

(2014) 06 J&K CK 0012

In the Jammu And Kashmir High Court

Case No : Others Writ Petition (OWP) No. 338 Of 2013 C/w Others Writ Petition (OWP) No. 627 Of 2013

Navneet Mahajan

APPELLANT

Vs

Municipal Corporation

RESPONDENT

Date of Decision : 13-06-2014

Acts Referred:

Citation : AIR 2014 JK 76 : (2014) 2 JKJ 453

Hon'ble Judges : Bansi Lal Bhat, J

Bench : Single Bench

Advocate : Pranav Kohli, Hancy Maini, S.S. Nanda and Sachin Gupta, Advocate for the Appellant; S.S. Nanda, Sachin Gupta, Adarsh Sharma, Pranav Kohli and Hancy Maini, Advocate for the Respondent

Judgement

Bansi Lal Bhat, J.—Above titled writ petitions have been clubbed together for hearing. OWP No. 338/2013 is the writ petition filed by

Navneet Mahajan (hereinafter referred to as petitioner) challenging action of Municipal Corporation, Jammu in issuing impugned order dated

28.02.2013 by virtue whereof the building of petitioner was ordered to be sealed on the ground that petitioner had opened a tutorial/coaching

center thereby violating land use from residential to commercial and that he had violated the status quo order passed by the Jammu and Kashmir

Special Tribunal (herein after called the Tribunal). The sealing order related to the premises situated at House No. 15, Sector-5A, Trikuta Nagar,

Jammu. Vide order dated 02.04.2013 passed in CMA No. 452/2013 in OWP No. 338/2013, this Court allowed the petitioner to file an

application in the appeal pending in the Tribunal for seeking appropriate relief regarding de-sealing of the premises. The Tribunal, in the event of

petitioner filing an application, was directed to consider such application and passed appropriate orders. The petitioner approached the Tribunal

with an application for de-sealing of the premises, which came to be disposed of by virtue of order dated 12.04.2013 setting aside the sealing

order dated 28.02.2013 issued u/s 8(1) of Control of Building Operations Act 1998 (hereinafter referred to as COBA). The Tribunal directed the

respondent-Municipal Corporation, Jammu (herein referred to as Corporation to de-seal the premises.

2. The respondent-Corporation filed OWP No. 627/2013, titled BOCA v. Navneet Mahajan challenging the order of Tribunal order dated

12.04.2013. Both the writ petitions involving the same questions of law have been heard together.

3. In OWP No. 338, the petitioner sought the following relief.

(i) Certiorari seeking quashment of the impugned order bearing No. MJ/CEO/407, dated 28th February, 2013 u/s 8(1) of Control of Building

Operation Act, 1988 issued by the respondent No. 2 whereby building situated at plot No. 15, Sector 5-A, Trikuta Nagar, Jammu has been

ordered to be sealed.

(ii) Certiorari seeking quashment of notice bearing No. MJ/CEO/1801/2011 dated 31.05.2011, u/s. 7(1) of J&K Control of Building and

Operations Act, 1988 issued by respondent No. 3.

(iii) Mandamus commanding upon the respondents to remove the sealing of the premises i.e. H. No. 15, Sector-5A, Trikuta Nagar, Jammu.

4. The case set up by petitioner is that he is the owner in possession of a plot bearing House No. 15 situated at Sector 5-A, Trikuta Nagar Jammu

which has dimension of 60x90 feet. After obtaining the possession from JDA, petitioner claims to have approached the Corporation for sanction of

building permission. The site plan of petitioner with regard to ground floor, 1st floor and second floor was sanctioned vide sanction order dated

09.03.2010. When the petitioner started raising construction, he found that size of plot from western side was less than the prescribed. This

resulted in slight deviation in maintaining the setbacks on the western side of the plot. The corporation issued notice u/s. 7(1) of COBA. This

happened on 31.05.2011. According to the petitioner, the building had been constructed by then. This was followed by another notice u/s. 7(3) of

COBA. Aggrieved thereof, petitioner filed statutory appeal before the Tribunal which directed maintenance of status quo. Petitioner's case is that

he did not raise any further construction thereafter. However respondent-2 issued the impugned order dated 28.02.2013 u/s. 8(1) of COBA

directing sealing of the premises. According to petitioner the building was sealed by respondent No. 5 on 01.03.2013 without the petitioner being

afforded an opportunity of being heard. The impugned sealing order alleged change of land use from residential to commercial by opening of an

educational institution styled as Phoenix Classes, which did not amount to erection or re-erection of building justifying passing of order u/s. 8(1) for

sealing of the building.

5. Respondents filed objections contesting the petition on the ground that the petitioner was granted building permission to raise the construction of

ground floor, 1st floor and second floor over plot area of 5400 sq. ft. for residential purposes. It is pleaded that the petitioner has raised RCC

pillars on third floor without raising partition walls by deviating from the building plan. Chief Khilaf-Warzi Officer of the area issued notices u/s.

7(1) and 12(1) of COBA Act upon the petitioner. Since the petitioner failed to show cause and continued with the construction, notice u/s. 7(1) of

COBA Act directing petitioner to demolish the construction was issued. Petitioner filed the appeal before the Tribunal which directed the parties to

maintain status quo. It was further pleaded that petitioner completed the building after passing of status quo order by the Tribunal and also started

running tutorial in the building. According to respondent, running of educational institution in a residential building, is a commercial activity which is

against the provision of master plan of the area. It is further pleaded that the petitioner has covered more area and violated conditions in respect of

setbacks and height of building which are major violations warranting demolition of the building. This besides change of land use from residential to

commercial, is a major violation. It is further pleaded that building in question is located in Trikuta Nagar, Jammu which is a housing colony. The

plot in question was allotted for residential purposes and the master plan prohibits commercial activity in the residential premises. According to

respondent, running of coaching center is a commercial activity and the same cannot be permitted in a residential building. Change of land use is an

offence under clause 8.5 of Master Plan and warrants punitive action. Thus, the impugned order of sealing is justified.

6. OWP No. 627/2013 has been filed by BOCA assailing the order dated 12.04.2013 passed by the Tribunal by virtue whereof the Tribunal

directed de-sealing of premises of petitioner. The grounds urged are the reiteration of objections raised by COBA in OWP No. 338/2013.

Respondent-1 in OWP No. 627/2013 who is the petitioner in 338/2013, has contested the petition primarily on the pleas which form the

averments of OWP No. 338/2013. It is further pleaded that the additional pleas raised by BOCA to supplement the grounds of sealing in the writ

petition, cannot be looked into. BOCA has filed the rejoinder claiming therein that Chapter 8 of the Master Plan 2021 provides zoning regulation in

which para 8.1(XX) deals with the conversion of buildings. Para 8.1(e) in the said chapter provides for the penalty and gives power of sealing to

the authority. Educational Intuition is allowed in the residential area. The developers are required to keep separate space for such activities in

residential colony. The plot carved out for residential purpose and solely leased out for the purpose, cannot be used for purposes other than the

residential purposes. Reliance is placed on SRO 64 (Master Plan) which provides for proper specification for each type of activity provided under

user permitted"".

7. Heard the rival sides.

8. In view of the fact that the Tribunal has set aside the order of sealing of the premises of petitioner in OWP No. 338/2013 (hereinafter referred

to as owner of the premises), the focus is on the issue raised in OWP No. 627/2013 filed by BOCA. The Tribunal noticed that on 28.02.2013

when the impugned order of sealing was passed, no appeal was pending before the Tribunal; that there was no erection or re-erection in the

building after August, 2011 and there was no allegation in the impugned sealing order that the building was being constructed in violation of

approved site plan. It found that the impugned order of sealing had been issued without application of mind and sans the power to invoke Section

8(1) of COBA. The issue raised is thus, confined to the question whether, in absence of any erection or re-erection being carried out at the time of

passing of impugned sealing order dated 28.02.2012, COBA was justified in

invoking provisions of Sec. 8(1) of Control of Buildings Act.

9. Learned counsel for the owner of premises submits that the construction was completed as per the sanctioned plan when show cause notice u/s.

7(1) of COBA Act was issued followed by notice dated 15.06.2011 u/s. 7(3) of the Act. He further contends that owner of the premises had

preferred the statutory appeal against the impugned notice and the Tribunal directed the parties to maintain status quo. That thereafter no further

construction activity was carried out. The appeal came to be dismissed for default on 26.02.2013 and taking advantage of its dismissal, BOCA

issued the impugned order dated 28.02.2013 directing sealing of premises in question. It is contended that for invoking power u/s. 8(1) of COBA,

it is the pre-requisite that there must be an activity falling within the definition of ""erection or re-erection"" at the time of issuance of sealing order.

However the impugned order did not contain any allegation of erection or re-erection being carried out by the owner of premises at that time.

According to learned counsel, BOCA is precluded from taking such grounds in the writ petition. He further contended that the Master Plan permits

various activities under the zoning regulations and running of Schools offering general educational courses is permissible user in residential areas.

Lastly, it is contended that the impugned sealing order rests on twin grounds of opening of tutorial by violating the land use from residential to

commercial and violation of status quo order of the Tribunal but BOCA has pressed into service additional grounds in OWP No. 627/2013 which

cannot be looked into. According to learned counsel, the twin grounds taken for passing of impugned sealing order being without substance, the

impugned sealing order could not be justified as the Tribunal has rightly set aside the same.

10. Learned counsel representing BOCA, per contra, contended that owner of premises was guilty of having committed major violations by

deviating from sanctioned building plan. He further contended that the mere fact that under the Master Plan, the Educational Institution could be

setup in the residential pockets did not justify conversion of land use allotted and building sanction permission granted for residential purpose.

11. Upon consideration of rival contentions, it emerges that the impugned sealing order dated 28.02.2013 passed u/s. 8(1) of COBA, 1988 is

sought to be defended on the following three grounds:

- i) That tutorial was opened in the building, resulting in conversion of land use from residential to commercial.
- ii) That the order of Tribunal directing maintenance of status quo had been violated: and
- iii) That the commercial activity undertaken in the building was posing traffic hazards and environmental problems, besides inconvenience to local residents.

12. In so far as violation of status quo order passed by the Tribunal is concerned, the Tribunal found that on account of dismissal of appeal for default, no status quo order was in force at the time of alleged conversion of land use. In view of finding recorded by Tribunal, this ground does not survive. The Tribunal has also arrived at a conclusion that no construction was undertaken in the impugned premises after August 2011. This being a finding of fact and not shown to be erroneous, much-less perverse, cannot be called in question in the writ proceedings. The only question requiring consideration is whether in absence of any allegation of erection or re-erection, the impugned order of sealing could be justified.

13. It is indisputable that BOCA is empowered to pass order of sealing in appropriate cases. However, exercise of such power rests upon the nature of allegations justifying its exercise. Each and every violation of building permission would not justify invoking of power to order demolition followed by sealing of the premises. It is an admitted case that the construction activity has been completed. It is also not in controversy that the owner of the premises had been granted building permission for residential purposes. The impugned sealing order rests on the premise that the owner of the premises has converted the residential building into commercial one by opening tutorial under the name and style Phoenix Classes of Education, which was causing traffic hazard and environmental problems in the vicinity. On the face of it, there is no allegation of erection or re-erection of building as defined in Sec. 2(9) of COBA Act. It is also not in dispute that running of Schools offering general educational courses is a permissible user in residential areas under the Zoning Regulations incorporated in para 8.2 of the Master Plan approved under SRO 263 dated 09.08.2004. Functioning of tutorial in a residential building would thus be a

permitted user of the building in residential area and the same does not fall within the purview of commercial activity. Admittedly, there is no violation of approved land use. The building has been raised for residential purposes. Operation of tutorial from the building being activity not amounting to conversion of permitted user, invoking of power u/s. 8(1) of COBA in absence of "erection or re-erection", cannot be supported.

14. It is well settled that when a statutory functionary makes order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by the fresh reasons in the shape of affidavit or otherwise. Otherwise the order, bad in the beginning, may by the time it comes to court on account of challenge, get validated by additional grounds later brought in. This principle was enunciated in case titled Commissioner of Police, Bombay Vs. Gordhandas Bhanji, and followed in later decisions.

15. In view of this settled position of law, BOCA would be precluded from raising grounds in support of sealing order other than the one incorporated therein.

16. Admittedly, the impugned sealing order does not allege the contingencies referred to in Section 8(1) of COBA Act. The impugned order dated 28.02.2013 is accordingly held illegal and unauthorized and declared so. The impugned order passed by the Tribunal dated 12.4.2013 does not suffer from any legal infirmity and there being no merit in OWP No. 627/2013, the same is dismissed.

17. OWP No. 338/2013 is allowed. Order impugned No. MJ/CEO/407 dated 28.2.2013 is quashed and respondent-2 is directed to remove the sealing of the premises i.e. H. No. 15, Sector 5-A, Trikuta Nagar, Jammu. The issue of violation of sanctioned building plan and demolition thereof being sub judice before the Tribunal, same is left to be dealt with by the Tribunal.