

J&K SPECIAL TRIBUNAL, JAMMU
(BENCH-II, PRESIDED BY RAJEEV GUPTA, MEMBER)

File No. : **STJ/289/2021**
Date of Institution : **11-11-2021**
Date of Decision : **13-04-2023**

Smt. Mamta Singh, Age 55 years, W/o Dr. Nirmal Kumar Singh, R/o Village Ban, Tehsil Nagrota, District Jammu.

.....**Appellant**

Vs

1. Building Operation Controlling Authority, Jammu Local Area BOCA-A, Vikas Bhawan, Rail Head Complex, Jammu through Vice Chairman, Jammu Development Authority, Jammu (Prescribed Authority Under J&K Control of Building Operations Act, 1988 and J&K Town Planning Act, 1963).
2. Vice Chairman, Jammu Development Authority, Jammu Vikas Bhawan, Rail Head Complex, Jammu.
3. Khilafwarzi Inspector, Jammu Development Authority, Vikas Bhawan, Jammu.

.....**Respondents**

Appeal U/s 13 of the Control of Building Operation Act, 1988 against Order No. JDA/BOCA/A/1271-76 dated 08.11.2021 passed by respondent No.1.

Sh. Raj Kumar Gupta, Senior Advocate with Sh. Rahul Sadotra, Advocate for the appellant.

Sh. Adarsh Sharma, Advocate for the respondents.

ORDER

1. In the instant appeal filed in terms of Section 13 of the J&K Control of Building Operations Act, 1988 (hereafter referred to as the COBO Act) read with Regulation 10 of the COBO Regulation, the appellant has called in question Order bearing No. JDA/BOCA/A/1271-76, dated 08-11-2021, issued under section 7(3) of the COBO Act by the Building Operation Controlling Authority (hereafter referred to as the BOCA), by virtue of which the appellant has been directed to remove the alleged illegal construction raised by the appellant. In the memo of appeal, it is projected

by the appellant that she had purchased a residential plot measuring 4 kanals

comprising Khasra No. 441 min, Khata No. 534, and Khewat No. 80 situate at Revenue Village Ban, Nagrota District Jammu, by way of sale deed dated 20-05-2014, from its erstwhile owner, namely, Sh. Darshan Singh, registered on 28-05-2014, before Sub-Registrar (Sub Judge), Jammu. The area where the plot of land is located, was at the relevant time situate outside the jurisdiction of Jammu Development Authority (hereafter referred to as the JDA). It did not need any building permission to be sought from the JDA. The appellant, however, was given no objection certificate by the Panchayat, Nagrota through Block Development Officer, Nagrota regarding construction of residential house of the appellant. Accordingly, construction was raised by the appellant in the year 2017 itself. Jammu Master Plan, 2032 (hereafter referred to as the JMP, 2032), was notified vide SRO 90 of 2017 dated 03-03-2017, whereby as many as 103 villages were included within the jurisdiction of the JDA, and accordingly jurisdiction of JDA was extended to village Ban of Nagrota. Since, the construction had already been completed, extension of jurisdiction of JDA over the village Ban had not impacted the appellant. There had been some dispute raised by the defence authorities, involving the residents of the area with respect to restrictions imposed by the defence authorities under the guise of Works of Defence Act, 1903 (hereafter referred to as the WODA). A writ petition bearing OWP No. 865 of 2018 was filed by the Union of India for a direction to the State authorities to take action against the residents for raising construction in violation of the WODA. The said writ petition is still pending and the appellant and other affected person were made parties in the writ petition by the orders of the Hon'ble High. After a lapse of about 4 years of the appellant raising construction of the residential house, a show cause notice under section 7(1) of the COBO Act was alleged to have issued by the BOCA, asking the appellant to show cause as to why the house constructed by her may not be demolished as it was alleged to have been raised without valid permission. The appellant, however, had never received notice under section

7(1) of the COBO Act or for that matter notices under section 12(1) and

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12(2) of the COBO Act. The appellant was served with the Order of demolition in terms of section 7(3) of the COBO Act, directing the appellant to demolish the construction within a period of 5 days from the date of issuance of the Order.

2. The appellant has challenged the impugned order by stating in the grounds in the memo of appeal that the impugned order has been issued in complete derogation and in contravention of the provisions of the COBO Act, and having been issued in cursory and casual manner, which discloses non-application of mind in issuing the impugned order; no notice under section 7(1) of the COBO Act was ever served on the appellant by the BOCA, as such all the subsequent proceedings conducted against the appellant are illegal; the impugned order has been issued without verifying the factual position of the case, especially the fact that the construction had already been raised in the year 2017 when the JDA had no jurisdiction over the area and the Jammu Master Plan, 2032 had not been extended in the area; no objection certificate with regard to raising of construction of residential house had been duly issued by the Panchayat concerned through BDO, which was the competent authority at the relevant point of time; there had been no requirement of law to obtain building permission from the BOCA for the reason that it had no jurisdiction in the area till 03-03-2017 when the jurisdiction of the JDA was extended through JMP, 2032, vide SRO 90 of 2017; during the time when construction was being raised, nobody had objected to raising of such construction, as such, no objection is entertainable more than 4 years after the completion of construction; the appellant has been condemned unheard and no opportunity of being heard was ever provided to the appellant.

3. The respondents have contested the appeal and have presented their objections and the factual report therein. It is stated by the respondents that the appeal has been preferred on misleading and factually incorrect assertions. Village Ban, Nagrota of District Jammu had been included in the jurisdiction of JDA vide SRO 388 dated 10-08-1984, and since then it

continues to be administered by the JDA. It was incumbent upon the appellant to have obtained permission from the BOCA before commencement of the construction of residential house. It is incorrect to say that the building had been completed in the year 2017, but the fact remains that in the year 2018, the construction was in progress and the concerned Khilafwarzi Officer had reported the illegal construction being raised by the appellant. Infact a criminal complaint had also been submitted to the SHO, Nagrota against the appellant by the Khilafwarzi Officer regarding illegal obstruction caused by the persons on site of construction in performing the official duties. Photographs were also taken at that time, as laid as in October, 2018, reflect that the construction was in progress. The construction has been raised illegally by the appellant without obtaining valid permission from the BOCA, regarding which notice under section 7(1) of the COBO Act was issued, asking the appellant to show cause as to why the construction may not be demolished. The notice was duly served on the appellant, however, she had not responded to the notice, as such the demolition order was issued. No illegality has been committed by the BOCA in issuing the impugned show cause notice and the demolition order.

4. Arguments have been addressed by Ld. Counsel for the parties. On behalf of the appellant, Ld. Counsel, Sh. Raj Kumar Gupta, Senior Advocate, apart from raising the repeating assertions as are set forth as grounds of challenge in the memo of appeal, has argued that the impugned order is factually and legally untenable. When the construction was raised by the appellant, the area fell outside the limits of the JDA and no permission for raising construction was required. Appropriate permission was, however, obtained from the concerned Panchayat, regarding which no objection certificate had been issue by the BDO, Nagrota. Therefore, the construction raised by the appellant cannot be termed as illegal merely for the reason that the JDA has subsequently been entrusted with jurisdiction over the area. The extension of jurisdiction would not apply retrospectively, so as to nullify the permission obtained from the Panchayat concerned. It is further argued by

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Ld. Counsel that the BOCA had no authority to initiate proceedings against appellant for violation of the Building Bye-law for the reason that the construction had already been completed 4 years prior to initiation of proceedings by them for violation of the Building Bye-laws. It is submitted by Ld. Counsel that the show cause notice had never been served on the appellant, which is a mandatory pre-condition for issuance of demolition order. Ld. Counsel has referred to the scheme of Section 7 and has also referred to the judgement of the Division Bench of the Hon'ble High Court of J&K in OWP No. 1863 of 2017 titled "**Building Operation Controlling Authority vs Koushalya Devi & Ors.**", decided on 15-11-2021. Ld. Counsel has argued that where the concerned authority fails to submit the proof of service of the show cause notice, in the manner prescribed under section 7(2) of the COBO Act, subsequent proceedings are rendered illegal. On that basis, the impugned order is also illegal and thus, liable to be quashed. Ld. Counsel has argued that even if presuming that there is some violation of the Building Bye-laws or the permission had not been validly obtained by the appellant still under the J&K Unified Building Bye-laws, 2021, the construction so raised can be regularized by compounding the violations. In this case, it is submitted by Ld. Counsel, that the construction has been raised in an area of 4 kanals by maintaining the requisite set-backs and the coverage area, as permissible in the Building Bye-laws. The violations if any committed by not obtaining permission, would be minor in nature and thus compoundable in character.

5. Ld. Counsel for the respondents on the other hand has argued that no valid building permission had been obtained by the appellant before commencement of construction work. The no objection certificate obtained by the appellant is no substitute for the Building Permission. The jurisdiction of the JDA was extended to the Ban area in the year 1984 and not for the first time in the year 2017, as alleged by the opposite counsel. It was requisite to obtain permission from the BOCA, which admittedly the appellant has

not taken, thus, violation of the Building Bye-laws has been committed. Ld.

Counsel has further argued that even though the coverage area and other norms have been followed, the building having been raised without permission from the competent authority, is illegal. By referring to the record produced by the respondents, it is submitted by Ld. Counsel that the show cause notice was validly served and an endorsement to that effect was recorded by the BOCA officials. Likewise, the impugned order was also validly served on the appellant and an endorsement was recorded on the order itself. Ld. Counsel has further argued that even if it is assumed for the sake of argument that in terms of the J&K Unified Building Bye-laws, 2021 read with the Regulation 11 of the COBO Regulations, post facto regularization by charging compounding fee is permissible, in the case of the appellant this cannot be done for the reason that the construction has been raised in the area described as vegetation. Such area falls within the ambit of agricultural land use, where construction activities are strictly prohibited. Ld. counsel has submitted that from the materials placed on record, it is established that the residential house of the appellant has been raised in the area comprised under agricultural land.

6. Rebutting to the arguments regarding land use, it has been argued by Ld. Counsel that there is no record available on the file to demonstrate that the survey numbers in which construction has been raised, have been notified to be agricultural land use. Merely, inclusion of the area in the land use plan annexed with the JMP, 2032 would not make it an area prohibited from raising construction. Ld. Counsel has submitted that there are many other houses existing in the vicinity of the construction raised by the appellant, which would reveal that even if the land use has been described as agricultural, predominantly, the area is residential in nature.

7. I have considered the arguments addressed by Ld. Counsel for the parties and have perused the material placed on record. The record produced by the respondents as to proceedings conducted against the appellant for the violation of the Building Bye-laws, has also been thoroughly examined. *Self*

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8. Various legal contentions have been raised by the Id. Counsel for the appellant regarding the illegality of the impugned order, the prominent objections being the lack of jurisdiction of JDA in the area at the relevant time and as to incompetence of the BOCA in taking statutory action for violation of the Building Bye-laws. Before addressing the merits of the case, it will serve the interest of propriety of proceedings to address the legal questions so raised by the Ld. Counsel for the appellant.
9. It has been highlighted in the memo of appeal and has been strenuously argued by Ld. Counsel for the appellant that the JDA got jurisdiction over the area in the year 2017, after the construction had been raised by the appellant. For this reason, there had been no need to obtain permission from the JDA for raising construction and the BOCA could not have taken statutory action in terms of Section 7 of the COBO Act. Insofar as jurisdiction of the JDA over village Ban, Nagrota in District Jammu is concerned, by virtue of SRO 388 dated 10-08-1984, 7 villages, including Ban were notified as local area, to be administered by the JDA. This fact finds mention in JMP, 2032 in Annexure-'A' containing the list of villages forming part of Local Planning Area to be administered by the JDA. In list 'B' at serial No. 7, name of village Ban finds mention, having been notified vide SRO 388 dated 10-08-1984. Arguments of Ld. Counsel, thus, is unsustainable that for the first time village Ban was included in the local area, jurisdiction of the JDA when JMP, 2032 was notified vide SRO 90 of 2017 dated 03-03-2017. The fact of the matter is that the jurisdiction of the JDA had been extended in the area in the year 1984 vide SRO (supra), and in JMP, 2032, the area alongwith many other villages is mentioned in the Annexure-'A', to have continued to be included in the local planning area, of the JDA. This contention of Ld. Counsel is, therefore, rejected.
10. It was next contended by Ld. Counsel that permission had been taken for raising building from the Panchayat concerned through BDO, and in this regard Ld. Counsel referred to copy of the no objection certificate issued under the signature of the BDO, Nagrota. Even that being so, no objection

certificate issued by the Panchayat or by the BDO under the direction of the Panchayat concerned, is and can be no substitute for building permission required in terms of section 5 of the COBO Act read with Regulation 7 of the COBO Regulations and the Building Bye-laws in place. In this regard, the position of law has been settled by the Hon'ble High Court in its judgement dated 08-03-2022, in "**Vice Chairman, JDA & Ors. vs Zulfiqar & Ors.**", WP(c) No. 2689 of 2019. It shall be profitable to note here the observations of the Hon'ble High Court, which is as under:-

"18. A simple reading of the provisions of the Act and the COBO Act reveal that a permission in writing of the authority is necessary for raising any construction and that the BDO or the Sarpanch has no role to play in grant of such permission. The 'NOC' issued by them that they have no objection, if the Banquet Hall is constructed is not a permission to construct and notwithstanding the said NOC, it was incumbent upon the respondent No. 1 to have obtained permission in writing of the Authority before initiating the construction work which, admittedly, was not taken".

11. The judgement aforementioned rendered by the Hon'ble High Court has already been upheld by the Hon'ble Supreme Court in special relief to appeal (c) No. 5586/2022, titled "**Zulfiqar Ali vs Vice Chairman, JDA & Ors**", vide **Order dated 08-04-2022**. Therefore, the appellant cannot be heard saying that no objection certificate given by the Panchayat through BDO is valid permission. The settled legal position, thus, is that such no objection certificate is no substitute for the building permission required under the extant building bye-laws. The appellant, as such, is found to have not obtained any valid permission from the competent authority.
12. Next argument of Ld. Counsel has been that the notice under section 7(1) of the COBO Act was never served on the appellant, which position is disputed by the Ld. Counsel for the respondents. It may be noticed that as per the scheme of taking statutory action under section 7 of the COBO Act for violation of the Building Bye-laws, it is imperative first to give a show cause

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notice to the violator, asking the violator to show cause as to why the construction may not be removed which is raised in violation of the Building Bye-laws. After appreciating the reply, if any, submitted by the violator or if no reply is received within the stipulated time of 48 hours, the competent authority may issue demolition order in terms of Section 7(3) of the COBO Act. The manner of service of notice is prescribed in section 7(2). The position of law is settled in this regard that proof of service of show cause notice by the competent authority is imperative and failure to establish the valid service renders whole of the proceedings, including the demolition order to be illegal. Ld. Counsel for the appellant has rightly placed reliance on the judgement of the Hon'ble Division Bench of the Hon'ble High Court of J&K in OWP No. 1863 of 2017 titled "**Building Operation Controlling Authority vs Koushalya Devi & Ors.**", decided on 15-11-2021. It is profitable to note here that the observations of the Hon'ble High Court, which is as under:-

"Notice is alleged to have been served by pasting it on wall. The endorsement of pasting of the notice on the wall as per the report of the process server does not contain any independent witness, in absence of which it does not stand proved, more particularly, when it is disputed."

13. Coming to the facts of the instant case, the appellant is stated to have been served with a notice under section 7(1) of the COBO Act on 30-10-2021. The office copy of the notice is available on the case record furnished by the respondents, which is marked as page 3 with further marking of page No. 12. Bare reading of the office copy of the show cause notice would reveal the endorsement recorded under the signature of some official, whose designation has not been mentioned. The signature happens to be of the same person, who has signed the show cause notice on behalf of the BOCA. The following endorsement has been made:-

"served to the violator through concerned KWT".

14. The endorsement is signed on 30-10-2021 i.e on the same date when the notice is said to have been served. Conspicuously, the manner in which the

notice was served, the particulars of the serving official and the person to whom it was served have not been mentioned in the endorsement and even it has not been recorded in the minutes of proceedings in the file. Therefore, the concerned authorities have given a sufficient ammunition to the appellant to raise a doubt as to the valid service of notice on the appellant. It becomes more imperative when it is seen in the context of the service of the impugned demolition order. Office copy of the impugned order is available on the case record furnished by the respondents, marked as page No. 5 with further page number marked as 14. This order is said to have been served by serving one part of the notice on one Balwant Singh, under his signature. The similar exercise had not been done while serving the show cause notice.

15. The manner of serving show cause notice is prescribed under section 7(2) of the COBO Act, which is by affixing notice on the outer door of some conspicuous part of the building, whereupon the notice is deemed to have been duly served on the owner or the occupier of the building. In the instant case, there is no proof available on the record to establish that the notice under section 7(1) of the COBO Act was served personally on the appellant or any other person available at that time when the notice was served or that it was served by affixing the notice on any conspicuous part of the building, in terms of the Section 7(2) to the COBO Act. Merely, writing in the minutes of the proceedings or endorsing it on the office copy that the show cause notice was served on the owner or occupier of the building, would not constitute a valid service of notice. The respondents herein have failed to establish the valid service of the show cause notice on the appellant, which is a mandatory pre-condition for proceeding with statutory exercise against violation of the Building Bye-laws. Non-serving of the notice in the manner prescribed under section 7(2) or there being no proof of personal service of the notice on the owner or occupier of the Building, renders all the subsequent proceedings illegal. Thus, no valid action can be taken on the basis of the impugned order which has been rendered illegal in view of the

illegality of the show cause notice.

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16. The next question raised by the Ld. Counsel for the respondent has been that the area is described in JMC, 2032, as vegetation, and, as such, falls under agricultural land use. It is argued on behalf of Ld. Counsel for the appellant that this is factually incorrect as the area is predominantly residential and there is no agricultural activity carried on in the area. Be that as it may, in my considered opinion this question would not arise for determination by this Tribunal at this stage for the reason that its foundation has neither been laid in the show cause notice under section 7(1) or in the impugned order under section 7(3) of the COBO Act. Bare perusal of the show cause notice and the impugned order would reveal that this was never a ground of statutory action initiated against the appellant that the construction has been raised in the area described as agricultural land use. The only grounds on which the show cause notice and the impugned order were served, pursuant to statutory exercise for violation of the Building Bye-laws, were that the appellant had not attained the valid permission from the competent authority and that residential house has been constructed without permission. It is explicit from the relevant paragraphs/clauses tick marked in the show cause notice and the impugned order. The paragraphs/clauses regarding land use violation in the show cause and the impugned order have not been specifically tick marked. Also, there is no specific mention of the land use having been violated from being i.e to suggest converting agricultural land use to the residential one. That being so, the respondents cannot be allowed in law to proceed with statutory action on any ground which had not been indicated in the show cause notice or for that matter in the impugned order. The position of law on the point is settled by the Hon'ble High Court of J&K in judgement "**Building Operations Controlling Authority v. Joginder Prakash Gandotra**", reported as 2017 (5) JKJ 194 [HC]. The observations of the Hon'ble High Court be noted as under:-

"11. Sub-section (1) of Section 7 of the Act, makes a provision for issuing a show-cause notice by the authority in respect of erection and re-erection of any building without the

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permission or in contravention of any condition subject to which any permission has been granted. Sub-section (3) of Section 7 provides for issuance of demolition order in case concerned person fails to submit reply to show-cause notice or authority is satisfied that such construction is being raised without permission or in contravention of the permission. Thus, the authority under Sub Section 1 of Section 7 has to indicate the nature of the violation in the show cause notice.

The purpose behind the aforesaid provision is to provide an opportunity to concerned person to explain alleged violation. The authority can pass an order under Sub-section 3 only on the basis of the ground as stated in the show cause notice. The order of demolition, therefore, cannot be passed on the ground, which was never indicated in show-cause notice and for which no opportunity was given to concerned person. It is settled principle of law that unless the foundation of the case is made out in the show cause notice, the party cannot be allowed to argue the point not raised therein. The Hon'ble Supreme Court in Commissioner of Central Excise Bhavneshwar v. M/s Champdany Industry Ltd reported in 2009 (8) Supreme-345, has settled the law on the aforesaid point in the following lines:-

“Apart from that, the point on Rule 3 which has been argued by the learned counsel for the Revenue was not part of its case in the show cause notice. It is well settled that unless the foundation of the case is made out in the show cause notice, the Revenue cannot in court argue the case not made out in its show cause notice.”

17. For the aforesaid reasons, the impugned order is found to be suffering from illegality and incurable defect, there being no proof to establish the valid service of the show cause notice on the appellant, rendering the subsequent statutory proceedings including the impugned order to be illegal. Therefore, appeal is allowed and the impugned order is set aside. The BOCA shall be at liberty to proceed afresh against the appellant for violation of the Building Bye-laws, by strictly adhering to the procedure prescribed under section 7 of the COBO Act. The question regarding the land use has not been

considered by this Tribunal for the reasons mentioned hereinabove, as such,

no prejudice shall be caused to either side, if any, fresh proceedings are carried out by the BOCA against the appellant. With regard to other grounds urged by the parties but not specifically dealt for returning finding, shall not be construed as expression of any opinion by this Tribunal. Appeal is, accordingly, dispose of, it may be consigned to records. The record received from the respondents may be returned alongwith a copy of this order

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Deputy Registrar,
Special Tribunal
Jammu

Name and Address of Applicant: Sherki Zulfiqar Ah. (Advocate)
Date of application: 17/4/2023
Date of preparation of copy: 17/4/2023
Date of issuance of copy:
Stamps Rs.: 130/-
Expense of copy: record
No. of words: 499 Approx
P/S

Printed name of the Registrar
Date of registration

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DATE & TIME :

17 APR 2023 12:48:30

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LOCATION :

High court complex jammu

NAME OF LITIGANT :

SHEIKH ZULFIKAR AHMED

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e-COURT FEE AMOUNT :

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