUDGE

SRINAGAR
27.08.2024
Ishaq

Whether the order is speaking? Yes
Whether approved for reporting ? Yes