

(1998) 08 J&K CK 0023
In the Jammu And Kashmir High Court
Case No : O.W.P. No. 518 of 1998

Joginder Lal Kuthiala and Others

APPELLANT

Vs

Administrator, Jammu Municipality and Others

RESPONDENT

Date of Decision : 13-08-1998

Acts Referred:

Jammu and Kashmir Municipal Act, 1951 — Section 224

Citation : AIR 1999 J&K 47

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

Bench : Single Bench

Advocate : K.S. Johal, for the Appellant; S.S. Nanda, for the Respondent

Judgement

T.S. Doabia, J.—The circumstances under which this petition has come to be filed be noticed :

The petitioners submitted an application seeking permission to raise construction on a piece of land measuring 3 Kanals and 19 marlas. This land is

said to be located in Khasra Nos. 381 Min, 382-Min and 385-Min. This land was purchased by the petitioners through a registered sale deed;

This is said to have been executed in their favour on 11-9-1997. The petitioners wanted to raise a "Hall" to be used for devotional purposes. The

requisite permission to raise the construction was given. The building plans were sanctioned. This sanction was granted on 14th May, 1998. When

construction activity was taken in hand, respondent No. 5 appears to have taken objection to the raising of the construction. This was on the

ground that the part of the land which is subject-matter of sale deed referred to above was not owned by persons, who sold property. Some

opinion was also expressed by the Nazool De-partment. This is to the effect that part of the land is Nazool Land.

2. On this stand have been taken and this fact having come to the notice of the respondent Municipality, the Municipal Authorities took action and

the Executive Officer of the Municipality issued an order on 23rd June, 1998. This order reads as under :-

Building permission for the above named title which was granted vide permission order No. 31 dated 14-5-1998 is hereby kept in abeyance till

the clarification regarding the proprietary land is received from the Assistant Commissioner, Nazool, who is enquiring the title of the land on

complaint of one Shri Jawhar Lal Malla.

The above order is Annexure K

3. It be seen that the petitioners had also taken steps with a view safeguard their interest in the property acquired in pursuance of the sale-deed

referred to above. A civil suit has been filed. An application under Order 39, Rules 1 to 2 was also filed an interim order has been passed. This

order permits the petitioners to raise construction. They are however, supposed to give an undertaking to the effect that if ultimately, they fail in the

suit then they would demolish the building at their own expenses. This order was passed by the Civil Court on 23rd June, 1998.

4. In this petition validity of order Annexure K is questioned.

5. The argument raised by the learned counsel for the petitioners is that once permission is granted to raise the construction, then it cannot be

withdrawn. There is no provision to keep the permission in abeyance.

6. The legal position is as under :

Once a plan is sanctioned, then there is some power vested in the Municipality to direct modifications to be made in the sanctioned plan. This can

be done u/s 223 of the Jammu and Kashmir Municipality Act of Samavat, 2008. Powers can be exercised u/s 225 of the Act also. If some

building is being raised in contravention of the Act, then the person raising the construction can be directed to not to do so. Powers is also

conferred on the Minister Incharge Local Self Government. The Minister Incharge Local Self Government has the power to revoke any sanction for

erection or re-erection of any building at any time before commencement of erection or re-erection of any building. This is so provided in Section

224(1), Proviso of the Act. As the Jammu and Kashmir Municipality is relying upon these provisions with a view to sustain , action taken, by it, it

would be apt to notice the statutory provisions referred to above. These sections read as under:-

223. Power of Executive Officer to direct modification of a sanctioned plan of building before its completion. If at any time before the completion of building of which the erection has been sanctioned u/s 222, the Executive Officer or the Council finds that any modification of the sanctioned plan is necessary, then Executive Officer or this Council may, subject to the compensation for any loss to which the owner may be put, direct that the building be modified accordingly.

224. Lapse of sanction after one year, from the date of sanction (1) Every sanction for the erection or re-erection of any building which shall be given or be deemed to have been given by the Executive Officer, shall remain in force for 3 (two years) only from the date of such sanction, or for such longer period as the Executive Officer may have allowed when conveying sanction u/s 222 should the erection or re-erection of the building not have, been commenced within 3 (two years) and completed within 3 (three years) or such longer period as may have been allowed by the Executive Officer the sanction shall be deemed to have lapsed but such lapse shall not bar any subsequent application for fresh sanction under the foregoing provisions of this Act;

(Provided that the Minister In charge Local Self Government shall always have power to revoke any sanction for erection or re-erection of any building at any time before commencement of erection or re-erection of any building.

(2) Every order made by the Executive Officer of the Minister In charge Local Self Government under this section shall be final and shall not be called in question in any original suit, application or proceedings and no injunction shall be granted by any Court or other authority in respect of any action taken or to be taken in pursuance of the power conferred by or under this section.

(3) The provisions of this section shall have effect notwithstanding anything to the contrary contained in this Act or in any other law for the time being in force.

225. Power to executive officer to stop progress of buildings work unlawfully commenced or carried out - (1) In any case in which the erection of

building has been commenced or is being carried on in contravention of the provisions of this Act (2 (or any rule or bye-law made thereunder), the

Executive Officer may, by written notice, require the building operations to be discontinued from the date of the service of such notice.

(2) Any person failing to comply with the terms of such notice shall be punishable with fine which may extend to 3 (two thousand rupees) and when the non-compliance is a continuing one, with a further fine which may extend to 3 (one hundred rupees) for every day after the first during which the non-compliance continues.

7. A plain reading of the Section 223 makes, it apparent that it is Executive Officer or the Council acting as a body which can take steps and direct

modification of the sanctioned plan. This is subject to payment of compensation for any loss which may occur to the owner raising the construction.

u/s 224(1). the Minister In-charge Local Self Government has power to revoke sanction before the commencement of erection or re-erection of

any building. The Municipality has not been able point out as to under which statutory provision powers has been exercised while passing order

Annexure K, The same is therefore liable to be quashed, as being totally without jurisdiction.

8. Independently, of the above, it be seen that Executive Officer has not passed the order of his own. He has also not acted on the asking of the

Municipal Council. He has acted on the direction given by the Assistant Commissioner, Nazool. As to how Assistant Commissioner, Nazool

comes in the picture has not been clarified. It is settled law that if the power is vested in a particular person or authority, then that power has to be

exercised by that person alone. If power is exercised at asking of the third person, then it would not be a valid exercise of power. In this regard

reference be made to the decisions reported as Kans Raj Nathu Ram Vs. Deputy Excise and Taxation Commissioner, Jullundur and Others, . In

the above case it was held as:-

(15) As I have already mentioned, there is no order by District Excise and Taxation Officer deciding the respective merits of the applicants

regarding each licence. These applications were processed as already set out and a decision was taken by the Excise and Taxation Commissioner

in consultation with the C.M. and Minister concerned. That decision was conveyed

to the District Excise and Taxation Officer who merely gave effect to it by signing his name against the applicant's name to whom it had been decided to allot the licence. It is significant that this list is initiated by the Excise and Taxation Commissioner and the reason for this is obvious, i.e. that the District Excise and Taxation Officer does not perform his statutory function u/s 35, but merely carries out the decision arrived at by the higher authorities. It is settled law that if any authority has been vested with the power to grant a licence, it is that authority which must exercise that power, and if power is exercised by some other authority the exercise of that power will be wholly void. In this connection reference maybe made to the decision of the Supreme Court in Commissioner of Police, Bombay Vs. Gordhandas Bhanji, . In this case the authority to grant and cancel a licence for the erection of a building to be used for purpose of public amusement vested in the Commissioner of public amusement vested in the Commissioner of Police under the rules.

The power did not vest in the State Government. The Commissioner of Police granted the licence for the erection of a cinema house. This sanction was later cancelled by the Commissioner of Police at the instance of the State Government. The cancellation was questioned by the person who had been permitted to construct this cinema hall. His petition was allowed by the Bombay High Court and the appeal by the Commissioner of police to the Supreme Court failed, while dealing with this matter the Supreme Court observed as follows :

(26) We have held that the Commissioner did not in fact exercise his discretion in this case and did not cancel the licence he granted. He merely forwarded to the respondent an order of cancellation which another authority had purported to pass. It is evident from these facts that the Commissioner had before him objections which called for the exercise of the discretion regarding cancellation specifically vested in him by Rule 250. He was therefore bound to exercise it ,and bring to bear on the matter his own independent and unfettered judgment and decide for himself whether to cancel the license or reject the objections. That duly he can now be ordered to perform u/s 45 (of the Specific Relief Act).

(28) The discretion vested in the Commissioner of Police under Rule 250 has been conferred upon him for public reasons involving the

convenience, safety morality and welfare of the public at large. An enabling power of this kind conferred for public reasons and for the public

benefit, is, in our opinion, coupled with a duty to exercise it when the circumstances so demand. It is a duty which cannot be shirked or shelved nor

can it be evaded, performance of it can be compelled u/s 45.

Reference may also be made in this connection to Chanan Singh v. State of Punjab 1963 Cri LJ 248 Hari Kishan Sharma v. Punjab State ILR

(1961) P&H 831 Novelty Talkies Bhatinda v. Punjab State, ILR (1960) 2 Punjab 276 and Punjab State and Others Vs. Mehr Chand, .

9. Thus power exercised at the asking of the third person is not proper exercise of power. Order Annexure-K is liable to be quashed on this

ground alone.

10. The learned counsel appearing for the respondent No. 5 submits that Assistant Commissioner Nazool is the member of the Committee which

granted sanction, and therefore he could give directions to the Executive Officer.

11. It be seen that Assistant Commissioner Nazool could point out and raise objection, when the matter was being considered by the Municipality.

Once sanction is granted, then Assistant Commissioner Nazool ceases to have any power and in any case he has no power to issue direction in his

individual capacity. Whatever powers are conferred on him are conferred on him as member of the Committee which sanctioned building plan. The

Assistant Commissioner Nazool is not exercising any power individually. In view of the above legal situation, the order Annexure K is held to be

beyond statutory provisions and same is set aside.

12. As the litigation is pending in the Civil Court and as an ex party, order was passed by the Civil Court pending the suit to raise construction and

as respondent No. 5 has filed his written statement, the Civil Court would see to it what the application is disposed off within a period of one

month from the date of copy of this order is made available to that Court, Otherwise as indicated above, it is held that Municipality Jammu has

exercised powers contrary to the provisions of the Act referred to above. Order Annexure K is thus set aside.

13. Disposed of accordingly