

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

OWP N. 470/2015, MP No. 669/2015
c/w
OWP No. 449/2015, MP No. 639/2015
OWP No. 450/2015, MP No. 640/2015
OWP No. 451/2015, MP No. 641/2015

Date of decision: 22.05.2015

Kanav Khajuria and others vs. State of J&K and others
a/w connected matters.

Coram:

Hon’ble Mr. Justice Janak Raj Kotwal-Judge

Appearing counsel:

For petitioner (s):	Mr. Sunil Sethi, Sr. Advocate with Mr. Vaibhav Gupta, Advocate and Mr. Pranav Kohli, Advocate
For respondent(s):	Mr. S. S. Nanda, Sr. Advocate with Mr. Sachin Gupta, Advocate

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

1. The Jammu and Kashmir Control of Building Operations Act, 1988 (for short, the Act) has been enacted to amend and consolidate the law relating to control of building operations in the State. Section 4 of the Act prohibits *inter alia* ‘development’ of any site or to erect or re-erect any building in any area except with the previous permission of the Authority concerned. Section 3 authorizes the State Government to appoint an Authority for the purpose of the Act for an area to which

the Act applies. Section 7 provides for demolition, alteration or pulling down of a building so far as it is necessary to remove the violation and section 8 empowers the Authority concerned to issue an order directing sealing of such building/site.

2. In all these petitions, petitioners seek issue of writ, order or direction in the nature of **Certiorari** quashing notices (orders) for sealing of their business premises issued in terms of section 8(1) of the Act. Petitioners also seek **Mandamus** commanding the respondents to de-seal their business premises. In OWP No. 470/2015, petitioners also seek **writ of Mandamus** declaring the action of the respondents in invoking provisions of section 7 and 8 of the Act against their businesses activities as illegal and bad in the eyes of law. In OWP Nos. 449/2015 and 451/2015, petitioners also seek quashing of notice under section 7(1) issued to them.
3. I may state briefly and shorn of unessential, the background facts, mostly admitted or indisputable, leading to these writ petitions:

OWP No. 470/2015

- 3(a) Petitioner No. 1, Kanav Khajuria claims that he is in the process of setting up a spa and beauty saloon in first floor of 'building known as 29-D/C' Gandhi Nagar, Jammu and for that purpose was making necessary

renovations in the rooms, whereas petitioner No. 2 claims to have already set up a Gym under the name and style of 'M/S Waves Gym' in the ground floor of the said building. It is stated by the petitioners that respondent No. 3, Mohinder Gupta is owner of this building and he has rented out its first and ground floor to petitioner Nos. 1 and 2 respectively.

- 3(b) Respondent No. 2-the Building Operation Controlling Authority, Municipal Corporation, Jammu, through its Chief 'Khailafwarzi Officer', firstly, issued a notice under section 7(1) of the Act dated 01.11.2014 to Vikaram Mahajan the son of petitioner No. 3 pointing out that he has started unauthorized construction of additions and alteration to convert the aforementioned residential building into commercial without permission of Jammu Municipal Corporation, thereby he has changed the land use by converting the whole residential building into commercial one, that commercial activities would cause nuisance, traffic hazards and other environment problems much to the inconvenience of neighbouring residents and called upon him to show cause within 48 hours as to why khilafwarzi/violation should not be demolished. After more than five months the Authority issued notice (order) dated 06.04.2015 under section 8 (1) directing sealing of the building stating in the notice *inter alia*

that interior renovation work has been restarted in spite of affidavit dated 23.12.2014 whereby he (Vikaram Mahajan) had undertaken that the said accommodation shall not be used for any commercial purpose.

- 3(c) Earlier than the aforementioned notices to Vikaram Mahajan, respondent No. 2 had issued demolition order under section 7(3) of the Act dated 06.07.2013 against petitioner No. 2 followed by a notice (order) of sealing under section 8(1) dated 06.04.2015 qua the Gym (supra).

OWP No. 449/2015

- 3(d) Petitioners—1 & 2, Dr.Ajay Gupta and Dr. Ashma Mahajan, have set up a Dental Clinic in a hall over the drive-way of aforementioned building No. 29-D/C. According to the petitioners, this portion of the building is owned by petitioner No. 3, S. K. Gupta, who has leased out the hall and a bathroom to petitioners 1 & 2 and that petitioner No. 2 is the daughter of petitioner No. 3. Respondent No. 2, firstly, issued notice under section 7(1) of the Act dated 31.3.2015 to petitioner No. 3 stating that he has changed the land use of first floor of the residential house to commercial one by running dental clinic and that the said clinic was causing nuisance, traffic hazards and other

environment problems much to the inconvenience of neighbouring residents and called upon him to show cause within 48 hours as to why khilafwarzi/violation should not be demolished. Pursuant to the notice under section 7(1), the authority issued notice (order) dated 6.4.2015 under section 8(1) for sealing of the premises.

OWP No. 451/2015

3(e) Petitioner No. 2 has started a business activity in the nature of boutique under the name and style of 'M/s Fashion Fortune Studio' from a specific portion of the ground floor of the aforementioned building. This portion of the building is owned by petitioner No. 1 who has allowed the business activity under a deed of licence executed between him and petitioner No. 2. Respondent No. 2, firstly, issued notice under section 7(1) of the Act dated 31.03.2015 to petitioner No. 1 stating *inter alia* that the business activity has been started in violation of land use of the building from residential to commercial and that the said business activity was causing nuisance, traffic hazards and other environment problems much to the inconvenience of neighbouring residents. Pursuant to notice under section 7(1), the Authority issued notice (order) dated 06.04.2015 under section 8(1) for sealing of the premises.

OWP No. 450/2015

3(f) Petitioner No. 2 has set up a business activity dealing in school uniforms under the name and style of 'M/s Vidyarthi School Uniform' from ground floor of building in plot No. 1 D/C Gandhi Nagar, Jammu. This building is owned by petitioner No. 1 who has allowed the business activities under a deed of licence executed between him and petitioner No. 2. Respondent No. 2 has issued sealing notice(order) under section 8(1) of the Act stating *inter alia* that the business activities has been started in violation of land use of the building from residential to commercial and that the said business activities was causing nuisance, traffic hazards and other environment problems much to the inconvenience of neighbouring residents. This order also shows that respondent No. 2 had earlier issued a notice under section 7(1).

3(g) Petitioners of OWPs 449, 450 and 451 have assailed the orders issued under section 8(1) of the Act in appeal before the J&K Special Tribunal Jammu and learned Member of the Tribunal by his separate orders dated 8.4.2015 has stayed their operation. It is however, averred by the petitioners that appeal against order under section 8 is not permissible in

terms of section 13 and they are in the process of withdrawing the appeal filed by them.

4. Common ground of all the petitioners as main plank of their case is that the business activities have been set up by them in the buildings, which had already been duly constructed, without making any structural change for that purpose. It is, therefore, contended that no 'erection or re-erection' of a building can be said to have been made by them in violation of section 4 of the Act as contemplated under sections 7 and 8. Case being projected on behalf of the petitioners is that sections 7 and 8 of the Act can be invoked only where a building has been or is being erected or re-erected without or in contravention of permission required under section 4 of the Act, whereas a simpliciter change of user from residential to commercial or *vice versa* of an existing building neither falls within the purview of the Act nor would call for an action under sections 7 and 8 of the Act. It is averred in OWP No. 470/2015 that 'violating the land use of the area from residential to commercial' is not where contemplated under section 7 and 8 of the Act and Authorities under the Act have no jurisdiction to invoke powers under the Act in regard to the business activities of the petitioners. Contextually, in OWP Nos. 449/2015, 450/2015 & 451/2015, it is averred that the

expressions 'erection or re-erection' relates to construction, re-construction, structural addition and alteration to bring it within the mischief of section 7 of the Act and without there being any erection or re-erection, section 7 is not attracted. The other ground set up is that business activities, like running Gym, Spa or Saloon or dealing in school uniform of students are permissible activities in residential zone as per modification to the master plan notified vide SRO 64 dated 16.02.2010.

5. Respondents have opposed the petitions and the stand taken is that conversion of a residential house into commercial is covered under the definition of erection or re-erection and mischief under section 7 of the Act is attracted.
6. It is noticed as common ground of both the sides that Gandhi Nagar, where aforementioned building is located, is a residential zone within Jammu city and permissible land use in the zone is residential only. It is not the petitioners' case that the plots in which the said buildings have been constructed were allotted to the respective allottees for a purpose other than the residential. It is also admitted that the respective business activities have been started/allowed to be started by their owners in residential buildings.

7. Interlinked questions raised in these writ petitions are these:

i) Whether change of user of a building/site (say misuse) simpliciter in violation of permitted land use in the area will attract mischief under section 7 of the Act?

ii) Whether the Authority under the Act has jurisdiction to take action under sections 7 of the Act and/or to issue order of sealing under section 8 where user of a building/site has been unauthorizedly changed, say from residential to commercial and *vice versa*, without effecting any structural change therein or thereto?

8. Mr. Sunil Sethi learned Senior Advocate, appearing for the petitioners in OWP No.470/2015 submitted that neither the change of user of premises is covered within the domain of the Act nor any permission under the Act is required to be sought for change of user. Mr. Sethi submitted further that the land use is covered under the Master Plan prepared under the Jammu and Kashmir Development Act, 1970 (for short the Development Act) and in case of violation, if any, action can be taken by the Development Authority constituted under the Development Act and not by an Authority under the Act. Mr. Sethi would say further that business activities, like running a Gym, Spa or a Saloon are permissible activities in residential zone as

per modification to the master plan notified vide SRO 64 dated 16.02.2010.

9. Mr. Pranav Kohli, learned counsel for the petitioners in OWP Nos. 449/2015, 450/2015 and 451/2015 submitted that section 7 as well as section 8 of the Act would come into operation only where erection or re-erection of a building is commenced, carried on or completed without a building permission under section 4. In the cases on hand, submitted Mr. Kohli, there is no allegation of any activity relating to erection or re-erection so neither provisions of the Act are attracted nor the Authority under the Act has jurisdiction to take action for change in land use simpliciter. Mr. Kohli drew support from definition of 'erect or re-erect' given in section 2(9) of the Act and submitted that it does not include change of user simpliciter. Mr. Kohli relied upon a judgment of a Co-ordinate Bench of this Court in Krishan Chander Bandral v. State of Jammu and Kashmir and ors. 2013 vol. 1 SLJ 49 and submitted that learned co-ordinate Bench of this Court has clearly laid down that change of user is not covered under sections 7 and 8 of the Act.
10. Per contra, Mr. S. S. Nanda, supported and assisted by Mr. Sachin Gupta, learned counsels for respondents submitted that the question whether the Authority

under the Act has jurisdiction to invoke sections 7 & 8 where user is unauthorizedly changed in violation of permitted land use is no more *res integra* in view of the law laid down by the Supreme Court in *M. C. Mehta v. Union of India and ors*, (2006) 3 SCC 399. Referring to various provisions of the Act and Control of Building Operations Regulations, 1988 (for short the Regulations), Mr. Nanda submitted that the building permission under section 5 of the Act is granted in accordance with the Master Plan prepared under the Development Act and all the conditions including restricting in regard to land use in a zone becomes integral part of the building permission. Unauthorized change of user in violation of permitted land use would mean cause breach of condition of the building permission and the master plan and amounts to unauthorized re-erection of the building and infringes section 4 of the Act. In regard to Krishan Chander Bandral's case (*supra*) relied upon by petitioners' counsel, Mr. Nanda submitted that question in regard to change of user did not arise in that case as learned Single Judge of this Court had mainly noticed the contradiction between notice under section 7(1) and that section 8(1) of the Act. Mr. Nanda also relied upon a Division Bench judgment dated 20.12.2013 of this Court in *Nazir Ahmad Mir vs. State of J&K*, OWP No. 875/2013.

11. In their supplementary arguments, in regard to Supreme Court judgment in MC Mehta's case, Mr. Sethi as well as Mr. Kohli sought to draw my attention to, what they called significant, difference between definition of the term 'erection or re-erection' given in section 2(9) of the Act and definition of term 'to erect a building' given in section 331 of the Delhi Municipal Corporation Act, 1957 (for short the DMC Act). It was pointed out that under clause (h) of section 331 of the DMC Act, 'to erect a building' includes *inter alia* 'to convert into a stall, shop, warehouse godown, stable, factory or garage any building not originally constructed for use as such or which was not so used before the change', whereas no such provision is contained in section 2(9) of the Act and no way a case of change of user, that is, using residential building as a commercial building or vice versa would fall within the purview of the Act.
12. Before taking up the aforesaid questions, it is necessary to examine the judgment of the Co-ordinate Bench of this Court in Krishan Chander Bandral's case (supra) as according to petitioners' counsel it has already been settled by this Court that sections 7 & 8 of the Act do not apply in a case of change of user simpliciter and if it is so, scope of consideration may

change. Learned Single Judge of this Court in that case noticed the show cause notice issued under section 7(1) and sealing notice (order) under section 8(1) of the Act issued by the Authority. In the notice under section 7(1), the petitioner of that case was informed that he has rented out shops to open a Bank, that no space for parking was available in those premises and that the unit was causing traffic hazards and other environmental problems and inconvenience to the people residing in the vicinity. As against this, it was mentioned in the sealing notice that the petitioner has raised construction without seeking permission from the competent authority and thereafter intends to convert the building for commercial use for establishment of a bank. In the backdrop of contradiction in the two notices, learned single Judge allowed the writ petition observing in para 7 of the reporting:

“Admittedly, notice under section 7(1) of the Act of 1988 of 1988 does not allege any of the contingencies as are referred to in section 7(1) of the Act of 1988 of 1998. Notice dated 21.07.2012 in the facts and circumstance of the case, is illegal and unauthorized and, in consequence thereof, sealing order is also rendered illegal.”

13. It is noticed on a plain reading of the judgment in Krishan Chander Bandral that question in regard to applicability of sections 7 & 8 of the Act to a case of

change of user neither was raised nor was it debated as to whether change of user of a building would mean unauthorized erection or re-erection of the building as contemplated under these two sections. It would, therefore, not be correct to say that this Court has held that sections 7 & 8 of the Act do not apply if it is a case of change of user (misuse) of a building/premises simpliciter.

14. It is necessary also to examine judgment dated 13.05.2013 rendered by a Co-ordinate Bench of this Court in OWP No. 373/2013 in context of the maintainability of these writ petition given that the petitioners have challenged the notices under section 8(1) of the Act. Learned Single Judge has held in that case that a sealing order issued under section 8(1) of the Act is not appealable under section 13 of the Act and the aggrieved person can invoke the extra ordinary writ jurisdiction of this Court and this Court in appropriate cases can entertain such a petition and pass orders in accordance with law. The question of jurisdiction, however, neither was raised at Bar nor was debated in this case and is not being taken up in light of the Authority in judgment dated 13.05.2013 (supra). I may also refer to the Division Bench judgment of this Court in Nazir Ahmad Mir's case (supra) relied upon by the respondents' counsel ratio

whereof is that the competent Authority has the power to order for sealing of unauthorized construction even before initiating action for ordering demolition of any structure as provided under section 7 of the Act. This power, however, is conditional inasmuch as, immediately after issuance of order of sealing, the competent authority would be duty bound to initiate action in terms of section 7 of the Act.

15. It is necessary to examine few provisions of the Act relevant for determining the questions (supra) and also to compare them with the corresponding provisions of DMC Act as far as necessary to look into the applicability aspect of the judgment rendered by the Supreme Court in M.C. Mehra (supra) to these cases. Point involved in relation to the questions to be determined would be whether change of user (misuse) of a building, say from residential to commercial or *vice versa*, in violation of the permitted land use as per the Master plan for an area to which the Act applies, would fall within the ambit of unauthorized 'erection or re-erection' as contemplated under section 7 of the Act read with section 8. Before taking up the questions, it would, however, be important to point out that sections 7 & 8 are interlinked inasmuch as a sealing order can be issued only in respect of such

erection or re-erection about which action under section 7 has been or is intended to be taken.

16. Section 4 of the Act *inter alia* prohibits 'development' of any site and erection or re-erection of any building except with the previous permission of the Authority, which in relation to erection or re erection of a building is called the building permission. It reads:

"4.Control of development and building operation-

No person shall undertake or carry out the development of any site in any Municipal area, Local Area, Town Area, Notified area or Area notified under the Jammu and Kashmir State Town Planning Act, 1963, or erect or re-erect any building or make or extend any excavation or lay out any means of access to a road in such area except with the previous permission of the authority concerned in writing."

(Underlining by me)

- 16 (a). Section 2(12) defines a 'local area' as:

"local area" means any area declared to be a local area under sub-section (1) of section 3 of the Jammu and Kashmir Development Act, 1970

- 16(b). Section 2(7) defines 'development' as:

""development" with grammatical variations means the carrying out of building, engineering, quarrying or extraction of manufacture of building materials or other operations in, on, over or under the land, or erecting or re-erecting of any building on land or over water making any physical change in or on land and includes re development."

(underlining by me)

16(c). Section 2(5) defines ‘building operations’ as:

“ “Building operation” includes re-building operations, structural alterations of or additions to buildings and other operations, normally undertaken in connection with the construction of building;.”

16(d). Section 2(3) defines ‘building’ as:

“ “building” means any shop, house, hut, out-house, shed, super-structure, boat, house-boat and stable whether used for the purpose of human habitation or otherwise and whether of masonry, bricks, wood, mud, thatch, metal or any other material whatever and includes a wall and a well.”

16(e) Section 2(9) defines the term ‘erect or re-erect’ as:

““erect or re-erect any building includes-

- (a) Any material alteration or enlargement of any building;
- (b) Mooring or installing of any boat or house boat in the river or lake falling within the jurisdiction of any Authority;
- (c) The conversion by structural alteration into a place for human habitation of any building not original constructed for human habitation;
- (d) The conversion into more than one place for human habitation of a building originally constructed as on such place;
- (e) The conversion of two or more places of human habitation into greater number of such places;
- (f) Such alteration of a building as affects an alteration in its drainage or sanitary arrangements or affects its stability;
- (g) The addition of any room, building, out-house or other structure to any building;
- (h) The construction of a wall adjoining any street or land not belonging to the owner of the wall of a door opening on to such street; and

- (i) Reconstruction of a building or a portion thereof, by means of props, commonly known as “PAND-PAND” in Kashmir Valley.”

17. Section 3 of the Act authorizes the Government to constitute Authorities in respect of different areas as contemplated under section 3 of the Act including the ‘Municipal area’ notified under the Jammu and Kashmir Municipal Act Samvat, 2008. As per the Regulation-3 of the Regulations framed by the Government in exercise of powers confirmed under section 19 of the Act, Authority for a ‘Municipal area’, is headed by the Administrator of the Municipality.

18. Section 5 of the Act deals with applying for grant of building permission under section 4 as also the grant and refusal of the permission. It reads:

(1) Every person desiring to obtain the permission, referred to in section 4 shall make an application in writing to the authority or through any agency authorized, in such form and containing such information as may be prescribed by regularization made under this Act.

(2) The authority shall, within a period of 7 days of the receipt of application under sub-section (1) decline to accept a plan as sufficient for purpose of granting sanction under this Act if it does not bear the signature and seal of a Registered Architect or a Draftsman registered with the Authority.

(3) On receipt of such application the authority, after making such enquiry as it considers necessary, keeping in view the area and the laws, rules and regulations applicable therein, shall by an order in writing, either grant the permission, subject to such conditions, if any, as may be specified in the order

or refuse to grant such permission, under the State Town Planning Act, 1963 or any Master Plan.

(4) Where the permission is refused, the grounds of such refusal shall be communicated to the applicant in writing within a period of 30 days.

(underlining by me)

19. Regulation 4(1) of the Regulations prescribes Form 'A' for making an application for obtaining building permission under section 4 of the Act and provides further that the application Form shall be accompanied *inter alia* with 8 copies of the building plan. Regularization 4 (2) provides for the details to be indicated in the building plan. It reads:

"4. Application for permission

(1)

(2) The Building Plan shall indicate the following details:

- (i) the key plan of location which shall clearly and unambiguously describe the location of the proposed building;
- (ii) the nature and the use of the existing site and the use of the proposed building;
- (iii) sections and elevations of the building in each floor;
- (iv) specification of the building;
- (v) the position of the door/windows and drainage outlets with reference to the adjacent side;
- (vi) the positions of approach to the site."

(Underlining with me)

20. Section 7 of the Act makes provisions for proceeding and taking action against unauthorized 'erection or re-erection' of buildings including their demolition and

section 8 provides for sealing of such 'erection or re-erection'.

21. Contextually, it is necessary also to refer to sections 3 and 7 of the Development Act. Section 3 provides for declaration of the local area under that Act and constitution of an Authority for that area to be called as Development Authority and section 7 provides for preparation of the Master Plan for the local area by the Authority constituted for that area.
22. It is noticed, as it emerges as undisputed and indisputable factual scenario, that the Gandhi Nagar area of Jammu City, where the aforementioned buildings are located is comprised in the local area of Jammu Municipality notified under the Jammu and Kashmir Municipal Act, Samvat, 2008 and that the entire local area of Jammu Municipality is the part of a local area declared under section 3 of the Development Act controlled by the Jammu Development Authority. The 'development' and the 'building operations' within the local area of the Jammu Municipality as per sections 3 and 4 of the Act, however, are controlled under the Act and to that extent the Development Act does not apply as per section 20 of the Act. It is admitted also that the Jammu Development Authority has prepared the Master Plan for the aforementioned local area under

the Development Act and the area is divided into different land use zones, like residential, commercial and industrial.

23. It is noticed and needs to be underlined that as per section 5(3) of the Act a building permission under section 4 for carrying out any development, erection or re-erection within the area of Jammu Municipality has to issued in conformity and accordance with the Master Plan (supra) prepared under the Development Act, having regard to the permitted land use in the zone where the development is to be made. In the residential zone, the Authority under the Act can and shall accord permission only for constructing the buildings for permissible residential uses as per the Master Plan. It being so, it is not permissible for any person, may it be the owner of the building or a tenant, to change user of a building in violation of the land use. To ensure this Regulation 4(2) of the Regulations mandates to indicate the present and future user of proposed building in the building plan accompanying the application for building permission.
24. Reading sections 4 and 5(3) of the Act and Regulation 4(2) in juxtaposition, as they should be, would lead to irresistible conclusion and render it beyond any doubt that the nature of use, that is, the purpose for which a building is being or has been constructed in a particular

zone and shall be used for, is inherent in and inseparable from the grant of permission to erect or re- erect a building and approval to the Building Plan. Adhering to permitted user and not changing the user in violation of permitted land use would be relevant not only during the erection or re-erection (construction) of a building but for all times to come and the user cannot be permitted to infringe the permissible land use as per the Master Plan applicable at a given time. To say that unauthorized change of user (misuse) of a building after its construction has been completed without effecting any structural change would not attract mischief under section 7 of the Act and action under sections 7 and 8 would not be in conformity with the scheme under the Act and would rather defeat the very purpose envisaged in Control of building operations for the planned development of an area. To allow change of user contrary to Master Plan after the construction of a building has been completed would defeat the very object of planned development of an area/zone and neutralize the purpose of preparing Master Plan, which is linked with not only the future development of an area/zone but also the future of the generations coming to reside there.

25. The question came up for consideration of the Supreme Court in *M. C. Mehta's (supra)* in relation to the Chapter XVI of DMC, Act. It is noticed from the judgment that Chapter XVI comprising of sections 330-A to 349-A of the DMC Act deals with the building regulations in the areas controlled by Municipal Corporation of Delhi (MCD). The provisions relating to the grant of building permission and action in regard to unauthorized constructions including sealing of unauthorized constructions contained in Chapter XVI of DMC Act by large are identical to the provision of the Act. Section 345-A of the DMC Act dealing with power of sealing unauthorized constructions in its material particulars is identical to section 8 of the Act. Supreme Court while dealing with the question, whether MCD under DMC Act has power to seal premises in case of its misuse has held in para 38 of the reporting that under section 345-A of the DMC Act, the Commissioner of MCD is empowered to exercise power of sealing in case of misuse of any premises.
26. Supreme Court has also underlined importance of land use, commercial or residential, and large impact of violation of land use on various facilities including water, sanitation and drainage and has held in para 33 of the reporting:

“33. Keeping future needs in view, experts prepare master plans. Perusal of the Delhi Master Plans, 1962 and 2001 shows what were plan projections. At the time of planning, the experts in the field of town planning take into account various aspects, such as, healthy living, environment, lung space need, land use intensity, areas where the residential houses are to be built and where the commercial buildings are to be located, need of household industries, etc. Provision for household industries in residential areas does not mean converting residential houses into commercial shops. It only means permitting activities of household industry in a part of residential property. It does not mean that residential properties can be used for commercial and trading activities and sale and purchase of goods. Master plan contemplates shops in district centres, community centres, local shopping centres, etc. and not in residential areas. Be that as it may, for the present, we are not considering the cases of small shops opened in residential houses for catering to day-to-day basic needs, but are considering large-scale conversion, in flagrant violation of laws, of residential premises for commercial use.”

27. Mr. Sunil Sethi, Senior Advocate and Mr. Pranav Kohli, learned counsels for the petitioners, however, pointed out the difference between definition of the term ‘erection or re-erection’ as defined under section 2(9) of the Act and the term ‘to erect a building’ as defined under section 331 of the DMC Act to support the argument that judgment in M. C. Mehta’s case would not be applicable in the cases on hand. What was pointed out is that clause ‘h’ of section 331 of the DMC Act includes within the ambit of term ‘to erect a building’ to convert into a stall, shop, warehouse or

godown, stable factory or garage any building not originally constructed for use as such or which was not so used before the change, whereas such an eventuality is not provided under section 2(9) of the Act.

28. Argument of learned counsels for the petitioners' though attractive would not support the view that the change of user simpliciter, that is, conversion of a residential building into commercial and *vice versa* in violation of permitted land use without any structural change in the building would not attract the mischief of section 7 and section 8 of the Act for the reasons stated above.
29. To restate, briefly, nature of user of a building is inherent in an inseparable from the building permission and approved building plan and has to be adhered to for all times to come. That apart, concept of using a residential building for commercial purpose without effecting structural change would be imaginary for the reason that whenever there is change in user structural alteration of the building is imperative and cannot be ruled out and it would certainly amount to re-erection of the building in question. No commercial/business activity from a residential building would be possible without making some structural alteration, small or big. Change of user

of a building from residential to commercial can hardly be restricted to simply using the building for commercial purpose but would involve conversion of the building into a commercial building by necessary alterations and modifications

30. **To sum up, it is held that change of user (misuse) of a building in violation of permitted land use even without effecting structural alteration therein and thereto attracts mischief under section 7 of the Act and the Authority under the Act has jurisdiction to proceed under sections 7 & 8 of Act and to take appropriate action including order of sealing of the building/premises so misused.**

31. Having held as aforementioned, cases are now taken up individually qua the second ground on which the impugned notices/orders have been challenged:

OWP No. 470/2015

32. As aforesaid, respondent-Authority as per para 8 of the writ-petition issued notice dated 1.11.2014 under section 7(1) of the Act to Vikram Mahajan, the son of the owner of the building No. 29-D/C, herein respondent No. 3 and pursuant to this notice the Authority issued notice (order) dated 06.04.2015 for sealing of the building. As per these two notices, the action was initiated and sealing of the building ordered

for the reason that said Vikram Mahajan was found to have 'started the construction work of addition and alternation to convert residential building into commercial one without the permission of Jammu Municipal Corporation' and to have converted the whole residential building for commercial purpose and changed the land use from residential to commercial. It is noticed that as per notice dated 01.11.2014 issued under section 7(1), Vikram Mahajan was called upon to show cause within forty eight hours from the date of service of the notice as to why the khilafwarzi/violation mentioned in the notice should not be demolished. As per the notice (order) dated 06.04.2015, Vikram Mahajan is said to have submitted an affidavit dated 23.12.2014 undertaking that the building shall not be used for commercial purpose but in spite of that he restarted the renovation work to put the building to commercial use.

33. It is noticed further that the respondent-Authority in spite of giving forty eight hours' time in the show cause notice under section 7(1) dated 01.11.2014 did not take any action in 51 days till 23.12.2014 when Vikram Mahajan is said to have submitted affidavit that he will not use the building for commercial purposes. Further it is noticed that even though the construction work for alternation of the residential building into

commercial one was started without any authorization/permission, the respondent-Authority did not issue an order for demolition or alteration of the building under section 7(3) and instead issued notice (order) for sealing of the building on 06.04.2015, that is, over five months after the show cause notice. It is also noticed that while issuing the notice (order) for sealing of the building, respondent/Authority did not ascertain as to who the owner of the building was. These aspects of the matter should have been explained by the respondents in their reply which, however, the respondents surprisingly have opted not to do.

34. Brief reply to para 8 of the writ petition is that notice was issued to son of the owner who was duty bound to inform his lessees. Besides, plea taken is that proceedings under section 7 of the Act are not necessary for issuing the order of sealing under section 8 and reliance is placed on Nazir Ahmed Mir's case (*supra*).
35. Respondents seem to have attempted to neutralize the affect of issuing show cause notice under section 7(1) of the Act to the son of the owner of the building and not to the owner and not issuing the demolition order under section 7(3) by taking the stand that order of

sealing under section 8(1) is not dependent upon taking action under section 7 and any defect in the proceedings under section 7 will have nothing to do with order of sealing under section 8(1). Stand of the respondents, however, is without any substance and cannot sustain. Learned Division Bench of this Court in Nazir Ahmd Mir's case (supra) cannot be said to have taken such a view nor is such a view possible if sections 7 and 8 are read in juxtaposition, as they should be. Section 8(1) of the Act reads:

"8 Power to seal unauthorized construction

- (1) It shall be lawful for the Authority concerned, at any time, before or after making an order of demolition under section 7 to make an order directing the sealing of such erection, re-erection or work or of premises in which such erection, re-erection or work is being carried on or has been completed for the purpose of carrying out the provisions of this Act, or for preventing any dispute as the nature and extent of such erection or work."

(underlining by me)

36. Section 7(1) of the Act provides for issue of show cause notice and section 7(3) provides for passing the demolition order, if the show cause notice is not replied or the reply is not satisfactory. It also provides for hearing the person to whom the notice has been issued before issuing demolition order under sub-section (3). Section 8(1) by using the term 'such

erection, re-erection’ makes it undoubtedly clear that an order of sealing can be issued only in respect of those erections or re-erections about which action under section 7 is called for. The order of sealing, however, can be issued at any time and even before initiating action under section 7, that is, issuing the show cause notice till the demolition order, if passed, is implemented. In Nazir Ahmed Mir’s case learned Division Bench, while recognizing Authority’s power to issue order of sealing before initiating action under section 7, has clearly held that this power is conditional and immediately after issuing the order of sealing, competent authority would be duty bound to initiate action in terms of section 7. It would therefore, not be correct to say that power of sealing under section 8 of the Act is independent of section 7 and the correct position is that power of sealing under section 8 is directly related to action under section 7 and can be exercised only when mischief under section 7 is attracted.

37. Prior to the notice under section 7(1) dated 01.11.2014 to Vikram Mahajan, as per para 9 of the writ-petition, respondent-Authority had issued demolition order under section 7(3) of the Act against petitioner No. 2 for having opened a Gym, namely, ‘Waves’ in the ground floor of the building and on 06.04.2015 issued

notice (order) under section 8(1) for sealing of the premises. It was mentioned in the demolition order that earlier the show cause notice dated 29.05.2013 was issued to petitioner No. 2 and reply thereto submitted by petitioner No. 2 was not found satisfactory. It is not understandable as under what circumstances order of sealing has been issued at such a belated stage and whether any fresh show cause notice was issued or not. It was expected of the respondents to have explained this aspect in their reply but surprisingly respondents have totally, denied rather vehemently, para 9 of the writ petition by stating in para 5 of para wise reply that 'contents of para 9 and 10 are denied vehemently'.

38. Position, thus, emerging is that respondent-Authority but for issuing a show cause notice to the son of the owner under sub-section (1) of section 7 of the Act did not take appropriate and complete action under section 7 against the owner of the building in regard to unauthorized construction aimed at conversion of the residential building into commercial one in violation of land use before issuing the impugned order of sealing dated 06.04.2015 in respect of the whole building and another order of the even date in respect of the ground floor where the petitioner No. 2 has set up the Gym. Authority rather acted in slipshod manner by

earlier issuing a show cause notice under section 7(1) to petitioner No.2 in the year 2013 and again issuing similar notice to the son of the owner but not taking further action in the matter till the whole residential building came to be converted into commercial one in violation of the land use and commercial activities in specific portions of the building were set up by the other petitioners. Petitioner No. 1, who is said to have set up Spa and beauty saloon in first floor of building having been rented out to him by the owner, Mohinder Gupta (respondent No. 3), all along remained unheard. No show cause notice was issued to him. Even petitioner No.2 cannot be said to have been given proper hearing before issuing the sealing order, reason not far too to seek. Show cause notice under section 7(1) to him is said to have been issued on 29.05.2013 and demolition notice was issued over a month later on 06.07.2013. Order under section 8(1) has been issued on 6.5.2015 though in the meantime, petitioner No. 2 claims to have assailed order under section 7(3) dated 06.07.2013 in appeal before Jammu and Kashmir Special Tribunal.

39. **Issuance of order of demolition in regard to entire building is, therefore, illegal for having been issued without appropriate action under section 7 against the owner and violative of the principle of natural**

justice insofar as it relates to that portion of the building in which petitioner Nos. 1 and 2 have set up their commercial activities of running a Spa, beauty saloon and Gym respectively.

OWP No. 449/2015& 451/2015.

40. These two writ petitions also relate to the building No. 29-D/C (supra). Petitioners 1 & 2 of OWP No. 449/2015 have set up a Dental Clinic in a hall over the drive way and petitioner No. 2 of OWP No. 451/2015 has set up a boutique in a specific portion of the building. These two portions of the building are owned by respondent-S.K.Gupta and as per the petitioners, the owner has let out the hall for running the Dental Clinic and granted licence for running the Boutique. In OWP No. 449/2015 respondent-Authority has issued a joint show cause notice dated 31.3.2015 under section 7(1) of the Act to the owner/petitioner No. 3 and petitioner No.1 and likewise, in OWP No. 451/2015 similar joint show cause notice of the even date has been issued to the owner/petitioner no. 1 and petitioner No. 2. In both the cases notices (orders) for sealing the premises have been issued on 06.04.2015.

OWP No. 450/2015

41. This case relates to the building at Plot No. 1-D/C Gandhi Nagar, which is owned by petitioner No. 1.

Petitioner No. 2 has set up business activity under the name and style of 'M/s Vidyarthi School Uniform' in the ground floor of the building under licence granted by petitioner No. 1. Respondent-Authority issued order for sealing dated 06.04.2015 under section 8 (1) of the Act against the petitioners perusal whereof shows that earlier respondent No.1 had issued show cause notice too under section 7(1) to the petitioners.

42. The orders of demolition issued in these three cases on close look would show that the same have been issued without hearing the owner of the building, persons to whom they were issued, that is the petitioners.
43. Besides questioning the applicability of sections 7 and 8 of the Act, petitioners have assailed the notices (orders) of sealing on the ground that the above mentioned business activities alleged to have been set up by them do not infringe the permitted land use as per the Master plan and zone.
44. Mr. Sunil Sethi on the strength of the averments in OWP No. 470/2015 argued that running of a Gym or a Saloon or Spa are fully permissible commercial activities in a residential zone as per the Master Plan issued by the Government. Likewise, Mr. Parnav Kohli on the strength of averments in OWP Nos. 449/2015, 450/2015 and 451/2015 argued that the activities like,

Nursing Home, Clinic and local shops are permitted in a residential zone. It is contended that the action of the respondents in ordering the sealing of the business establishments of the petitioners is outcome of malice, arbitrariness and hostile discrimination against the petitioners. In this contest, the petitioners have given list of business activities, namely, Jewellery Show Room i.e. Midas Touch, Yes Bank, BSL Tuition Centre, Union Bank of India, Partap Shoes, JWS, Javed Habib, NU Look, Medicare Nursing Home and Looks Beauty Parlour, which, according to them, are running in the close vicinity.

45. On the strength of the grounds so raised, petitioners have contended that the orders of sealing have been issued without hearing the petitioners and they have been deprived of their fundamental right of earning livelihood in violation of principle of natural justice.
46. As explained above, the notices (orders) for sealing of the respective portions in which the commercial activities have been set up have been issued without hearing the owner(s) of the buildings or the persons who have set up the activities. Prototype orders issued in all the three cases would show that neither the petitioners were **heard nor the Authority took a**

considered view that none of the activities was permitted in a residential area.

47. 'Permissible Uses' in a residential zone as provided in para 8.2. of the Master Plan at page numbers 94 and 95 have been redefined by SRO 64 dated 16.02.2010 issued by the Government and following is the detail of permitted residential uses:

"Dwellings of all types, guest houses, boarding houses, dharmshallas, night shelters, nurseries, kindergartens, schools, education institutions, clinics, pathological Medicare/healthcare facilities. Social institutional, public utilities, libraries, parks and play grounds, golf courses green houses, religious buildings, cultural and philanthropic association of non- commercial nature, community centers/Janjghars, swimming pools for community use, professional establishments satisfying the requirements of customary occupation and private nursing homes, convenience/local shopping, recreational uses including clubs, gyms etc., ancillary uses clearly incidental to residential uses except service uses which will create pollution, nuisance and hazard".

48. The Authority under the Act, before taking action under section 7 of the Act or issuing sealing order under section 8(1) for violation of land use without structural change, is duty bound to take a considered view after hearing/affording opportunity of hearing to the affected person(s) that a particular activity infringes the Master Plan. It needs to be ascertained by the Authority as to whether a particular business

activity about which the action is going to be taken is not permissible in the residential zone and infringes the Master Plan. While taking action against one defaulter it is important also to take note of other similar activities running in the area and their permissibility so that discrimination is avoided. All this, however, does not seem to have been done in these cases. The orders of demolition, therefore, cannot be allowed to sustain as they infringe the principle of natural justice. At the same time alleged change of land use (misuse) in the residential area cannot be condoned for the faulty action of the Authority or allowed to continue without determining its permissibility.

49. Viewed thus, these writ petitions are disposed of in the following terms:

- i) Applicability of the sections 7 and 8 of the Act and power of the Authority under the Act to take action including issue of order of demolition in a case where unauthorized change of user in violation of Master Plan is made even without effecting structural change in the building is upheld.
- ii) Notices (orders) under section 8(1) of the Act in all the cases are quashed and respondent- Authority is directed to de-seal the premises. Quashment of the order, however, shall not confer any right on the

petitioners to make or continue with any unauthorized erection or re-erection (structural change/ renovations) to the building/premises.

- iii) The respondent-Authority is directed to issue fresh show cause notices within two weeks' time hereafter to the owner(s) of the buildings as also to the persons running the commercial activities, that is, all the petitioners and take appropriate action in terms of sections 7 & 8 of the Act afresh after hearing/providing opportunity of being heard to them, having regard to the residential uses as permitted in the concerned area/zone as per SRO 64 dated 16.02.2010 (supra).

50. Disposed of.

(Janak Raj Kotwal)
Judge

Jammu
22.05.2015
Karam Chand*