

(2020) 07 J&K CK 0085

In the Jammu And Kashmir High Court

Case No : Other Writ Petition No. 2524 Of 2018, Civil Miscellaneous No. 1855, 2701, 2933, 2934 Of 2020, IA No. 1 Of 2018, CCP(S) No. 476 Of 2019

Chaggar Singh And Others

APPELLANT

Vs

State Of J&K And Others

RESPONDENT

Date of Decision : 07-07-2020

Acts Referred:

Jammu and Kashmir Tenancy Act, 1980 — Section 67
Jammu and Kashmir Land Revenue Act, 1996 — Section 133
Constitution Of India, 1950 — Article 226

Citation : (2020) 07 J&K CK 0085

Hon'ble Judges : Vinod Chatterji Koul, J

Bench : Single Bench

Advocate : Rahul Pant, S.S.Nanda, H.A.Siddiqui

Final Decision : Dismissed

Judgement

Vinod Chatterji Koul, J

1. Petitioners seek a direction to respondents not to interfere in their possession over the land measuring 20 Kanals 10 Marlas falling under Khasra no.21 situated in Village Chak Riju Tehsil and District Kathua. Petitioners also seek a direction to respondents to grant proprietary rights in their favour vis-à-vis aforesaid land in accordance with Ellan no.17 dated 27 Badhon 1984 (BK).

2. The case set up by petitioners in writ petition on hand is that predecessors-in-interest of petitioners, namely, Khuslu, Maigu and Phatu had been granted rights as occupancy-tenants in the State land prior to coming into force of J&K Tenancy Act Svt. 1980, falling under Khasra nos.10, 22, 13, 12, 21, 23 and 23/1, situated at Village Chak Riju Tehsil and District Kathua. The occupancy-tenants were holding the aforesaid rights as co-sharers and there was no partition of land. Petitioners 1&2 as well as Late Jarnail Singh were three brothers as successors-in-interest of occupancy tenant-Khuslu and insofar petitioner no.3 is concerned, he is also successor-in-interest of Late Khuslu being son of Late brother of

petitioners 1&2, namely, Late Jarnail Singh and that petitioner no.4 is also successor-in-interest of Khuslu and petitioner no.5 is successor-in-interest of Phatu and petitioners 6&7 are successors-in-interest of occupant tenant-Maigu. It is maintained by petitioners that after settlement operations in the year 1979-1980 (BK) [1923-24] i.e., new settlement operations, Khasra numbers of the land, in which predecessors-in-interest of petitioners had been awarded the occupancy tenancy rights were changed to different numbers. The predecessors-in-interest of petitioners had been granted occupancy rights by the Maharajas, i.e. the Ruler of the State prior to coming into force of J&K Tenancy Act Svt. 1980, and therefore, they were Grade-A Class-I occupancy tenants and the rights of occupancy tenants were duly protected and inheritable as per the law of Succession in terms of Section 67 of J&K Tenancy Act Svt. 1980. It is also averred by petitioners that in the year 1973 (BK) when a canal was to be constructed and land was required for construction of Canal by Irrigation Department of J&K, the occupancy rights of predecessors-in-interest of petitioners were cancelled to the extent of 20 Kanals 10 Marlas of land by the then Tehsildar Kathua vide Mutation No.32 dated 17 Kartik 1973 (BK). It is further stated that even total land measuring 21 Kanals 15 Marlas, whereabouts occupancy tenancy rights were cancelled, the land measuring 20 Kanals 10 Marlas was belonging to their predecessors-in-interest and rest of land measuring 01 Kanal 05 Marlas belonged to a different occupancy tenant. Petitioners claim that although their predecessors-in-interest had been granted occupancy rights, yet cancellation of occupancy rights was subject to payment of compensation to them by Revenue Department. However, no such compensation was ever paid and, in the interregnum, Canal was constructed in the land in question. It is also mentioned in writ petition that when in the year 1979-80(BK) settlement operations were conducted in the erstwhile State of Jammu and Kashmir about 42 Kanals 03 Marlas of land, which had purportedly been acquired for construction of Canal, was shown as State land under occupation of Irrigation Department and it was reflected as if same had been purchased, but no such purchase had taken place nor the land had been acquired by paying compensation to occupancy tenants. Petitioners state that in the year 1955 a new Canal was constructed and old location was abandoned by the State and therefore occupancy tenants who had been deprived of their rights subject to payment of compensation and who had not been paid compensation, again got in possession of their land in the year 1955 itself and that predecessors-in-interest of petitioners were occupants of the land after the land was abandoned by Irrigation Department and so has been shown in revenue records. Nevertheless, petitioners, as claimed by them in writ petition on hand, are being harassed by respondents, forcing them to move instant writ petition.

3. Objections have been filed by respondents 1 to 3. They insist that petitioners cannot claim proprietary rights over subject-matter of land under Ailan 17 dated 27 Badhoon 1984 BK inasmuch as the said Ailan does not cover their case at all. Another objection raised by respondents 1 to 3 is that disputed questions have

been raised in writ petition which cannot be gone into through writ proceedings. It is also insisted by respondents that as per the record annexed with writ petition, land under Survey no.21 measuring 42 Kanals 03 Marlas is recorded as State land in ownership column and in cultivation column, Department of Irrigation/ Canal is recorded as in cultivating possession upto the extent of 13 Kanals 01 Marla. Respondents claim that revenue entry seems to have been manipulated somewhere in the year 1995, so as to show petitioners as unauthorized occupants in respect of small pieces of land and that even petitioners are not in actual and physical possession of Land falling under Survey no.21. Respondents maintain that unauthorized occupation cannot denude the State to assert its title over the land and utilize it in accordance with law. The land measuring 03 Kanals in Survey no.21 is stated to have been allotted to Drug and Food Control Organization for construction of Modern Drug and Food Laboratory and that possession of land being vacant on spot, was delivered to the Department concerned on 26th September 2019. It is averred that petitioners have no locus to file writ petition and seek proprietary rights in the State land. Respondents contend that cancellation of rights was never subject to any compensation and petitioners cannot seek compensation of the land as the persons, whose occupancy rights were cancelled 70 years ago, never agitated the issue for long 70 years. Respondents vehemently claim that petitioners are not in possession of the land as the same when allotted to Drug and Food Control Organisation was vacant on spot and possession thereof was delivered to the said Organisation, which fenced it, but same was damaged by petitioner, which was followed by a communication no.ADC/K/220199-20/579 dated 22nd August 2019 to Incharge Police Post Hatli Morh, Kathua, as a result whereof FIR has been lodged by competent authority. It is asserted that neither provisions of Section 133 of Land Revenue Act apply to instant case nor provisions of Ailan no.17 and similarly provisions of Big Landed State Abolition Act or J&K Agrarian Reforms Act do not apply to the instant case.

4. Respondent no.4, who, on his motion, has been latterly impleaded as party respondent, has in his reply echoed respondents 1 to 3. Respondent no.4 maintains land under Survey no.21 of Village Chak Riju Tehsil and District Kathua measuring 42 Kanals 03 Marlas is a state land recorded in the ownership of the State. Out of aforesaid land, under column of cultivation the land measuring 29 Kanals 02 Marlas is shown as Warhal Awal and 13 Kanals 01 Marla as Ghair Mumkin Nehar. According to respondent, from the entry of 2018, it is clear that aforesaid land is State land and is under occupation of Department of Irrigation/ Canal. In support of his submission, respondent no.4 has appended with his objections copy of Khasra Girdawari 2018 to demonstrate that land in question being in occupation of Irrigation/ Canal Department. Respondent no.4 also contends that land measuring 13 Kanals was vacant on spot; and out of which, land measuring 03 Kanals was transferred for public purpose, viz. establishing of a modern Drug and Food Testing Laboratory at Kathua.

5. I have heard learned counsel for parties and considered the matter.

6. Petitioners claim that their predecessors-in-interest had been in possession of land in question. Petitioners admit that land in question had been acquired by the Government of Jammu and Kashmir and Canal was constructed thereover, which, however, was abandoned and, therefore, their predecessors again occupied it. Respondents strenuously rebut petitioners' claim. Respondents maintain that petitioners are not in possession of land in question. Respondents even allege that revenue record has been manipulated in the year 1995. Submissions and counter-submissions of parties give rise to disputed questions of fact, which require thorough trial and adducing of evidence to adjudicate upon and square off the rights of the parties. Such practice is unavailable in writ proceedings.

7. It may not be incongruous to mention here that a very important facet of the Indian Constitution is the jurisdiction it confers on the High Courts to issue writs. The writs have been among great safeguards provided by the British Judicial System for upholding the rights and liberties of the people. It was an act of great wisdom and foresight on the part of the Constitution-makers to introduce the writ-system in India and, therefore, constitute the High Courts into guardians of the people's legal rights. It is a public law remedy. The High Court, while exercising its power of judicial review, does not act as an appellate body. It is concerned with illegality, irrationality and procedural impropriety of an order passed by the State or a statutory authority. In a writ petition, theoretically, the High Court has jurisdiction determining questions, both of fact and law, but, usually, the Court is reluctant to go into question of fact, requiring oral evidence for determination thereof. The attitude of the courts is that questions of fact are determined by an ordinary civil suit after adducing evidence and not by/in a writ petition inasmuch as writ jurisdiction is, in essence, supervisory and not appellate jurisdiction. In the present case, petitioners claim possession over land in question whereas respondents maintain petitioners not being in possession thereof. In such circumstances, questions of fact are to be determined, which can be undertaken when evidence is adduced by the parties. Determination of question of fact, requiring oral evidence is enshrined and available by an ordinary civil suit and not in writ proceedings. My above adages are fortified by the decisions rendered in *D.L.F. Housing Construction v. Delhi Municipality* AIR 1976 SC 386; *Union of India v. Bata India Ltd* AIR 1994 SC 921; *M/s Padmavathi Constructions v. The A.P. Industrial Infrastructure Corp. Ltd* AIR 1997 AP 1; and *Goa v. Leukoplast (India) Ltd* AIR 1997 SC 1875; and *Grid Corpn. of Orissa Ltd. v. Timudu Oram* (2005) 6 SCC 156.

8. Petitioners, in the case in hand, seek adjudication and determination of questions of fact, which they could have done by institution of an ordinary civil suit, in which they could have adduced evidence. This Court in writ jurisdiction, cannot go into question of fact that requires oral evidence for determination. Ordinarily, therefore, a writ is not issued to determine questions relating to immovable property, its kind/type or for that matter its title or ownership or possession. The reason is that this may involve determination of questions of fact and such questions are best decided in a civil suit because questions of fact

cannot be decided without evidence, both oral or documentary. In that view of matter, it would be patent and grave error to scan evidence or to reappraise evidence and arrive at a finding of fact. [See: State of U.P. v. Chemtreat Chemical (2002) 10 SCC 593; Director of Entry Tax v. Sunrise Timber Company (2008) 15 SCC 287; and Mahesh Chandra Gupta v. U.O.I. (2009) 8 SCC 273].

9. It is well settled law that a Court of law is a Court of equity and in granting relief under Article 226, the Courts will bear in mind the conduct of the party who invokes the jurisdiction. This principle emanates from the very nature of the power of interference under Article 226 of the Constitution of India, i.e. a discretionary jurisdiction. The attempt of the Supreme Court is prefaced by saying that there is no definition of 'material facts' in the Code of Civil Procedure nor in any statute, which come before the courts. But the Supreme Court in a series of judgements has laid down that all facts necessary to formulate a complete cause of action should be termed as "material facts". All basic and primary facts, which must be proved by a party to establish the existence of cause of action or defence are material facts. According to the dictionary meaning, 'material' means 'fundamental', 'vital', 'basic', 'cardinal', 'central', 'crucial', 'decisive', 'essential', 'pivotal', 'indispensable', 'elementary' or 'primary'. [Burton's Legal Thesaurus, (Third Edn.); p.349]. The phrase 'material facts', therefore, may be said to be those facts upon which a party relies for his claim or defence. In other words, 'material facts' are facts upon which the party's cause of action or defence depends. 'Material facts' in other words mean the entire bundle of facts which would constitute a complete cause of action. Non-disclosure of full facts or suppression of relevant materials or otherwise misleading the Court would disentitle a party to any relief. In the present case, petitioners have come up with half-truth. The facts and submissions made in writ petition on hand have been strenuously rebutted by respondents. To rebut the documents/ revenue papers, relied upon by petitioners, respondents have also placed on record documents/revenue papers, to show that documents/ revenue papers, placed on record and relied upon by petitioners, are manipulated. As a result whereof and in the above backdrop, contentious and triable questions and issues come forth for adjudication, such as: whether the documents/revenue papers, relied upon by petitioners, confer any right upon petitioners; whether the documents/revenue papers relied upon by petitioners are admissible in law, particularly when respondents allege them as manipulated; whether petitioners had been in continuous and uninterrupted actual and physical possession of land in question, particularly when respondents dispute petitioners' possession over land in question; whether petitioners had been in possession of land when Canal was constructed; whether Canal was constructed and left abandoned and whether petitioners had been in cultivating possession of the said abandoned land over which Canal was constructed; whether predecessors-in-interest of petitioners had been in actual and physical possession of land in question; whether petitioners have proved beyond any doubt their genealogy with the persons, who

are stated to have been in possession of land in question; whether petitioners have proved beyond any doubt their locus vis-à-vis subject matter of the case; whether Ailan No.17 dated 27 Badhoon 1984 BK, applies to the case of petitioners; whether Land Revenue Act applies to case of petitioners; whether Land Agrarian Reforms Act applies to the case of petitioners; whether J&K Tenancy Act Svt. 1980 applies to the case of petitioners; whether petitioners are entitled to any relief solicited for by them. All these questions and issues need thorough investigation, adducing of evidence, examination of witnesses to be produced by parties in support of their respective pleadings.

10. In view of above, it is ingeminated at the cost of repetition, that jurisdiction of the High Court under Article 226 of the Constitution is couched in wide terms and exercise thereof is not subject to any restrictions except territorial restrictions as expressly provided in the Articles. But exercise of jurisdiction is discretionary: it is not exercised merely because it is lawful to do so. The very amplitude of jurisdiction demands that it will ordinarily be exercised subject to certain self-imposed limitations. Resort that jurisdiction is not intended as an alternative remedy for relief which may be obtained in a suit or other mode prescribed by statute. Ordinarily, the Court will not entertain a petition for a writ under Article 226, where petitioner has an alternative remedy, which, without being unduly onerous, provides an equally efficacious remedy. Again, the High Court does not generally enter upon determination of questions that demand an elaborate examination of evidence to establish right to enforce which the writ is claimed. Where it is open to aggrieved petitioner to move another tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not permit by entertaining a petition under Article 226 of the Constitution; machinery created under the statute to be bypassed, and will leave the party applying to it to seek resort to the machinery so set up.

11. The object of Article 226 of the Constitution of India is to provide a quick and inexpensive remedy to aggrieved parties. Power has consequently been vested in the High Courts to issue to any person or authority, including in appropriate cases any government, within the jurisdiction of the High Court, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warrant and certiorari. It is plain that if the procedure of a suit had also to be adhered to in the case of writ petitions, the entire purpose of having a quick and inexpensive remedy would be defeated. A writ petition under Article 226 it needs to be emphasized, is essentially different from a suit and it would be incorrect to assimilate and incorporate the procedure of a suit into the proceedings of a petition under Article 226. The High Court is not deprived of its jurisdiction to entertain a petition under Article 226 merely because in considering the petitioner's right of relief, questions of fact may fall to be determined. In a petition under Article 226 the High Court has jurisdiction to try issues both of fact and law. Exercise of the jurisdiction is no doubt discretionary, but the discretion must be exercised on sound judicial principles. When the petition raises complex

questions of fact, which may for their determination require oral evidence to be taken, and on that account the High Court is of the view that the dispute should not appropriately be tried in a writ petition, the High Court may decline to try a petition [See: *Gunwant Kaur v. Bhatinda Municipality* (1969) 3 SCC 769].

12. Exercise of jurisdiction is, it is true, discretionary, but discretion must be exercised on sound judicial principles. When a petition raises questions of fact of a complex nature, which may for their determination require oral evidence to be taken, and on that account the High Court is of the view that the dispute may not appropriately be tried in a writ petition, the High Court may decline to try a petition. Rejection of a petition in limine will normally be justified, where the High Court is of the view that the petition is frivolous or because of the nature of the claim made, dispute sought to be agitated, or that petition against the party, against whom relief is claimed, is not maintainable or that the dispute raised thereby is such that it would be inappropriate to try it in writ jurisdiction, or for analogous reasons. [Vide: *New Satgram Engineering Workers v. Union of India*, AIR 1981 SC 124; *Himmat Singh v. State of Haryana* (2006) SCC 256; *New Okhla Industrial Development Authority v. Kendriya Karamchari Sahkari Grith Nirman Samiti* (2006) 9 SCC 524; *Food Corporation of India v. Harmesh Chand*, (2007) 7 MLJ 687; *Roshina T. v. Abdul Azeez K.T*, AIR 2019 SC 659]

13. Disputed question relating to title cannot be satisfactorily gone into or adjudicated in a writ petition, has been so held by the Supreme Court in *State of Rajasthan v. Bhawani Singh and others*, 1992 AIR SC 1018. In *State of Orissa v. Ramachandra Dev and another*, AIR 1964 SC 685, the Supreme Court held that in issuing writ, the High Court failed to appreciate legal effect of its conclusion that questions of title cannot be tried in writ proceedings. Once it is held that the question of title cannot be determined, it follows that no right can be postulated on the basis of which a writ can be issued under Article 226. Again the Supreme Court in *R. P. Murlidharan v. Swami Dharmananda Theertha Padar*, (2006) 4 SCC 501, had held that jurisdiction under Article 226 would remain effective and meaningful only when it is exercised prudently and in appropriate situation and that a writ of mandamus cannot be sought for, especially when determination of questions involved did not merely involve interpretation of documents alone, but require adducing of oral evidence, and in such circumstances writ proceedings cannot be a substituted for a civil suit.

14. In the decisions rendered in *State of Orissa v. Madan Gopal Rungta*, AIR 1952 SC 12; *Sohan Lal v. The Union of India*; AIR 1957 SC 529; *Bokaro and Ramgur Ltd v. The State of Bihar*, AIR 1963 SC 516; *State of Orissa v. Ramachandra Dev and another*, AIR 1964 SC 685; *Joseph Pothan v. State of Kerala*, AIR 1965 SC 1514; *Arya Vyasa Sabha and Others v. Commissioner of Hindu Charitable and Religious Institutions & Endowments, Hyderabad and Others*, AIR 1976 SC 475; *State of Rajasthan v. Bhawani Singh and others*, AIR 1992 SC 1018; *State Bank of India and others v. State Bank of India Canteen Employees' Union and others*, (1998) 5 SCC 74; *Chairman, Grid Corporation of*

Orissa Ltd (GRIDCO) and others v. Sukamani Das (Smt.) and another (1999) 7 SCC 298; Steel Authority of India Ltd v. National Union Waterfront Workers (2001) 7 SCC 1; Rourkela Shramik Sangh v. Steel Authority of India Ltd and another (2003) 4 SCC 317; S.D.O. Grid Corporation of Orissa Ltd v TimuduOram, 2005 (5) CTC 695 (SC); Himmant Singh v. State of Haryana and others, (2006) 9 SCC 256, the Supreme Court held that where dispute revolves round questions of fact, the matter ought not to be entertained under Article 226 of the Constitution and parties can approach the appropriate forum.

15. The Supreme Court in Punjab National Bank v. Atmanand Singh 2020 SCC Online SC 433, while setting-aside the judgements of both the learned Division Bench and Single Bench of the High Court of Judicature of Patna, has made it clear that when a petition raises questions of fact of complex nature, which may for their determination require oral and documentary evidence to be produced and proved by concerned party, the High Court should be loath in entertaining such writ petition and instead must relegate the parties to remedy of a civil suit and had it been a case where material facts referred to in the writ petition are admitted facts or indisputable facts, the High Court may be justified in examining claim of writ petitioner on its own merits in accordance with law. However, the High Court cannot allow its constitutional jurisdiction to be used for deciding disputes, for which remedies under general law, civil or criminal are available. Writ jurisdiction is not intended to replace ordinary remedies by way of a civil suit inasmuch as jurisdiction under Article 226 being special and extraordinary, it should not be exercised casually or lightly on mere asking by the litigant. In the present case, respondents seriously dispute the facts and submissions made by petitioners in writ petition on hand. In that situation, no factual finding could be recorded without consideration of evidence to be adduced by parties and it is not, therefore, an appropriate case in which this Court would exercise its writs jurisdiction. As a corollary thereof, it would be appropriate for petitioners to avail appropriate remedy by approaching the Civil/ Revenue Court for adjudication of the matter.

16. For all what has been discussed and stated above, writ petition is devoid of any merit and is, accordingly, dismissed along with connected CM(s) and contempt petition, if any, pending shall stand closed.

17. Interim direction, if any, shall stand vacated.

18. Nevertheless, petitioners are free to avail of remedy by approaching the civil court for determination of their rights, if so advised.