

(2022) 11 J&K CK 0023

In the Jammu And Kashmir High Court

Case No : Others Writ Petition No. 550 Of 2018

Lakes And Waterways Dev. Authority And Others

APPELLANT

Vs

Shameem Ahmad Shameem And Another

RESPONDENT

Date of Decision : 10-11-2022

Acts Referred:

Constitution Of India, 1950 — Article 226
Building Operations Act, 1988 — Section 7(1)

Citation : (2022) 11 J&K CK 0023

Hon'ble Judges : Rajnesh Oswal, J;Rahul Bharti, J

Bench : Division Bench

Advocate : Ilyas Laway, Shuja-Ul-Haq

Final Decision : Dismissed

Judgement

Rahul Bharti, J

1) Heard the learned counsel for the parties. Perused the pleadings and record. The respondent no. 1 herein, for the purpose of undertaking residential construction at the site of his ownership plot measuring 1 kanal and 13 marlas 137 sq. feet (9113 sq. feet) situated in the locality of estate Gupta Ganga, came to seek building permission from the petitioner no. 1, which is the Building Permission Authority under Jammu & Kashmir Control of Building Operations Act, 1988.

2) The building permission for the residential construction came to be granted in favour of the respondent no. 1 vide an Order no. 38-Bldj/LDA of 2014 dated 04.10.2014 in terms whereof the respondent no. 1 was permitted the construction of a double storey residential house with respect to the site on the plot of land consisting of khasra no. 1267, 2062/1266 min situated in Estate Gupta Ganga. Permission so granted in favour of the respondent no. 1 was in accordance with the master plan of the Srinagar City in vogue. As per the sanctioned plan, the respondent no. 1 was to use 1720 sq. feet of area as plinth

area for the super structure to be raised thereupon. The respondent no. 1 was supposed to maintain the four side set-backs as stipulated in the said sanction plan.

3) In August, 2017, the petitioner no. 1, acting through its Enforcement Officer, came to take cognizance of the fact that the building construction raised by the respondent no. 1 at the site has taken place in deviation of the sanctioned plan issued for the purpose by the petitioner no. 1 in favour of the respondent no. 1. The deviation found to be actionable in law by the petitioner no. 1 against the respondent no. 1 was that the plinth area was exceeded from the permitted 1720 sq. feet to 2225 sq. ft, thus exceeding by 505 sq. feet and for this the respondent no. 1 was put to show cause notice dated 28.08.2017 under Section 7(1) of the Building Operations Act, 1988, by the petitioner no. 1.

4) Proceeding on the basis of the show cause notice dated 28.08.2017, the petitioner no. 1 came to issue demolition order with respect to the violation of 505 sq. feet exceeding plinth area coverage and for this respondent no. 1 came to be served with demolition order no. LDA/EO/11/100 dated 01.09.2017 passed by the petitioner no. 1 against the respondent no. 1.

5) The aforesaid demolition order LDA/EO/11/100 dated 01.09.2017 came to be challenged in appeal under the Control of Building Operations Act, 1988, by the respondent no. 1 before the J&K Special Tribunal, Srinagar, on its file no. STJ/1/4564/2017.

6) Said statutory appeal of the respondent no. 1 came to be allowed by the J&K Special Tribunal, Srinagar, by taking due notice of the position of law settled by the Apex Court in the case of Kewal Krishan Gupta Vs. J&K Special Tribunal and others (AIR 205 S.C. 2758).

7) The J&K Special Tribunal, Srinagar, upon examination of the nature of the violation in reference, came to pose a question as to whether the same was in violation of any Zoning Regulations etc, to which the outcome found by the J&K Special Tribunal, Srinagar, was that the said construction was not in any manner in violation of any Zoning Regulations, etc. The J&K Special Tribunal, Srinagar, also examined to hold that by having excess the plinth area laid from the one permitted in terms of the sanctioned plan to the one actually laid by the respondent no. 1 did not result in any encroachment of the neighbors' adjacent land or any kind of nuisance on account of the said excess plinth area coverage. The J&K Special Tribunal, Srinagar, held that there was no violation of the Master Plan in the case before it and as such by taking notice of the fact that when the construction at the site had already been carried out to the full knowledge of the respondent no. 1 and its officials concerned, to punish the respondent no. 1 with the demolition of the deviation in place would be unwarranted and uncalled for. Therefore, the J&K Special Tribunal, Srinagar, was convinced that the construction raised by the respondent no. 1 was purely residential in nature and as such the deviation in reference was worthy of being considered minor in

nature. Thus, the J&K Special Tribunal, Srinagar, came to compound violation by directing the respondent no. 1 to pay Rs. 50 per sq. feet for the aggregate deviation amounting to Rs. 63,305/. The appeal of the respondent no. 1 was thus allowed by the J&K Special Tribunal, vide its judgment dated 16.11.2017.

8) It is against this judgment that the petitioner no. 1 has come to pose a challenge through the medium of the present writ petition under Article 226 of the Constitution of India for seeking quashing of the judgment dated 16.11.2017 of the J&K Special Tribunal. In its writ petition, the petitioner no. 1 has posed its challenge to the impugned judgment by reference to clause 9 of the J&K Control of Building Operations Regulations, 1998. The thrust of the challenge in the writ petition particularly by the petitioner no. 1's end against the judgment dated 16.11.2017 of the J&K Special Tribunal in compounding the violation of 505 sq. feet area being in excess than the permitted plinth area, is that the case for compounding was not made out in terms of the Regulation 7 of the Control of Building Operations Regulation 1998, in terms whereof any erection/re-erection being in violation of approved land use in violation of permissible front, rear or side setbacks prescribed in the prescription and/or confers of residential building into a commercial or vice-versa cannot be admitted to compounding.

9) A bare perusal of the said ground of challenge of the petitioner no. 1 in its writ petition taking it as it is, even then the J&K Special Tribunal, Srinagar, has not fallen in any error, be it of fact or law in compounding the violation in the prescribed case as the petitioner no. 1 in its order dated 01.09.2017 by no stretch of intent and inference ever made out a case that the offending construction by the respondent no. 1 was falling in any of the three contingencies provided in clause 7 of the Regulations. It is worth taking notice of the fact that as against 9,113 sq. ft. of plot area owned by him, the respondent no. 1 has carried out the construction of the residential building there at by having use of 2,225 sq. feet of area and as such the rest of the plot area is unconstructed area and that is the reason that there could not be any charge of violation of four side setbacks against the respondent no. 1 in the order of demolition.

10) Thus we are not convinced that the J&K Special Tribunal, Srinagar, has not erred in its adjudication of the appeal of the respondent no. 1 against the demolition order issued by the petitioner no. 1 qua the construction in reference.

11) The judgment cited by the learned counsel for the petitioners to impugn the judgment of the J&K Special Tribunal, Srinagar, are not applicable in the present facts and circumstances of the case. The learned counsel for the petitioners has referred to judgment of Vice Chairman J&K LAWDA and Others Vs. Dr. Nusrat Jabeen dated 15.03.2022 in WPC no. 3226/2019. In this case, the charge of the J&K LAWDA against the construction in reference was that it had violated the approved land use of the area which is not the case in hand before us. Second case cited by the learned counsel for the petitioners has referred to judgment of J&K LAWDA Vs. Mohd. Ibrahim Sheikh in OWP no. 194/2019 decided by this Court in terms of its judgment dated 17.09.2021. In this case the construction

allowed was of two storied building, but the actual construction taking place was of a three storied building along with the increase in the plinth area which again is not seen in the present case. The respondent no. 1 in the present case has carried out the residential construction without compromising with setback areas and without adding any further floor to the permissible two storey residential house structure and, as such, the case of the respondent no. 1 fact-wise is different than the above two cited cases by the learned counsel for the petitioners to assail the judgment of the J&K Special Tribunal, Srinagar.

12) In view of this, the writ petition filed by the petitioners is held to be without merit, and as, such dismissed.