

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

OWP No.1446/2016

BIBA AND ORS

... Petitioner(s)
Through: -Mr.F.A.Bhat, Advocate

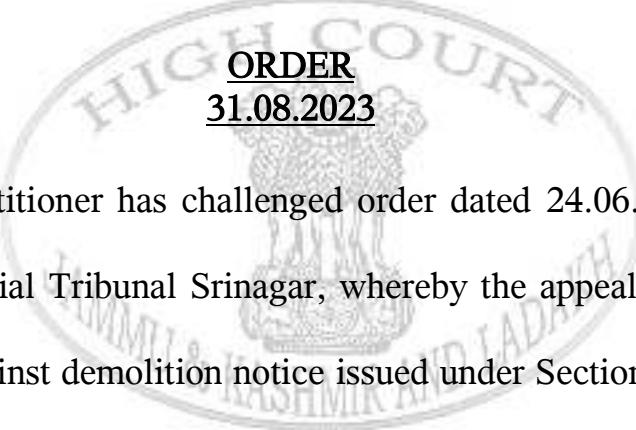
Vs.

COMMISSIONER SMC AND ORS

...Respondent(s)
Through: -Mr.Momin Khan, Advocate

CORAM:

HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE


ORDER
31.08.2023

1. The petitioner has challenged order dated 24.06.2016 passed by J&K Special Tribunal Srinagar, whereby the appeal filed by the petitioner against demolition notice issued under Section 7(3) of the J&K Control of Building Operations Act, 1988 (for short 'the Act') has been dismissed.

2. It appears that the petitioner was granted building permission vide order No.975 of 2006 dated 30.11.2006 for construction of two storeyed residential house with attic and compound walling on a plot of land in khasra No.487/1 and 544/16/1 situated in estate Owanta Bawan Srinagar. After the petitioner raised the construction of the house on spot, it was observed by the field staff of the respondent Corporation that the petitioner has made violation of the building

permission, inasmuch as, he has not adhered to the conditions relating to maintenance of set backs. Accordingly, on 09.11.2009, a notice of demolition under Section 7(3) of the Act came to be issued by the respondent/Corporation, whereby the petitioner was directed to demolish/pull down the construction, so far as it deviated the sanctioned plan within a period of five days.

3. It seems that the petitioner filed an appeal against the aforesaid notice of demolition on 19.11.2009 before the J&K Special Tribunal Srinagar. The learned Tribunal vide its impugned decision dated 24.06.2016 dismissed the appeal filed by the petitioner by holding that the petitioner has grossly violated the set backs which he had to maintain as per the building permission and that there is serious violation of front set back.

4. Learned counsel for the petitioner has contended that prior to issuance of demolition notice under Section 7(3) of the Act, no show cause notice was issued to the petitioner in terms of Section 7(1) of the Act. It has been further contended that notice of demolition came to the knowledge of the petitioner on 17.11.2016 and immediately thereafter i.e, on 19.11.2016 he filed the appeal before the Tribunal. Therefore, the appeal filed by him is well within the prescribed period of limitation.

5. Learned counsel for the respondents on the other hand has argued that notice under Section 7(1) of the Act was served upon the petitioner and this is clearly indicated in the demolition notice dated 09.11.2009, wherein a reference to show cause notice dated

04.11.2009 has been made. The learned counsel has also contended that as per the provisions contained in Section 13 of the Act, the period of limitation begins to run from the date of issuance of notice of demolition and not from the date of service of notice.

6. Heard and considered.

7. If we have a look at the memo of appeal filed by the petitioner before the Tribunal, it has been specifically pleaded by him that prior show cause notice has not been served upon him by the respondents. This aspect of the matter has not been considered by the learned Tribunal while passing the impugned order. The petitioner has specifically denied having received the show cause notice. Learned counsel for the respondent Corporation was directed to produce the record so as to ascertain whether any such notice was served upon the petitioner but the relevant record has not been produced. Even record of the Tribunal does not contain a copy of the show cause notice. The only inference that can be drawn in the circumstances is that the show cause notice has not been served upon the petitioner prior to passing of demolition order.

8. Section 7(1) of the Act makes it mandatory to issue a notice of show cause in writing to the person who has carried on construction in violation of any building permission asking him as to why building should not be altered or demolished. The cause has to be shown within a period of 48 hours. Sub Section (3) of Section 7 provides that if upon service of notice of show cause the person raising construction refuses or fails to show cause or the authority is

not satisfied that his explanation then the order of demolition has to follow.

9. In the instant case, as already noted, there is nothing on record to show that notice in terms of Section 7(1) of the Act has been served upon the petitioner before passing the demolition order. It is case of the petitioner that the deviations committed by him are not major in nature, therefore, before passing the demolition order, he should have been given an opportunity to show before the authority that the deviations are not major in nature. Without giving such opportunity to the petitioner the order of demolition becomes unsustainable in law. The learned Tribunal has ignored this aspect of the matter while passing the impugned judgment.

10. So far as question of limitation is concerned, as already stated, the respondents contend that period of limitation begins to run from the date order of demolition is made by the authority. In this regard they are relying upon Section 13 of the Act which provides that appeal against order of the authority shall lie within seven days after the date of order. A Division Bench of this Court in case of *Building Operation Controlling Authority vs. Koushalya Devi and Ors*, has while interpreting the provisions of Section 13 of the Act, held that the question of preferring of appeal within seven days of the order would not arise if the order is not brought to the notice of the concerned party. The Division Bench went on to hold that limitation for filing of an appeal will commence from the date of the service of the order or the knowledge of the order.

11. Since the respondents have not produced any thing on record to show that the order of demolition was served upon the petitioner on the date of its issuance and the petitioner has specifically pleaded that he received notice of demolition only on 17.11.2009, as such, the version given by the petitioner has to be accepted. Thus it is crystal clear that the petitioner had filed the appeal before the Tribunal well within the prescribed period of limitation.

12. For the fore going reasons, the writ petition is **allowed** and the impugned order passed by the Tribunal is set aside. However, it shall be open to the respondent Corporation to initiate fresh action against the petitioner after following the mandate of Section 7 of the Act.

13. Disposed of.

SRINAGAR
31.08.2023
Sarveeda Nissar

