IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: July 01, 2019

\+ W.P.(C) 3989/2018 & CM. No 15715/2018

DR. RAJESH KAPOOR

..... Petitioner

Through: Mr. Vikas Dhawan and Ms. Kreeti Joshi, Advs.

versus

DELHI CANTONMENT BOARD AND ANR.

..... Respondents

Through: Mr. Ankur Mishra and Mr. Tarveen Singh Nanda, Advs. with Mr. Alkesh Sharma, Officiating Executive Engineer for Delhi Cantonment Board.

CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO

J U D G M E N T

V. KAMESWAR RAO, J

1. The present petition has been filed by the petitioner with the following prayers:

> *"The petitioner respectfully prays that this Hon'ble Court may be pleased to:*
> *I. issue appropriate writ(s), order(s) or direction(s) in the nature o Certiorari calling for the records pertaining to, and quash, the order No.DCB/4/UC/RK/SH.Bazar/2017-18 dated 07.03.2018;*
> *II. consequently issue appropriate writ(s),*

order(s) or direction(s) in the nature of Mandamus directing respondent No.1 to de-seal the petitioner's property bearing No.IV/1/73 (forming part of survey No.52/15), Gopi Nath Bazar, Delhi Cantonment;

III. award costs of this writ petition to the petitioner; and

IV. grant such further or other relief as this Hon'ble Court may deem fit in the facts and circumstances of this case."

2. In substance the challenge in the writ petition is to the communication dated March 07, 2018 by which the respondents have sealed the shop at ground floor of premises bearing No.IV/1/73, Gopi Nath Bazar, Delhi Cantonment on the ground that addition / alternation / modifications are being carried out unauthorisedly in contravention to the provisions of the Cantonments Act, 2006 ("Act of 2006" in short).

3. It was the submission of Mr. Vikas Dhawan, learned counsel for the petitioner that the impugned order under section 249(1) of the Act is in violation of the principle of natural justice, inasmuch as the petitioner has not been given notice / hearing before the property has been sealed. According to him as per whatsapp messages exchanged between the CEO of the Board and the Junior Engineer, it is clear that the petitioner was carrying out the work of plastering, repairs and change of electrical wiring. So, a notice / hearing is pre-requisite before the sealing is effected as the petitioner could have clarified the position that there is no alteration / additions / modification, the grounds on which the respondents effected the sealing. In fact, it was his submission that the CEO, himself directed the Junior Engineer to

give notice to the petitioner before effecting the sealing. Unfortunately, no notice has been given to the petitioner. That apart, it was his submission that the power to seal unauthorized construction under Section 249(1) of the Act of 2006 is pursuant to an order of demolition under Section 248(1) or stoppage of erection of any building or execution of any work, and such power is exercisable only within 12 years of such erection or re-erection, which in this case was in the year 2004. Hence, the impugned order is liable to be set aside on this ground as well.

4. That apart, he also submitted that order dated March 07, 2018 has been signed by one Mr. Alkesh Sharma, who is Executive Engineer and as such not authorized under the Act to sign or authenticate the order. According to him, the power under the Act is statutorily vested in President of the Board or Chief Executive Officer or Members of any Committee specially authorized by the Board and hence the order is bad.

5. That apart, it was his submission, that when a statutory functionary makes an order based on certain grounds its validity must be judged by the reasons so mentioned and cannot be supplemented by the fresh reasoning in the shape of affidavit or otherwise. In this regard, he submitted that the validity of the impugned order must be judged only by the reasons so mentioned in the order and cannot be supplemented by the fresh reasoning in the shape of affidavit or otherwise, as in the affidavit, the respondents sought to justify the sealing by stating; (i) the construction is on land earmarked for grassland / ornamental ground; (ii) in 2004 the petitioner had constructed building

without approval as per building Bye-laws for which notices were issued and the petitioner has preferred an appeal which is pending before the Competent Authority. He would rely on the judgment in the case of ***Pancham Chand v. State of H.P., (2008) 7 SCC 117*** in support of his contention.

6. Counter affidavit has been filed by the respondents wherein the following has been stated:

> *"5.a. That an area admeasuring 3.89 acres comprising of Sy. No. 52/15, Shastri bazaar, Delhi Cantt. was leased out to Sh. L. Gopinath, vide lease deed dated 30.07.1937 for a period of 30 years, renewable at the option of lessee upto 90 years w.e.f 09.06.1932. The said lease was granted for the purpose of shops, dwelling house and ornamental garden. Cop of the lease deed has been annexed as* ***Annexure A2.***
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> ***b.*** *In 1939 the Respondent had sanctioned building plan in respect to fSy. No. 52/15, wherein 11 shops and 7 residential quarters were sanctioned and rest of the area was shown as grass lawn / ornamental garden.*
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> *c. The entire leased area of Sy. No.52/15 is recorded in favour of Sh. Ajay Gupta. In the year 1990, Sh. Ajay Gupta had sold the lease hold rights of the entire built up area to 36 persons and submitted the list of purchasers of leasehold rights in Sy.No.52/15 to Respondent vide letter dated 26.04.2000. The said list also included the portion held by Sh. Rajesh Kapoor and Ranjan Kapoor i.e IV/1/73 and IV/1/73A respectively.*
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> *d. That in the year 2004 Sh. Vinod Kumar Bakshi submitted a copy of General Power of Attorney and Memorandum of understanding cum agreement of sell dated 24.01.2004 executed by Sh. Ajay Gupta*

in his favour the property No. IV/1/73. Thus, the Respondent has not taken any action for mutation in the said property No., despite the request from both the parties.

e. It is pertinent to mention that Sh. Ajay Gupta had not sought prior permission from the competent authority before transferring the lease hold rights in the said Property, which is in contravention of the lease condition 1(8) of the lease deed.

f. That vide letter dated 29.10.2002, Director, DE, Western Command had issued specific directions that no case were unauthorized construction has been done on ornamental garden should be proposed for mutation or execution of lease. Copy of the said letter dated 29.10.2002 has been annexed as ***Annexure A3.***

g. In the year 2016, 25 cases were initiated for obtaining sanction for condonation of lease condition 1(8) and allotment of subsidiary Sy. Number in the favour of purchasers. Copy of letter dated 03.08.2016 for condonation and the sanction letter dated 16.01.2018 have been annexued as ***Annexure A4 and Annexure A5.***

h. It is pertinent to mention the board vide its resolution contained in CBR No.01 dated 21.12.2016, resolved to determine the lease of land reserved for development of ornamental garden admeasuring 2.10 acres approximately in Sy. No. 52/15. And, the proposal for determination of lease hold rights in respect of land reserved for ornamental garden in Sy. No. 52/15 has bene forwarded to Principal Director vide letter dated 31.01.2017. Copy of CBR No.1 dated 21.12.2016 and Copy of letter dated 31.01.2017 has been annexed as ***Annexure A6 and Annexure A7.***

i. The petitioner has not come up with clean hands as the Petitioner has not disclosed the fact that in 2004 the petitioner had constructed three storey building comprising of Ground Floor, Second Floor and Third Floor over an area measuring 21'6"x (11'+ 9')/2 without approval of building plans and obtaining sanction of the competent authority as required u/s 178A/179 of Cantonment Act, 1924 on the site earmarked as green land in the sanctioned plan. The illegal construction was reported to the competent authority by the Junior Engineer (JE) vide its inspection report dated 24.02.2004, 28.02.2004 and 15.06.2004. Copy of the JE's report has been annexed as ***Annexure A8.***

j. Notice u/s 185 of the Cantonments Act, 1924 was issued to the Petitioner on 15.03.2004 and 16.06.2004 against which he has preferred appeal before the competent authority. The appeal is pending for disposal. Similarly, prosecution cases have also been lodged U/s 184 of the Cantonments Act, 1924 in which the Petitioner has pleased guilty before the concerned M.M. and was convicted with a fine of Rs.5,000/- and Rs.2,000/. Copy of the Notices u/s 185 has been annexed as ***Annexure A9.***

k. That despite pleading guilty and the appeal pending against order passed U/s 185 of the Cantonments Act, 1924 before the competent authority; the petitioner was again found carrying out unauthorized construction work in said premises which is a blatant violation of law. This fact was reported to the competent authority by the concerned JE's. That based on the report of JE an order U/s 249 was issued by the executive engineer on behalf of the Chief Executive Officer."

7. Learned counsel for the respondents has justified the impugned action, by stating in terms of Section 249(1) of the Act

of 2006 no notice is required to be given as the property is already booked for unauthorized construction under Section 248(1) of the Act of 2006. That apart, he stated that the impugned order has been issued by the Executive Engineer pursuant to the orders of the Chief Executive Officer of the Board, who is the competent authority in terms of the Section 249(1) to direct sealing of the property. He also submitted the plea of Mr. Dhawan that the sealing cannot be carried out after 12 years from the date of notice shall not be applicable in an action under Section 249(1) of the Act of 2006.

8. Having heard the learned counsel for the parties, and perused the photocopy of the relevant record placed before me I deem it appropriate to, first deal with the submission made by Mr. Vikas Dhawan that Section 249 being in aid of Section 248 which refers to the powers of the Board to demolish / stay of erection or re-erection, the power of sealing has to be exercised within 12 years, is concerned, the same is fallacious for the reason the limitation period of 12 years is only stipulated in Section 248(1). The same is conspicuous of its absence in Section 249(1) of the Act of 2006. So on a literal construction of Section 249(1), the period of 12 years cannot be read in the said Section. Otherwise, it would amount to reading in Section 249(1) the period of 12 years which is not even thought of by the Parliament.

9. Insofar as the plea of Mr. Dhawan that the impugned order having been signed by the Executive Engineer, who is not the authority mentioned under Section 317 to sign or authenticate

the order and as such the order is bad is concerned, this argument is also fallacious as Section 317 of the Act of 2006 on which the reliance was placed by Mr. Dhawan contemplates all notices, orders or requisition issued by the Board under the Act or any rule or byelaw made thereunder shall be signed either by the President of the Board or by the Chief Executive Officer or by the Members of the Committee specially authorized by the Board in that behalf. But in the case in hand, the petitioner is not concerned with a notice, order or requisition issued by the Board, but as noted from Section 249(1) of the Act of 2006 itself that the authority concerned to seal unauthorized constructions is the Chief Executive Officer, who is an authority other than the Board and I have not been shown any provision that any order issued pursuant to the decision of the Chief Executive Officer need to be communicated by the Chief Executive Officer only. So, it follows the Executive Engineer has only conveyed the decision of the Chief Executive Officer to the petitioner. It is also not the case of Mr. Dhawan that there is no decision of the Chief Executive Officer of sealing. So, this submission of Mr. Dhawan is also liable to be rejected.

10. One submission of Mr. Dhawan was that the respondents were required to follow the principles of natural justice of at least giving notice / hearing to the petitioner before passing the sealing order. There is no dispute that the action of sealing under Section 249(1) of the Act of 2006 can follow action of stoppage of erection or re-erection or demolition taken by the Board. It is a settled position of law in terms of the judgment of the Division

Bench of this Court in the case of ***Danish Infratech Private Limited v. Delhi Cantonment Board, W.P. (C) 7139/2014,*** decided on November 19, 2014 wherein an issue arose whether Section 248(1) of the Cantonment Act, 2006 is unconstitutional and ultra vires the scheme of the Constitution of India as Section 248(1) does not contemplate any hearing being given before the notice to stop work. The question was decided in the negative. This decision of the Division Bench was also for the reason that there is a remedy of appeal provided against the said action of the Board under Section 340 read with Schedule 5 of the Act, and in view of Section 342 during the pendency of the appeal no action of demolition is taken. If that be so, that whether on account of Section 249(1) sealing of the property can be taken without issuance of a notice / hearing to the owner / occupier. The answer to this question has to be in the negative, for various reasons, which includes (i) in view of the fact that during the pendency of the appeal under Section 340 of the Act against an order under Section 248(1) of the Act the respondents do not take any action to demolish the property in question. In other words, the owner / occupier enjoys the property to the fullest extent during the pendency of the appeal, (ii) but with the order of sealing under section 249(1) the enjoyment of the property is interdicted.

11. In view of drastic consequence, even though Section 249(1) does not contemplate any notice / hearing to be given to the owner / occupier, the same must be read into the said provision as the sealing of the property causes grave prejudice to

the owner / occupier. In his regard, it is apt to refer to the judgment of the Supreme Court in the case of ***Haryana Financial Corporation v. Kailash Chandra Ahuja, (2008) 9 SCC 31*** wherein the Supreme Court has applied the test of prejudice and it was held that if there is no prejudice the action cannot be set aside merely on the ground that no hearing was accorded before taking a decision by the authority. Further prejudice is also caused in an action under Section 249(1) unlike Section 248(1) of the Act as there is no remedy of appeal against the order passed under Section 249(1) of the Act as is seen from Schedule 5 of the Act, and also unlike under Section 248(1) when an appeal is pending no precipitative action is being taken till the hearing of the appeal which is not the case under Section 249(1) as the action of sealing is acted upon. No doubt, Section 248(1) stipulates passing of a sealing order before or after making an order of demolition under Section 248(1) or stoppage of erection of any building or executing of any work, but as no appeal is provided against the order under Section 249(1) and the order has the effect of sealing the property. So, it is necessarily follows that in both the eventuality it becomes imperative a notice is issued seeking reply of the owner / occupier and considering the same before passing an order. It must be clarified, that the notice is only to the extent of sealing. In this case also as no notice was issued to the petitioner, the impugned order dated March 07, 2018 is liable to be set aside. It is ordered accordingly. Liberty is with the respondents to issue notice to the petitioner and take further action after considering the reply to be filed by the

petitioner to the notice. If any order is passed to the prejudice of the petitioner, he is within his right to seek such remedy as available in law.

CM. No 15715/2018

Dismissed as infructuous.

V. KAMESWAR RAO, J

JULY 01, 2019*/aky*