

(2014) 09 J&K CK 0017

In the Jammu And Kashmir High Court

Case No : OWP Nos. 36 Of 2007, 1498 and 1570/2011 and 613 Of 2012 and CSA No. 02 Of 2013

Ab. Rashid Wani and Others

APPELLANT

Vs

State of JandK and Others

RESPONDENT

Date of Decision : 05-09-2014

Acts Referred:

Citation : (2015) 2 JKJ 17

Hon'ble Judges : M.M. Kumar, C.J.;Dhiraj Singh Thakur, J.

Bench : Division Bench

Advocate : M.A. Qayoom and Muhammad Ashraf Bhat Advocates, for the Appellant; M.A. Chashoo, AAG, for the Respondent

Final Decision : Dismissed

Judgement

Dhiraj Singh Thakur, J.â?"Since in all the four writ petitions and the CSA aforementioned, the facts involved and the controversy between the

parties is common, we propose to deal with them by way of a common judgment. However, we propose to briefly state the facts in each of them

so that the controversy is understood and dealt with appropriately.

OWP No. 1570/2011:

CASE OF THE PETITIONERS:

The genesis of the controversy in all the aforementioned cases including the present one revolves around land measuring 6 kanals 15 marlas in plot

No. 96 situate at Gulmarg, Kashmir. This land originally belonged to Thokar Nichand which was leased out to him by the Government. This

property was subsequently a subject matter of sale executed by Thokar Harnam Chand on behalf of Thokar Nichand in favour of Haji Ghulam

Mohammad, Haji Ghulam Nabi and Ghulam Rasool, sons of Sidiq Joo Wani and Haji Mohammad Abdullah S/o. Subhan Joo Wani R/o Karfali

Mohalla, Srinagar.

2. It is stated that this plot of land measuring 6 kanals 15 marlas along with five single storied structures came to be purchased by aforementioned

persons who were the predecessors in interest of the petitioners herein. Since the land in question was a subject matter of lease, the predecessors

in interest of the petitioners appear to have approached Deputy Commissioner, Baramulla, who accorded sanction for transferring the same in

favour of aforesaid vendees on the same terms and conditions as the original grant.

3. It is averred that pursuant to the transfer of the lease in favour of the vendees, the revenue authorities also attested a mutation in their favour.

Subsequently, the predecessors in interest of the petitioners started a hotel commonly known as City View Hotel thereon.

4. It was in the year 1976, when the vendees executed an agreement with one Abdul Rashid Khan on 3rd of May, 1976, whereby, the hotel was

given to him for a period of three years with effect from 1st May 1976 to the end of 1978 for a consideration of Rs. 10,000/-. A translated version

of the agreement executed between the parties is also relevant which is reproduced hereunder:

I, Abdul Rashid Khan S/o. Kh. Mohammad Khan am the resident of Khaipora Tehsil Tangmarg Kashmir.

Whereas the immovable property situated at Gulmarg comprised of the following houses:

(a) Single storied consisting of rooms as under:--

Drawing room one, Dinning room one, two numbers of bed rooms alongwith bathrooms and kitchen.

(b) Two Storied consisting of following rooms:--

Drawing room one, Dinning room one, six bed rooms alongwith bathrooms, kitchen, crockery, cutlery, quilts, curtains mentioned in the separate

list owned and possessed by Haji Gh. Mohammad, Ghulam Nabi, Ghulam Rasool sons of Sidiq Joo, Abdul Rashid in person of his own behalf

and as a guardian on behalf of other sons and daughters of Haji Mohammad Abdullah (deceased) R/o Karfali Mohalla Srinagar under the name

and style of (City View Hotel). The said property is given by the owners to other people on contract basis. I have taken the above said property

from its owners on contract basis for a period of three years with effect from May 1st 1976 till the end of year 1978 and the contract amount has

been fixed at Rupees Ten Thousand with the owners. No addition or deduction will be made in the same.

Now I, executant, do hereby executed this agreement in favour of owners out of my own free will, consent and without any force or expulsion

while possessed of my full senses on the following terms and conditions and do hereby declare that the employees under my supervision will

perform the contract work excellently, honestly which will add to the reputation of the said hotel.

Moreover, there is a complete electric filling in the said hotel. I will also perform satisfactorily my duties as worker of the said hotel as per the

direction of the visitors coming to the said hotel. I will also bear all the expenditure of the hotel for privacy of the visitors, electric fee, radio fee,

sales tax myself besides the contract amount. I will be responsible for all the municipal violations i.e. Municipal Act. During the contract period if I

effect any repairs of the hotel for my own benefit, I will myself bear the expenses for the same. That amount will not be counted with the contract

amount. I will not make any claim for compensation against the owners after the completion of contract period. In case any damage is caused to

the furniture of the hotel during contract period, I will either make up the same or in the alternative. I will pay for the same as per prevalent market

rate. I shall have no right after the expiration of the contract period. The owners of the hotel will be fully authorities to run the hotel either

themselves or through any other contractor. At this time, I have paid an amount of Rs. 3,000/- towards the contract as per receipt. I will be liable

to pay an amount of Rs. 3,000/- in the month of July, 1977 and Rs. 4,000/- in the month of July, 1978. For non-payment, the contract shall be

deemed to have been cancelled and I will not be having any right to do any work in the said hotel. During contract period, my employees will not

commit any theft, embezzlement or disentrustment with the visitors. In that case, I shall be held responsible and I will have no right to do any work

in the hotel. Adjacent to the immovable property is a servant house single-storied, concrete and shingal roofed consisting of two rooms. That is

also included in the contract amount. In addition, the houses of the said contract are shingal-roofed. I will produce the receipts of electric fee, radio

fee, licence, sales tax to the owners from time to time for inspection. In addition, load tax and tanki under the immovable property of land will be

the responsibility of the owners. I am also responsible for the payment of income tax vis-À-vis the business. In absence of receipt, no contract

amount will be considered. On the basis of these few words mentioned in the instant agreement, the same has been executed at Sadder Court

premises.

Sd/-

Signature of Abdul Rashid Khan

Be it noted that if during contract period the owners make any change in the details of their own, then in that even the contract shall be deemed to

have been cancelled and inoperative. In case any new contract, I shall have the first preference. In that event instead of Rs. 3,000/- only Rs.

1,000/- shall be deemed to have been paid.

5. By virtue of Government order No. 547-UD of 1978 dated 28.10.1978, the lease in favour of the vendees was extended by a further period of

40 years from the date of expiry of the original lease subject to certain terms and conditions. The name of the predecessors in interest of the

petitioners figured at sr. No. 10 of annexure-F attached to the said Government order which reflect the holding of the lessees at 6 kanals 15 marlas

and further that the said Government order under serial No. 6, inter-alia, held as under:

...In respect of the lease shown at item (6) of the annexure-F, it may be renewed for the total land leased out originally with permission to

construct a hotel on it.

In the year 1977, however, on account of a fire incident, the aforementioned property was gutted in fire.

6. That since in terms of the Government order dated 28.10.1978, the lessees, predecessors in interest of the petitioners, were liable to pay

ground rent as per details given therein in regard to 6 kanals 15 marlas, the official respondents i.e. the State of Jammu & Kashmir and Chief

Executive Officer, Gulmarg Development Authority, Gulmarg, accepted ground rent amounting to Rs. 29920/- from the petitioners, for land

measuring 4 kanals only while refusing to receive the ground rent for remaining 2 kanals 15 marlas of land.

It is in these circumstances that the present writ petition has been filed seeking an appropriate direction against the respondents, directing them to

receive the ground rent of the remaining portion of land measuring 2 kanals 15 marlas under plot No. 96 situate at Gulmarg and further not to

cause any kind of interference in the possession of the petitioners over the land in question.

OFFICIAL RESPONSE:

7. Response has been filed by the Government through the Additional Advocate General in which a stand has been taken that the issue pertains to

the Gulmarg Development Authority which is responsible for allowing the renewal of licenses running the business approval for construction,

repairs, reconstruction etc along with the department of Tourism which has the power to either renew, extend or refuse renewal of leases.

RESPONSE OF PRIVATE RESPONDENT No. 3:

8. By virtue of order dated 16th April, 2013, respondent No. 3 came to be incorporated as a party in the aforementioned writ petition. The prayer

as sought by the petitioners in the present writ petition is resisted by this respondent.

9. It is stated that the petitioners have no longer any interest, right or title to the land measuring 6 kanals 15 marlas inasmuch as he is in possession

of the same for the last more than 60 years.

10. It is further stated that by virtue of agreement dated 3rd of May, 1976, the aforesaid land was leased out, along with structures existing

thereupon, in his favour for an amount of Rs. 10,000/-. Pursuant to the agreement, he was put in actual physical possession of the landed property

as also the structures existing thereupon. Further, that after the fire incident in which the property was gutted, respondent No. 3 approached the

Tehsildar concerned for leasing out the said land in his favour who addressed a communication to the Chief Executive Officer, Gulmarg

Development Authority, Gulmarg, dated 21st September, 1977, recommending the case of the said respondent for leasing out land measuring 4

kanals which was already in his possession.

11. While referring to the order dated 28.10.1978 bearing Government order No.

547-UD of 1978, it is stated that the Government had renewed the lease in favour of the vendees with regard to 4 Kanals for residential purposes only subject to payment of ground rent as prescribed.

It is further averred that since lessees did not deposit the ground rent nor entered into any lease agreement with the Government, the said lease ordered in favour of the petitioners expired and should be deemed to have been determined.

12. It is stated that the respondent No. 3 has an independent right to continue to occupy the land measuring 6 kanals 15 marlas not as tenant of the above lessees but independently of that inasmuch as he had already applied for leasing out the said land in his favour.

13. It is important to notice the specific stand taken by this respondent in paragraph-F at page 7, which is reproduced hereunder:

f) That, in exercise of his rights to continue to occupy the land in his own right and not as a tenant of the above lessees keeping in view the fact that

the lease granted in favour of lessees vide order Annexure-R2 had lapsed and the leased house had been destroyed in fire, that the Answering

Respondent applied before the Tehsildar Tangmarg and Chief Executive Officer, Gulmarg Project Organization, Tangmarg in continuation of

application of his father contained in Annexure-R1 (supra) for leasing out the said land under survey No. 671 in his favour alongwith additional

land, the total measuring 08 kanals....

14. A further stand has been taken that the said respondent had been paying all taxes and demands of the competent authority in the area against

the hotel which it is stated is being run by the on the spot. Receipts of payment of taxes, permissions granted by the concerned authorities are on

record.

The further stand of the respondent is that an application under the J&K State Lands (Vesting of Ownership to the Occupants) Act, 2001, has

already been tendered by him before the authorities in the year 2006 on the prescribed format seeking conferment of ownership rights over the

said plot of land.

15. It is further stated that being in absolute possession of the property in question, he had entered into arrangements with telecom companies in

the year 2007, to erect telecom towers in the premises in question for which he

had been receiving rentals too.

16. It is thus asserted that the petitioners have no right to claim to be lessees in regard to the land in question muchless did they have any right to

seek a direction against the official respondents forcing them to accept the premium/ground rent etc in terms of order dated 28.10.1978.

OWP No. 1498/2011:

CASE OF THE PETITIONERS:

17. In this petition, the petitioner, Abdul Rashid Khan, on the same set of facts as was his defense in OWP No. 1570/2011, has sought the relief

of mandamus directing the respondents to consider and decide his application under the J&K State Lands (Vesting of Ownership to the

Occupants) Act, 2001 with a further prohibition prohibiting the respondents from interfering with the smooth running of hotel City View by the

petitioner.

OFFICIAL RESPONSE:

18. Response has been filed by Tehsildar, Tangmarg, respondent No. 3, wherein a stand has been taken that as per the revenue record, under

mutation No. 131, land measuring 6 kanals 15 marlas are shown to be transferred in the name of Haji Ghulam Mohammad, Haji Ghulam Nabi,

Haji Ghulam Rasool sons of Sidiq Joo and Haji Mohammad Abdullah Son of Subhan Joo as Wasidars in equal shares and further that mutation

No. 131 has been recorded for transferring of the lease hold rights.

It is further stated that the entire land falling in Gulmarg has been transferred by the Government to the Gulmarg Development Authority vide order

dated 13th June, 2005. It is further asserted that petitioner, Abdul Rahid Khan's name did not figure anywhere in the Jamabandi. However, it is

stated that from 2006, the name of the petitioner has been shown as having 2 kanals 10 marlas but it is not known as to how the entry has been

incorporated and under whose orders when the entire land stood transferred to the Gulmarg Development Authority from 2005.

19. It is stated that the original lessees have also filed an application before the Divisional Commissioner, Kashmir, about these wrong entries which

are being investigated.

A further stand is taken that the J&K State Lands (Vesting of Ownership to the

Occupants) Act, 2001, is not applicable to the land in question

which has already been transferred to Gulmarg Development Authority in the year 2005.

20. It has specifically been denied that the petitioner is in possession of the land in question or that he has constructed any sheds or huts as per the records.

21. The Chief Executive Officer, Gulmarg Development Authority has filed his objections wherein a specific stand has been taken that the land in

question does not fall within the purview of the J&K State Lands (Vesting of Ownership to the Occupants) Act, 2001, in view of Section 3(b) of

the Act. For purposes of reference, Section 3 of the said Act is reproduced hereunder:

3. Act not to apply to certain lands The provisions of this Act shall not apply to such State land as is:--

(a) recorded or used as pathway, grazing ground, graveyard, cremation ground, camping ground or Kohl (irrigation channel);

(b) held by any Government Department of institution under the control of the Government;

(c) earmarked for a specific purpose in any [xxx] Master Plan;

(d) covered by fields floating over water; and

(e) forest land or wooden waste].

A further stand is taken that the land in question has been leased out to the lessees (Predecessor in interest of the private respondents) for a period

of 40 years vide Government order No. 547-UD of 1978 dated 28.10.1978.

QWP No. 613/2012:

CASE OF THE PETITIONER:

22. In this petition, the petitioner, Abdul Rashid Khan, seeks the issuance of a writ of certiorari for quashing the receipt dated 17.10.2011 issued

by the Gulmarg Development Authority, in regard to payment of rent for 4 kanals of land for 34 years with 10% interest amount to Rs. 29920/- in

favour of private respondents herein and further relief has been prayed in the nature of a mandamus calling respondent No. 5, Director Tourism to

decide his application for renewal of the license for running the hotel in favour of the petitioner.

RESPONSE OF THE GULMARG DEVELOPMENT AUTHORITY, RESPONDENT NO. 4.

23. A specific stand has been taken to the effect that the petitioner has no locus, right or claim in regard to the land in question which has not been

leased out or transferred to the petitioner. It is further stated that the said land stands leased out in favour of the lessees (predecessor in interest of

private respondents) for a period of 40 years, which property is now in their legal possession and occupation.

A further stand has been taken that this court in SWP No. 1570/2011 had directed the acceptance of rent from the private respondents vide order

dated 2nd December, 2011 and in view of the pendency of that writ petition, the present writ petition is not maintainable.

24. It is further stated that the petitioner is nothing but a trespasser who is trespassing over the Gulmarg Development Authority's land and was

mis-representing the facts to protect his illegal action of such a trespass.

A further stand is taken that the Gulmarg Development Authority is a Government department created under a Statute and therefore was not

subject to any benefit and was out of the purview of the J&K State Lands (Vesting of Ownership to the Occupants) Act, 2001.

It is also stated that a civil suit filed by the petitioner on the same set of facts already stands dismissed.

CSA No. 02/2013:

CASE OF THE APPELLANT:

25. This Civil Second Appeal arises out of a suit filed by the appellant, Abdul Rashid Khan, which was dismissed by virtue of judgment and decree

dated 17th March, 2012. A further appeal preferred before the learned First Additional District Judge, Baramulla, also met with the same fate. In

the present Civil Second Appeal, the appellant questions the aforementioned judgments and decrees.

26. Briefly stated, in the suit filed before the learned Munsiff, Tangmarg, the following relief had been prayed for:

a) Mandatory injunction commanding the respondents not to interfere in the subject matter of the suit land measuring 6 kanals 15 marlas at

Gulmarg and to allow the plaintiffs to run their business smoothly.

b) Mandatory injunction commanding defendant No. 1 (Ghulam Ahmad Laigroo S/o. Ghulam Nabi Laigroo R/o Hyderpora, Srinagar-Kashmir)

from causing any inconvenience to the plaintiffs as he is ceased to have any right in the suit property.

c) Declaratory decree declaring the plaintiffs as legal and lawful possessors of the suit property measuring 6 kanals 15 marlas and further directing

the defendant No. 2, General Manager, AIRCEL, Srinagar, to release bills of the plaintiffs without any hindrance.

27. In the aforementioned civil suit, three issues came to be framed which are reproduced hereunder

ISSUE No. 1: Whether plaintiff is in lawful possession of the suit property by virtue of agreement (OPP)?

ISSUE No. 2: Whether the agreement executed between the parties is an agreement to sell or simply deed of license and what is its effect

(OPD/OPP).

ISSUE No. 3: Whether the plaintiff is having any cause of action in its absence suit is liable to be rejected. (OPD).

28. Out of the aforementioned three issues, issue No. 3 was treated as a preliminary issue which came to be decided by the learned Munsiff,

Tangmarg, which resulted in the dismissal of the suit filed by the plaintiff! While exercising its powers in terms of Order VII Rule 11, the court

below gave the following reasoning for dismissal of the suit:

The plaintiff relies on agreement which is at worst not more than a license deed which lost its validity in the year 1978, the plaintiff relies on

agreement and claim to be a lease holder on the basis of agreement and prays for relief of declaration to be lawfully possessor of suit property

without pleading in the plaint that after termination of the contract how he is a lawful possessor of the suit land. The suit of plaintiff fails on his own

fate as the plaint and documents annexed with it does not support the claim of plaintiff. The documents on which plaintiff sues and basis his claim is

contradictory to the stand taken in the plaint. Therefore, in my view the plaint is not maintainable in the present form as it does not disclose any

cause of action against the defendants on the basis of pleas taken in the plaint and I am of the view that the issue No. 3 framed in the suit that is

whether the plaintiff is having any cause of action in its absence suit is liable to be rejected (OPD)", can be tried as a preliminary issue, and I find

to no merit in the application filed by plaintiffs to lead evidence which is also

rejected.

On the basis of what has been stated above I am of the view that the plaint does not disclose any cause of action as per the pleas taken in the plaint. Therefore, the plaint is rejected. Office is directed to prepare decree sheet accordingly. The file shall be consigned to records after its due compilation.

29. In appeal before the First Additional District Judge, Baramulla, the appellate court while dismissing the appeal upheld the judgment and decree as passed by the court below, hence the present Civil Second Appeal.

30. From the aforementioned facts, what is required to be seen and determined are the following:

(a) What was the nature of the rights of the petitioner, Abdul Rashid Khan, over the land measuring 6 kanals 15 marlas on the basis of the

agreement dated 3rd of May, 1976 and whether the same was as a lessee or licensee?

(b) What is the nature of the rights of the petitioner, Abdul Rashid Khan, after the expiry of the period as reflected in the agreement dated 3rd of

May, 1976 and whether is entitled to any rights to be vested in him in terms of the J&K State Lands (Vesting of Ownership to the Occupants)

Act, 2001?

(c) Whether the civil courts committed a perversity in law in dismissing the suit and the civil first appeal filed by the appellant under Order VII Rule

11 on the ground that the plaint was not maintainable as the same did not disclose any cause of action -against the defendants?

For purposes of brevity, the petitioners in OWP No. 1570/2011 are herein per referred to as petitioner-A and in OWP Nos. 1498/2012 and

613/2012 as petitioner-B.

31. From the facts as they emerge on the basis of the pleadings and documents on record, it appears that admittedly leasehold rights in regard to

land measuring 6 Kanals 15 marlas underlying plot No. 96 situate at Gulmarg were transferred in favour of the predecessors in interest of the

petitioners A. It is also a fact that this lease came to be renewed by virtue 2SZZL order No. 547-UD of 1978 dated 28.10.1978, for a further

period of 40 years from the date of expiry of the original lease subject to payment of premium, ground rent etc.

It is also admitted that both the Government and the Gulmarg Development Authority treated the predecessors in interest of the petitioners A as

lessees in regard to the land in question.

Petitioner B came into the picture only on account of agreement dated 3rd of May, 1976. A reading of the aforementioned agreement would show

that the said petitioner was permitted to run the hotel for a period of three years from 1st May, 1976 to the end of 1978 for a consideration of

Rs 0,000/-. It is stated by the petitioner B that he came in the possession of the said premises and started running it as a hotel till 1977 when the

same was gutted in fire. The issue is whether he was a licensee in the premises or a sub-lessee.

32. The difference between lease and licence has been very succinctly dealt with by the Apex court in Associated Hotels of India Ltd. Vs. R.N.

Kapoor, .

(27) There is a marked distinction between a lease and a licence S. 105 of the Transfer of Property Act defines a lease of immovable -property

as a transfer of a right to enjoy such property made for a certain time in consideration for a price paid or promised. Under S. 108 of the said Act,

the lessee is entitled to be put in possession of the property. A lease is therefore a transfer of an interest in land. The interest transferred is called

the leasehold interest. The lessor parts with his right to enjoy the property during the term of the lease, and it follows from it that the lessee gets that

right to the exclusion of the lessor. Whereas S. 52 of the Indian Easements Act defines a licence thus:

Where one person grants to another, or to a definite number of other persons, a right to do or continue to do, in or upon the immoveable property

of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in

the property, the right is called a licence.

....

....

....

....

The following propositions may, therefore, be taken as well-established: (1) To

ascertain whether a document creates a licence or lease, the substance of the document must be preferred to the form; (2) the real test is the intention of the parties-whether they intended to create a lease or a licence; (3) if the document creates an interest in the property, it is a lease; but, if it only permits another to make use of the property, of which the legal possession continues with the owner, it is a licence; and (4) if under the document a party gets exclusive possession of the property, 'prima facie', he is considered to be a tenant; but circumstances may be established which negative the intention to create a lease. Judged by the said tests, it is not possible to hold that the document is one of licence....

33. In the aforementioned case the apex court was determining the nature of the right of the person in occupation and possession of two rooms in a hotel where he was carrying his business as a hairdresser on payment of Rs. 700/- per month.

Subsequently, an application was moved by him with a view to fix fair rent in regard to the said rooms under the provisions of Delhi and Ajmeer

Rent Control Act, 1947, before the Rent Controller, New Delhi, alleging that he was a tenant of the spaces in question.

A defense was taken by the Associated Hotels who own the hotel that the provisions of the Act did not apply to that case as, according to them, the Act did not include a room in a Dharamshala, hotel or lodging house.

34. The apex court on the basis of the document executed between the parties before it which described the same as a leave and a license

agreement came to a conclusion that in fact the possession of the occupier was not in the nature of a licensee as it put him in exclusive possession

of Two room untrammelled by the control and free from the directions of the hotel owners and accordingly, held that the document in fact created a

tenancy in favour of the occupier.

35. Testing the document executed on 3rd of May, 1976 it will be seen that the entire hotel was put in exclusive possession of the petitioner B

without there being any let or hindrance by the true owners. The said document, therefore cannot be treated to be a license as had been stated by

the court below. In fact the rights accrued in favour of the petitioner B were in the nature of a sub-lease limited for a period of three years only.

We are not going into the question, in these proceedings, whether the sub-lease

was permissible in the accordance with the original terms of the grant or the leasehold rights which came to be vested in the lessees.

36. Be that as it may, in view of the subsequent renewal of lease in favour of petitioners A in the year 1978 in regard to the entire 6 kanals 15

marlas of land from the date of expiry of the original leasee leaves no doubt in our mind that the lease stood renewed by virtue of the Government

order aforementioned in favour of the petitioners A notwithstanding the fact that there was some delay in the payment of ground rent premium etc.

This we say for the reason that there was no time limit prescribed for the renewal amounts within any prescribed time.

The argument that the petitioners A had ceased to have any right in regard to the land in question is totally bereft of substance or logic.

37. We accordingly, hold that the petitioners A continued to remain as lessees of the land in question measuring 6 kanals 15 marlas at Gulmarg and

accordingly, the official respondents are directed to receive the amounts in respect of entire 6 kanals 15 marlas of land as is chargeable either in

terms of the Government order of 1978 or any other law for the time being in force.

Writ petition (OWP) No. 1570/2011 is consequently allowed.

38. In OWP No. 1498/2011, the petitioner B seeks a mandamus directing the respondents to consider his application for ownership rights under

the J&K State Lands (Vesting of Ownership to the Occupants) Act, 2001, and prohibition prohibiting the respondents from interfering with the

smooth running of hotel City View by the petitioner.

The petitioner B, in view of specific stand of the official respondents and Section 3(b) of the Act (supra) has no such right for claiming ownership

rights more so for the reason that the said land is already a subject matter of lease in favour of petitioners A as has been decided in the paragraph

above.

This petition is, accordingly, found without merit and is dismissed.

39. OWP No. 613/2012 has been filed seeking issuance of writ of certiorari for quashing the receipt dated 17.10.2011 issued by the Gulmarg

Development Authority.

The prayer of the petitioner for grant of relief to the extent of quashing the

receipt dated 17.10.2011 issued by Gulmarg Development Authority is rejected in view of the fact that OWP No. 1570/2011 already stands allowed. However, in regard to the relief that a mandamus be issued against respondent No. 5 i.e. Director Tourism, directing him to decide his application for renewal of licence for running the hotel is concerned, the same would depend upon the finding of the trial court in the civil suit regarding the possession over the property in question. The application shall be considered by respondent No. 5 for renewal of his licence for running the hotel subject to his fulfilling the other conditions as prescribed under rules.

40. Coming to the Civil Second Appeal, it is seen from the records that the same emerges from a suit for declaration and injunction where the plaintiff sought a decree that he be declared as the legal and lawful possessor of the suit property measuring 6 kanals 15 marlas and a mandatory injunction restraining the defendants not to interfere in the subject matter of the suit.

41. We have already held in the preceding paragraphs of this judgment that the right, if any, which the plaintiff possessed was a sub-lessee. His right to remain in possession of the leased premises was limited to three years from 3rd of May, 1976 till the end of 1978. Legally speaking, the right to remain in possession ceased with effect from the date when the period prescribed in the agreement dated 3rd of May, 1976 expired. However, the plaintiff sought to protect his possession on the ground that ""they were the legal and lawful possessors of the suit property"".

42. In Maria Margarida Sequeria Fernandes and Others Vs. Erasmo Jack de Sequeria (Dead) through L. Rs., , while crystallizing the law in regard to possessions, the apex court deduced the principles in paragraph-97 as under:

97. Principles of law which emerge in this case are crystallised as under:

- (1) No one acquires title to the property if he or she was allowed to stay in the premises gratuitously. Even by long possession of years or decades such person would not acquire any right or interest in the said property.
- (2) Caretaker, watchman or servant can never acquire interest in the property irrespective of his long possession. The caretaker or servant has to give possession forthwith on demand.

(3) The courts are not justified in protecting the possession of a caretaker, servant or any person who was allowed to live in the premises for some time either as a friend, relative, caretaker or as a servant.

(4) The protection of the court can only be granted or extended to the person who has valid, subsisting rent agreement, lease agreement or licence agreement in his favour,

(5) The caretaker or agent holds property of the principal only on behalf of the principal. He acquires no right or interest whatsoever for himself in such property irrespective of his long stay or possession.

43. Be that as it may, the courts below dismissed the suit filed by the plaintiffs on the ground that the same did not disclose any cause of action.

Reliance was placed by the courts below on various apex court rulings on Order VII Rule 11 to emphasize the point that the courts should

exercise powers under Order VII Rule 11 to see whether real cause of action has been set out in the plaint or something purely illusory has been

stated with a view to bolster a frivolous claim.

44. In T. Arivandandam Vs. T.V. Satyapal and Another, , the apex court held as under:

5 We have not the slightest hesitation in condemning the petitioner for the gross abuse of the process of the court repeatedly and unrepentantly

resorted to. From the statement of the facts found in the judgment of the High Court, it is perfectly plain that the suit now pending before the First

Munsiffs Court, Bangalore, is a flagrant misuse of the mercies of the law in receiving plaints. The learned Munsiff must remember that if on a

meaningful - not formal - reading of the plaint it is manifestly vexatious, meritless, in the sense of not disclosing a clear right to sue, he should

exercise his power under Order VII Rule 11, C.P.C. taking care to see that the ground mentioned therein is fulfilled. And, if clever drafting has

mentioned therein is fulfilled. And, if clever drafting has created the illusion of a cause of action, nip it in the bud at the first hearing by examining the

party searchingly under Order X, C.P.C. An activist Judge is the answer to irresponsible law suits. The trial Courts would insist imperatively on

examining the party at the first hearing so that bogus litigation can be shot down at the earliest stage. The Penal Code is also resourceful enough to

meet such men, (Cr. XI) and must be triggered against them. In this case, the

learned Judge to his cost realized what George Bernard Shaw remarked on the assassination of Mahatma Gandhi:

It is dangerous to be too good

In *Sopan Sukhdeo Sable and Others Vs. Assistant Charity Commissioner and Others*, , a similar view has been referred.

45. The entire premise of the plaintiff rested on the plea that he was in possession and that his possession required to be protected from

interference by the defendants. The courts below dismissed the suit and appeal on the plea that the plaintiff had no right to remain in possession

after the expiry of the period prescribed in the agreement. What the courts below forgot was the fact assuming that the period prescribed in the

agreement had expired, whether the plaintiff could be put to the risk of eviction by the defendants without adopting due course of law or not. The

plaintiffs possession over the property in question may not be justified by him on the ground of title but certainly he would have a right to retain his

possession till such time as he was evicted in accordance with law. To that extent, the courts below should have examined the issue. The rights of

person who is in settled possession of a property is no longer *res-integra*.

46. In *Rame Gowda (D) by Lrs. Vs. M. Varadappa Naidu (D) by Lrs. and Another*, , the apex court held as under:

9. It is the settled possession or effective possession of a person without title which would entitled him to protect his possession even as against

the true owner. The concept of settled possession and the right of the possessor to protect his possession against the owner has come to be settled

by a catena of decisions. Illustratively, we may refer to *Munshi Ram v. Delhi Adm.*, *Puran Singh v. State of Punjab* and *Ram Rattan v. State of*

U.P. The authorities need not be multiplied. In *Munshi Ram* case it was held that no one, including the true owner, has a right to dispossess the

trespasser by force if the trespasser is in settled possession of the land and in such a case unless he is evicted in the due course of law, he is entitled

to defend his possession even against the rightful owner. But merely stray or even intermittent acts of trespass do not give such a right against the

true owner. The possession which a trespasser is entitled to defend against the rightful owner must be settled possession, extending over a

sufficiently long period of time and acquiesced to by the true owner. A casual act

of possession would not have the effect of interrupting the possession of the rightful owner. The rightful owner may re-enter and reinstate himself provided he does not use more force than is necessary.

Such entry will be viewed only as resistance to an intrusion upon his possession which has never been lost. A stray act of trespass, or a possession

which has not matured into settled possession, can be obstructed or removed by the true owner even by using necessary force. In *Puran Singh*

case the Court clarified that it is difficult to lay down any hard-and-fast rule as to when the possession of a trespasser can mature into settled

possession. The "settled possession" must be (i) effective, (ii) undisturbed, and (iii) to the knowledge of the owner or without any attempt at

concealment by the trespasser. The phrase "settled possession" does not carry any special charm or magic in it; nor is it a ritualistic formula which

can be confined in a straitjacket. An occupation of the property by a person as an agent or a servant acting at the instance of the owner will not

amount to actual physical possession. The Court laid down the following tests which may be adopted as a working rule for determining the

attributes of "settled possession":

(i) that the trespasser must be in actual physical possession of the property over a sufficiently long period;

(ii) that the possession must be to the knowledge (either express or implied) of the owner or without any attempt at concealment by the trespasser

and which contains an element of *animus possidendi*. The nature of possession of the trespasser would, however be a matter to be decided on the

facts and circumstances of each case;

(iii) the process of dispossession of the true owner by the trespasser must be complete and final and must be acquiesced to by the true owner; and

(iv) that one of the usual tests to determine the quality of settled possession, in the case of culturable land, would be whether or not the trespasser,

after having taken possession, had grown any crop. If the crop had been grown by the trespasser, then even the true owner, has no right to destroy

the crop grown by the trespasser and take forcible possession.

47. The plaintiff had material on record on the basis of which he was claiming to be in settled possession based upon the agreement executed

between the parties which entitled him to run the hotel for a period of three

years. The plaintiff also claims to have reconstructed the damaged hotel after obtaining requisite permission from the concerned quarters. The plaintiff in fact could protect his possession if not establish his title in the suit filed by him. Whether or not he actually was in possession was a fact which needed to be proved by leading evidence. However, the court below dismissed the suit only on the ground that the period prescribed in the agreement had expired and solely based upon that fact came to the conclusion that the plaint did not disclose any cause of action. The plaintiff did have a right to protect his possession till such time he is evicted in accordance with law.

48. In *Fakirbhai Bhagwandas and Another Vs. Maganlal Haribhai and Another*, , a view was taken when it was held that it was not necessary for a person claiming injunction to prove his title to the suit land. It would suffice if he proves that he was in lawful possession of the same and his possession was invaded or threatened to be invaded by a person who had no title thereof.

49. However, in *Munshi Ram and Others Vs. Delhi Administration*, , it was held that no one including the true owner had a right to dispossess the trespasser by force if the trespasser is in settled possession of the land and he is entitled to defend his possession against the true owner till he is evicted in due course of law.

50. In the present case assuming the period prescribed in the agreement had expired, if the plaintiff was in possession of the property in question, he could not have been evicted except in accordance with law and, therefore, courts below ought not to have dismissed the suit and appeal or the ground that the plaint had failed to disclose any cause of action only because the period prescribed in the agreement had expired.

51. For the purposes of this appeal, question framed in para 31(c) is treated as a substantial question of law and is answered in favour of the appellant.

52. For the reasons mentioned above, the Civil Second Appeal is allowed. The judgments and decrees impugned in the appeal are set-aside. The trial court shall proceed with the suit and decide it in accordance with law.

OWP No. 36/2007 & CMP No. 57/2007, 664/2007.

53. Notice dated 11.1.2007 issued by the Chief Executive Officer, Gulmarg Development Authority is impugned in the present petition. According

to the impugned notice, the petitioner has been asked to remove the illegal construction and to vacate the land measuring 18 marlas, belonging to

the Gulmarg Development Authority, occupied by the petitioner unauthorizedly.

54. Learned counsel for the petitioner asserts that although the land does not belong to the petitioner, yet he has a claim over the same inasmuch

not only the petitioner but his predecessors-in-interest were in possession of the said land for decades.

55. It is also urged that in the year 1970, repairs had been effected to the house built over the said land after taking proper permission from the

Notified Area Committee, Tunmarg/Gulmarg. It is further asserted that the notice dated 12.5.1970 had earlier been issued by the concerned

authority, alleging therein that the construction/repairs effected in the said house were without permission. That notice was challenged through a

regular civil suit in the court of learned City Judge, Srinagar and was decided in favour to the petitioner vide judgment and decree dated

21.5.1974 with a declaration that the plaintiff had made repairs of the house with due permission of defendant No. 1 i.e., Executive Officer,

Notified Area Committee, Gulmarg. In that context, learned counsel for the petitioner asserted that the impugned notice to the extent it asks the

petitioner to demolish the construction on the land in question was totally misconceived and illegal.

56. The petitioner also prays for issuance of a writ of mandamus commanding the respondents to regularize the possession of the petitioner as owner

of the land in question and the construction existing thereon and further to declare the petitioner as owner of the land in question under the doctrine

of prescription.

57. Objections have been filed by the respondents wherein a stand has been taken that the petitioner has illegally encroached on state land and his

possession is totally illegal and further that the construction raised by the petitioner is in violation of Gulmarg Master plan, according to which no

structures have been allowed within the inner circular road in the Gulmarg Bowl'.

58. Heard learned counsel for the parties.

59. Admittedly, the land in question does not belong to the petitioner. The

possession is nothing but unauthorized. In any case, since disputed questions of fact are involved, the issue of adverse possession cannot at all be gone into in the present writ proceedings.

60. Reference made by the petitioner to a judgment and decree dated 21.5.1974, declaring that the petitioner had effected repairs with the house over the land in question after due permission of defendant No. 1 does not legitimize the unauthorized possession of the petitioner over the land in question. The impugned notice, in fact, aims at vacation of the unauthorized occupation of the petitioner over the land in question by removal of the construction over it.

61. Another argument of the learned counsel for the petitioner was to the extent that the impugned notice was vague in as much as it did not specify

the land which is supposed to have been occupied unauthorizedly by the petitioner however, from the pleadings, it is clear that the parties are

absolutely not in any sort of confusion regarding the identification of the land in question, which falls under khasra No. 112/104/303 situate in

Gulmarg measuring approximately 18 marlas. The impugned notice cannot be quashed on that ground alone. Be that as it may, the impugned notice

does not suffer from any illegality. The petition is consequently found to be without merit and is accordingly dismissed along with connected

CMP(S), if any.