

CASE NO.:
Appeal (civil) 2592 of 2004

PETITIONER:
Kewal Kishan Gupta

RESPONDENT:
J. & K. Special Tribunal & Ors.

DATE OF JUDGMENT: 11/05/2005

BENCH:
D.M. Dharmadhikari & B.N. Srikrishna

JUDGMENT:
J U D G M E N T

with

Civil Appeal Nos. 2593/2004 and 2595/2004

Srikrishna, J.

These three appeals arise out of connected proceedings and, therefore, can be disposed of by a common judgment.

Facts:

Civil Appeal No. 2592 of 2004

Kewal Kishan Gupta-appellant applied to the State Government of Jammu & Kashmir in the Revenue Department seeking sanction of transfer of leasehold rights over certain Nazool land situated at B.C. Road Rehari, Jammu, from the previous leaseholders, Dileep Kumar and Dhani Ram. By an order made on 13.9.1990, the State Government in the Revenue Department sanctioned the transfer of leasehold rights from the previous leaseholders to the appellant "on the existing terms and conditions".

A lease deed was executed on 24.10.1990 between the Governor of Jammu & Kashmir and Kewal Kishan Gupta. Clause 2(1) of the lease deed stipulated as under:

"2. the lessee hereby covenants with the lessor as follows:-

1. The land shall be used solely and exclusively as residential purposes, and the lessee shall within three years of the execution of the lease deed erect thereon buildings according to the plan and elevation approved by the Collector and attached hereto or as it may be subsequently altered or varied with the written consent of the Collector Jammu on behalf of the lessor."

It is the case of the appellant that although B.C. Road was shown as residential zone in the Master Plan, factually and predominantly, most of the properties situated at B.C. Road were being used for commercial purposes. The buildings on the said road used for commercial purposes belonged not only to private parties, but also consisted of several Government offices as well as banks and public sector undertakings. In the appeal memo, the appellant has named a large number such commercial entities, which were using the buildings along the B.C. Road at the time the lease deed was entered into.

It is also the case of the appellant that his predecessor-in-title had put up an old construction on the said leased land which was in dilapidated state. The appellant applied to the Jammu Municipality (Respondents Nos. 2 and 3) to grant permission to put up a new construction on the leased land. On 22.11.1992 such permission was granted to the appellant to raise construction of 2,274 sq. ft. on the ground floor and 1,390 sq. ft. on the first floor. The appellant commenced the construction, but could not complete the same before the validity of the permission ran out. The appellant applied to the Jammu Municipality, which by Order No. 28 dated 29.4.1997 revalidated the permission for the construction. On 2.6.1997, the appellant was served with a notice from the Executive Officer of the Jammu Municipality calling upon him to refrain from cutting and digging of earth for construction of basement on the leased land. There was certain correspondence between the Jammu Municipality and the appellant on the subject, which finally resulted in a letter dated 17.7.1997 from the Executive Officer of the Jammu Municipality informing the appellant that he was permitted to go ahead with the construction and that, in addition to the ground floor, he would be permitted to raise one more storey above it. On 4.10.1997, the appellant was served with a communication from the concerned officer of the Municipality alleging certain violations of the applicable laws and called upon to show cause within three days. On 14.10.1997, the appellant was served with an order calling upon him to demolish the construction which was alleged to be unauthorized. The appellant filed an appeal against such order before the J&K Special Tribunal (hereinafter referred to as 'the Tribunal'). The Tribunal made an order dated 6.3.1998 holding that the appellant had blatantly violated the SRO of 14.1.1997 inasmuch as after taking the sanctioned plan to construct an area of 3,664 sq. ft. for residential purpose, the appellant had constructed a commercial complex of 11,470 sq. ft.. The Tribunal felt that it was a major offence which could not be compounded and, therefore, granted the Municipality the liberty to demolish this offending structure. However, the Tribunal said in the Order:

"However the Municipality cannot be allowed to hold the threat of demolition over the head of the appellant for an indefinite period like a sword of Damocles. This will keep the appellant in a state of perpetual anxiety and fear. The Municipality should be able to demolish the structure within three weeks from today i.e. by 27th March, 1998. In case the Municipality is unable to demolish the structure by 27th March it can be presumed that the Jammu Municipality has neither the will nor the inclination to take action against the law breaker. In such a situation after 27th March, they should compound the offence after admitting their inability to demolish the structure. In such circumstances the Municipality should realize the compounding fee for the entire area of 11,470 sq. ft. @ Rs.80/- (Rs. Eighty only) per sq. ft. The fees should be paid by the appellant to the Jammu Municipality by 27th June, 1998 failing which the appeal shall be deemed to have been dismissed."

On 18.5.1998 the Executive Officer, Jammu Municipality called upon the appellant to deposit the compounding fee of Rs. 9,17,600/-, as directed in the Order of the Tribunal dated 6.3.1998. The appellant filed writ petition OWP No. 458/98 impugning the order of the Tribunal and on 10.6.1998 the learned Single Judge of the High Court granted an interim stay of the impugned order of the Tribunal dated 6.3.1998. On 30.5.2000, the learned Single Judge of the High Court dismissed the writ petition by holding that the order of the Tribunal to the extent of demolition of unauthorized construction was justified.

The appellant impugned the judgment and order of the learned Single Judge by Letters Patent Appeal No. 214/2000. The Division Bench agreed with the learned Single Judge's finding and held that the appellant had failed

to produce his title deed and also raised the construction far in excess of the sanctioned plan. It further held that the appellant had no regard for the law and, therefore, deserved no consideration from the court. In this view of the matter, the Division Bench went on to direct the Jammu Municipality (which had since then become a 'Corporation') to take immediate action for demolition of the unauthorized construction and make a compliance report to the High Court.

While the writ petition of the appellant was pending before the High Court, the appellant sought for transfer of leasehold rights over the said plot of land to Bhim Sain, Swatantra Kumar and Smt. Rita Rani "for commercial purposes." By an Order made on 9.6.1999, sanction was accorded by the State Government for transfer of the leasehold rights to the said three persons "on the existing terms and conditions of lease" on payment of ground rent on enhanced rate of 150% as admissible under Rules without payment of premium. On 20.8.2001, the State Government executed such a lease deed in favour of the said three persons. Bhim Sain, Swatantra Kumar and Smt. Rita Rani, who were the transferees of the leasehold rights in the plot in question, filed Writ Petition OWP No. 1102/03 before the High Court seeking a mandamus against the authorities from interfering with their rights as transferees of the leasehold rights and sought a declaration that the judgment and order dated 12.11.2003 made by the Division Bench of the High Court in LPA No. 214/2000 did not, in any way, interfere with or prejudice their rights in the property.

In the meanwhile, the appellant also filed a Review Petition Rev.(LPAOW) No. 44/03 seeking review of the judgment and order of the Division Bench in his case. The Division Bench of the High Court clubbed the Review Petition along with Writ Petition OWP No. 1102/03 and by its judgment dated 4.12.2003 dismissed both of them.

Civil Appeal No. 2593 of 2004

This appeal has been brought by the said transferees-Bhim Sain, Swatantra Kumar and Smt. Rita Rani impugning the aforesaid judgment of the Division Bench dismissing their writ petition OWP No. 1102/2003.

Civil Appeal No. 2595/2004

This appeal has been brought by the appellant-Kewal Kishan Gupta impugning the dismissal of his Review Petition Rev. (LPAOW) No. 44 of 2003 in LPA No. 214 of 2003 decided on 12.11.2003.

The first thing that strikes us as very strange in this matter is that the Jammu Municipality (Respondents Nos. 2 and 3 in C.A. No. 2592/04), which appears through their officers, was not at all aggrieved by the Order dated 6.3.1998 made by the Tribunal. In fact, their action of demanding the compounding fee by notice dated 18.5.1998 suggests that the Municipality was satisfied that there was no need to demolish the offending structure in question and that the matter could be compounded by payment of compounding fee as directed by the Tribunal. It is also strange that, despite the pending litigation, the State Government granted sanction for transfer of the leasehold rights to the three transferees. The Minutes of the meeting held in the Office of the Vice Chairman, Jammu Development Authority on 6.1.1998, which was attended by the Administrator, Jammu Municipality; Vice Chairman, J.D.A.; M.D., Housing, J&K State, Jammu; Chief Town Planner, J.D.A., Jammu; Executive Officer, Jammu Municipality, show that it was decided that in view of the non-implementation of planning proposals envisaged in Master Plan it was felt that commercial activities at selected points along main roads and roads within some colonies developed by Housing Board/J.D.A. may be allowed to come up to meet the ever-rising needs of commercial land users within the city. B.C. Road was one such road specifically referred to in the said minutes.

Contentions:

While the learned counsel for the respondents has attempted to support the impugned judgment of the High Court on the basis of the reasoning contained therein, Shri G.L. Sanghi, learned counsel for the appellant contended that the impugned judgments of the High Court are

contrary to law and made without noticing the provisions of the Jammu and Kashmir Municipal Act, 2008 (1951 A.D.) (Act No. VIII of 2008) (hereinafter referred to as 'the Act'). He drew our attention to the provisions of Section 229 of the Act, which prescribes penalty for disobedience. Clause (d) of sub-section (1) of Section 229 provides that where a building has been erected or re-erected in contravention of the terms of any sanction granted, the Executive Officer of the Municipality shall issue a show cause notice to the offender, and after taking his explanation in the matter, if not satisfied with the explanation, shall have the power under sub-section (3) to demolish the portion of the building in contravention of the terms of the sanctioned plan. Sub-section (4) of Section 229 provides that any person aggrieved by the order of the Executive Officer made under sub-section (3) may prefer an appeal to the Minister Incharge Local Self Government or the authority appointed by him. The Minister Incharge Local Self Government or the authority appointed by him is empowered to decide the appeal. The second proviso to sub-section (4) of Section 229 is important and reads as under: "Provided further that the Minister Incharge Local Self Government or the authority appointed by him in this behalf may, either before or after the filing of the appeal, compound the offence and accept by way of compensation such sum as he or it may deem reasonable subject to such rules, regulations and orders as may be prescribed. Where an offence has been compounded no further action shall be taken against the aggrieved person in respect of the offence so compounded."

We are informed by counsel on both sides that the Special Tribunal is the "authority appointed" in this behalf to hear appeals under Section 229(4) of the Act. The order passed by the Tribunal also suggests that it was hearing the appeal against an order passed under sub-section (3) of Section 229 of the Act. A careful reading of the second proviso to sub-section(4) of Section 229 of the Act suggests that the Minister Incharge Local Self Government or the authority appointed by him (the Special Tribunal, in our case) is fully empowered to pass an order for compounding the offence, either before or after filing of the appeal. Obviously, such order could be made upon hearing of the appeal also. The Order dated 6.3.1998 made by the Tribunal also appears to have been made without noticing the specific provision of the second proviso to sub-section (4) of Section 229 of the Act. Consequently, the order states that the Municipality was given the liberty to demolish the offending structure, or if not, to accept a compounding fee for the entire area of 11,470 sq. ft. @ Rs. 80/- per sq. ft. In other words, the order of the Tribunal gave an option to the appellant before it of saving the construction from demolition upon payment of the compounding fee. The order of the Tribunal, though passed in ignorancia of the second proviso of sub-section (4) of Section 229 of the Act, was perfectly within its jurisdiction as it was exercising the power exercisable by a Minister Incharge or his appointee thereunder. Consequently, the learned Single Judge was justified in expunging the unnecessary remarks made by the Tribunal as to the absence of will for demolition on the part of the Municipality and quashing the said remarks. It was not open to the learned Single Judge to substitute his discretion in the matter and uphold the order of the Tribunal only to the extent of demolition of the unauthorized construction. Though, the learned Single Judge does not in express words set aside the finding with regard to the compoundability of the offence, we presume it to be the consequence of the order.

Turning next to the impugned judgment made in the Letters Patent Appeal, we find that the judgment flies off at a tangent. The reasons which seem to have impelled the Division Bench to dismiss the Letters Patent Appeal are: (1) the appellant's failure to produce his title deed, (2) the fact that the construction was far in excess of the sanctioned plan and (3) the appellant converted the land use from residential to commercial purpose. In our view, the Division Bench erred on all the three counts. In the first place, the title of the appellant to the land in question was never in dispute, nor put in issue either before the Tribunal or before the learned Single Judge. In fact, the orders of sanction which we have referred to earlier indicate that the

appellant presumably had good title. In any event, that was not the issue before any of the courts below. The second reason for dismissing the Letters Patent Appeal seems to be that the appellant had far exceeded the construction beyond the sanctioned plan. That was purely begging the question. It was precisely because of an offence within the meaning of clause(d) to sub-section (1) of Section 229 that the Executive Officer of the Municipality passed an order for demolition; the appellant appealed thereagainst under sub-section (3) and the Tribunal made an order for compounding the offence under sub-section (4). If there was no contravention of the sanctioned plan, there would have been no occasion for levying a compounding fee at all. That the Tribunal had jurisdiction to levy a compounding fee is clear from the terms of the second proviso to sub-section (4) of Section 229 of the Act. That the Municipality was willing to do so is evident from the Municipality's notice dated 18.5.1998 demanding the compounding fee and also the fact that the Municipality at no point of time appeared to be aggrieved by the order made by the Tribunal, as it did not challenge the said order. Finally, the third count on which the Division Bench held against the appellant, namely, that there was conversion of the land use from residential to commercial, contrary to the lease deed, also appears to be without substance. We have already referred to the Minutes of the meeting held on 6.1.1998 and the decision taken at the said meeting. The meeting was headed by the Administrator of the Jammu Municipality as Chairman with Vice Chairman of the Jammu Development Authority, M.D. Housing, J&K State, Jammu, Chief Town Planner, J.D.A., Jammu as Members and Executive Officer, Municipality, JMU as Member Secretary. This High Powered body, which was aware of the manner in which development was taking place in the city of Jammu, took notice of the fact that there was non-implementation of planning proposals envisaged in the Master Plan on account of high density of commercial activities along several roads, B.C. Road being one of them. It was precisely for this reason that the High Powered body took the view that commercial activities could be permitted at selected points along the said road and opined "B.C. Road is totally commercial at present and to thrust residential activity on the area would be putting cart before the horse. In areas like B.C. Road whenever there is an application for grant of B.P. the applicant submits a plan for residential purposes where in fact he has commercial activity in mind. This results in loss of revenue to the Jammu Municipality/J.D.A./J&K Housing Board together with hassle of unauthorized constructions, it was, therefore, decided in the meeting to come-up with a proposal where areas like B.C. Road would be identified so that the same is submitted to the Government for issuing necessary modification in the land use as envisaged in the Master Plan approved by the Government in 1978."

Finally, apart from these three reasons for which the impugned judgment is liable to be faulted, our attention was drawn by the learned counsel for the appellant to notification dated 9.8.2004, SRO 263 issued by the Commissioner & Secretary to the Government of Jammu & Kashmir by which the Master Plan for Jammu : 2021 has been published. Paragraph 6.9.11 at page 81 of the said Master Plan specifically provides that B.C. Road area is earmarked as special area to be developed as a mixed use zone having residential, commercial, light industry, institutional and other uses. The phase of rapid growth of industrial development also makes it unnecessary for permitting demolition of the structure even if it be in contravention of the provisions of the Act or the zoning provisions in the previous Master Plan. Considered from all angles, it appears that the High Court need not have taken an activist role in directing demolition of the offending structure which had been permitted to be compounded by the competent authority, namely, the Tribunal.

We are of the view that for the same reasons, the review petition filed by the appellant in Civil Appeal No. 2595/04 was liable to succeed and so was the writ petition filed by the transferees in OWP No. 1102/03.

Conclusion :

In the result, we allow the three appeals and set aside the judgment and order of the Division Bench of the High Court in Review Petition Rev.(LPAOW) No. 44/03 in L.P.A. No. 214/2000 dated 4.12.2003, the

judgment of the Division Bench in Writ Petition No. 1102/03 of the same date, and the judgment of Division Bench of the High Court in L.P.A. No. 214/2000 dated 12.11.2003 as well as the judgment of the learned Single Judge of the High Court dated 30.5.2000 in OWP No. 458/98. We affirm the order of the appointed authority/ J&K Special Tribunal in STJ/239/97 dated 6.3.1998 and leave it to the authorities of the Jammu Municipality to deal with the matter in accordance therewith.

In the circumstances of the case, there shall be no order as to costs.

JUDIS