
(2001) 08 J&K CK 0007
In the Jammu And Kashmir High Court
Case No : O.W.P. No. 703 of 1998

Dr. Mohammad Afzal Khan	Vs	APPELLANT
State of J. and K. and Others		RESPONDENT

Date of Decision : 27-08-2001

Acts Referred:

Jammu and Kashmir Control of Building Operations Act, 1988 — Section 20
Jammu and Kashmir Control of Building Operations Regulations, 1998 — Regulation 1
Jammu and Kashmir General Clauses Act, 1977 — Section 21
Jammu and Kashmir Town Planning Act, 1963 — Section 10

Citation : AIR 2002 J&K 36

Hon'ble Judges : Syed Bashir-ud-Din, J

Bench : Single Bench

Advocate : R.A. Jain, for the Appellant; M.A. Qayoom and B.A. Khan, for the Respondent

Final Decision : Dismissed

Judgement

Syed Bashir-ud-Din, J.—Petitioner's residential house is in Plot No. 15-E of Rawalpura Housing Colony on the plot allotted to him by the

State Government. Adjacent to this plot is another residential Plot 15-F allotted to one Mr. D.N. Kaul. The respondent No. 5 as attorney of his

D.N. Kaul, on 14-5-1998 obtained permission to raise the building. Petitioner finding that no set back is left on his side of plot and house towards

north in violation of the said building permission order (granted under J. & K. Town Planning Act, 1963) filed a suit for injunction before Municipal

Magistrate, Sub-Judge. Srinagar. He got an interim order for stay of building activities on the said plot. On appeal while the matter was remanded

by the Appellate Court of 4th Addl. District and Sessions Judge. Srinagar. the embargo on construction was lifted with direction to strictly raise the

construction in terms of the building permission. In the meanwhile. Dr. D.N. Kaul. though respondent 5 filed a fresh proposal before the Building Permission Authority and the authority took a decision on 9-12-1998 to grant permission on this proposal, on conditions and terms specified thereto. The petitioner has challenged this decision of the authority (constituted u/s 5 of the Jammu and Kashmir Control of Building Operation Act, 1988 hereinafter for short 'Act') on the ground that the authority had no powers to initiate the process for granting the permission, much less to grant permission under the Act and Jammu and Kashmir Control of Building Operation Regulations, 1998 (hereinafter for short 'Regulation'). The decision taken to grant the permission it is stated is in violation of the building laws. The provision for leaving the set backs in terms of earlier permission have been given a go-bye. Once the authority gave the earlier sanction it became functus officio and under no circumstance could it grant a fresh permission. The decision of granting fresh permission suffers from error of jurisdiction and is quite arbitrary and tainted, besides mala fide. The petitioner has prayed for quashment of the building permission decision dated 9-12-1998 of the authority and to ban the authority from issuance of any further sanction in addition to stoppage of the building activities at Plot 15-F.

2. Respondents 1 to 4. Government and authority under the Act and the Administrator of the Srinagar Municipality, have in their objections contested petitioners claim for the relief. It is stated that only a decision has been taken by the authority and no building permission or order thereto has been issued by respondent No. 5 or any one else. The writ petition in its present form is premature and not maintainable Dr. D.N. Kaul, holder of Plot No. 15-F. through his attorney respondent No. 5 had duly applied for permission to the authority under the Act and Regulations. The permission was granted In May. 1998, subject to condition that Rules providing for construction of house as per colony type design is not infringed. However, the said D.N. Kaul failed to construct in terms of permission and on the report of the Ward Officer that said D.N. Kaul had constructed the single storey house, even before issuance of the said permission and that the single storey structure on spot is in violation of colony type design prescribed for Rawalpura Housing Colony, the said D.N. Kaul and his attorney respondent No. 5, were asked not to carry out the

building activity and were not allowed to raise the construction on the said single storey house. It is in this background that Shri D.N. Kaul, through

respondent No. 5 filed a fresh proposal to the authority for being permitted to construct first floor over the existing structure. After the site was

inspected by Senior Town Planner and Division Town Planner of Srinagar Municipality who also happened to be members of the Building

Permission Authority and on due consideration of the matter in its entirety with aforementioned report(s) a decision was taken by Building

Permission Authority to allow said D.N. Kaul to raise the construction in terms of the minutes qua this agenda item of the meeting held on 9-12-

1998. The permission was granted among other things on the condition and with the rider that north side of the proposed construction towards the

petitioner's existing residential house shall be kept blank as same is necessary in order to take care of petitioner's interests. The respondents have

contended that petitioner has himself constructed two storied residential house on his allotted Plot 15-E without adhering to the rules and

regulations. He has violated Rawalpura Housing Colony type design and has laid no set backs as prescribed and contained in the permission order

996 dated 22-11-1996 issued by the authority in respect of his said building on Plot 15-E. In the overall security scenario and turmoil in the valley,

the respondents have refrained from demolition of the said construction raised by the petitioner. Many other plot holders in Rawalpura Housing

Colony have also violated building permissions and the colony bye-laws while raising their residential houses. The petitioner has not approached

this Court with clean hands. Petitioner's mala fides are visible when his action of violating his own building permission to his liking and to suit his

interests is weighed with bona fides of authorities (respondents) in protecting his interests by the authority while according building permission to

said D.N. Kaul by laying down that he will keep north side of proposed construction facing petitioner's residential house totally blank. None of the

rights of petitioner has been violated. The respondent's have fully discharged their legal obligations. The authority has the powers to

amend/alter/revoke Its decision, if requirements of situation so merit and it cannot be said that the authority has no powers and becomes functus

officio once it grants permission in respect of construction of a building- Neither it is a case of violating the Act or Regulation Act, nor is it a case of

acting without powers or beyond Jurisdiction. Petitioner's case on these counter averments Is prayed to be dismissed.

3. Heard. Perused and considered.

4. No dispute is raised on either side that the residential plots of petitioner 15-E and of D.N. Kaul 15-F, are adjoining plots in Rawalpura Colony.

Petitioner has built residential house on his plot. D.N. Kaul through respondent No. 5, his attorney is desirous to build residential house on his

above plot, for which he obtained permission vide Order No. 78 of 1998 dated 14-5-1998. a copy whereof is on record and Annexure 'B' to writ

petition. This building permission is valid only for two years as laid in the permission. The permission has by now lapsed even by efflux of time. The

petitioner has a grouse that this building permission was not acted upon and instead respondent No. 5 submitted a fresh proposal to the authorities

under the Act and Regulation for grant of fresh permission. The powers of the authority to entertain the fresh proposal and take a decision thereto

is challenged. The reason given by the official respondents for not allowing Shri D.N. Kaul to proceed further with the construction on said May,

1998 permission is that on the report of the Ward Officer, they found that a structure was already existing on spot in violation of colony type

designs and terms and conditions of said permission order. The said D.N. Kaul was therefore, asked to submit fresh proposal which was

processed and considered and after following due procedure under the Act and Regulation, a decision was taken thereto in December, 1998. It is

found that no orders whatsoever have been issued or communicated to concerned Including the said D.N. Kaul. Intimating him of any permission

given to raise the building. Section 5 of the Act provides that once an application is made to the authority, the authority after making such enquiry

and after 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 conditions provided thereto or refuse to grant such permission.

5. in this case, no orders in writing of granting permission have been issued or passed by the authority. So long grant or refusal of permission is not

conveyed/communicated in writing, the decision is Just provisional. It cannot be said to have been made so absolute as to give any cause to

petitioner to come to the Court. Besides. In view of the explanation given in para

4 of the objections by the respondents qua said D.N. Kaul's failure to abide by the previous permission of May, 1998, entailing in its cancellation, the said D.N. Kaul/his attorney, cannot be forced to abide by this cancelled permission of May. 1998. Not only so, this permission of May. 1998 has hi terms of the condition of the permission spent Us life being valid only for two years from the date it was Issued on 14-5-1998. The fresh proposal of the petitioner was considered by the Building Permission Authority along with the report of Sr. Town Planner and Divisional Town Planner of Srinagar Municipality who actually Inspected the site and found that not only the structure on spot of D.N. Kaul, but also petitioner's house are existing on spot without any set backs and in violation of Colony type designs prescribed for the Rawalpura Housing Colony, local of the two plots in question. All documents have been considered by the authority and the Building Permission Authority on consideration of the matter approved the sanction in December, 1998 on conditions and terms of recorded minutes of this agenda item, The provisions of the Act and Regulation, as seen even from record available with the file, have not been violated or bidden good-bye. The authority has acted within jurisdiction and parameters of law, The contention that the authority under the Act has no power to amend/alter/rescind the permission granted in May, 1998, is to say too much. It is seen from the permission of May. 1998 placed by the petitioner on record that the petitioner has been granted permission under provisions of Section 10 of J & K State Town Planning Act. 1963, whereas, the approved agenda item of Building Permission Committee of granting fresh permission subject to conditions and terms thereto, has been Initiated and granted under the Act and the regulation. Even Section 20 of the Act providing for repeals and saving in its last proviso provides, that any action taken under any provision of law in force before pronouncement of the Act. shall be deemed to have been done and taken under that provision of the law (In this case J & K Town Planning Act. 1963) and shall continue in force unless and until superseded by the action taken under the Act. The later decision of December, 1998 of approving the permission for building of I petitioner shall be deemed to be an act of the authority under the Act. which has superseded the earlier permission, The decision is in force after coming into force

of the Act, which in any case has been enforced after May. 1998 vide SRO 164 of 1998. Besides in terms of Section 21 of the General Clauses

Act, 1977. the authority having the power to grant permission shall also be deemed under law to have the power to add, amend/ alter or rescind it.

To say that the authority under the Act after giving the permission becomes functus officio. Irrespective of Imperativeness and requirement of a

given situation meriting immediate remedial measures and that too in the present day environment of fast up coming mushroom growth of building in

violation of laws and rules. is to negate the very purpose and object for which the Act and Regulation have been passed. To say that the authority

has no powers or authority to act as above is to set at naught the control and regulatory mechanism provided by the Act in respect of buildings

activities operations in urban areas. No facts or circumstances are brought to the notice of Court to suggest even faintly exercise of powers

arbitrarily or mala fide. Even no ground is laid/pleaded thereto in the writ petition.

6. Strange enough that the said D.N. Kaul has not been made a party, though the substantial relief is sought against him for the constructional

activities he is intending to Initiate and conduct on spot on the proposal submitted by him for grant of permission by the authority and the decision

of the authority thereto. The said D.N. Kaul though a necessary party, is not arrayed as party to the writ.

7. The two authorities cited by petition-ers-counsel viz.. Marathwada University Vs. Seshrao Balwant Rao Chavan, and Smt. Naseem Bano Vs.

State of U.P. and others, are not applicable to this case. The facts and circumstance of these two cited cases are not pari materia with the facts

and circumstances to this case.

8. in result, the writ petition is dismissed in limine, Interim directions issued from time to time shall go with the main petition.