

S. No.

**HIGH COURT OF JAMMU AND KASHMIR & LADAKH
AT JAMMU**

OWP No. 298/2011 (O&M)

Reserved on: 20.12.2022
Pronounced on: 27.12.2022

Jammu Municipal Corporation th. Joint
Commissioner (A) Municipal Corporation,
Town Hall Jammu.

...Appellant(s)

Through :- Mr. S. S. Nanda, Sr. AAG

v/s

Mohd. Nadeem and anr.

.....Respondent (s)

Through :- Mr. S. S. Ahmed, Advocate with
Mr. Rahul Raina, Advocate

**Coram: HON'BLE THE CHIEF JUSTICE (ACTING)
HON'BLE MR. JUSTICE RAJESH SEKHRI, JUDGE**

JUDGMENT

Rajesh Sekhri-J

1. Petitioner has invoked the writ jurisdiction of this Court for issuance of a writ of Certiorari seeking quashment of order dated 20.01.2010, propounded by respondent No. 2, J&K Special Tribunal, Jammu (hereinafter to be referred as the Tribunal), vide which learned Tribunal has set aside Notice No. MJ/Estt/CEO/598-99/3/09 dated 08.04.2009 issued by the petitioner in terms of Section 7(3) of J&K Control of Building Operation Act, 1988 (COBA, for short) and directed respondent No.1 to deposit the monthly rent.

2. Brief facts of the case are that a complaint came to be filed by the inhabitants of Mohalla Ustad Jammu through Mohd. Salim Malik, a Meat vendor, alleging *inter alia* that Mohd. Saleem, Tahir Ustad, and Saleem Malik

had installed Khokhas by encroaching upon the public street. Show cause notice dated 18.03.2009 under Section 7(1) of COBA was issued to respondent No. 1. Since the petitioner was not satisfied with the response of respondent No. 1, the said show cause notice was followed by the final demolition notice under Section 7(3) of COBA. This notice was assailed by respondent No. 1 before learned Tribunal by way of appeal under Section 13 of COBA. The petitioner responded with a complete report of violations committed by respondent No. 1. Learned Tribunal has quashed the demolition notice under Section 7(3) of COBA primarily on the ground that respondent No. 1 being deaf and dumb was 100% disabled and petitioner had already accepted monthly rent of the Khokha, therefore, respondent No. 1 was directed to deposit the monthly rent as per the Municipality rates.

3. The petitioner has questioned the impugned order primarily on the ground that respondent No. 1 has encroached the public street/municipal lane and installed the khokha without any permission or authority and without any right, title or interest, in breach of the provisions of COBA, its Regulations as also the prescribed building Bye-laws and Master Plan. According to the petitioner, the Khokha raised by respondent no. 1 over public street is a cause of inconvenience and nuisance to the general public of the neighborhood frequenting the area as the same has been raised without permission required under Section 230 of the J&K Municipal Corporation Act, 2000. According to the petitioner, learned Tribunal has practically allotted the Khokha to respondent no. 1 constructed upon a public street, which is not permissible under law.

4. Countervailing the stand taken by the petitioner, respondent No. 1 is affront with the contention that he being 100% disabled as deaf and dumb, is

running the Khokha in question for the last more than twenty years and the said Khokha is the only source of his income and Municipality has already accepted a fee of Rs. 432/- from him for the use and occupation of the Khokha in question over a piece of land measuring 6' X 2' only.

5. Heard arguments and perused the file.

6. Learned counsels on the rival sides have reiterated their respective pleadings in arguments.

7. At the outset, this Court has complete sympathy with respondent No. 1 that he is a specially abled person with 100% disability and it appears that probably for this reason he has been allowed by the petitioner authority to use the open piece of public land to earn his livelihood.

8. It is the case of respondent No. 1 that he is running the Khokha in question for the last more than 20 years and the petitioner has even accepted monthly fee of Rs. 432/- from him for the use and occupation of the said Khokha. It appears that taking advantage of the liberty granted, respondent No. 1 raised Khokha over the said open space and he was served upon a show cause notice followed by final notice of demolition under Section 7(3) of COBA in the year 2009. It is evident from the receipt placed on record by respondent No. 1 that petitioner has accepted the monthly fee for the use and occupation of open space and not for Khokha. Therefore, respondent No. 1 cannot be allowed to raise any structure, be it temporary or permanent, over the open space provided to him to earn his livelihood. Learned Tribunal has fallen in grave error of law to hold that the petitioner-authority has accepted the monthly rent of Rs. 432/- from respondent No. 1 as rent of the Khokha in question. We find ourselves in agreement with

Mr. S. S. Nanda, learned Sr. AAG appearing for the petitioner-authority that learned Tribunal, by virtue of the impugned order, has virtually made an allotment of Khokha on a public lane in favour of respondent No. 1 which is not permissible under law.

9. Before parting, however, it needs a specific mention that unfortunately, encroachments have become a menace especially in this party of the country and all directions passed by this Court from time to time to maintain the order on the public road and public street have fallen on the deaf ears of the concerned authorities. It is pertinent to mention that every citizen has a fundamental right of movement and it cannot be allowed to be breached in public. Hon'ble Supreme Court and High Courts across the country from time to time have taken a serious view of the encroachments over public lands and public streets, which belong to citizens at large. Encroachments over public property in general and over public lanes or public streets promote a public nuisance, constitute serious traffic hazards and jeopardize public safety, health and convenience. Needless to mention that right to enjoy public property which belongs to the general public at large, belongs to every citizen. It goes without saying that illegal constructions like signboards, hoardings, illegal constructions on public premises, public roads and public lanes cause hindrance and interruption in free flow and movement of traffic as also the smooth movement of the foot-walkers. There is no fundamental right or legal right to encroach upon a public lane or public street and raise construction of any kind thereon.

10. Therefore, while disposing of the present petition, we deem it necessary to issue the following directions:

- a. Government of Union Territory of J&K, in general, and the petitioner-authority, in particular, shall ensure that no structure of

any kind is allowed/permitted to be raised on public road, street, pathway, lane etc. which is part and parcel of the public property and belongs to the UT.

- b. If any such structure is erected or re-erected within a period of last five years, the same shall be removed forthwith.
- c. If any encroachment is made on roads, pathways, streets or lanes in future, the Deputy Commissioners and Superintendents of Police of that area shall be responsible for the same.
- d. The violation/disobedience of the aforesaid direction shall be construed as deliberate and intentional attempt to lower down the authority of this Court and would amount to criminal contempt of this Court.

11. Having regard to what has been observed and discussed hereinabove, the present petition is allowed and the impugned order is set aside.

12. Registrar Judicial is directed to supply a copy of this order to all the Deputy Commissioners of Union Territories of J&K and Ladakh as well as Senior Superintendents of Police concerned for compliance.

(RAJESH SEKHRI)
JUDGE

(TASHI RABSTAN)
CHIEF JUSTICE (A)

JAMMU
27.12.2022
Paramjeet

Whether the order is reportable?

Yes