

(2019) 04 J&K CK 0103

In the Jammu And Kashmir High Court

Case No : Others Writ Petition (OWP) No. 71 Of 2017, IA No. 01, 02, 03 Of 2017

Chander Udhey Singh & Ors

APPELLANT

Vs

Sarika & Ors

RESPONDENT

Date of Decision : 16-04-2019

Acts Referred:

Constitution Of Jammu And Kashmir, 1956 — Section 103, 104
Code Of Criminal Procedure, 1973 — Section 133, 435
Jammu And Kashmir Agrarian Reforms Act, 1976 — Section 31
Jammu And Kashmir Panchayati Raj Rules, 1996 — Rule 155
Constitution Of India, 1950 — Article 226

Citation : (2019) 04 J&K CK 0103

Hon'ble Judges : Sindhu Sharma, J

Bench : Single Bench

Advocate : O.P.Thakur, Rahul Pant

Final Decision : Dismissed

Judgement

1. Petitioners are permanent residents of village Arazi, Tehsil Samba, whereas respondent Nos. 1 to 4 are the residents of village Mandi Dansal, Tehsil and District, Samba. Both the villages, according to the petitioners, are contiguous to each other, separated by Samba-Sumb link road, the width of which is not more than 15 feet.

2. The case of the petitioners is that respondent Nos. 1 to 4 are claiming to have purchased land comprising Khasra No. 90/84 min measuring 11 kanals and 18 marlas situated in village Mandi Dansal, Tehsil and District Samba, which is opposite to their homes and forty other residents of Arazi. Agricultural land, which according to them, cannot be converted to commercial use but respondent Nos. 1 to 4, being rich and influential persons, have started construction of a multistoried building without seeking permission.

3. On being approached by the petitioners and others, respondent No.9 told them that the building will be used for establishing an English Medium School,

but subsequently the petitioners became suspicious looking into the nature of construction. After enquiry, the petitioners came to know that the respondents are building a commercial complex including a Banquet Hall. The petitioners along with 29 other persons complained to the Deputy Commissioner, Samba and submitted an application before him on 27.03.2017 for getting the construction work stopped. He was assured that the Banquet Hall would not be allowed to be raised but no action was initiated to stop the construction. The petitioners and other residents of the village Arazi started agitation against the unauthorized construction thereafter respondent No.5 stayed the construction of Banquet Hall vide order dated 20.05.2017. It is also stated that the order was passed on the complaints/representation of the petitioners.

4. Order dated 20.05.2017 passed by the Deputy Commissioner, Samba was challenged by the respondents by filing a revision in the court of learned Sessions Judge, Samba, who stayed the operation of the said order vide his order dated 22.05.2017.

5. Aggrieved of the order dated 22.05.2017 passed by the learned Sessions Judge, the petitioners have approached this Court seeking following reliefs:

"i) that the court in exercise of powers under Section 104 of the Constitution of the Jammu and Kashmir issue an appropriate direction or order quashing order dated 22.05.2017 passed by the Sessions Judge, Samba in criminal Revision Petition File No. 4/Rev titled Smt. Sarika and others Vs Assistant Commissioner (Revenue), Samba whereby the order No. DCS/SQ/1718/353-56 dated 20.05.2017 passed by respondent No.5 has been stayed;

ii) that the court in exercise of powers under Article 226 of the Constitution of India read with section 103 of the Constitution of Jammu and Kashmir issue writ, direction or order commanding respondent Nos. 4 to 7 to implement order dated 20.05.2017 by respondent No.5; and

iii) further issue a writ of mandamus and prohibition restraining the respondent Nos. 1 to 4 and 9 from raising the construction of the building, Banquet Hall etc. on the land measuring 11 kanals and 18 marlas comprising under Khasra No. 90/84-min situated at village Mandi Dansal Tehsil Samba with a further direction to respondent Nos. 5 to 8 to get the unauthorized building demolished."

6. Petitioners have further stated respondent No.1 is the daughter of respondent Nos. 4 and 9, respondent No. 4 is the wife of respondent No.9, respondent Nos. 2 & 3 are the daughter-in-laws of respondent No.9. The construction is being raised by respondent Nos. 1 to 4 through respondent No. 9.

7. The ground of challenge in para (20) of the petition are summarized as under:

"a) that order dated 20.05.2017 passed by respondent No.5 cannot be said to be an order passed under Section 133 Cr.P.C and, therefore, the revision cannot be entertained.

b) that order dated 20.05.2017 was issued because the construction was raised without permission of the Competent Authority, as such, Section 435 Cr.P.C was not applicable and the order impugned is without jurisdiction as the construction was being done without obtaining the permission from the Block Development Officer or the Assistant Deputy Commissioner, Samba as per Circular No. DCS/31 of 2016 dated 19.09.2016.

c) that the construction was being made without getting NOC from the Power Development Department and Public Health Engineering Department, as such, Criminal Revision was not maintainable.

d) that the construction was also in violation of order of the court dated 02.06.2015 passed in WPIL No. 25/2014 directing the Divisional Commissioner, Jammu and the Deputy Commissioner of Jammu Province to ensure that agricultural land is used only for agricultural purpose.

e) that the Deputy Commissioner issued directions being head of the District under single line administration and has the authority to ensure that law is enforced in letter and spirit within the District.

f) that the construction of the Banquet Hall is being made unauthorizedly in a populated area which is not permissible."

8. In the counter filed on behalf of respondent Nos. 1 to 4 and 9, the respondent Nos. 1 to 4 and 9 have denied any wrong doing because they being owners in possession of the land measuring 11 kanals and 18 marlas falling under Khasra No. 90 in Khewat No. 13 Khata No. 32 min submitted a site plan of the building to Halqa Panchyat in terms of Rule 155 of the Panchyati Raj Rules, 1996. The Halqa Panchyat verified their ownership and the fact that the land was outside the Municipal Committee, Samba. The file was submitted to the Block Development Officer, Samba where it remained pending for one year. Since the Block Development Officer was to grant permission within thirty days, therefore, it was deemed permission under law. Regarding jurisdiction of learned Sessions Court, Samba and exercise of revision under Section 435 Cr.P.C, it is stated that noise pollution is a nuisance, therefore, order dated 20.05.2017 is one under Section 133 Cr.P.C. Alleged traffic hazard could also be a nuisance, therefore, revision under Section 435 Cr.P.C was rightly entertained. Respondent Nos. 1 to 4 are owners of land measuring 04 kanals comprised in Khasra No. 90/84-min having purchased the same vide two Sale Deeds dated 23.02.2010 registered in the court of Sub-Registrar, Samba on the same date and land measuring 03 kanals and 18 marlas vide Sale Deed dated 16.07.2010 registered by the Sub-Registrar, Samba on the same date as they are the owners of land measuring 11 kanals and 18 marlas comprising in Khasra No. 90/84-min situated at village Mandi Dansal, Tehsil Samba.

9. Private respondents have pleaded that the distance between the building and the village Arazi was not less than 1 KM, besides Arazi is a different revenue village and there is a resolution of inhabitants of village Mandi Dansal, Tehsil

Samba.

10. Since the building falls outside the municipal limits, therefore, it is a Panchyat Halqa which has rightly accorded the permission for construction of building.

11. Heard learned counsel for the parties.

12. The first contention of Mr. Thakur is that the learned Sessions Judge has passed the order without jurisdiction because Section 133 Cr.P.C is not attracted to the facts of the case. This submission is countered by Mr. Pant appearing for the private respondents that the very first objection contained in the order passed by the Deputy Commissioner is that the Banquet Hall is likely to cause noise pollution, which itself is a nuisance.

13. Mr. Pant has also referred to the application (Annexure A) to the petition submitted to respondent No.5 on 27.03.2017 along with other respondents. Para (3) of which is being relevant is extracted below for ready reference:

"That the Banquet Hall DJ is also used to be played during performing of various functions in Banquet Hall that too in loud noise as such the same will also cause pollution/nuisance in the area which will also effect the study of school going children of the area."

14. This allegation has been referred in the impugned order by the Deputy Commissioner and, therefore, it cannot be said that the order passed by the learned Sessions Judge is without jurisdiction. However, whether the stay order ought to have been granted or refused is a different matter. About this, Mr. Thakur submits that it tantamount to a final order. However, it is now admitted case of the petitioner that the building has been completed by the private respondents and even the counsel for the respondents submits that only a part of the flooring is left. It is the case of the petitioners that they allowed the building to be constructed because respondent no.9 has told them that an English Medium School is being established. It is also the case of the petitioner that the multistoried building is being constructed as per the site plan. They complained only when they came to know that the building is a Banquet Hall and much time was allowed to be passed from 27.03.2017 to the date the Deputy Commissioner is said to have passed the order i.e. 20.05.2017. It is misnomer to call it an order of the Deputy Commissioner because it is signed by only Waseem Raja, Assistant Commissioner (Rev), Samba but since the order states that ?By the order of the Deputy Commissioner, Samba?, therefore, assumption is that Mr. Raja has passed the direction under the orders of respondent No.5 which is unusual.

15. However, when so much time has been taken to stay the construction, the Deputy Commissioner should have either personally inspected the site of construction and issued commission to find out the stage of construction and it was nearing completion then interim stay would be quite justified, because a

multistoried building cannot be completed overnight as the order was stayed on 20.05.2017 and thereafter the order of stay of the learned Sessions Judge dated 22.05.2017 was stayed by this Court only on 31.05.2017. This court directed that no further construction shall be made. If the argument of Mr. Thakur is to be accepted then whole construction should have been completed within less than ten days which is impossible. It was next argued by Mr. Thakur that construction has been made in violation of Circular dated 19.09.2016 issued by the Deputy Commissioner making it mandatory for obtaining permission from the Block Development Officer and Assistant Commissioner (Revenue).

16. As per Circular dated 19.09.2016, the Deputy Commissioner had directed that there should be no violation of the provisions under the Agrarian Reforms Act, Land Revenue Act, Land Alienation Act etc. Apparently, there is no violation of any provisions of Agrarian Reforms Act, 1976 because the rest of the directions from 02.02.2010 do not apply to the facts of the case because the land on which the construction is raised is recorded as Banjar Kadeem which means it has not been cultivated since time immemorial.

17. Since there is no violation of sale of land by the owner in terms of Section 31 of the Agrarian Reforms Act, which prohibits transfer of land, has been deleted since 1997.

18. Mr. Thakur, however, referred to Circular issued by the Revenue Department during the period there was a prohibition against the transfer of land under Section 31 of the Agrarian Reforms Act but after its deletion since the circulars have not been withdrawn, the patwaries while issuing copies do refer to these, but they have no legal validity after Section 31 was deleted. So the argument, the owners could not have sold the land more than 04 kanals of land have no substance in view of the deletion of Section 31 of the Act. Mr. Thakur next referred to the prohibition containing the alienation of land Act but this also have no substance in it because the limit of 04 kanals of land applies only to transfer of land in favour of non-agriculturalists. There is no such plea in the ground for respondent Nos. 1 to 4 of non-agriculturalists in the absence of which this argument is not tenable. Learned counsel for the petitioner also argued that the construction of building is in violation of the directions issued by this Court in WPPIL No. 25/2014. The question is whether the directions are applicable to the facts of the case. To appreciate this, reference to the relevant part of the directions have been quoted as under:

"In order to arrest the tendency of unauthorizedly converting agricultural land to non agricultural use and in order to fully ensure that agricultural land is protected and preserved at this state we direct Divisional Commissioner, Jammu and all Deputy Commissioners of Jammu Division to ensure that agricultural land is used only for agricultural purpose and not for any other purpose. We direct these authorities to take all necessary steps in accordance with law for enforcing provisions of law and ensure that the agricultural land is preserved and protected. The violation of provisions of the Land Revenue Act by any person

shall be reported to this Court besides action shall be taken against the competent statutory authority. These authorities to file Status Report. Registry to serve copy of this order to the Divisional Commissioner, Jammu for implementation of the order."

19. This direction is only in respect of unauthorized construction of agricultural land but without any reference to the Agrarian Reforms Act. Since the land measuring 11 kanals and 18 marlas comprised in Khasra No. 90/84 on which the construction is being raised is Banjar Kadeem since time immemorial, as such, no conversion of agricultural land is involved, thus, the land is not covered by the directions of this Court.

20. Therefore, neither Circular dated 19.09.2016 issued by the Deputy Commissioner, Samba nor the directions of this Court have been violated, as such, there is no infirmity in the order passed by the learned Sessions Judge, Samba. This petition is, accordingly, dismissed.

21. Parties are directed to appear before the learned Sessions Judge, Samba on 14.05.2019.