
(2021) 05 J&K CK 0041

In the Jammu And Kashmir High Court

Case No : Other Writ Petition No. 1110 Of 2017

Abdul Qayoom Khan And Others

APPELLANT

Vs

State Of J&K And Others

RESPONDENT

Date of Decision : 20-05-2021

Acts Referred:

Jammu And Kashmir Restitution Of Mortgaged Properties Act, 1976 — Section 4, 16
Constitution Of India, 1950 — Article 226

Citation : (2021) 05 J&K CK 0041

Hon'ble Judges : Javed Iqbal Wani, J

Bench : Single Bench

Advocate : M. Sultan, B. A. Dar, Afroza Hassan, J. H. Reshi

Final Decision : Dismissed

Judgement

1. In this petition petitioners on the foundation of case setup implores for the following reliefs: -

a) Certiorari, quashing the fraudulent entries in the Jamabandi as well as settlement records effected in pursuance of a vacated appellate

order of the then Presiding officer, Syed Mohammad Amin Shah, with further direction to restore the original record and names of the

petitioners in the proprietary column of the records with respect to concerning Survey No.3386/2921.

b) Mandamus, commanding the respondent State to create/constitute/notify the authority in terms of Section 4 of the Restitution of Mortgage

Properties Act to hear the suits and conduct the proceedings for disposal of the redemption of mortgage properties of land.

c) Mandamus, commanding the respondent Director Land Records to make available the necessary suit record of proceedings of a case

captioned Asmat Khan and Ors. Vs. Mst. Noor Illahi and Ors., to the authority empowered to hear and dispose of the case in the light of

Section 4 of the Restitution of Mortgage Properties Act. Or in the alternative

d) Mandamus, commanding the respondent Director Land Records to transfer the proceedings of a suit captioned Asmat Khan and Ors., Vs.

Mst. Noor Illahi and Ors., to some civil court for disposal under law.

e) Any other writ, order or direction which this Honâ??ble court may deem, fit and proper may also be passed favouring petitioners and

against the respondents, albeit not prayed for.

2. The background facts under the cover of which the petitioners claims the reliefs aforesaid are that one Ali Khan and his brother Ghulam Mohammad

Khan (predecessors in interest of the petitioners) had created a mortgage along with possession of land measuring 02 kanals and 15 marlas covered

under Survey No. 3386/2921 of revenue estate Natipora (in short land in question) in favour of the predecessors in interest of private respondents

herein (father of respondent No. 3.)

3. It is being stated that the predecessors in interest of the petitioners along with some petitioners filed a civil suit on 26.03.1969 before the court of

Additional Munsiff, Srinagar, seeking therein the redemption of the mortgage and delivery of possession of land in question which court during the trial

of the suit decided an issue of non-joinder of parties vide order dated 26.10.1974 which order came to be assailed by the predecessors in interest of

the private respondents herein through a revision petition titled as Mst. Farhat Majeed Vs. Ghulam Mohammad Khan, before this court and it is being

further stated that the said revision petition along with connected files came to be transferred by this court to a forum/tribunal in terms of order dated

19.10.1978, constituted under an enactment of 1976 known as

â??Jammu and Kashmir Restitution of Mortgage Properties Act, 1976â? ,as the said Act barred the jurisdiction of the civil courts in terms of Section

16 of the said Act, requiring the civil courts under Section 5 to transfer such suits or any other proceedings arising thereof to the tribunal created under

the said Act of 1967 exercising jurisdiction in that area under the Act.

4. It is being stated that upon receiving the transferred suit/proceedings, the tribunal, (Kashmir Division) decided the suit/proceedings while allowing

the same vide order dated 27.01.1982 directed delivery of possession of the mortgage property to the plaintiffs/petitioners.

5. It is being further stated that the said order of tribunal dated 27.01.1982 came to be challenged in an appeal by the defendant/predecessors in

interest of private respondents herein before the appellate authority constituted under the Act of 1976 which appellate authority is stated to have vide

its order dated 11.03.1985 dismissed the suit of the petitioners after setting aside the judgement of the tribunal dated 27.01.1982 while making

observation that the mortgage in question virtually is a sale.

6. It is being next stated that the order of the appellate authority dated 11.03.1985 came to be challenged in a revision petition by the

plaintiffs/petitioners before the Special Tribunal Jammu and Kashmir, which vide its order dated 15.05.1987 is stated to have accepted the said

revision petition while setting aside the order of the appellate authority dated 11.03.1985 remanding the case back to the tribunal under the Act of 1976

for fresh orders under law after affording full opportunity of being heard to both the parties.

7. It is being next stated in the petition that the record of the case was remitted back to the tribunal constituted under the Act of 1976 on 01.03.1988

by the Special tribunal where after the case came to be adjourned without conducting any proceedings thereof on 14.03.1988.

8. It s being further stated that the case thereafter came to be consigned to the records and is lying in the office of Director Land Records un-disposed.

9. It is being next stated that sufficient time has elapsed and the State respondents failed to appoint an authority for disposal of the cases under the

Act of 1976, as such, the case of the petitioners remained un-disposed even after elapse of 29 years.

10. It is being further stated that the private respondents in the meanwhile played a mischief and fraud in league with revenue authorities particularly

Tehsildar Chadoora, who is stated to have acted in pursuance of appellate court's judgement dated 11.03.1985 which judgement had been

reversed by the Special tribunal in the revision petition vide order dated 15.05.1987 and got the mortgage property reflected as property under sale

with the name of Abdul Majeed and as such, effected correction of the records

and appropriated the property rights of the petitioners therein the land in question.

11. It is being next stated that the predecessors in interest of the petitioners have expired and that the petitioners after approaching the official respondents moved from pillar to post for appointment of an authority under the Act 1976, but without yielding any substantial results necessitating the petitioners to file the instant petition for redressal of their grievances while seeking a direction against the State respondents to constitute, appoint and notify the authority/tribunal in terms of Act 1976, who shall address the issue of the petitioners and dispose of the case pending in the records of the Director Land Records respondent No. 3 herein.

12. Per contra, respondent No. 3 and respondents 4 to 6 have filed objections in opposition to the writ petition.

13. Respondent No. 3 in the objections has in explicit terms stated that no such case file as stated in the writ petition by the petitioners is available in the office but same is lying in the office of Settlement Officer (Consolidation) Kashmir. The said post of Settlement Officer (Consolidation) Kashmir is stated to be lying vacant and is being held presently by Assistant Commissioner, Revenue, Srinagar. It is being stated that the answering respondent is not a necessary part in the writ petition, as such, the petition is liable to be dismissed.

14. Respondents 4 to 6 in their objections filed in opposition to the writ petition have resisted and controverted the contentions raised by the petitioners in the petition while admitting that the mortgage deed executed by the predecessors in interest of the petitioners in favour of predecessors in interest of the answering respondents in essence is a sale deed and denying to have manipulated any records pertaining to land in question otherwise than in accordance with law. The contention of filing of suit for redemption of mortgage by the predecessors in interest of petitioners is being also admitted as also its transfer to the tribunal upon coming into being of the Act of 1976. It is also admitted in the objections that the order dated 27.01.1982 passed by the tribunal in the suit came to be challenged by their predecessors in interest before appellate authority which authority vide its order dated 11.03.1985 set aside the order of the tribunal vide dated 27.01.1982 while dismissing the suit holding mortgage deed as virtual sale thus not amenable

to restitution.

15. It is being further stated that the answering respondents are not aware about the revision petition stated to have been filed before the Special Tribunal by the predecessors in interest of the petitioners as also the order passed therein remanding case back to the tribunal for fresh disposal in accordance with law.

16. It is being next stated that petitioners have deserted the proceedings before the forum constituted under the Act of 1976, and did not either approach this court or any other forum for around 29 years for agitating their grievances without placing anything on record or showing as to why after 30 years the instant petition has been filed before this court.

17. It is being further stated that entries in the revenue records have been entered into in their favour qua the land in question strictly in accordance with law and without any manipulation.

18. Heard learned counsel for the parties and considered the matter.

19. Learned counsel for the petitioners while making his submissions in line with the pleadings prays for the relief as claimed in the petition, whereas, counsel for the respondents sought dismissal of the petition primarily and fundamentally on account of unexplained delay and laches. Further, counsel for the respondent No. 3 would contend that during the pendency of the instant petition, petitioners have filed a suit on 16.03.2021 for decree of redemption of land being subject matter of the writ petition wherein the accompanying application for interim relief an interim order of status-quo with respect to the subject matter of the suit has been ordered vide order dated 16.03.2021. The said contention of learned counsel for the respondent No.3 has not been denied by learned counsel for the petitioners. A copy of the suit and interim order supra has been produced by learned counsel for the respondent Nos. 4 to 6 in compliance to order of this court dated 03.05.2021 after the instant case was reserved for orders.

20. Having regard to the controversy involved in the petition coupled with the submissions made by counsel for the respondents 4 to 6 the moot question that would beg consideration of this court will be as to whether exercise of extraordinary jurisdiction/discretionary power under Article 226 of the Constitution is warranted.

21. Before advertng to the said question it would be appropriate to refer to the scope of Article 226 of the Constitution.

Article 226 of the Constitution confers extraordinary jurisdiction on the High Courts to issue high prerogative writs for enforcement; (a) of any of the

rights conferred by part third and; (b) for any other purpose. Under the first part a writ may be issued under the Article 226 of the Constitution only

after a decision that the aggrieved party has a fundamental right and that it has been infringed, whereas, under the second part it may be issued only

after a finding that the aggrieved party has a legal right which entitles him to any of the writs enshrined under Article 226 and that such right has been

infringed. This extraordinary jurisdiction under Article 226 is discretionary and has been held to be exercised along recognized lines subject to certain

self imposed limitations including the one where there is negligence or omission on the part of the petitioner to assert his right in conjunction of the

lapse of time for which there is no satisfactory explanation.

In regard to above a reference to the judgement of the Apex court would be relevant and germane herein passed in case titled as â??Shiv Das Vs.

Union of India and Others reported in 2007 (9) SCC 274â??, wherein at para 6, 7, and 8, it has noticed and observed as under: -

â??6. Normally, in the case of belated approach writ petition has to be dismissed. Delay or laches is one of the factors to be borne in mind

by the High courts when they exercise their discretionary powers under Article 226 of the Constitution of India. In an appropriate case the

High court may refuse to invoke its extraordinary powers if there is such negligence or omission on the part of the applicant to assert his

right as taken in conjunction with the lapse of time and other circumstances, causes prejudice to the opposite party. Even where

fundamental right is involved the matter is still within the discretion of the Court as pointed out in Durga Prashad V. Chief Controller of

Imports and Exports (1969) 1 SCC 185. Of course, the discretion has to be exercised judicially and reasonably.â??

â??7. What was stated in this regard by sir Barnes Peacock in Lindsay Petroleum Co. V. Proser Armstrong Hurd. PC at P.239 was

approved by this court in Moon Mills Ltd. V. MR. Meher and Maharashtra SRTC V. Balwant Regular Motor Service. Sir Barnes had stated:

Now the doctrine of laches in courts of equity is not an arbitrary or technical doctrine. Where it would be practically unjust to give a

remedy either because the party has, by his conduct done that which might fairly be regarded as equivalent to a waiver of it, or where by

his conduct and neglect he has though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be

reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But

in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting

to a bar by any statute of limitation, the validity of that defence must be tried upon principles substantially equitable. Two circumstances

always important in such cases are, the length of the delay and the nature of the acts done during the interval which might affect either

party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.

8. It was stated in *State of M.P.V Nandlal Jaiswal* that the High court in exercise of its discretion does not ordinarily assist the tardy

and the indolent or the acquiescent and the lethargic. If there is inordinate delay on the part of the petitioner and such delay is not

satisfactorily explained, the High court may decline to intervene and grant relief in exercise of its writ jurisdiction. It was stated that this

rule is premised on a number of factors. The High court does not ordinarily permit a belated resort to the extraordinary remedy because it is

likely to cause confusion and public inconvenience and bring in its train new injustices, and if writ jurisdiction is exercised after

unreasonable delay, it may have the effect of inflicting not only hardship and inconvenience but also injustice on third parties. It was

pointed out that when writ jurisdiction is invoked, unexplained delay coupled with the creation of third party rights in the meantime, is an

important factor which also weighs with the High court in deciding whether or not to exercise such jurisdiction.

22. Looking at the merits of the case, indisputably the order of the appellate forum dated 11.03.1985, passed in the appeal filed by the predecessors in

interest of the respondents against the order of the tribunal dated 27.01.1982, set aside the same holding the mortgage as a virtual sale.

The said order of the appellate forum according to the petitioners had been questioned before the Special tribunal by their predecessors in interest and the Special tribunal according to the petitioners set aside the said order of the appellate forum vide order dated 15.05.1987 remanding the case back to the tribunal constituted under the Act of 1976 for passing of fresh orders.

According to the petitioners the said tribunal received the case/proceedings on 01.03.1985 and thereafter adjourned the case for further proceedings

on 09.03.1988, 14.03.1988 and 22.04.1988. No further record of proceedings has been either mentioned or placed on record by the petitioners.

Ironically the petitioners seem to have abandoned the proceedings consciously and knowingly and instead filed the instant petition before this court. No

explanation whatsoever has been offered in the instant petition by the petitioners as to what steps and measures did they take in retrieving the said

record of the suit/proceedings either from the office of respondent No. 3 wherein the record is alleged to have been consigned to, or from any other

office. This deliberate negligence and omission on the part of the petitioners is writ large without there being any sort of explanation or cause much

less a sufficient or plausible one offered by them. The writ petition thus prima-facie is found to be hopelessly barred by laches and delay.

23. Next the petitioners withheld the information from this court about filing of the civil suit supra relating to the resumption of land in question on

16.03.2021 before the court of Additional District Judge, Srinagar, wherein an interim order of status-quo has been passed by the said court. Though

the concealment of the said important material fact would otherwise disentitle the petitioners to any discretionary relief as prayed in the petition, yet

the petition in hand is held to be not maintainable and liable to be dismissed on the question of unexplained delay and laches. Accordingly, writ petition

is dismissed along with all connected application.