

HIGH COURT OF JAMMU AND KASHMIR AT JAMMU

OWP No. 1560/2011

CMA No. 2156/2011

Date of decision:31.10.2014

Mahant Vidaya Puri

Vs.

State of J&K and ors.

Coram:

Hon'ble Mr. Justice Janak Raj Kotwal, Judge

Appearing counsel:

For petitioner(s): Mr. Ved Raj Wazir, Senior Advocate with
Mr. Abhishek Wazir, Adv.

For respondent(s): Mrs. Seema Shekhar, AAG for No. 1
Mr. S. S. Nanda, Advocate for Nos. 2 to 4

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| (i) | Whether to be reported in
Press, Journal/Media: | Yes/No |
| (ii) | Whether to be reported in
Journal/Digest: | Yes/No |

1. This is a writ petition under Article 226 of the Constitution of India read with section 103 of the Constitution of Jammu and Kashmir, whereby petitioner seeks **writ of prohibition**, prohibiting respondent/Municipal Corporation, Jammu from interfering in construction process to be undertaken by the petitioner as per site plan submitted by him to the respondents and a command to be issued to the respondents to stop interference in the said construction process.

2. Heard. I have perused the record.

3. Petitioner's case, briefly, is that he submitted the site plan of proposed construction on a vacant piece of his land situate at Prem Nagar, Vivekanand Chowk, Jammu alongwith application for building permission to respondent No. 2 and deposited the requisite fee of Rs. 100 on 18.04.2011. Respondent No. 2, however, neither issued any notice to the petitioner calling upon him to satisfy any requirement nor has sanctioned the building plan or refused the sanction. It is contended by the petitioner that respondent Nos. 2 and 3 were required to accord or refuse sanction within stipulated period of sixty days from the date of receipt of application and after expiry of sixty days, petitioner has acquired an indefeasible right of deemed sanction under Regulation 7(3) of the Control of Building Operations Regulations 1998 (for short the Regulations) framed under the Jammu and Kashmir, Control of Building Operations Act, 1988 (for short the Act). Petitioner's case further is that he waited for reply of respondent Nos. 2 and 3 up to 31.08.2011 and as nothing was heard from them, he started raising the construction of a wall as per the site plan but respondent Nos. 2 and 3 through their officials of Khilaf Warzi Section dismantled the wall. Petitioner has thus, contended that as respondent Nos. 2 and 3 were under statutory obligation to take a decision in his application within a stipulated period of sixty days and in case

permission was refused, respondents were required to inform the grounds of such refusal to the petitioner in writing within 30 days of the refusal so indefeasible right of deemed permission has accrued to him.

4. Respondents in their reply have admitted the submission of application alongwith site plan by the petitioner. They have also admitted deposit of the fee of Rs. 100/ by the petitioner. It is not denied that neither the building permission has been accorded to the petitioner nor was he informed about the rejection. It is, however, contended by the respondents that the building site was got inspected by the respondents on 07.05.2011 and it was found that the petitioner had already commenced the construction against the provision of the site plan submitted by him and the Master Plan. The competent authority, therefore, decided that permission cannot be granted and took a decision to initiate action for unauthorized construction under section 7 of the Act. Show Cause notice under section 7(1) dated 04.03.2013 and notice under section 12(1) of the even date for discontinuing the construction were served upon the petitioner. The petitioner neither responded to the Show Cause notice nor stopped the construction so Demolition Notice dated 08.03.2013 under section 7(3) of the Act was served upon the petitioner. Petitioner has challenged

the Demolition Notice in appeal before Jammu and Kashmir Special Tribunal, which is pending. Respondents have, thus, contended that petitioner has no right to raise construction without obtaining permission from the respondent, Municipal Corporation and that petitioner having violated the provisions of the Act and the Regulations and the matter being sub judice before the Special Tribunal, this petition is liable to be dismissed.

5. Mr. Ved Raj Wazir, learned Senior Advocate, appearing for the petitioner sought to demonstrate the falsity of respondents' contention that the petitioner had started unauthorized construction immediately after submission of his application by pointing out that as per respondents' own say the notices under sections 7(1) and 12(1) of the Act were issued on 04.03.2013, that is, about two years after the submission of application and the site plan for accord of building permission by the petitioner. Mr. Wazir would say that had the petitioner been found having raised unauthorized construction on 07.05.2011 there was no reason for the respondents to proceed against him under section 7 of the Act in the year 2013. Mr. Wazir submitted that fact of the matter is that the petitioner had started construction on spot after waiting for sixty days period stipulated for grant of sanction and a further period of thirty days for receipt

of information about refusal of sanction, if any. Mr. Wazir thus, submitted that an indefeasible right of deemed sanction had accrued to the petitioner after expiry of sixty days, which got confirmed on expiry of another thirty days so petitioner was within his right to start the construction on spot on the basis of deemed sanction and respondent/Municipal Corporation has illegally demolished the construction raised by him and commenced action under section 7 of the Act.

6. Per contra, brief submission of Mr. S. S. Nanda, learned counsel for respondents, Municipal Corporation, is that petitioner was not entitled to grant of building permission as he had violated the Act and the Master Plan by starting the construction without obtaining for the grant of sanction even for stipulated period of sixty days.
7. Short question arising in this writ petition, which is being taken up here, is whether indefeasible right of deemed permission accrued to the petitioner in this case or not?
8. Section 4 of the Act prohibits *inter alia* erection or re-erection of any building within Municipal Area except with the previous permission of the Authority concerned in writing. Section 5 of the Act provides for making application for permission as contemplated

under section 4 to the concerned Authority. Sub section (3) of section 5 casts a duty on the Authority to pass order either granting permission, subject to such conditions, if any, as may be specified in the order or to refuse to grant such permission. If the permission is refused, sub- section (4) of section 5 casts a duty on the Authority to communicate the applicant in writing within a period of thirty days, the grounds of such refusal in writing. Besides, sections 4 and 5 of the Act, Regulation 7 of the Regulations deals further with grant of building permission. Regulation 7(3) is relevant which reads:

“7. Grant of Permission

(1).....

(2).....

(3) The Authority shall decide the matter within a maximum period of sixty days from the date of submission of the application and in case no decision can be taken within this stipulated period, the permission shall be deemed to have been accorded.”

9. Regulation 7(3), on its plain reading, creates an indefeasible right of deemed permission in case, decision in the application is not taken within sixty days. What is thus, required of the Authority is that either to refuse permission if a case for refusal is made out or to accord the same within sixty days of the application, failing which it shall be deemed that the permission has been accorded. It is important to note that Regulation 7(3) shall operate not only in a case

where no decision has been taken but even in a case where 'no decision can be taken within stipulated period' of sixty days. There is no scope of escape from operation of Regulation 7(3) and the concept of deemed permission coming into operation in case the application is not decided within sixty days. Escape from Regulation 7(3) rather need not be claimed because Authority has the competence to refuse the sanction in case sanction cannot be granted but there is no scope for sitting over the matter or not taking decision in the matter, reason notwithstanding.

10. Plea taken by the respondents that petitioner had started unauthorized construction on spot is without any substance for the reason that had the petitioner been found raising unauthorized construction, respondent Nos. 2 and 3 were required to and would have immediately proceeded under section 7 of the Act against him. Such action, however, has been commenced after about two years in March, 2013. The plea for the purpose of this petition is not sustainable. Plea of the respondents, even if accepted for the sake of arguments, however, will not dilute the operation of deemed sanction because fact of the matter remains that decision in the application was not taken within the stipulated time and in the result concept of deemed permission has taken effect. This Court has already

taken similar view in Krishen Chand v. State and ors, 2007(3) JKJ 263, which incidently was against the respondents herein and in face of that decision, respondents should better have avoided such a situation to arise in this case too.

11. For all what has been said and discussed above, this writ petition has merit and is allowed. By issue of **writ of prohibition** respondent Nos. 2 and 3 are restrained from interfering with the construction being and to be raised on spot by the petitioner. It is, however, made clear that deemed permission shall operate only to the extent of construction to be raised in accordance with and subject to fulfillment of the conditions of the Master Plan and Rules and Regulations governing the construction in the concerned area.

(Janak Raj Kotwal)
Judge

Jammu
31.10.2014
Rakesh