$~

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **W.P.(C) No. 10156 of 2009**

Reserved on: January 27th, 2010
Decision on: February 16th, 2010

RAJESH AGARWAL ..... Petitioner
Through: Mr. Arvind K. Nigam, Senior Advocate with Mr. R. Sudhinder and Mr. Shivram, Advocates.

versus

UNION OF INDIA & ORS. ..... Respondents
Through: Ms. Manisha Dhir with
Mr. K.P.S. Kohli, Advocate for R-1 & R-2.
Ms. Rekha Pandey with
Ms. Rashmi Pandey, Advocate for R-5 & R-6.

CORAM: HON'BLE MR. JUSTICE S. MURALIDHAR

1. Whether Reporters of local papers may be allowed to see the judgment? No
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in Digest? Yes

J U D G M E N T

W.P.(C) No. 10156 of 2009 & CM No.8613 of 2009 (for direction)

1. The challenge in this petition is to an order dated 25th February 2009 passed by the Central Government in exercise of its power to review under Section 57 of the Cantonments Act, 2006 ('Act') whereby the decision dated 4th January 2008 of the Cantonment Board ('Board') sanctioning the plans submitted by the Petitioner in respect of the Bungalow No. 167, Chappel Street, Meerut Cantonment (hereinafter 'the property') was set aside.

2. The Petitioner inherited the property in question which belonged originally

to his grandfather. In 1932 the Petitioner's grandfather had constructed a cinema hall and shops in the property after obtaining sanction from the Cantonment authorities. The cinema hall, known as Palace Cinema, underwent additions and alterations from time to time. It is claimed that the usage of the property was always commercial. Resolutions dated 15th January 1952 and 14th June 1997 of the Board recorded that the Petitioner's grandfather had made applications for permission to carry out additions and alterations to the property. Inter alia it was recorded that the property which was held on "old grant terms" was located "within the bazaar area." This assumes significance because it is now sought to be contended by the Respondents that the area in question was always residential and, therefore, no cinema hall can be constructed thereon.

3. The Petitioner submitted a building application with a notice under Section 179 of the Cantonments Act, 1924 on 15th February 2003 to the Board proposing the demolition of the 70-year old structure and erecting new structures in its place. The building plans were returned to the Petitioner by the Chief Executive Officer ('CEO') of the Board (Respondent No.5 herein) asking him to get the mutation done in his favour before submitting the plan. The Petitioner on 22nd February 2006 applied for correction of the entries in the general land register ('GLR') to show the property as commercial i.e. shops and cinemas instead of bungalows as the property had in fact been used for a commercial purpose for over 70 years.

4. On 27th February 2006 the Principal Director Defence Estates, Lucknow Cantonment (Respondent No.4 herein) wrote to the Director General Defence

Estates, Government of India ('Respondent No.3 herein) forwarding a letter dated 20th March 2006 of the CEO of the Board regarding the Board's proposal for regularization of the change of purpose relating to the property. In the said letter, after presenting the history, it was mentioned in paragraph 5 that "the change of purpose has already been approved by the Board as plans for shops and Cinema Hall were sanctioned by the Board vide its CBR No. 01, dated 5th February 1952 and CBR No. 1(19), dated 14th June 1957 respectively." Copies of these Resolutions were enclosed with the letter. The CEO, Meerut had further reported that the cinema hall which existed at the site was not in a running condition but that the shops therein were still operational. It was stated in the letter that in terms of the instructions issued on 17th May 2000 by the Respondent No.3 and those dated 16th November 2002 of the Union of India, Ministry of Defence ('MOD') Respondent No.1 herein, the building plan submitted by the Petitioner could not be approved by the Board without prior approval of Respondent No.1 since the change of purpose was involved. It was stated that "since the Cantonment Board had sanctioned the plan on 14th June 1957 for granting permission to use the premises for purposes other than residential before the said instructions were issued by the GOI, MOD (DGDE), the change of purpose from Bungalow to Cinema Hall and Shops is required to be regularised." In the meanwhile on 7th August 2005 mutation was effected in the Petitioner's name in respect of the property. It was mentioned therein that the Petitioner had "purchased the building and not the land which belongs to the Government of India."

5. The petitioner, on 7th December 2007 again applied to Respondent No.5 by giving a written statutory notice under Section 235 of the Cantonments Act,

2006 (which replaced the Cantonments Act, 1924). The said application was considered by the Board and by its resolution dated 4th January 2008 the plan was sanctioned. However the no objection certificate ('NOC') from the 'fire point of view' was asked to be obtained by the Petitioner from the Chief Fire Officer. The Board required the Petitioner to deposit Rs.53,223/- towards charges for sanctioning the building plan. The amount was paid by the Petitioner on 16th January 2008 and the building plans were duly sanctioned on that day.

6. On the basis of the sanctioned building plan, the Petitioner commenced reconstruction and redevelopment of the property. The old structure was demolished. In the second week of January 2009 the Petitioner was surprised to come across a news item in the local newspaper that the sanctioned building plans of the Petitioner had been put on hold by the Board by the instructions of Respondent No.3. The Petitioner then made representations on 9th, 12th and 19th February to the senior official asking them a personal hearing before any decision was taken. On 25th February 2009, Respondent No.3 informed Respondent No.5 (CEO of the Board) that the Government of India had set aside the Resolution dated 4th January 2008 of the Board. Thereafter, the Petitioner received a letter dated 16th March 2009 from the Board informing him that the MOD had by its order dated 20th February 2009 set aside the Board's Resolution dated 4th January 2008. The letter also referred to a Resolution dated 12th March 2009 of the Board whereby it was decided to keep a strict watch to ensure that no unauthorised construction took place.

7. The said letter also referred to a letter dated 18th September 2008 of the

Board which according to the Petitioner was never received by him. After the Petitioner made enquiries for the reasons for the sanction being set aside, it was revealed that one Mr. Om Pal on 8th February 2009 sent a complaint to Respondent No.3. The copy of the said complaint was furnished to the Petitioner pursuant to an application made by him under the Right to Information Act, 2005 ('RTI act'). Interestingly, in its letter dated 20th February 2008, the Board informed Respondent No.4, *inter alia*, that no person named Om Pal resided at the given address therefore the complaint was bogus. Further on 5th March 2008, the Board wrote to Respondent No.4 stating that Respondent No.3 had spoken to the CEO of the Board and advised him that sanction of a shop and cinema hall in the property did not constitute any change of use of land as the Board had already sanctioned the building of the cinema hall and shops more than 50 years ago. It was pointed out that the Board was the competent authority to permit change of use of any land or building and that in the instant case, the sanction accorded by the Board was only a reiteration of the old sanction.

8. In the counter affidavit dated 20th February 2009 of the Respondents, three reasons have been cited for cancelling the sanction accorded to the Petitioner's building plan. The first is that the Board had sanctioned the building plan without waiting for the response of the Central Government to the proposal for amendment of GLR in respect of the property changing its description from residential to that of shops and cinema theatre. Secondly, in terms of the land policy dated 9th February 1995, the authorised floor space was 37,650 sq. feet whereas the space approved by the Board was 57,383 sq. feet comprising ground floor plus two floors. Thirdly, the regulations

concerning the cost of reconstruction of the building were not followed with an underlying motive to commercialise the use of the Government land contrary to the original grant terms. The response of the Petitioner is that the property has always been used as a commercial property and taxes were also paid on that basis for more than 50 years. The change of land use was approved by the Board way back in 1957. Therefore, there was no need for the Petitioner to apply afresh for recording the change of land use. Secondly, under para 4.1A of the Building Bye-Laws which applied to buildings in the notified civil areas and held on old grant terms the Board was permitted to sanction additions and alterations. Moreover, as per the long standing practice in Meerut Cantonment, the term "authorised floor space" has always been interpreted as "authorised plinth area" with number of storeys as per the building bye-laws i.e. ground plus two storeys. Bye-law 8 expressly provides that the number of storeys should not exceed three. Thirdly, the cost calculated was on floor area and not on plinth area and since the commercial use of the land had already been tacitly approved by the Board. Consequently, there was no basis for alleging that the Petitioner was commercialising the use of land contrary to the original grand terms.

9. Mr. Arvind Nigam, learned Senior counsel appearing for the Petitioner submitted that first and foremost the impugned order was passed by the Respondent No.1 without even a show cause notice being issued to the Petitioner. It is plainly a violation of the principles of natural justice. In fact, the Petitioner had made three representations asking for a personal hearing prior to the order being passed. These were ignored. Secondly, it is submitted that reasons given for recalling the sanction of the building plan was

untenable both in law and facts. By a Resolution dated 28th February 2007 the Board had regularised the land use of the property as cinema/shop and this Resolution had not been set aside by Respondent No.1. After the Petitioner's building plans were duly sanctioned on 4th January 2008, he had demolished the existing 70-year old structure and, therefore, had acted to his detriment on the basis of the said decision which was valid. Consequently, Respondent No.1 was estopped from reversing the said decision, that too on untenable grounds.

10. Mr. Nigam, points out that the impugned order came to be passed only because of an anonymous complaint by Om Pal Singh, a fictitious person. He refers to the instructions dated 29th June 2009 of the Central Vigilance Commission ('CVC') which were reiterated on 31st January 2002 that no investigation is to be commenced or action initiated on the basis of an anonymous complaint. Since the very basis of the impugned order was an anonymous complaint, it should be quashed. It is denied that the letter dated 18th September 2008 of the Board suspending the building plan was never communicated to the Petitioner. Significantly, it does not find mention in the reply dated 1st January 2009 of the Board to the show cause notice of Respondent No.1.

11. Mr.Nigam contests the preliminary objection of the Respondents that an appeal ought to have been filed against the Board's order dated 16th March 2009. It is submitted that the Board's order dated 16th March 2009 is merely consequential upon the order dated 20th February 2009 of the Respondent No.1 which is challenged in the present petition. It is further submitted that in

terms of the Schedule 5 of the Act read with Section 340, the Appellate Authority was the Principal Director and it is the same Principal Director who sought sanction for regularisation from the Central Government. The Principal Director was directly functioning under the Central Government, therefore, an appeal to the Principal Director would be futile. Finally it is submitted that the matter ought to be sent back to Respondent No.1 with a direction to comply with the principles of natural justice. The Petitioner should be heard and thereafter a reasoned order passed in accordance with law within a time-bound schedule. Pending such determination the Petitioner should be permitted to recommence construction on the basis of the earlier approved plan at least to the permissible extent of 37,650 sq. ft.

12. A short reply has been filed on behalf of Respondents 5 and 6. A preliminary objection is taken as to the maintainability of the petition on the ground that the Petitioner has no locus to challenge the order dated 20th February 2009 passed by Respondent No.1 which reviewed the decision of the Board dated 4th January 2008. An objection is taken to the maintainability of the writ petition even on the basis of the territorial jurisdiction of this Court since the offices of the Respondents 5 and 6 as well as the property in question are located in Meerut. It is contended that a letter dated 18th September 2008 had been written to the Petitioner asking him not to commence any building activity of any kind on the basis of the sanction granted by the Board since that had been reviewed. It is claimed that although the letter was sought to be served 'by hand' but on reaching the suit property it was learnt that the Petitioner was living in Delhi and since on enquiry no other address of the Petitioner could be found, the said letter dated 18th

September 2008 was pasted on the main gate of the suit premises. No parawise reply was given to the petition to deny some of the facts mentioned therein and which have been set out hereinbefore.

13. Ms. Manisha Dhir, learned counsel appearing for the Respondents reiterated that the Petitioner ought to have filed an appeal to challenge the decision of the Board instead of filing the present writ petition. She referred to Clause 3.2 of the policy dated 9th February 1995 of the MOD regarding addition, alteration, renovation or reconstruction of the private buildings in Cantonments which stipulated that "there shall be no change of purpose in the proposed construction or in the use of building." She points out that the older building was constructed with ground floor only whereas the new plan is for 57,283 sq. feet. The policy also indicated that the cost of reconstruction of the building "shall not exceed the cost of construction as per the approved plinth area rates as per the MESSSR." The said stipulation was not complied with by the Board in sanctioning the plan. Ms. Dhir claims that a show cause notice had been issued by the MoD to Respondents 5 and 6 on 21st November 2008 but no reply had been received from the Board within the time stipulated therein and, therefore, the MoD passed the order dated 20th February 2009 in terms of Section 57 of the Act. It is submitted that the Petitioner has not been singled out as steps have also been taken against Bungalow Nos. 176, 182 and 284 which were found to have unauthorised construction.

14. The objections as to the territorial jurisdiction of this court to entertain this petition require to be dealt with first. The impugned decision dated 20th February 2009 was obviously taken by Respondent No.1 in Delhi. Therefore a

substantial part of the cause of action has arisen in Delhi. Notwithstanding that the property and Respondents 5 and 6 are located in Meerut, it cannot be said that this Court has no jurisdiction to deal with the subject matter of the petition. The preliminary objection on this ground is, therefore, rejected.

15. The second objection is about the availability of a remedy by way of an appeal under Section 238 read with Section 340 of the Cantonments Act, 2006. Section 340 in turn refers to Schedule V under which an appeal against the decision of the Board lies to the Principal Director. In the instant case, the decision of the Board itself is merely consequential upon the decision dated 20th February 2009 of Respondent No.1. The Board has not independently applied its mind to arrive at the decision to withdraw the sanction granted to the Petitioner's building plan. The Principal Director, in fact, is an officer who himself wrote to the Respondent No.1 seeking its prior approval for change of use. There can be no doubt that the Principal Director acts under the control and authority of Respondent No.1. Where the decision dated 20th February 2009 of Respondent No.1 is sought to be challenged, an appeal to the Principal Director in terms of Section 340 of the Cantonments Act, 2006 would be futile. Therefore, there is no merit in this objection of the Respondents either.

16. The principal ground of challenge in this petition is that the impugned order dated 20th February 2009 has been passed without even as much as a show cause notice being issued to the Petitioner. There is no defence to this ground at all. It is not denied that no such show cause notice was issued and that the Petitioner was not given any opportunity of being heard. It is not as if

Respondent No.1 was unaware that the Petitioner was going to be adversely affected by the decision to cancel the sanctioned building plan. The Petitioner himself made representations on three dates in February 2009 prior to the decision being taken by Respondent No.1. The Respondents did not care to reply to any of these letters.

17. Inasmuch as the impugned order dated 20th February 2009 passed by Respondent No.1 has adversely affected the Petitioner, the decision could not have been made without affording him an opportunity of being heard. It is a well-settled that an order having adverse civil consequences cannot be made by a statutory authority without affording the person affected an opportunity of being heard. On this ground alone, the impugned order dated 20th February 2009 of Respondent No.1 cannot be countenanced and is hereby set aside. Consequently, the further orders of the Board communicating the said decision to the Petitioner are hereby also set aside.

18. The next question is whether this Court itself should deal with the merits of the contentions of the Petitioner which have been recorded hereinbefore. The better course is for the Respondent No.1 to consider each of the above points, after giving the Petitioner a hearing and then pass a reasoned order in accordance with law. Every point urged in this petition and before this Court as noted hereinbefore will be considered by Respondent No.1 and it will give a reasoned decision thereon. Consequently, this Court refrains from opining on any of the contentions on merits of either parties at this stage. These are left open to be agitated by the petitioner, in accordance with law, if aggrieved by the decision of Respondent No.1. As regards the prayer of the Petitioner to

be permitted to construct up to 37,650 sq. ft. pending the decision afresh of Respondent No.1, it is open to Respondent No.1 to consider take a decision thereon in accordance with law. This point is also left open to be agitated by the Petitioner if aggrieved by the decision of Respondent No.1. The petitioner's claim for compensation for the loss suffered on account of not being able to proceed with the construction of the new building in accordance with the sanctioned building plan is also left open to be agitated by him at the appropriate stage in accordance with law.

19. It is directed that within a period of two weeks from today, Respondent No.1 will communicate to the Petitioner the date on which it proposes to give him a hearing. It will be open to the Petitioner by that day to file any further documents or statement that he wishes to. Within four weeks of the hearing, the Respondent No.1 will pass a reasoned order and communicate it to the Petitioner within a period of one week thereafter. The petitioner is at liberty, if aggrieved by the decision of Respondent No.1, to seek further remedies in accordance with law.

20. The petition is accordingly allowed with costs of Rs.5,000/- which will be paid by Respondent No.1 to the Petitioner within a period of four weeks from today. The application is disposed of.

S. MURALIDHAR, J.

16th FEBRUARY 2010
dn