

A.F.R.

Court No. - 49

Case :- WRIT - C No. - 26782 of 2023

Petitioner :- Ram Kumar

Respondent :- State Of U.P. And 3 Others

Counsel for Petitioner :- Mohammad Mustafa

Counsel for Respondent :- C.S.C., Pankaj Kumar Gupta

Hon'ble Syed Qamar Hasan Rizvi, J.

1. Heard Sri Mohammad Mustafa, learned counsel for the petitioner; Shri Awadhesh Kumar Patel, learned Standing Counsel for State-respondents No.1, 2 & 3; Shri Pankaj Kumar Gupta, learned counsel appearing for the Gaon Sabha-respondent No. 4 and perused the material available on record.

2. With the consent of the learned counsel for the parties, the present Writ Petition is decided finally at the stage of first hearing in view of the second proviso to Rule 2 of Chapter XXII of the Allahabad High Court Rules (Rules of the Court, 1952).

3. By means of the present writ petition, the petitioner has prayed for the following relief:

- I. Issue a Writ, Order or direction in the nature of certiorari quashing the impugned order/notice dated 13.07.2023, passed by the Respondent No. 3 – Sub-Divisional Magistrate, Shohratgarh, District Siddharth Nagar (Annexure No. 1) to this Writ Petition.*
- II. Issue any other writ, order or direction which this Hon'ble Court may deem fit and proper under the facts and circumstances of the case.*
- III. Award the cost of the Writ Petition to the Petitioner.*

4. Brief facts of the case which are relevant to be stated are that by means of the impugned notice dated 13.07.2023 issued by the Sub Divisional Officer, Shohrartgarh, District: Siddharth Nagar/respondent No. 3, the petitioner has been directed to remove his possession on his own, from the part (ad-measuring area 0.006 Hectare) of the plot bearing Gata No. 316 / 0.3670 Hectare; within a period of seven days, otherwise the same shall be demolished in exercise of the action as provided under Section 136 of the U.P. Revenue Code, 2006 and he will be saddled with compensation, for which he himself shall be responsible.

5. Being aggrieved by the aforesaid notice dated 13.07.2023, petitioner has filed the instant writ petition praying for a Writ in the nature of Certiorari quashing the same.

6. Assailing the impugned notice, the contentions of learned counsel for the petitioner are as under:

6.1 That vide order/notice dated 13.07.2023 the respondent no.3 has issued a direction to the petitioner to remove his possession within a period of seven days without any opportunity of defending his case. Therefore, the impugned action of the respondent no. 3 against the petitioner is absolutely illegal being in utter violation of the principles of natural justice.

6.2. He further submits that the contents of the impugned Notice dated 13.07.2023, as contained in Annexure No. 1 to the writ petition, itself reflects the very nature of the same being a clear direction/order to the

petitioner for the removal of his possession within seven days and cannot be regarded as notice, what to say a show cause. It is nothing, but a final order/direction though termed as notice and as such the same is liable to be quashed being nonest and illegal.

6.3. Last plunk of his submission is that as per section 136 (3) of the U.P. Revenue Code, 2006 despite there being a specific bar provided therein to the extent that no person shall be evicted from the land over which a Gram Panchayat or local authority is entitled to take possession, unless adequate opportunity to show cause has been afforded to them, but in the present case, no such opportunity has ever been afforded to the petitioner before passing the said order/notice.

7. Sri Awadhesh Kumar Patel, learned Standing Counsel appearing on behalf of the State-respondents has raised a preliminary objection regarding the maintainability of the present writ petition by contending that it is a well settled legal position that Writ Petition under Article 226 of the Constitution of India, is not maintainable against a notice and as such the present Writ Petition being against the notice is liable to be dismissed. In support of his contention, he has placed before this Court the judgement passed in Writ-C No.-5606 of 2020 (**Ghanshyam and 11 others versus Union of India and others**) (**Neutral Citation No.-2020:AHC:31654-DB**), wherein the Hon'ble Division Bench of this Court by relying upon the judgement passed by the Hon'ble Supreme Court of India in the case of **The Special Director and another versus Mohd. Gulam**

Ghouse and another reported in (2004) 3 SCC 440; has been pleased to dismiss the said Writ Petition, declining to interfere with the show-cause notice.

7.1. He further submits that by means of the impugned notice dated 13.07.2023, the petitioner had been provided seven days' time to remove his unlawful possession from the land belonging to the Gaon Sabha and as such he had ample opportunity to defend his case within the stipulated time. He further submits that there is nothing on record to show that the petitioner has been evicted or his possession has been taken over in pursuance of the impugned notice and as such it is still open for the petitioner to approach the respondent No. 3 for the redressal of his grievances.

8. Sri Pankaj Kumar Gupta, learned counsel appearing on behalf of Gram Sabha-respondent No. 4 has also strongly contended that the petitioner is a trespasser of the land belonging to the Gram Sabha and as such, the impugned notice for ejection of the petitioner from the land in question has been rightly issued to secure the property belonging to the Gram Sabha. He further submitted that there is no infirmity or illegality in the impugned notice dated 13.07.2023. Referring to section 136 of the U.P. Revenue Code 2006, he submitted that the Sub-Divisional Officer-respondent No. 3 is fully competent to initiate proceeding for ejection of any person found trespassing the property belonging to the Gram Sabha. The impugned notice issued by the respondent No. 3 to the petitioner who

is a trespasser of the land belonging to Gram Sabha, is perfectly legal and justified.

9. Having heard the learned counsel for the parties, the preliminary issue which has arisen for consideration before this Court is regarding the maintainability of the present Writ Petition.

10. For ready reference, the impugned notice dated 13.07.2023 as contained in Annexure No.1 to the Writ Petition is reproduced below:

कार्यालय उपजिलाधारी शोहरतगढ़ सिद्धार्थनगर।
पत्रांक-623 /र0का0/ 2023-24/ दिनांक 13 जुलाई, 2023
श्री राम कुमार पुत्र. सरजू पट्टाई
साकिन- खुनुवा
तहसील-शोहरतगढ़
जनपद-सिद्धार्थनगर।

आपके द्वारा ग्राम-खुनुवा तप्पा-बंजरहा परगना-नौगढ़ तहसील-शोहरतगढ़ जनपद-सिद्धार्थनगर के गाटा संख्या 316 रकबा 0.3670हे0 मं से रकबा ०.००६...०.००६...०.००६... जो कि ग्रामसभा की सम्पत्ति है, का दुर्विनियोजन करते हुए व्यवसायिक गतिविधि की जा रही है।

अतः आपको निर्देशित किया जाता है आप अपना कब्जा 07 दिवस के अन्दर स्वतः हटा लें अन्यथा उपरोक्त की धारा-136 के अन्तर्गत कार्यवाही करते हुए आपका अवैध कब्जा ध्वस्त करा दिया जायेगा एवं क्षतिपूर्ति की वसूली की जायेगी जिसकी जिम्मेदारी आपकी स्वयं की होगी।

D
13/7/23
उपजिलाधिकारी
शोहरतगढ़

- प्रतिलिपि:-तहसीलदार शोहरतगढ़ को आवश्यक कार्यवाही हेतु।

उपजिलाधिकारी
शोहरतगढ़

11. From a bare perusal of the aforementioned impugned notice dated 13.07.2023, it is clearly visible that the Sub Divisional Officer (respondent No. 3) had issued direction to the petitioner to remove his possession on his own, from the plot in question within a period of seven

days by alleging him for misappropriation of land belonging to the Gram Sabha, failing which his illegal possession will be demolished in accordance with the proceeding under section 136 of the U.P. Revenue Code, 2006 (**hereinafter referred to as the Code of 2006**) and he will be saddled with compensation, for which petitioner himself will be responsible.

12. Before entering into the rival submissions made by the learned counsels for the parties, it would be appropriate to encapsulate the term ‘*notice*’. Notice has been defined by the Black’s Law Dictionary, 6th edition in the following manner,

“Notice in its legal sense is information concerning a fact, actually communicated to a person by an authorised person, or actually derived by him from a proper source, and is regarded in law as ‘actual’ when the person sought to be affected by it knows thereby of the existence of the particular fact in question.” “It is the knowledge of facts which would naturally lead an honest and prudent person to make inquiry.”

13. Further, the objective of a ‘*notice*’ has been succinctly discussed by this Court in the case of **Sohan Lal Singh versus Basic Education Board, Allahabad and others**; Civil Misc. Writ Petition No. 18886 of 1990 (**Neutral Citation No. 2004:AHC:200**) wherein this Court has observed that, *“the object of notice is to give an opportunity to the individual concerned to present his case...”* and further *“The notice must be clear, specific and unambiguous and the charges should not be vague and uncertain.”*

14. The basic purpose behind serving of notice is to make the noticee understand the precise case set up against him. The basic ingredients of a notice will include the statement of imputations detailing out the alleged breach that noticee has committed, the material ground which necessitates an adverse action against the noticee, particulars of the penal action which is proposed to be taken and a specific time period that is granted to the noticee providing an opportunity to rebut and defend the alleged breach. It is necessary that a notice under any Act should contain the above mentioned ingredients for it to be a genuine Notice.

15. For better appreciation of the ingredients of the impugned notice dated 13.07.2023, the same is synthesised in two parts. The *first part* is a direction to the petitioner to remove his possession from the land in question within a period of seven days, by alleging him of misappropriation of the Gaon Sabha property and carrying out commercial activities on the same. The *second part* of the said notice is that in case of non-compliance of the direction given in the first part, his illegal possession shall be demolished by carrying out proceeding under Section 136 of the Code of 2006, and recovery of compensation shall be made from the petitioner, for which he himself will be responsible.

16. On critically examining the contents of the aforementioned impugned notice, it is abundantly clear that the *first part* of the same can in no way be considered to be a genuine notice as it lacks the basic element of opportunity to the noticee to rebut and defend the allegation imposed

against him, as the Sub Divisional Officer (respondent no.3) has outrightly imputed the allegation of misappropriation (दुर्विनियोजन) of the Gaon Sabha property on the petitioner without disclosing any basis on which the allegations made against him are founded and has directed him to remove his possession from the land in question within a period of seven days. The said direction for removal of possession is based on the pre-mediated determination of misappropriation of Gaon Sabha land by the petitioner. The petitioner/noticee has been denied the opportunity to explain his status over the land in question, which is in utter violation of the principles of natural justice and frustrates the real essence of a notice.

17. In so far as the **second part** of the impugned notice as mentioned above is concerned, before analysing the same, it is necessary to go through the contents of section 136 of the Code of 2006. For the ready reference, Section 136 of the Code of 2006 is reproduced hereinbelow,

“136. Ejection of trespassers of Gram Panchayat land—

*(1) Notwithstanding anything contained in other provisions of this Code, the Sub-Divisional Officer may, of his own motion or on the application of the Gram Panchayat or other local authority, eject any person **taking or retaining possession of any land** specified in sub-section (2), if such possession is in contravention of the provisions of this Code and is without the consent of such Gram Panchayat or the local authority and shall also be liable to pay damages at the rates prescribed.*

(2) The provisions of sub-section (1) shall apply to the following categories of land, namely —

(a) any land entrusted or deemed to be entrusted to any Gram Panchayat or local authority under the provisions of this Code or any other law for the time being in force;

(b) any land over which a Gram Panchayat or local authority is entitled to take possession under the provisions of this Code;

(c) any land which belongs to or is owned or held by a Gram Panchayat or local authority;

(d) that the asami is holding land specified in clause (d) or clause (e) of section 77 and that the cultivation of crops in such land has become impossible;

(e) that the asami was admitted to the land under clause (b) of section 125 of the Gram Panchayat proposes to use it for a public purpose.

(3) No person shall be evicted from any land under this section unless adequate opportunity to show cause has been afforded to him.

(4) In evicting a person under this section, the Sub-Divisional Officer may use or cause to be used such force as may be necessary.

Explanation. - For the purposes of this section, the word 'land' includes trees and other improvements existing on such land."

(Emphasis supplied)

18. From the bare perusal of section 136 as quoted above, it is abundantly clear that the sub-section (1) empowers the Sub Divisional Officer to eject any person *Suo motu* or on the application of the Gram Panchayat or other local authority if he is found '***taking or retaining possession of any land specified in sub-section (2)***'. Section 136 of the Code of 2006 covers only those cases where the possession is found to be in contravention to the provisions of the Code of 2006 and is without the consent of the Gram Panchayat or the local authority.

19. In the instant case, the impugned notice indicates that the person to whom it has been issued is guilty of misappropriation (दुर्विनियोजन) of the property belonging to Gaon Sabha. It would be not be out of place to say that the cases relating to the misappropriation of the Gram Sabha property is the subject matter of Section 67 of the Code of 2006.

20. At this stage, it is pertinent to mention here that Section 67 of the Code of 2006 also deals with the eviction of unauthorised occupants from the land belonging to the Gram Panchayat or other local authority. For the ready reference, Section 67 of the Code of 2006 is reproduced hereinbelow:

“67. Power to prevent damage, misappropriation and wrongful occupation of Gram Panchayat property—

*(1) Where any property entrusted or deemed to be entrusted under the provisions of this Code to a Gram Panchayat or other local authority is damaged or **misappropriated**, or where any Gram Panchayat or other authority is entitled to take possession of any land under the provisions of this Code and such land is occupied otherwise than in accordance with the said provisions, the Bhumi Prabandhak Samiti or other authority or the Lekhpal concerned, as the case may be, shall inform the Assistant Collector concerned in the manner prescribed.*

(2) Where from the information received under sub-section (1) or otherwise, the Assistant Collector is satisfied that any property referred to in sub-section (1) has been damaged or misappropriated, or any person is in occupation of any land referred to in that sub-section in contravention of the provisions of this Code, he shall issue notice to the person concerned to show cause why compensation for damage, misappropriation or wrongful occupation not exceeding the amount specified in the notice be not recovered from him and why he should not be evicted from such land.

(3) If the person to whom a notice has been issued under sub-section (2) fails to show cause within the time specified in the notice or within such extended time as the Assistant Collector may allow in this behalf, or if the cause shown is found to be insufficient, the Assistant Collector may direct that such person shall be evicted from the land, and may, for that purpose, use or cause to be used such force as may be necessary, and may direct that the amount of compensation for damage or misappropriation of the property or for wrongful occupation, as the case may be, be recovered from such person as arrears of land revenue.

(4) If the Assistant Collector is of opinion that the person showing cause is not guilty of causing the damage or misappropriation or

wrongful occupation referred to in the notice under sub-section (2), he shall discharge the notice.

(5) Any person aggrieved by an order of the Assistant Collector under sub-section (3) or sub-section (4), may within thirty days from the date of such order, prefer an appeal to the Collector.

(6) Notwithstanding anything contained in any other provision of this Code, and subject to the provisions of this section every order of the Assistant Collector under this section shall, subject to the provisions of sub-section (5) be final.

(7) The procedure to be followed in any action taken under this section shall be such as may be prescribed.

Explanation. - For the purposes of this section, the word 'land' shall include the trees and buildings standing thereon."

(Emphasis supplied)

21. The distinction as is evident from the bare reading of the above quoted provisions of the Code of 2006 is that the provisions of **Section 67** are applicable to those cases also where the property belonging to the Gaon Sabha or the local authority is '**damaged or misappropriated**' but **Section 136** deals with the cases of **unauthorised occupation**.

22. Taking into consideration the aforesaid provisions of the Code of 2006, it is clear that on the charge of misappropriation (दुर्विनियोजन) of the Gram Sabha land the action proposed to be undertaken under Section 136 of the Code of 2006, as mentioned in the notice, is unlawful being beyond the purview of Section 136 of the Code of 2006.

23. On putting query by this Court about non applicability of section 136 of the Code of 2006 under the facts of this case, it has been urged by Sri Pankaj Kumar Gupta, learned counsel for the respondent No. 4, that the purpose of both the Sections, namely, 67 and 136 of the Code of 2006 is common, i.e. to protect the Gram Sabha property from trespass,

encroachment and misuse. Since, the petitioner was found misusing the property belonging to the Gram Panchayat, the respondent No. 3 bonafidely issued the impugned notice, just to protect the Gram Sabha land. The action taken by the authority concerned is perfectly legal and justified. He further submits that mentioning of a wrong section, if any, does not vitiate the impugned Notice and in support of his contention he placed the judgement passed by the Hon'ble Supreme Court in the case of **Vikram Singh Junior High School versus District Magistrate (Fin. & Rev.) and others**; reported in (2002) 9 Supreme Court Cases 509.

24. Dealing with the aforementioned arguments made by Sri Gupta, it is hereby made clear that from a bare reading of Sections 67 and 136 of the Code of 2006, it is evident that though the object and purpose of both the sections is quite similar yet the applicability and procedure for their enforcement is quite different. The broad distinctions of the aforesaid two sections can be seen as under:

24.1. So far as the scope of Sections 136 and 67 of the Code of 2006 are concerned, the earlier is applicable even in those cases also where the land '*belong to*' or '*is owned*' or '*held by*' the Gram Panchayat or the local authority while the latter is in respect of the property referred to in that section is occupied otherwise than in accordance with the provisions of the Code of 2006.

24.2. Further, the proceeding under Section 67 is summary in nature as provided under Rule 192 of the U.P. Revenue Code Rules, 2016

(hereinafter referred to as the Rules of 2016) while the proceeding under Section 136 of the Code of 2006 is not categorised as a summary proceeding. For ready reference, the said Rule 192 of the Rules of 2016 is reproduced hereinbelow,

“192. Determination of questions in summary proceedings (Section 225-A) —

(1) All the questions arising for determination in any summary proceeding under this Code or these rules shall be decided upon affidavits.

(2) The following proceedings shall be treated as summary proceedings, namely:

<i>Section</i>	<i>Particulars</i>
<i>24</i>	<i>Demarcation proceedings.</i>
<i>25</i>	<i>Proceeding regarding rights of way and other easements.</i>
<i>26</i>	<i>Proceeding regarding removal of obstacle</i>
<i>30(2)</i>	<i>Proceeding regard physical division of minjumla number.</i>
<i>31(2)</i>	<i>Proceeding regarding determination od shares.</i>
<i>32</i>	<i>Proceeding regarding correction of records.</i>
<i>35</i>	<i>Mutation proceedings.</i>
<i>38</i>	<i>Proceeding regarding correction of error or omission.</i>
<i>49</i>	<i>Proceeding regarding revision of map and records.</i>
<i>58</i>	<i>Proceeding regarding dispute arising in respect of any property referred to in sections 54, 56 or 57.</i>
<i>66</i>	<i>Proceeding regarding inquiry into irregular allotment of Abadi sites.</i>
<i>67</i>	<i>Proceeding regarding eviction of unauthorised occupants.</i>
<i>80</i>	<i>Proceeding regarding declaration for non-agricultural use.</i>
<i>82</i>	<i>Proceeding regarding cancellation of declaration.</i>
<i>98</i>	<i>Proceeding regarding permission to transfer Bhumidhari land to person other than Scheduled Caste.</i>
<i>101</i>	<i>Proceeding for exchange.</i>
<i>105(2)</i>	<i>Proceeding for possession of Land.</i>

128	<i>Proceeding for cancellation of allotment and lease.</i>
149 & 150	<i>Proceeding for eviction of Government Lessee.</i>
193	<i>Proceeding to set aside sale for irregularity.</i>
195	<i>Proceeding for setting aside of sale by Collector or Commissioner.</i>
212	<i>Proceeding for transfer of cases.</i>

(Emphasis supplied)

(3) The State Government or the Board may declare any other proceeding except the suits under the Code or these rules as the summary proceeding.

(4) The procedure for disposal of summary proceedings is contained in Revenue Court Manual.”

24.3. It would not be out of place to mention here that Section 225-A of the Code of 2006 deals with the manner for determination of the questions in summary proceedings. For a ready reference, Section 225-A of the Code of 2006 is reproduced hereinbelow,

“225-A. Determination of questions in summary proceedings.—
Notwithstanding anything contained in other provisions of this Code, all the questions arising for determination in any summary proceeding under this Code shall be decided upon affidavits, in the manner prescribed:

Provided that of Revenue Court or Revenue Officer is satisfied that the cross examination of any witness, who has filed affidavit, is necessary, it or he may direct to produce the witness for such cross examination.

24.4. It is also relevant to note that the competent authorities to take cognizance under above said provisions are different. In the cases under Section 67 of the Code of 2006, the competent authority is the Assistant Collector while under Section 136 of the Code of 2006, the competent authority is the Sub-Divisional Officer. Moreover, there are distinct Rules under the Rules of 2016 corresponding to Section 67 and Section 136 of

the Code of 2006. The Rule corresponding to Section 67 of the Code of 2006 are Rules 66 and 67 of the Rules of 2016.

24.5. In so far as Section 136 of the Code of 2006 is concerned, the corresponding Rule 118 of the Rules of 2016 deals with the ejection of unauthorised occupant from Gram Panchayat land and delivery of possession of the same to the Gram Panchayat. For a ready reference, the said Rule 118 is reproduced below,

“Rule 118. Delivery of possession to Gram Panchayat (Sections 124 and 136). —

(1) Where the interest of a bhumidhar in any land is extinguished under the provisions of the Code or under any other law for the time being in force, and any person is in unauthorized occupation of such land, the Bhumi Prabandhak Samiti may apply to the Sub-Divisional Officer for the ejection of such occupant.

(2) The Sub-Divisional Officer may after issuing a show cause notice to the person concerned, evict such unauthorised occupant and deliver possession over the land to the Gram Panchayat.

(3) The provisions of this rule shall mutatis mutandis apply to the eviction of an asami holding land from the Gram Panchayat or a lessee from a Bank referred to in section 95(2).”

25. In view of the aforesaid, this Court is of the view that the provisions of both the Sections 67 and 136 of the Code of 2006 should be applied only in their respective domains/spheres, as defined under the Code of 2006 to be read with the corresponding Rules.

26. This Court finds that in the instant case the alleged notice which is impugned in the present writ petition, by no stretch of imagination can be considered as Notice, rather the same is clearly a premediated order/direction to the petitioner for specific compliance of the same within a

stipulated time, and as such cannot be regarded as genuine Notice. It is admittedly not a Notice to show cause but a order/direction though termed as Notice, for specific compliance of a premediated decision. Merely putting the word 'Notice' on the top of the paper does not bring it in the realm of a notice. In order to be considered as a notice, the document must at least meet the conditions and characteristics as discussed in the preceding paragraph nos.12, 13 and 14.

27. Further, the effect of mentioning a wrong provision of law in the notice indicating initiation of proceeding under an incorrect provision of law, amounts to deceiving the noticee, as it deviates and misdirects the noticee from the correct line of defence and proper course of action. As such, it is not at all fair and justified on the part of the authority concerned to proceed in pursuance of the notice that proposes an action to be taken under the provision defining the proceeding of different nature and to be carried out by a different authority as prescribed under law.

28. Needless to say, that 'justice must not only be done but should always be seen to be done'. The Sub Divisional Officer (respondent No.3) before issuing such a direction to the petitioner to remove his possession from the land in question ought to have given an opportunity to have his version before issuing such a direction affecting his civil rights. May it be, that the petitioner in his reply could not have stated any fact which would have dispelled the allegation levelled against him. In any case the action taken by the public authority while exercising his judicial or quasi-judicial

power must act with all fairness and in conformity with the law as well as the principles of natural justice.

29. In so far as the judgement passed by the Hon'ble Supreme Court in the case of **Vikram Singh Junior High School** (*Supra*), as has been relied upon by Sri Gupta is concerned, the same does not support his contention in the context of the present case. The ratio of the said judgement is that 'merely quoting of wrong provision would not invalidate the order if it is shown that such an order could be passed under the other provision'. For better understanding the law laid down by the Hon'ble Supreme Court in the above noted case, paragraph 3 of the same is reproduced below:

“The matter may also be examined from another angle. The appellant was neither a bhumidhar, sirdar nor asami of the land in dispute. The alleged resolution dated 15-8-1973 had no legal sanctity in the absence of an approval of the Assistant Collector, First Class, in charge of the sub-division and, therefore, the resolution did not convey any title whatsoever in favour of the appellant. The entry in the revenue record must have a legal basis. Further there was no adjudication of dispute as regards continuance of the wrong entry. The appellant could not have claimed any title over the land in dispute merely on the basis of wrong entry which continued in its favour through negligence or failure of the Revenue Officer or the Consolidation Officer to correct the record, in pursuance of the order of the Board of Revenue which had attained finality. In the consolidation proceedings, the Collector is also the District Deputy Director of Consolidation under the U.P. Consolidation of Holdings Act and is authorised to correct any wrong entry continued in the consolidation record in that capacity in the exercise of power under Section 48 of the U.P. Consolidation of Holdings Act. Merely because a wrong provision was quoted by the Collector for exercising his power while deleting the name of the appellant from the revenue record would not invalidate the order if it is shown that such an order could be passed under the other provisions of the Act viz. under Section 48 of the U.P. Consolidation of Holdings Act. In

that view of the matter, we do not find any infirmity in the order passed by the Collector.”

30. In the instant case, the dispute is that the action proposed to be undertaken against the petitioner, as indicated in the notice is under Section 136 of the Code of 2006 against the charge of misappropriation in respect of the property belonging to Gaon Sabha while the same is a subject matter of separate provision i.e. Section 67 of the Code of 2006 wherein the proceedings are summary in nature. Further, the authorities that carry out proceeding in the aforesaid Sections are different i.e. under Section 67 of the Code of 2006, the competent authority is the Assistant Collector while under Section 136 of the Code of 2006, it is the Sub-Divisional Officer. In any case, the situation herein is quite different. It is not a case of ‘mere’ mentioning of a wrong provision of law, rather the same has a direct bearing on the applicability of the provision to be alleged charge, nature of proceeding and of jurisdiction of the authority. In view of the aforementioned different factual matrix the ratio of the **Vikram Singh Junior High School** (*Supra*) case is not applicable in the present case.

31. As discussed hereinabove, in the instant case the allegation against the petitioner is of misappropriation (दुर्विनियोजन) in respect of the property belonging to Gaon Sabha and the action proposed to be undertaken against him, as indicated in the notice is under Section 136 of the Code of 2006 that deals with the cases of unauthorised occupation, while of the

Code of 2006 itself provides a separate provision i.e. Section 67 that deals with the misappropriation of Gram Sabha land. This itself goes to show that the impugned notice suffers from such a manifest legal error that goes to the very root of the case, so much so, the nature of both the proceedings, in view of Section 192 of the Code of 2006 are all together different. Moreover, the competent authorities to carry out the said proceedings are also different as provided under relevant provisions of the Code of 2006 and as such the impugned Notice proposing to proceed under a non-applicable provision of law, entailing serious prejudice to the civil as well as fundamental rights of the person, must not be allowed to subsist.

32. On the preliminary objection as raised by the learned counsels for the respondents regarding the maintainability of the writ petition challenging a ‘notice’, this Court finds that where the question of legality and correctness of the notice under any Act is involved, there shall be no bar in entertaining the writ petition in appropriate cases. This view finds support from the judgement passed by the Hon’ble Supreme Court in the case of **Siemens Ltd. versus State of Maharashtra** reported in (2006) 12 SCC 33. The Hon’ble Supreme Court in the said judgement was pleased to hold as under,

“9. Although ordinarily a writ court may not exercise its discretionary jurisdiction in entertaining a writ petition questioning a notice to show cause unless the same inter alia appears to have been without jurisdiction as has been held by this Court in some decisions including State of U.P.v. Brahm Datt Sharma [(1987) 2 SCC 179 :

(1987) 3 ATC 319 : AIR 1987 SC 943] , Special Director v. Mohd. Ghulam Ghouse [(2004) 3 SCC 440 : 2004 SCC (Cri) 826] and Union of India v. Kunisetty Satyanarayana [(2006) 12 SCC 28 : (2006) 12 Scale 262] , but the question herein has to be considered from a different angle viz. when a notice is issued with premeditation, a writ petition would be maintainable. In such an event, even if the court directs the statutory authority to hear the matter afresh, ordinarily such hearing would not yield any fruitful purpose. (See K.I. Shephard v. Union of India [(1987) 4 SCC 431 : 1987 SCC (L&S) 438 : AIR 1988 SC 686] .) It is evident in the instant case that the respondent has clearly made up its mind. It explicitly said so both in the counter-affidavit as also in its purported show-cause notice.

10. The said principle has been followed by this Court in V.C., Banaras Hindu University v. Shrikant [(2006) 11 SCC 42 : (2006) 6 Scale 66] , stating: (SCC p. 60, paras 48-49)

“48. The Vice-Chancellor appears to have made up his mind to impose the punishment of dismissal on the respondent herein. A post-decisional hearing given by the High Court was illusory in this case.”

49. In K.I. Shephard v. Union of India [(1987) 4 SCC 431 : 1987 SCC (L&S) 438 : AIR 1988 SC 686] this Court held: (SCC p. 449, para 16)

‘It is common experience that once a decision has been taken, there is a tendency to uphold it and a representation may not really yield any fruitful purpose.’ ”

(See also Shekhar Ghosh v. Union of India [(2007) 1 SCC 331 : (2006) 11 Scale 363] and Rajesh Kumar v. D.C.I.T. [(2007) 2 SCC 181 : (2006) 11 Scale 409])

11. A bare perusal of the order impugned before the High Court as also the statements made before us in the counter-affidavit filed by the respondents, we are satisfied that the statutory authority has already applied its mind and has formed an opinion as regards the liability or otherwise of the appellant. If in passing the order the respondent has already determined the liability of the appellant and the only question which remains for its consideration is quantification thereof, the same does not remain in the realm of a show-cause notice. The writ petition, in our opinion, was maintainable.”

33. Further, in the case of **Kaikhosrou (Chick) Kavasji Framji versus Union of India and Another** reported in (2019) 20 SCC 705, the Hon'ble Supreme Court has reiterated that a writ court can entertain a writ petition in appropriate cases wherein the question is in regard to the legality and correctness of the notice issued under any Act and there is no bar in entertaining the writ petition in appropriate cases.

34. The Hon'ble Supreme Court in paragraph 15 of its decision in the case of **Whirpool Corporation versus registrar of Trademarks, Mumbai**, reported in (1998) 8 SCC 1 carved out the following exceptions on the existence whereof a Writ Court is justified in entertaining a writ petition:

- (i) where the writ petition seeks enforcement of any of the fundamental rights;
- (ii) where there is violation of principles of natural justice;
- (iii) where the order or the proceedings are wholly without jurisdiction; or
- (iv) where the vires of an act is challenged.

35. It would not be out of place to mention here that the power to issue prerogative writs under Article 226 of the Constitution of India is plenary in nature. It does not, in terms, impose any limitation or restraint on the exercise of the power to issue writs. It is the discretion of the Writ Court to entertain writ petition or not, depending upon the facts and circumstances of each case. One of the self-imposed restrictions on the exercise of the power under Article 226 of the Constitution that has evolved through judicial precedents is that the High Court should

normally not entertain a writ petition against a show-cause notice unless the same, inter alia, appears to have been issued without jurisdiction. There is a series of decisions rendered by the Hon'ble Supreme Court as well as by this Court holding therein that ordinarily, no writ lies against a show-cause notice. The reason why ordinarily a writ petition should not be entertained against the notice to show cause is that at that stage the writ petition may be held to be premature. Mere show-cause notice does not give rise to any cause of action, but it does not amount to an adverse order which affects the rights of any party unless the same has been issued by a person having no jurisdiction to do so. Further, it is quite possible that after considering the reply to the show-cause notice, the authority concerned may drop the proceedings and/or hold that the charges are not established. It is well settled that a Writ lies when any right of the party is infringed. A mere show-cause notice does not infringe the right of any person. It is only when certain order or direction adversely affecting the rights of a party is passed, that the said party can be said to have a grievance.

36. However, in the cases where the notice is in the form of an order/direction by itself, and not a notice to show cause rather it is pre-mediated direction for specific compliance holding the person concerned guilty, without being affording any opportunity to defend his case; the same does not remain in the realm of a notice. In such cases, in my opinion the Courts are entitled to interfere with the said order, under

Article 226 of the Constitution of India. A similar view has been taken by the Hon'ble Division Bench of the High Court of Judicature at Calcutta in the case of **“Joyous Blocks & Panels Private Limited & Anr. versus Assistant Commissioner, Commercial Taxes, Ballygunge Charge & Anr.”** in M.A.T. No. 1931 of 2022 with IA No. CAN 1 of 2022, decided on 21.12.2022 wherein it has been held that if the authority has pre-decided the issue and the show-cause notice is pre-mediated then it is not a show-cause notice though termed as a show-cause notice. In such a situation, the Writ Court has the right to interfere with the said notice/order, in exercise of its extra-ordinary jurisdiction under Article 226 of the Constitution of India.

37. In the instant case, from a bare perusal of the impugned notice dated 13.07.2023, it is abundantly clear that the Sub Divisional Officer (respondent No.3), has issued the same with a pre-conceived notion that the petitioner has misappropriated the Gram Sabha land and that his possession is liable to be removed/demolished being illegal. As such, without affording an opportunity of show cause to the petitioner as required under law, he straight way issued direction to the petitioner to remove his possession from the said property within a period of seven days. There is nothing in the said impugned notice to suggest that the Sub Divisional Officer has ever provided opportunity of show cause to the petitioner. In view of the settled legal proposition on the subject, the

present Writ Petition deserves to be entertained by this court under Article 226 of the Constitution of India.

38. Therefore, so far as the *first part* of the impugned Notice is concerned, the same is practically a pre-mediated order/direction issued by the Sub-Divisional Officer (respondent No. 3) to the petitioner for specific compliance. Regarding the *second part* of the same, it is observed that when the charge against the noticee/petitioner is of misappropriation of the Gram Sabha land then the proceedings under section 136 of the Code of 2006 as proposed to be undertaken, itself is beyond the domain and scope of Section 136 of the Code of 2006 in the teeth of the fact that there is a separate provision under Section 67 of the Code of 2006 to deal with the cases of misappropriation of the Gram Sabha land.

39. Now, coming to the another aspect of the case that by means of the impugned Notice which is in the form of a premediated order with a direction for specific compliance, the petitioner has been held guilty of misappropriation (दुर्विनियोजन) of the Gram Sabha land, without affording any opportunity of defence is against the basic principle that no person shall be condemned either civilly or criminally without being afforded an opportunity of being heard in answer to the charge made against them.

40. In the case of **State of U.P. versus Shatrughan Lal and another** reported in **JT 1998 (6) SC 55**, the Hon'ble Supreme Court has been pleased to hold that:

"One of the principles of natural justice is that a person against whom an action is proposed to be taken has to be given an opportunity of hearing. This opportunity has to be an effective opportunity and not a mere pretence."

41. Strict adherence to basic norms of natural justice is essential rather inescapable while taking decision affecting rights of a person as observed by the Hon'ble Supreme Court in the case of **Ram Chander versus Union of India** reported in (1986) 3 SCC 103:

"It is a fundamental rule of law that no decision must be taken which will affect the rights of any person without first giving him an opportunity of putting forward his case. Both the Privy Council as well as this Court have in a series of cases required strict adherence to the rules of natural justice where a public authority or body has to deal with rights."

42. In the case of **Commissioner of police, Bombay versus Gordhandas Bhanji** reported in AIR 1952 SC 16, the Hon'ble Supreme Court has been pleased to observe that:

"Public Authorities cannot play fast and loose with the powers vested in them, and persons to whose detriment orders are made are entitled to know with exactness and precision what they are expected to do or forbear from doing and exactly what authority is making the order.....An enabling power of this kind conferred for public reasons and for the public benefit is, in our opinion, coupled with a duty to exercise it when the circumstances so demand. It is a duty which cannot be shirked or shelved nor it be evaded, performance of it can be compelled."

43. It is a well settled proposition of law that principles of natural justice are inbuilt in the statutory rules and require observance unless the same stand excluded by a statutory provision either specifically or by necessary

implication. Any exercise of power prejudicially affecting another must be in conformity with the rules of natural justice. The authority taking action must be impartial and without any interest or bias of any type; where the said authority is exercising judicial or quasi-judicial power, the authority concerned must give full opportunity to the affected person to produce all the relevant evidence in support of their case and must disclose all material placed before it on the basis of which the allegations made against them are founded and the said authority cannot utilise any such material unless the opportunity of hearing is given to the party against whom it is sought to be utilised. The authority must give opportunity to the party concerned to rebut the evidence / material against him and further to put forward, explain and substantiate his own version.

44. In any case, the manner in which the Sub Divisional Officer has proceeded to issue the Impugned Notice dated 13.07.2023 does not even satisfy the legal requirement of show cause as provided under section 136 (3) of the Code of 2006.

45. Now, it would also be apposite to discuss the law relating to necessity of quashing the orders, which are inherently defective. **In the case of Ritesh Tiwari & other versus State of UP & other** reported in 2011 (3) **MLJ 491 (SC)**, the Hon'ble Supreme Court has been pleased to hold as under. For ready reference para 26 of the said Judgment it reproduced below:

“It is settled legal proposition that if an order is bad in its inception, it does not get sanctified at a later stage. A subsequent action/development cannot validate an action which was not lawful at its inception, for the reason that the illegality strikes at the root of the order. It would be beyond the competence of any authority to validate such an order. It would be ironical to permit a person to rely upon a law, in violation of which he has obtained the benefits. (vide Upen Chandra Gogoi Vs. State of Assam & Ors.,(1998) 3 SCC 381; Satchidananda Misra Vs. State of Orissa & Ors.; (2004) 8 SCC 599; and Regional Manager, SBI Vs. Rakesh Kumar Tewari, (2006) 1 SCC 530”

46. A similar view has also been taken in the case of **Mangal Prasad Tamoli (dead) by LRs. versus Narvadeshwar Mishra (dead) by LRs & Ors.**, reported in **(2005) 3 SCC 422**, holding therein that if the order at the initial stage is bad in law, then all further proceedings consequent thereto will be nonest and have to be necessarily set aside. In another case of **C. Albert Morris versus K. Chandrasekaran & others**, reported in **(2006) 1 SCC 228**, the Hon’ble Supreme Court has been pleased to observe that the right in law exists only and only when it has a lawful origin.

47. It is also well settled that all Courts, whether civil or criminal, possess, in the absence of any express provision, as inherent in their constitution, all such powers as are necessary to do the right and to undo a wrong in the course of administration of justice on the principle of *quando lex aliquid alicui concedit, concedere videtur etid sine quo res ipsae esse non potest* (when the law gives a person anything it gives him that without which it cannot exist).

48. The discretionary jurisdiction of this Court is inherent under the powers conferred under Article 226 of the Constitution of India. It is true that the writ jurisdiction, though wide, has to be exercised carefully and with caution. However, it has to be exercised *ex debito justitiae* to do real and substantial justice for the administration of which alone courts exist.

49. There is no doubt that the authority of the court exists for advancement of justice and if any attempt is made to abuse that authority so as to produce injustice, the court has power to prevent such abuse. It would be an abuse of process of the court to allow any action which would result in injustice and prevent promotion of justice. In such a situation, the Writ Court in exercise of the power conferred under Article 226 of the Constitution of India is justified to quash any proceeding if it finds that initiation / continuance of it amounts to abuse of the process of court or quashing of the same would otherwise serve the ends of justice.

50. On the basis of foregoing analysis, the impugned notice dated 13.07.2023 is found to be unsustainable in the eyes of law and as such it is liable to be quashed. Accordingly, the notice dated 13.07.2023 is hereby **quashed**.

51. However, it is made clear that the concerned respondent authorities are always at liberty to initiate proceedings afresh, strictly in accordance with the provisions of law, without any premeditation and shall in no manner be guided by its order dated 13.07.2023 though termed it a Notice, which has been quashed by this Order.

52. It is further provided that in case if the respondent authorities take decision to initiate the aforesaid proceeding afresh, the same shall be done with an open mind and by providing due opportunity to the petitioner to put forward, explain and substantiate his own version; strictly in accordance with law by adhering to the principles of natural justice which are essential and inescapable while taking decision affecting the rights of a person.

53. The Writ Petition is accordingly **allowed**. No order as to cost.

Order Date :- 15.9.2023

Abhishek/Sumaira