

HIGH COURT OF AZAD JAMMU & KASHMIR

Writ Petition No. 2009/2024.

Date of institution 08.08.2024.

Date of decision 19.09.2024.

1. Syed Farzand Ali Naqvi President Anjuman-e-Jafaria Muzaffarabad (Registered).
2. Syed Liaqat Hussain Naqvi S/o Syed Muhammad Hussain R/o Imam Bargah District Muzaffarabad, Azad Jammu and Kashmir.
3. Syed Manzar Hussain Shah S/o Syed Ghulam Ali Shah R/o Imam Bargah District Muzaffarabad, Azad Jammu & Kashmir.
4. Khawaja Imtiaz Ahmed S/o Khawaja Usman Joo, R/o Imam Bargah District Muzaffarabad, Azad Jammu and Kashmir.

....Petitioners

Versus

1. Sardar Mukhtar Ahmed Abbasi S/o Sardar Fareed Khan Abbasi R/o Shoukat Line Muzaffarabad, Azad Jammu & Kashmir.
2. Mayor Municipal Corporation Muzaffarabad, Azad Jammu & Kashmir.
3. Assistant Mayor Municipal Corporation Muzaffarabad, Azad Jammu & Kashmir.
4. Chief Officer Municipal Corporation Muzaffarabad, Azad Jammu and Kashmir.
5. Executive Engineer Municipal Corporation, Muzaffarabad, Azad Jammu and Kashmir.
6. Inspector Municipal Corporation Muzaffarabad, Azad Jammu & Kashmir.
7. Deputy Commissioner Muzaffarabad, Azad Jammu & Kashmir.
8. Assistant Commissioner Muzaffarabad, Azad Jammu and Kashmir.
9. Tehsildar Muzaffarabad, Azad Jammu and Kashmir.
10. Public at large.

...Respondents

WRIT PETITION

Before:- Justice Syed Shahid Bahar, J.

PRESENT:

Sardar K.D. Khan, Advocate alongwith petitioners No.1 and 2 in person.
Saqib Ahmed Abbasi, Advocate for respondent No.1.
Respondent No.4 (Chief Officer, MCM) in person.
Muhammad Ali Ashrif, Advocate, Legal Advisor for MCM.
Jamil Rathore, XEN, MCM.

Judgment:-

1. The above titled writ petition has been filed under Article 44 of the Azad Jammu and Kashmir Interim Constitution, 1974, whereby the petitioners are seeking infra relief:-

“It is, therefore, very humbly prayed that in light of the above pleadings an appropriate writ may kindly be issued in favour of the petitioners in the following manner:-

- a) declaring the permission order for construction of Plaza on land survey No.1023 measuring 14 marla situated at Muhalla Imam Bargah Muzaffarabad dated 01.08.2023 and the amendment permission letter 09.05.2024 illegal, void, against the bye-laws of Municipal Committee Muzaffarabad, erection and re-erection laws dated 16.06.1979 violation of the fundamental rights security of life of the petitioners in person and public at large and same may kindly be struck down.
- b) *It is further prayed that the respondents may kindly be restrained to erect the structure of Plaza on the basis of the permission without leaving the street of 10 feet land as provided in the bye-laws.*
- c) *The official respondents may kindly be directed to act according to the law and rules.*
- d) *Any other relief which is admissible under law may also be granted in favour of the petitioners.”*

2. Facts of the case according to petitioners are that the petitioners are Social Workers and residents of Mohalla Imam Bargah Muzaffarabad. Petitioner No.2 is the guardian of the Imam Bargah and other petitioners are also residents of the locality. They contended that respondent No.1 purchased the land survey No.1023, measuring 14 marlas situated at Mohalla Imam Bargah Muzaffarabad and obtained a map from Municipal Corporation Muzaffarabad for construction of

Plaza. They alleged that the street which connects the Imam Bargah is coming from the main road known as "CMH Road Muzaffarabad" is adjacent to the land survey No.1023 measuring 14 marlas which was purchased by respondent No.1 vide sale deed dated 15.03.2023. Respondent No.1 for construction of Plaza obtained permission letter dated 01.08.2023 after preparation of Map. They further alleged that in permission letter dated 01.08.2023 the street area was left 16 feet and 08 inches; the respondent No.1 with the connivance of official respondent on 09.05.2024 amended the permission letter whereby on the 11 feet Street from south and at the last only 13 feet street was left from north side. The petitioners filed an application before the Mayor Municipal Corporation Muzaffarabad and the Deputy Commissioner Muzaffarabad but no action has been taken. They took a stance that official respondents issued the permission letter dated 01.08.2023 read with the amended letter dated 09.05.2024 against the "Master Plan" and building bye laws, code and the notification, thus, the petitioners moved this petition for seeking writ of mandamus and certiorari against the respondents.

3. Instant writ petition was admitted for regular hearing on 08.08.2024. The said order was challenged by respondent No.1 in an appeal before The Hon'ble Supreme Court, who after hearing parties, vide its order dated 20.08.2024, disposed of the same with a direction to this Court to adjudicate the writ petition within one month from the communication of this order. The said order was received before this Court on 21.08.2024.

4. Written statement has been filed on behalf of respondent No.1, wherein the claim of the petitioners has been negated in toto and prayed for dismissal of the writ petition.

5. Mr. K.D. Khan, Advocate appearing on behalf of the petitioners vehemently contended that all the proceedings being taken by the respondents are contrary to the Municipal bye-laws and Master Plan. He staunchly contended that NOC has been issued by Municipal Corporation in favour of non-petitioner No.1 Sardar Mukhtar Ahmed Khan Abbasi, in sheer violation of Bye Laws Muzaffarabad Municipal Committee (Erection and Re-erection of Buildings) dated 16.06.1979. As per his estimation the respondents are under legal obligation to leave the street of 10 feet for getting permission of construction of Plaza as per above referred bye laws of 1979. He further submitted that at present neither the Master Plan is being implemented in its pros and cons nor bye laws are being carried out in this regard by the relevant quarter. Mr. K.D Khan, further contended that random issuance of NOC without adhering to the Master Plan bye laws and report made by **JICA** amounts to mal-administration and administrative injustice; thus, as per his estimation, indulgence of this Court in extraordinary jurisdiction has been sought for redressal of the grievance of the petitioners as no other alternate remedy is available to them.

6. On the other hand, Muhammad Ali Ashrif, Advocate/ Legal Advisor appearing on behalf of respondents No.2 to 6 (MCM Department) contended that the bye-laws dated 16.06.1979 referred by the petitioners has already stood repealed after enactment of the

Azad Jammu and Kashmir Local Govt. Act, 1990. He referred Section 101 of Local Govt. Act, 1990 in support of his contentions. He further added that the petitioners have got no locus standi to file instant petition; all the proceedings have been taken normally in accordance with Local Govt. Act, 1990 by following the schemes of **Master Plan**.

7. In reply, the learned counsel for private-respondent No.1, Saqib Ahmed Abbasi, vehemently contended that the petitioners have got no locus standi to file instant petition as they are not personally aggrieved from the construction of respondent No.1. He staunchly contended that they have filed this petition with mala-fide intention; even otherwise without following requirement of Section 91 of CPC, petition at hand cannot be treated as filed in representative capacity. He contended that respondent No.1 started construction of Commercial Plaza according to Master Plan, while the street, adjacent to the said Plaza of respondent No.1, is restored to its original position. He further submitted that the petitioners are not affected by narrowness or wideness of the street leading to the Imam Bargah and the petitioners are not the original custodian of the Imam Bargah in presence of noble person Mufti Kafayat Hussain Naqvi, however, the reality of the petitioners are that the street leading to the Imam Bargah from the front of the houses of petitioners No.1 to 3 is only 9 feet wide and the street leading to the Imam Bargah from the back of five-story building of petitioner No.4, which has a two-sided entrance is also only 9 feet wide. Counsel for respondent No.1 vehemently contended that the petitioners have approached this Court with unclean hands

referring and relying upon the repealed bye-laws 1979 and concealed the relevant law and misrepresented the facts as the building bye-laws referred and relied upon were enforced by Administrator Municipal Corporation without any legal backing and the same stood repealed and inoperative by the enforcement of the Azad Jammu and Kashmir Local Govt. Act, 1990 vide its Section 23 of the said Act a Municipal Committee is supposed to draw up a "Master Plan" for the Municipality which shall provide for all the conditions and restrictions in respect of construction the succeeding sections of the said Act provided whole procedure in this regard. Counsel for respondent No.1 further contended that the answering respondent moved application for NOC as per "Master Plan" but the same application is subjudice before the MCM office and as per amendment letter, the MCM department instead of issuing the amended NOC as per Master Plan issued the NOC with 14 ft width instead of 12 ft-9" as per Master Plan and the application annexed with petition at page No.29, which is evident that the petitioners stand for the width of the street of 14 ft, but filed above petition contrary to the same application. The counsel for respondent No.1 finally prayed for dismissal of the writ petition.

8. In order to reach on just decision, I summoned the Chief Officer of Municipal Corporation, Muzaffarabad and Jamil Rathore concerned officer/X-EN of MCM. They were given opportunity to explain their position, particularly Chief Officer of the Corporation. They submitted that NOC was previously issued by the Corporation with full care and caution after taking into consideration ground realities of the

city area and right of path of public has also been looked into, that's why the private respondent was asked to leave some extra land for street, although it is not provided in the Master Plan but on his application same was revisited and respondent No.1 was directed to leave 14.0 ft street at the eve of raising the proposed Plaza. Thus, relevant officers of MCM apprised the Court that as per Master Plan width of such like street is indicated as 13.00 ft, thus, legally only 13 ft width could be asked for.

9. After hearing lengthy arguments of the counsel for the parties and perusal of the record with utmost care and caution it transpires that petitioners have sought implementation of the bye laws and regulations of 1979 while when AJK Local Govt. Act, 1990 was enacted through its Section 101 then all the enactments have been repealed. It is useful to reproduce Section 101 of Local Government Act, 1990, as infra:-

101. **Repeal and Protection.**- (1) On the coming into force of this Act in any area the enactments mentioned in the First Schedule shall, if and in so far as applicable to that area, stand repealed.

(2) Where any enactment stands repealed under subsection (1), any appointment, rule, regulation or bye-laws made, notification, order or notice issued, tax imposed or assessed, contract entered into, suit instituted or action taken under such enactment shall, so far as it is not in consistent with the provisions of this Act and the rules, be deemed to have been respectively made, issued, imposed or assessed, entered into, instituted or taken under this Act."

10. Therefore, in such situation, the laws referred and relied upon by the petitioners are no more in the field, thus, it can safely be held that no direction can be given to the respondents for enforcement

of repealed laws at all. Thus, at the very outset the argument of the learned counsel for the petitioners qua enforcement of Bye-laws 1979 (already stood repealed) is hereby repelled.

11. So far as the question of implementation of Master Plan and adherence of JICA report pertaining to the upcoming hazards of in thickly populated area is concerned, it transpires that commercial committee of the Municipal Corporation Muzaffarabad vide its decision dated 22.07.2023 approved resolution of double basement plus three stories map in favour of respondent No.1, thereafter in pursuance of the same in view of Section 32 Schedule 5 content/ziman No.26/27 of Local Government Act, 1990 NOC was accordingly issued in favour of respondent No.1 on 01.08.2023. As per statement of Jamil Rathore (X-EN), NOC of proposed construction was accorded strictly in accordance with indicated requirements of Master Plan and submission drawing of relevant architect was duly vetted as per Master Plan. Master Plan itself covers all the requisite facets of building construction and in such like affairs the aforesaid Master Plan has been made keeping in view the scenario and accordingly approved and notified on 02.11.2007 which fulfilled the criteria of new techniques of Master Planning. It is also admitted position that executing authority of Master Plan is now MCM while previously it was coming within province of Development Authority Muzaffarabad.

12. Permission of construction by way of NOC and thereafter amended NOC ex-facie is in line with the scheme of Master Plan.

13. Another aspect of the matter is that under Section 86 of the Local Government Act, 1990 statutory right of appeal has been given to the aggrieved person against any decision of Local Council or its Chairman and the competent authority in pursuance of Section 89 of the aforesaid Act have already framed AJK Local Councils Appeal Rules, 1993. In the aforesaid rules, it has been alleged that an appeal from an order to the authority specified in column No.1 of the Schedule 1 annexed with these rules shall lie to the authority specified in column thereof.

SCHEDULE-1

Authority making the rule

Order under appeal:

Appellate Authority

<u>Authority making the rule</u>	<u>Order under appeal:</u>	Appellate Authority
1. Zila Council, Municipal Corporation, Municipal Committee or its Mayor/Chairman or Deputy Mayor/ Vice Chairman		Divisional Commissioner
2. Town Committee, Union Council or its Chairman or Vice Chairman.		Deputy Commissioner

14. Trite that statutory remedies like appeal, review and revision are considered in the eye of law as an alternate efficacious, statutory remedies with a review to provide upper fora in the departmental hierarchy for having relook and revisit of the administrative decision which is definitely meant for providing administrative justice from departmental end.

15. Even otherwise, Hon'ble Supreme Court in plethora of judgments have laid down that disputed question of facts cannot be resolved by this Court in extraordinary jurisdiction.

16. Upon query of the Court the learned counsel for the petitioners were unable to indicate any specific provision of law/statute which has been bypassed or violated by the Corporation.

17. What should be width of the Street on grounds, it is disputed question of fact as both the parties are in variance in this regard. Laws referred to and relied upon by the learned counsel for the petitioners have already stood repealed.

18. Stance of the Executive Engineer MCM is worth mentioning abatract from his relevant submission are reproduced infra:-

”ادارہ نے ماسٹر پلان سے ہٹ کر عوامی مفاد کی خاطر موجودہ گلی کو (14-0) فٹ چوڑائی میں رکھنے کی ترمیمی منظوری دے رکھی ہے جبکہ ماسٹر پلان میں اس جانب کشادگی تجویز نہ ہے۔ قبل ازیں بھی عوامی مفاد کی خاطر ادارہ نے ابتدائی NOC کی شق نمبر 5 کے مطابق زیر بحث گلی کو 15-0 + 16-8 چوڑائی میں جاری رکھنے کی NOC جاری کر رکھی تھی۔ چونکہ ماسٹر پلان کے مطابق کشادگی نہیں کی جاسکتی تھی اسلئے ماسٹر پلان کے مطابق گلی کو 14-0 فٹ چوڑائی میں جاری رکھنے کی ترمیمی منظوری جاری کی۔“

19. Schedule Five- H 23 deals with Master Plan which among other matters provide for restrictions, regulations and prohibitions to be imposed with regard to the development of sites, and the erection and re-erection of buildings within the municipality.

20. It is responsibility of the MCM under Section 29 Schedule 5 of the Local Government Act, 1990 to provide and maintain public streets and other means of Public Communication as may be necessary.

21. **It is expected that the relevant quarters will mull over the matter qua widening of the streets by dealing with iron hand qua removal of encroachments, especially in the areas where Mosques, Imam Bargahs' Shrines, Educational Institutions or Hospitals and Clinics are situated, and should have kept close eye upon land grabber, encroachers and in the above areas width of the Streets**

given in the Master Plan requires to be revisited and relooked by the relevant quarters keeping in view the sensitivity of the above places in order to ensure and meet the situation in any emergency, as well as protective measures.

22. Before parting with the instant judgment, it is expected that Municipal Corporation and relevant quarters should take necessary steps for execution of the Master Plan in its pros and cons without any fear and favour and to do needful qua making municipal area neat and clean city by removing all the hazardous activities as well as vehicles stand established within the main city area.

23. Although mere involvement of disputed question of facts requiring deeper probe culminating to take evidence ipso facto does not bar the exercise of jurisdiction by the High Court, but if an alternate appellate fora is provided by the statute to impugn the decision over there, and a party switching over and taking refuge from the statutory remedy, then in such like state of affairs adjudication of the disputed question of facts requiring detailed probe is not justified in each and every case as it amounts to frustrate the very purpose of the Statute.

(underlining is mine)

24. At this juncture, I am not inclined to indulge in resolving a dispute particularly in absence of the exposition of wisdom of Appellate fora provided in the statute; that too, it will amount to preempt, fragile and defuse the intent of statute. The petitioners are at liberty to knock

the door of Appellate fora against the decision of Corporation as per scheme of the special law (subject to the limitation provided therein).

25. Needless to reiterate that Corporation at present has to follow the Master Plan duly notified in 2007, respondents are claiming issuance of NOC and amended one under the Master Plan whereas the petitioners are pressing enforcement of repealed bye-laws of 1979 and Master Plan, thus, matter at hand requires an investigation into disputed facts and materials, High Court will not deal with it in exercise of extraordinary jurisdiction conferred under Article 44 of the Constitution. One of the proper recourse in such like eventuality is to file a regular civil Suit.¹

26. In view of Section 93(4) of the Local Govt. Act, 1990 the petitioners can file a civil suit (if so advised) before the relevant civil Court subject to serving 01 month prior notice. Thus, 02 alternate and adequate remedies are available to the petitioners simultaneously.

27. In present era trend of alternate dispute resolution is being adopted and appreciated but in Azad Kashmir despite a bill was initiated for the purpose through Law department in 2022 but subsequent legislative measures are yet to be taken. Law department is expected to expedite the matter in this regard.

28. As it has been stated by the parties that they have attempted to resolve the matter through joint sittings but could not

¹. Samander Singh vs. State of Punjab AIR 1968 Pun 72;
Gulab Das vs. Assitant Collector AIR 1957 733;
Mohammad Ismail Qureshi vs. Firdous Steel Pvt. 2010 SCMR 1098;
Mohammad Qasim vs. SE Public Health 2023 SCR 106.

arrive at any decision. Be that as it may the door is always open to the parties qua finding out of the box solution.

29. Necessary specific rules making for the purpose of execution of Master Plan is the need of the hour. Necessary measures in this regard are also expected.

30. Findings qua any observations made supra shall not have binding effect on Civil Court (If the matter is brought for adjudication), as the same is tentative in nature.

31. The petition requires no further consideration, thus, consigned to record with above observations. Miscellaneous applications are also dealt with accordingly. File shall be consigned to record room, after due completion.

32. Copy of this decision be sent to Secretary Law, Secretary Services, Secretary Local Govt. and Chief Secretary of Azad Govt. of the State of Jammu and Kashmir for pondering over the para No.22, 27 and 29.

Muzaffarabad,
19.09.2024.

JUDGE

Approved for reporting

JUDGE