

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

Case:- OWP No. 172/2011
IA No. 200/2011

1. **Subash Choudhary, Age 44 years,**Petitioner(s)
S/o Lt. Sh. Puran Choudhary,
R/o 1/1 Sanjay Nagar, Jammu.
2. **Kuldeep Gupta, Age 58 years,**
S/o Sh. K. L. Gupta,
R/o 154 A/D Gandhi Nagar, Jammu.

Through: Mr. Vishal Kapur, Advocate

Vs

1. **J&K Special Tribunal Jammu** Respondent(s)
through its Chairman.
2. **Joint Commissioner (Khilafwarzi Officer),**
Building Operation Controlling Authority,
Municipal Corporation, Jammu.

Through: Mr. S. S. Nanda, Sr. AAG

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

ORDER
07.10.2023

(ORAL)

01. In the instant petition filed under Article 226 of the Constitution of India, the petitioners herein implore for the following reliefs:-

“Writ of certiorari quashing the order dated 07.02.2011 passed by respondent no.1 in file No.STJ/759/2009 in appeal titled Subash Choudhary & Ors. V/s Joint Commissioner, dismissing the appeal of the petitioners

with a further prayer for allowing the appeal of the petitioners thereby quashing the notice of demolition impugned in the appeal.”

02. The facts under the shade and cover of which the aforesaid reliefs are claimed by the petitioners and as stated in the petition would reveal that the petitioners herein claimed to have constructed a building known as “Satyam Resorts” (*hereinafter ‘the Resort’*) in the year 2000-01 for organizing social functions therein, after obtaining necessary permission from Block Development Officer, Parmandal, owing to the fact that the permission for raising constructions in the area at that relevant point of time were not governed and regulated under the Municipal laws being an area falling outside the municipal limits of Jammu Municipal Corporation and came to be included within the limits of Jammu Municipal Corporation thereafter in the year 2003.

03. It is being stated that after the construction and establishment of the Resort in the year 2000-01, the same was made operational and on account of its use and usage for marriage and other related functions during marriage seasons necessitated its necessary renovation and repairs in order to keep the Resort in good and proper condition.

04. It is next being stated that after a considerable period of time from the date of the construction, establishment and operation

of the resort, the Jammu Municipal Corporation (**for short, 'the Corporation'**) issued a demolition notice under Section 7(3) of the J&K Control of Building Operations, Act, 1988 (**for short, 'the Act of 1988'**) vide No. MJ/Estt/198/3/CEO/09 dated 04.09.2009 and served upon the petitioners on 07.09.2009, aggrieved whereof the petitioners questioned the same in a statutory appeal before the J&K Special Tribunal, Jammu (for short, **'the Tribunal'**)/ respondent 1 herein *inter alia* on the grounds that no show cause notice under Section 7(1) of the Act of 1988 was ever served upon the petitioners by the corporation before issuance and service of demolition notice dated 04.09.2009 and that the petitioners did not raise any construction on the spot, but only executed renovation and minor repairs in the building/the Resort in order to maintain the same in good condition and that no violation of the Act of 1988 or Master-plan or any other Law was committed by the petitioners.

05. It is being lastly stated in the petition that the appeal filed by the petitioners came to be dismissed by the Tribunal/respondent 1 herein without proper application of judicial mind ignoring the settled principles of law and natural justice.

06. Objections to the petition have been filed by the respondent 2 herein, wherein it is being stated that a complaint was filed by one Sh. Wikhil to the then Chief Minister of J&K, alleging therein that the Govt. land under the premises of JK Resorts near

Marble Market, Jammu has been grabbed by unfair means by the occupants through muscle power of land mafia and that a Mall is under construction thereon without permission from the competent authority.

07. It is further stated that the Khilafwarzi Inspector of the area upon inspecting the site reported that the petitioners have started the shuttering work of 15 number of existing pillars in the set back area abutting the nallah adding new construction to the existing construction without obtaining any building permission from the competent authority and that a show cause notice under Section 7(1) of the Act of 1988 dated 29.07.2009 followed by notice under Section 12 of the Act of 1988 dated 29.07.2009 came to be served upon the petitioners to which the petitioners did not file any reply and also failed to stop construction necessitating the issuance of demolition notice dated 04.09.2009, whereby the petitioners came to be directed to demolish the unauthorized construction.

08. It has been further stated in the objections that the petitioners came to be served with a show cause notice under Section 7(1) of the Act of 1988 in accordance with Sub-section (2) of Section 7 of the Act of 1988.

09. It is being lastly stated in the objections that the appeal of the petitioners herein came to be rightly dismissed by the Tribunal/

respondent 1 herein in terms of the order dated 07.02.2011 (**for short, 'the impugned order'**) reiterating that the petitioners herein are running the Banquet Hall against the land use of the area which land use is institutional and that the violations committed by the petitioners herein are major in nature and not compoundable.

10. The petitioners herein have questioned the impugned order on the grounds urged in the petition.

Heard learned counsel for the parties and perused the record.

11. Perusal of the record in general and in particular the objections filed by the respondent 2 herein before the Tribunal/ respondent 1 herein, in opposition to the appeal filed by the petitioners herein, took a specific stand which being relevant and germane herein is extracted *in extenso* and reproduced hereunder:-

- “1. That the appellants have raised the construction with the permission of the Block Development Officer, Parmandal.
2. That the appellants have constructed the building in violation of the Master-plan as the appellants have not kept the set back on one side and there is violation of 100% which is not compoundable as such the appeal deserves to be dismissed.”

The aforesaid objections filed by the respondent 2 herein before the Tribunal/respondent 1 bears the signature and date of being Joint Commissioner (A), Municipal Corporation, Jammu dated

17.03.2001. Further perusal of the said objections would reveal also that the notice under Section 7(1) of the Act of 1988 dated 29.07.2009 stands issued by the Chief Enforcement Officer of the BOCA, alleging therein that as per the report dated 27.07.2009 of the Khilafwarzi Inspector of the area, the petitioners commenced/ are carrying on/have completed unauthorized construction of shuttering work of the existing 15 number of RCC pillars in the set back area towards the nallah site. The said notice has been attested by the Joint Commissioner, Municipal Corporation, Jammu. Perusal of the record also tends to show that the notice issued under Section 12 of the Act of 1988 dated 29.07.2009 also stands issued by the Chief Enforcement Officer providing therein the same alleged unauthorized construction raised by the petitioners herein and the said notice as well stands attested by the Joint Commissioner, Municipal Corporation, Jammu.

12. Perusal of the aforesaid notices would reveal that the same had been entrusted for service by the Corporation to the process server, namely, Ashok Kumar, who on the reverse page of the said notices has made a report that the noticee was not available, as such, the notices were affixed at site in presence of the Inspector of the area on 30.07.2009.

13. The perusal of the record would reveal that the demolition notice dated 04.09.2009 has been served upon the petitioners on

07.09.2009 upon the same process server, namely, Ashok Kumar who have had been entrusted with the service of notice under Section 7(1) and Section 12 of the Act of 1988 upon the petitioners herein. While the petitioners claim to have received the demolition notice dated 04.09.2009 on 07.09.2009, the petitioners deny to have received the notice dated 29.07.2009 issued under Section 7(1) and Section 12 of the Act of 1988.

14. A bare perusal of the impugned order would reveal that the Tribunal/respondent 1 herein in regard to the said plea of the petitioners has taken cognizance of the report of the process server recorded on the reverse page of the notice issued under Section 7(1) of the Act of 1988 and though observed that the process server was unable to serve the notice on the petitioners herein, as such, had to affix the notice on the premises without there being any witness to the affixation of said notices, yet has opined that since the Corporation repeatedly had mentioned that the gates of the premises were closed while the work was going on inside, it can be concluded that the notices were served on the petitioners herein.

The aforesaid conclusions drawn by the Tribunal/respondent 1 *prima facie* are factually misconceived for two fold reasons; 'firstly' that there was no pleading submitted by the Corporation before the Tribunal/respondent 1 herein that the gates of the premises were closed while the work was going on inside and

‘secondly’ that no such report have had been made by the process server who claimed to have affixed the said notices.

It is significant to note here that the issuance of show cause notice under and in terms of Section 7(1) of the Act of 1988 against a violator in essence is based on the maxim “*Audi Alteram Partem.*” No doubt Section 7(2) provides the mode of service of notice upon the violator by affixing the same on the outer door of some conspicuous part of the unauthorizedly raised building providing that such affixing of notice would be deemed to have been duly served upon the violator, yet mere affixing of notice on the outer conspicuous part of the building cannot said to be substantial compliance of the actual service of notice and thus the theory of communication of such a notice cannot, in law, be invoked unless it is by credible evidence shown that the notice was actually affixed at site. In absence of any such proof of actual service of notice, the principles of *Audi Alteram Partem* cannot be said to have been complied with. In this backdrop a reference to the judgement of the Apex Court passed in case titled as “***Dharampal Satyampal Limited Vs. Deputy Commissioner of Central***” reported in **2015 (8) SCC 519**, wherein the nature, scope and applicability of the principles of natural justice came under consideration would be relevant and the following has been laid down in paras 21, 24 and 28:

“21. In common Law, the concept and doctrine of natural justice, particularly which is made applicable in the decision-making by judicial and quasi-judicial bodies, has assumed a different connotation. It is developed with this fundamental in mind that those whose duty is to decide, must act judicially. They must deal with the question referred both without bias and they must give (sic an opportunity) to each of the parties to adequately present the case made. It is perceived that the practice of aforesaid attributes in mind only would lead to doing justice. Since these attributes are treated as natural or fundamental, it is known as “natural justice”. The principles of natural justice developed over a period of time and which is still in vogue and valid even today are: (i) rule against bias i.e. nemo debet esse judex in propria sua causa; and (ii) opportunity of being heard to the party concerned i.e. audi alteram partem. These are known as principles of natural justice. To these principles a third principle is added, which is of recent origin. It is the duty to give reasons in support of decision, namely, passing of a “reasoned order”.

“24. The principles have a sound jurisprudential basis. Since the function of the judicial and quasi-judicial authorities is to secure justice with fairness, these principles provide a great humanizing factor intended to invest law with fairness to secure justice and to prevent miscarriage of justice. The principles are extended even to those who have to take an administrative decision and who are not necessarily discharging judicial or quasi-judicial functions. They are a kind of code of fair administrative procedure. In this context, procedure is not a matter of secondary importance as it is only by procedural fairness shown in the decision-making that a decision becomes acceptable. In its proper sense, thus, natural justice would mean the natural sense of what is right and wrong.”

“28. It is on the aforesaid jurisprudential premise that the fundamental principles of natural justice, including audi alteram partem, have developed. It is for this reason that the courts have consistently insisted that such procedural fairness has to be

adhered to before a decision is made and infraction thereof has led to the quashing of decisions taken. In many statutes, provisions are made ensuring that a notice is given to a person against whom an order is likely to be passed before a decision is made, but there may be instances where though an authority is vested with the powers to pass such orders, which affect the liberty or property of an individual but the statute may not contain a provision for prior hearing. But what is important to be noted is that the applicability of principles of natural justice is not dependent upon any statutory provision. The principle has to be mandatorily applied irrespective of the fact as to whether there is any such statutory provision or not.”

Furthermore, a Division Bench of this Court in case titled as **“Building Operation Controlling Authority Vs Koushalya Devi and others”** passed in **OWP No. 1863/2017** dated **15.11.2021**, has also held that an endorsement of pasting of the notice on the wall as per the report of the process server without the endorsement of an independent witness cannot be said that the pasting of notice stands proved, more particularly, when it is disputed.

15. In view of the aforesaid manifest flagrant breach of the requirement of service of notice under Section 7(1) of the Act of 1988 by the respondent 2 herein upon the appellants/ petitioners herein, the consequential order, i.e., the demolition notice dated 04.09.2009 cannot be said to be legally tenable, in that, by non-service of notice under Section 7(1) of the Act of 1988 appropriately by the respondent 2 upon the petitioners herein can safely be said to have

deprived the petitioners herein to project their version/defense against the allegations levelled by the Corporation against them *qua* the construction in question.

16. Viewed thus, what has been observed, considered and analyzed hereinabove, the instant petition succeeds, as a consequence whereof the impugned dated 07.02.2011 passed by the Tribunal/respondent 1 herein is set aside along with the demolition notice No. MJ/Estt/198/3/CEO/09 dated 04.09.2009, however, providing a liberty to the Corporation to proceed against the petitioners afresh in accordance with law treating the show cause notice under Section 7(1) of the Act of 1988 to have been served upon the petitioners herein, who shall have a right to respond to the said notice within ten days from today. It is made clear that nothing herein shall be construed to be a decision rendered by this Court on the legality or otherwise of the construction in question.

17. ***Disposed of*** along with connected application.

(JAVED IQBAL WANI)
JUDGE

JAMMU
07.10.2023
Muneesh

Whether the order is speaking : **Yes**

Whether the order is reportable: **Yes**