

**(2002) 11 J&K CK 0016**

**In the Jammu And Kashmir High Court**

**Case No : Others Writ Petition (OWP) No. 987 of 2001**

Balwan Singh and Others

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

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**Date of Decision :** 13-11-2002

**Acts Referred:**

Jammu and Kashmir Development Act, 1970 — Section 15

**Citation :** (2003) 1 JKJ 108

**Hon'ble Judges :** T.S. Doabia, J

**Bench :** Single Bench

**Advocate :** K.S. Johal and Z.A. Shah, S.S. Nanda and N.A. Choudhary, for the Appellant;

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## **Judgement**

T.S. Doabia, J.—The Union of India through one of its department wants to carry on commercial activity in an area which is predominantly

residential. If the Union of India is unable to move to a commercial area what would fate of an ordinary citizen. The Union of India should have

avoided of its own such a course. Having not done so, the petitioners have approached this court through the medium of present writ petition, who

are the residents of Gandhi Nagar, Jammu. The petitioners have objected to the decision taken by the respondents Union of India in taking a

premises owned by the respondent No. 10 for an activity which as per the petitioners is commercial in nature. The purpose is to set up an office

and utilize the premises for providing Tele-Communication department. This department is engaged for providing telephone connections and laying

down telephone wires. According to the petitioners, the area is predominantly residential and therefore, the user of this premises for an activity

which is commercial in nature should not be permitted.

2. The Counsel for respondents No. 9 and 10 , however, submits that it was only on the enforcement of Jammu & Kashmir Development Act of

1970, a master plan as envisaged by the said Act came to be prepared. It is submitted that in that Master Plan, some restrictions have been

imposed, then those restrictions would become applicable and given effect to vis-a-vis those buildings which came to be constructed after the

enforcement of the said Act. For this reliance is being placed on Section 15 of the Development Act, referred to above. As this section requires

Consideration, this is being reproduced below :-

15, user of Land and Buildings in contravention of the plans- After the coming into operation of plan in a zone no person shall use permit to be

used any land or building in that zone otherwise than in conformity with such plan.

Provided that it shall be lawful to continue to use, upon such terms and condition as may be prescribed by regulations made in this behalf, any land

or building for the purpose and to the extent for and to which it is being used upon the date on which such plan comes into force....

3. If the above Section is analysed, then it becomes apparent:

(i) That after coming into operation of a plan in a zone, no person shall use or permit to be used any land building in that zone otherwise than in

conformity with such plan;

(ii) The proviso to Section 15 protects the use of the building for which it was being used for purposes earlier to coming into force of the Master

Plan referred to in Section 15. The proviso is to the effect that it shall be lawful to continue to use, upon such terms and conditions as may be

prescribed by the regulations made in this behalf, any land or building for the purpose and to the extent for and to which it is being used upon the

date on which such plan comes into force.

4. A plain reading of the aforementioned Section would make it apparent that Section 15 main provision is to apply the buildings which have been

constructed even before the enforcement of Act of 1970 and these buildings are not to be used for a purpose which is not provided or indicated in

Section 15, If proviso is carried out, this is to the effect that if in a premises certain activity is carried on and it was being carried on, the date when

the Act was in force, then that activity would be permitted to be continued.

However, once there is a break and that user comes to an end for any reason after the enforcement of Act of 1970 and if it is again to be reused, then that reuser has to be in terms of Section 15. Any other interpretation would defeat the provisions of Section 15.

5. The question which arises for determination is as to whether the building in question was being used for residential purposes. In para 2 of the petition, the plea taken in that accommodation 14 A/D, Gandhi Nagar, Jammu is an accommodation meant for residential purposes. This was at one point of time let out to the State Bank of India for office purposes. The State Bank of India has vacated and the purpose for which the building was being used by the Bank came to an end. It is further stated that the building thereafter remained unoccupied. After getting the possession, the building was sought to be given for a commercial activity to the department referred to above.

6. The stand taken by respondents No 10 to be noticed.

It is stated that the construction was raised on the vacant plot in the year 1968. This has been let out to the various concerns who were carrying on commercial activities. It is submitted that the accommodation which was constructed was not meant for residential purposes. It is stated that it is not correct to state that the said property is purely and simply an accommodation for residential purpose. The fact that this property is located in that area which is meant for residential purposes has, however, not been denied. It is further stated that when a property is rented out as an office, then this is not a commercial activity.

7. As to what is meant by the term 'Commercial activity' is a matter which may require determination by taking into consideration Several factors.

However, the Telecom Department of Union of India was held to be an Industry by the Supreme Court in the case of General Manager, Telecom

Vs. A. Srinivasa Rao and Others, . Therefore, to say that the activity which going to be carried on the Union of India would be an activity which

would not fall under the term commercial activity cannot be accepted . As the Supreme court of India has categorically held that the Telecom

Department is an industry, therefore, all the activities carried on by it in any of the offices are to be treated as industrial/commercial activities. It is a

known factor that when premises are used for a purposes other than residence,

then the volume of traffic, number of vehicles coming inside the premises increases. There is blockage of normal traffic. All these factors are to be taken note of by the Municipal authorities. However, no stand has been taken by the Municipality on this aspect of matter.

8. There can be no dispute with the proposition that the Municipal authorities are supposed to implement the Municipal laws to that the

environmental damage which is caused to the urban area is avoided. To some extent this issue was considered by a Division Bench of this court in

LPA NO. 294/2000, Sham Grover Vs. Municipal Committee and anrs. decided on 10th Nov. 2000. The relevant observations which were made

are as under :-

In *Attorney General Vs. Cooper of Sutherland* (1876) Ch. D. 634 : 45 LJ Ch. 839:34 Lt 921, the position of the Municipal Authority while

performing its statutory duties was compared with that of the trustee. It was observed that the authorities would be guilty of breach of trust in case

they fail to perform this duty. Hundred years later in *Shri K. Ramadas Shenoy Vs. The Chief Officers, Town Municipal Council, Udipi and Others*,

, the action of Up Municipality permitting construction of cinema hall in the residential area was struck down. It was observed that the Municipal

authorities are supposed to act for the public benefit and if a Municipality acts in excess of the power conferred by the Act or abuses that power,

then, in such cases, it is not exercising its duties. It was observed that the power cannot be validated by acquiescence in or regulated by operation

of principle of equitable estoppel. What was observed in the case of *Maddison Vs. Alderson* (1883) 8A.C. 476, was taken note of. It was

observed that the court of equity would not permit the statute to be made an instrument of fraud.

9. The necessity to adhere to zoning lay-outs was commented upon by the Supreme Court of United States in the case of *Agins Vs. City of Tiburon*

(1980) 447 Us 255, it was observed that it is in the public interest to see to it that the land is used for the purpose so specified. In case this is not

done, then, it can lead to destruction of scenic beauty. Disturbance of ecology and the environmental hazards related to the geology, fire and flood

and other related consequences of urban sprawl would be consequential results. The zoning layouts not only benefit the public at large but they also

serve the city's interest and assure careful and orderly development. Same concern was shown by the US Supreme Court in the case of the

'Samuel Herman Vs Andrew Parker' (1954) 99 law Ed observance of these regulations can suffocate the spirit by reducing the people who live

there to the status of the cattle. This may lead to a situation where living would become an almost insufferable burden. Yet in another decision in the

case of the Belle Terre Vs Buree Boraas (1974) 39 Law Ed 2nd 797 :416 US 1 the Supreme Court Of the United States observed that the police

power is not confined to elimination of fifth, stench and unhealthy places. The State has the power to regulate layout zones so that the citizens at

large can lead a healthy life. Therefore, the view expressed by the Tribunal in the present case, which view has been upheld by a learned Single

Judge of this court that the construction of a job in the residential area and that too without giving respect to the concept of set back is a major

offence and cannot be compounded, is a view to which no exception can be taken.

10. The other argument that other buildings have been permitted to come in the area and they have also not observed the concept of the set back,

and therefore, this lapse, if any, is required to be compounded, be also examined.

11. The Supreme Court of India in the case of M.I. Builders Pvt. Ltd. Vs. Radhey Sham JT 1999 (5) 3 SC 42, has taken a very serious note of

such unauthorized and illegal constructions and cautioned the courts not only to direct holding of enquiry as to how these constructions were

permitted to come.

These observation were taken note of by a Division Bench of this Court in the case of Om Parkash Vs Administrator, Jammu Municipality and

another, LPA (OW) No. 227 2000, decided on 28th March, 2000. The precise argument that since other have been permitted to raise

constructions, and therefore, this lapse should be condoned, was taken note of. It was observed that the concept of Article 14 is positive and not

negative. Reference was also made to the decisions of the Supreme Court in Gursharan Singh Vs New Delhi Municipal Committee AIR 1994 SC

1177 and M/s. Faridabad Ct. Scan center Vs. D.G. Health Services and others, , wherein it was observed that the wrong orders cannot be

perpetuated with the help of the Article 14 on the basis that the such wrong

orders were earlier passed in the favour of the other persons. In the above letters patent Appeal, reference was also made to the provision of the Section 11 of the Development Act of 1970 which provides for Master Plan, Zonal Development Plan and the site Plan. It was accordingly observed that these zoning regulations are required to be observed. In the above case, an unauthorized construction was raised beyond the prescribed height and it was also within 25 feet from the centre of the road. These violation were held to be major and the appeal preferred by the appellant in the aforementioned case was dismissed. In the light of the Judicial pronouncements noticed above and in view of the finding recorded by the Tribunal holding that the violation is major and that it cannot be said that the view expressed by the learned Single Judge of this Court is required to be given a fresh look. The fact that the building exists at the corner of the two roads and it obstructs the passage and poses a danger to the moving traffic can also be not lost sight of.

12. From the above it can safely be concluded:-

- (I) that the Municipal authorities should act in a manner which should lead to implementation of the Municipal laws and not in a manner which leads to its contravention;
- (II) that no amount of acquiescence on the part of Municipal authorities can operate by way of equitable estoppel;
- (III) that zoning lay-outs and building by laws are required to be complied with, otherwise this can lead to several social problems;
- (IV) that merely because in some other matters no action is taken by the Municipality, would not be a ground not to take action where break of Municipal laws has taken place.

13. In the present case, as indicated above, no positive stand has been taken by the Municipality. The least which was required was to produce the plan which was sanctioned by the Municipality. That would have indicated as to whether the construction was approved for residential purpose or not. Needless to mention that the statutes made, by the Development authorities are made with a purpose. The counsel appearing for the Municipality, however submits that such an adverse inference basis supposed to be drawn on the account of non filing of counter affidavit be now drawn. It is submitted that one such inference would be that the premises were

sanctioned for residential purposes.

14. This petition is accordingly disposed of with the following directions :-

(I) That respondents No. 9 and 10 would appear before the administrator Municipality. The said officer would hear the respondents. The original

plans be perused and in case , it is found that the building was sanctioned for a residential purpose, then the concerned authorities would take

further steps with a view to issue directions visa-vis the use of the building.

Needless to mention that the Municipal authorities are under an obligation which has been put at par with the duties of a trustee to see that the

Municipal laws are implemented both in letter and spirit.

(II) That the parties would appear before the aforesaid officer on 10th of Dec. 2002 The said officers as indicated above would examine and issue

and pass appropriate orders with in further period of two months. In doing so, the said officer would take notice of the observation made in this

order and would take note of the impact of Section 15 of the Development Act. Till then, the respondent Union of India shall not undertake or go

ahead with any commercial activity in the premises in question. In case any adverse order is passed against the petitioners, that shall remain in

abeyance for a period of six weeks.