

(2023) 01 J&K CK 0001
In the Jammu And Kashmir High Court
Case No : Writ Petition (C) No. 2610 Of 2022

Fayaz Ahmad Rather

APPELLANT

Vs

Union Territory Of J And K And Ors

RESPONDENT

Date of Decision : 11-01-2023

Acts Referred:

Constitution Of India, 1950 — Article 226
Code Of Civil Procedure, 1908 — Section 151

Citation : (2023) 01 J&K CK 0001

Hon'ble Judges : Moksha Khajuria Kazmi, J

Bench : Single Bench

Advocate : F. A. Bhat, Jahangir Iqbal Ganai, Ruqaiya Siddique, Bilal Ahmad Ganai

Final Decision : Dismissed

Judgement

Moksha Khajuria Kazmi, J

1. In this petition, the petitioner has assailed an order bearing No. DCK/Reader/2022-23/201 dated 12.11.2022 passed by the District Magistrate, Kulgam pursuant to which Tehsildar, Kulgam, has been directed to proceed on spot and evict the petitioner from the land under survey Nos. 748, 749 and 752 situated at Rani Pura, Sangas, Kulgam. Petitioner has also sought direction upon the respondents to allow the petitioner to keep hold of the suit property consisting of three storied residential house and chunk of land situated at Rani Pura Kulgam.

BRIEF FACTS OF THE CASE

2. This petition has a chequered history, prior to the filing of the present writ petition, petitioner had filed a suit before the Court of Munsiff, Kulgam wherein he had challenged the deed of Power of Attorney executed by respondent No. 11 and the Agreement to Sell executed by him in favour of the private respondents. Along with the suit, the petitioner had also filed an application for grant of temporary injunction against the defendants/respondents restraining them from

interfering with the suit property. On 9.11.2011, notices were directed to be issued to the non- applicants/defendants and in the meantime, parties were directed to maintain status quo with respect to the suit property till further orders. The application was finally considered on merits after hearing both the parties and the application was dismissed vide order dated 04.08.2012.

"With these observations in my opinion plaintiff/applicant has failed to make out a case for grant of temporary injunction as none of the principles sine-quo-non for grant of temporary injunction are in favour of the applicant/plaintiff as the applicant has failed to make out prima facie case in his favour nor the balance of convenience tilts in his favour.

With these observations, the application for the grant of temporary injunction is rejected and the status-quo order dated 09.11.2012 is vacated. However, this order shall have no bearing on the ultimate result of the suit. The application is accordingly disposed of and shall form part of main file."

3. The petitioner herein, being aggrieved of the order dated 04.08.2012 filed a civil miscellaneous appeal before Court of District Judge, Kulgam. The appeal was considered and was dismissed on 27.12.2012.

"Therefore, in view of the aforesaid discussion the appeal filed by the appellant has no merit and the same is accordingly dismissed and the interim order passed on 7.8.2012 is vacated. The record of the trial Court be sent back along with copy of this judgment with the direction to the parties to appear before the Court below on 28.01.2013. The record of the appeal be consigned to records".

4. The petitioner filed another suit before Munsiff, Kulgam thereby challenging the sale deed executed between respondent Nos. 8 to 10 and respondent No. 11. Along with the suit, an application for grant of interim relief of temporary injunction was also filed seeking stay of the sale deed and an order of restrain against defendants/non-applicants (respondent Nos. 8 to 10), from causing any interference with the suit property. The application was considered by the court of Munsiff, Kulgam, and on consideration, the application for seeking temporary injunction was dismissed on 12.02.2016.

"For the reasons stated and discussed above, I am more than certain that the applicant/plaintiff has failed to establish any of the ingredients of famous triple test referred and discussed above and nor has established any other grounds to entitle him for the prayer sought in the instant application. As such the application merits dismissal and is accordingly dismissed. Be made part of the file for compliance. Any order passed on the instant application shall stand modified and effected by this dismissal. Anything said or written in this order shall not have any bearing over the merits of case, and it shall remain confine to the disposal of instant application only."

5. The petitioner thereafter preferred a civil miscellaneous appeal against order dated 12.02.2016 wherein no order was passed in favour of the petitioner and

the same is still pending before the Court of Principal District Judge, Kulgam.

6. From the perusal of the case projected by the petitioner in the suit filed, would indicate that the claim of the property has basis to the affidavit and the agreement purportedly to have been executed by the respondent No. 11 and the petitioner. The land falling under survey Nos. 748 (01 Kanal and 01 Marla), 749 (05 Marlas) and 752 (06 Marlas) along with double storied house situated at Rani Pura, Kulgam has been purchased by respondent Nos. 8 to 10. The respondent No. 11, filed an application seeking permission to alienate the property in accordance with the provisions of J & K Migrant Immovable Property (Preservation, Protection, and Restrain) on Distress Sales Act, 1997, before the competent authority i.e. Divisional Commissioner, Kashmir. Vide Order No. 1283 DIVK of 2010 dated 03.04.2010, the Divisional Commissioner, Kashmir granted permission to the alienation of the proprietary rights, for the land along with double storied house in favour of respondent Nos. 8 to 10. Pursuant to the permission, a sale deed was executed and was registered before the competent authority. The land has been mutated in favour of respondent Nos. 8 to 10 vide Mutation No. 3418 dated 22.12.2011.

7. An application was filed by the respondent Nos. 8 to 10, before Deputy Commissioner, Kulgam requesting therein to ensure that no illegal interference is caused by the petitioner with respect to their property. The petitioner was evicted from the said land. The petitioner again resorted to illegal occupation which resulted in filing of another application by private respondents and on consideration of the application, report was sought from the concerned Tehsildar, who in terms of report dated 17.11.2021 informed the Deputy Commissioner, Kulgam about the petitioner having failed to produce any legal, authentic document in support of his claim, and also that he had resorted to illegal occupation once again and thereto necessary orders were sought for his eviction. On consideration of the report dated 17.11.2021, the Deputy Commissioner, Kulgam, vide communication dated 19.04.2022, directed Tehsildar Kulgam to proceed further in the matter and take appropriate action under rules/law in vogue, under an intimation to his office. The petitioner failed to produce any such document which constrained official respondents to issue impugned order dated 12.11.2022.

8. Learned counsel for the petitioner has stated in this petition that petitioner has purchased three storeyed residential house and chunk of land under and appurtenant to it, measuring 1 Kanal 12 marlas under survey Nos. 748(1K-1M), 749(5M), 752(6M) along with the shamilat land measuring seven Marlas situated at Rani Pura, Kulgam in the year 2007-2010, in terms of an agreement arrived in the year 1988, with the actual owner for an amount of Rs.16 lakh, out of which he has received an amount of Rs. 10 lac only and he has executed an affidavit reflecting the fact about the possession delivered to the petitioner.

9. Learned counsel for the petitioner has further stated that the erstwhile owner has alienated the property in question in favour of the respondent Nos. 8 to 10 in

connivance with each other and through attorney have executed a sale deed on 19.12.2011 despite status quo order passed by the Hon'ble Court of Munsiff, wherein a suit for cancellation of Power of Attorney and Sale Agreement was challenged, executed by the actual owner of the property in favour of the respondent Nos. 8 to 10, fraudulently and without any knowledge or consent of the petitioner which has worked against the interest of petitioner, of which he is aggrieved and has filed a separate plaint for cancellation of the said instrument, which is pending disposal before the civil court. Learned counsel for the petitioner submits that the impugned order has been passed in ex parte as the petitioner has not been afforded the reasonable opportunity of being heard before passing of the impugned order which goes to the root of the case and the proceedings conducted by Tehsildar and other revenue officials including District Magistrate concerned are as such void ab initio and against the basic principles of natural justice. It is further submitted that no case of encroachment was made out against the petitioner as alleged by the official respondents but despite that on personal grudge and vengeance with the private respondents, the respondents have passed the impugned order without taking into account the documents of the petitioner in terms of which he is holding the possession of the suit property; that the act of the respondents is misuse of their powers as without hearing him and without assigning any good reason not even a immoral or a bad reason he is being thrown out of his property, which he is keeping hold from decades together very peacefully and without any sense of insecurity and without any interruption of the respondents.

10. This court on 23.11.2022 allowed the application filed by the petitioner in compliance of the order dated 21.11.2022 for impleadment of the migrant namely Shri Triloki Nath Panditta as respondent No. 11 and upon consideration of the matter, this Court ordered as under:-

"Meanwhile, subject to objections and till next date, the operation of the impugned communication/order dated 12.11.2022 insofar as it pertains to the petitioner shall remain on hold meaning thereby that the petitioner shall be deemed to be in possession of the property if the petitioner have had been in possession thereof on the date of passing of the impugned order."

11. The respondent Nos. 8 to 10 preferred an appeal against interim order passed by the Writ Court on 23.11.2022, which was disposed of at the threshold without going into the merits of the case, with a direction to the Writ Court to consider the interim application on the same day, before the Single Bench. The learned Single Bench directed the writ petition to be listed for consideration/disposal on 27.12.2022.

12. Mr. Jahangir Iqbal Ganai, learned senior counsel appearing for respondent Nos. 8 to 10, has filed comprehensive reply and has vehemently argued that the petitioner has not approached this court with clean hands and has suppressed the material facts. He has placed on record all the orders passed by Court of Munsiff, Kulgam, including the dismissal of the applications for interim relief as

well as of appeal filed by the petitioner. He has further stated that despite the fact that the petitioner had knowledge of his claim having been rejected by the competent court; the petitioner has approached this court on same facts and has deliberately suppressed the orders passed by the civil courts, on the same set of claim.

13. Learned counsel for the official respondents, Mr. F. A. Bhat has also reiterated the arguments raised by learned senior counsel for respondent Nos. 8 to 10. Mr. F. A. Bhat, learned AAG has also produced record which strengthens the reply filed by private respondents. He has argued that petitioner has intentionally suppressed the material facts and has placed twisted facts, as such he is not in law entitled to be heard on merits of the case. He has also stated that petitioner was given number of opportunities to prove his claim with regard to the said property but he has failed to prove his claim before the competent authority. Mr. Bilal Ahmad Ganai, Tehsildar, Kulgam who was also present in the court authenticated that petitioner as per record was called 11 times but he failed to prove his claim.

14. Heard learned counsels for the parties and perused the record.

15. The learned counsels for the respondents have raised a preliminary objection with respect to the maintainability of the instant petition on the ground of deliberate suppression of material facts by the petitioner. The learned counsel for respondent Nos. 8 to 10 has stated that a person who invokes the jurisdiction of a court under Article 226 of the Constitution of India is duty-bound to place all the facts before the court without any reservation. If there is suppression of material facts or twisted facts have been placed before the court, the petition on this ground alone is liable to be dismissed. The petitioner in law is not entitled to be heard on merits of the case, and the petition on this ground alone is liable to be dismissed.

16. Admittedly, petitioner in his writ petition in para b at page 6 has stated that status quo order was passed by the Court of Munsif Kulgam in favour of the petitioner. But he has nowhere stated that the status quo order granted by the Court of Munsiff, Kulgam on 09.11.2011 was vacated after hearing all the parties to the lis with a detailed order on 04.08.2012. Petitioner has also suppressed the fact that he had challenged the order of dismissal dated 04.08.2012. The order of dismissal was also challenged by way of civil miscellaneous appeal before the Court of Principal District Judge, Kulgam, which was also dismissed on 27.12.2012. Though the petitioner has stated that he had filed subsequent suit challenging the sale deed registered in favour of the private respondents, but he has again suppressed the fact that that the application for grant of interim relief of temporary injunction was also dismissed by the Court of Munsiff, Kulgam on 12.06.2016, and subsequently he had challenged that dismissal by way of filing civil miscellaneous appeal which was filed before Court of District Judge, Kulgam and the same is also pending.

17. Petitioner in this petition has mentioned in para D of the petition that communication bearing no. DCK/Reader/2021-22/35 dated 19.04.2022 was not pressed by the respondents because the petitioner had submitted all the documents of his right to hold the property. Moreover, the petitioner has stated that an ex-parte order has been passed without affording him any reasonable opportunity of being heard. He has also stated that no case of encroachment was made out against the petitioner but despite that on personal grudge and vengeance with private respondents the impugned order has been passed without taking into account the documents of the petitioner in terms of which he was holding the position of the suit property.

18. From the perusal of the record submitted by the official respondents, it transpires that the order dated 19.04.2022 was served upon the petitioner and petitioner had also filed an application in terms of section 151 of CPC for recalling of the said order. Tehsildar Kulgam, Mr. Bilal Ahmad Ganai, who was present in the court along with the record stated at Bar that petitioner was given 11 number of opportunities as per record to produce any legal, authentic documents in support of his claim but he failed to produce any such document which constrained them to issue impugned order dated 12.11.2022. It is borne out from the record of the official respondents and the other allied documents placed on record by the private respondents that not only the petitioner but the learned counsel for the petitioner, Mr. Peer Shafeeq Ahmad, undoubtedly had complete knowledge of the facts enumerated above. Mr. Peer Shafeeq Ahmad, Advocate, is representing the cause of the petitioner since 2011. He is the counsel for the petitioner before the court of learned Munsiff, Kulgam as well as before District Judge, Kulgam, as such this is beyond any imagination that the learned counsel and the petitioner has inadvertently not mentioned these facts before this court. Mr. Peer Shafeeq Ahmed, learned counsel for the petitioner during arguments not only admitted pendency of the suits and an appeal but also the dismissal of applications and an appeal filed by the petitioner. He also admitted the factum of an application having been filed by the petitioner pursuant to communication dated 19.04.2022 issued by Deputy Commissioner, Kulgam for recalling of the same, whereas in petition he has stated that he had submitted all the requisite documents. But he insisted that these are not the material facts. Petitioner as well as his counsel have admittedly concealed material particulars in order to gain advantage over the other side and also to seek appropriate relief by concealing and suppressing material facts as such are guilty of misleading this court.

19. Mr. Jahangir Iqbal Ganai, learned senior counsel appearing for private respondent Nos. 8 to 10, in support of his contentions, has relied upon various judgments passed by the Hon'ble Supreme Court and Hon'ble High Court of J&K reported as (i) 2021 SCC online SC 1194 (ii) 2013(2) JKJ 264 [HC], (iii) 2007 (8) SCC 449, (iv) 2011 7 SCC 69, (v) 2013 2 SCC 398 (para 32.1- 32.6) which are reproduced hereinbelow:-

20. In case titled K. Jayaram and Others vs. Bangalore Development Authority and others, reported as 2021 SCC online SC 1194, Honb'le Apex Court, while dealing with the similar matter, in para Nos. 16 & 17 has held as under:-

16. It is necessary for us to state here that in order to check multiplicity of proceedings pertaining to the same subject-matter and more importantly to stop the menace of soliciting inconsistent orders through different judicial forums by suppressing material facts either by remaining silent or by making misleading statements in the pleadings in order to escape the liability of making a false statement, we are of the view that the parties have to disclose the details of all legal proceedings and litigations either past or present concerning any part of the subject-matter of dispute which is within their knowledge. In case, according to the parties to the dispute, no legal proceedings or court litigations was or is pending, they have to mandatorily state so in their pleadings in order to resolve the dispute between the parties in accordance with law.

17. In the instant case, since the appellants have not disclosed the filing of the suit and its dismissal and also the dismissal of the appeal against the judgment of the civil court, the appellants have to be non-suited on the ground of suppression of material facts. They have not come to the court with clean hands and they have also abused the process of law. Therefore, they are not entitled for the extraordinary, equitable and discretionary relief.

21. In case titled A.S.C.O.M.S &Anr. vs. Sanna Mir, reported as 2013(2) JKJ 264 [HC], Honb'le High Court of Jammu and Kashmir, while passing the judgment, in para No. 10 has held as under:-

10. A perusal of the aforesaid principle of law would clearly bring out that the party mis-representing facts before the Court with the object of securing interim relief would be rendered disentitled to opportunity of hearing the matter on merit. Once the Tribunal has found that the interim order was secured by the appellant by practicing misrepresentation then no option is left with the Tribunal to non-suit the appellant on principle and precedent. It is established beyond doubt that such fraudulent misrepresentation has no place in the judicial administration. There is no substantial question of law within the meaning of Section 35G of the Act, which may warrant admission of the appeal.

22. In case titled Prestige Lights Ltd. vs. State Bank of India reported as 2007 (8) SCC 449, Hon'ble Supreme Court in para Nos. 33, 34 & 35 has held as:-

33. "It is thus clear that though the appellant- Company had approached the High Court under Article 226 of the Constitution, it had not candidly stated all the facts to the Court. The High Court is exercising discretionary and extraordinary jurisdiction under Article 226 of the Constitution. Over and above, a Court of Law is also a Court of Equity. It is, therefore, of utmost necessity that when a party approaches a High Court, he must place all the facts before the Court without any reservation. If there is suppression of material facts on the part of the applicant or twisted facts have been placed before the Court, the Writ Court may

refuse to entertain the petition and dismiss it without entering into merits of the matter.”

34. “The object underlying the above principle has been succinctly stated by Scrutton, L.J., in *R v. Kensington Income Tax Commissioners*, [(1917) 1 KB 486 : 86 LJ KB 257 : 116 LT 136], in the following words: "(I)t has been for many years the rule of the Court, and one which it is of the greatest importance to maintain, that when an applicant comes to the Court to obtain relief on an ex parte statement he should make a full and fair disclosure of all the material facts, not law. He must not misstate the law if he can help it the Court is supposed to know the law. But it knows nothing about the facts, and the applicant must state fully and fairly the facts, and the penalty by which the Court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the Court will set aside, any action which it has taken on the faith of the imperfect statement". (emphasis supplied)

35. It is well settled that a prerogative remedy is not a matter of course. In exercising extraordinary power, therefore, a Writ Court will indeed bear in mind the conduct of the party who is invoking such jurisdiction. If the applicant does not disclose full facts or suppresses relevant materials or is otherwise guilty of misleading the Court, the Court may dismiss the action without adjudicating the matter. The rule has been evolved in larger public interest to deter unscrupulous litigants from abusing the process of Court by deceiving it. The very basis of the writ jurisdiction rests in disclosure of true, complete and correct facts. If the material facts are not candidly stated or are suppressed or are distorted, the very functioning of the writ courts would become impossible.”

23. In case titled *Amar Singh v. Union of India* reported as 2011 7 SCC 69, while dealing with the similar matter, certain observations were made by the Hon’ble Apex Court, Para Nos. 50, 53 & 62 being relevant are taken note of hereinbelow:-

50. This Court wants to make it clear that an action at law is not a game of chess. A litigant who comes to Court and invokes its writ jurisdiction must come with clean hands. He cannot prevaricate and take inconsistent positions.

53. Courts have, over the centuries, frowned upon litigants who, with intent to deceive and mislead the courts, initiated proceedings without full disclosure of facts. Courts held that such litigants have come with "unclean hands" and are not entitled to be heard on the merits of their case.

62. This Court, therefore, dismisses the writ petition and vacates the interim order and is not called upon to decide the merits, if any, of the petitioner's case. No case of tapping of telephone has been made out against the statutory authorities in view of the criminal case which is going on and especially in view of the petitioner's stand that he is satisfied with the investigation in that case.

24. In case titled *Kishore Samrite v. State of Uttar Pradesh and Others* reported as 2013 2 SCC 398, Hon’ble Supreme Court, in para Nos. 32.1 & 32.6 has held

as under:-

32.1 Courts have, over the centuries, frowned upon litigants who, with intent to deceive and mislead the Courts, initiated proceedings without full disclosure of facts and came to the courts with 'unclean hands'. Courts have held that such litigants are neither entitled to be heard on the merits of the case nor entitled to any relief.

32.6 The Court must ensure that its process is not abused and in order to prevent abuse of the process the court, it would be justified even in insisting on furnishing of security and in cases of serious abuse, the Court would be duty bound to impose heavy costs.

25. On the other hand, learned counsel for the petitioner, in support of his submissions has relied upon the various judgments passed by this Court and also by the Hon'ble Supreme Court reported as (i) AIR 1982 J&K 141, (ii) AIR 1961 J&K 82, (iii) 1972 0 AIR (J&K) 125, (iv) 2001 Legal Eagle SC 692.

26. From what is being discussed above, it is a clear case of suppression of material facts. Petitioner has patently made a false statement on oath. The jurisdiction exercised by this Court under Article 226 of the Constitution of India is extraordinary, equitable and discretionary and it is imperative that the petitioner approaching the writ court must come with clean hands and put forward all facts before the court without concealing or suppressing anything. Not only the petitioner but his counsel Mr. Peer Shafeeq Ahmed has also intentionally concealed the material facts to this court and this court passed interim order without having any knowledge of misrepresentation of the petitioner. Though counsel for the petitioner is also responsible for professional misconduct but this court only warns him to be very careful in future. Needless to mention here that the judgments cited by the learned counsel for the petitioner are not relevant to the facts of the case in hand.

27. In view of the above, this petition is dismissed as not maintainable. The conduct depicted by the petitioner as also his counsel is deplorable. The court records it very distastefully that the counsel appearing before this Court, despite having represented the petitioners throughout, has concealed the material particulars from the court to gain an undue advantage over the other side so as to obtain the favourable orders from the court of law. In the circumstances, therefore, the petitioner is burdened with a cost of Rs. 100,000/- (one lac) to be deposited in the Lawyers Welfare Fund within a period of one month.

28. Record be returned to Mr. F. A. Bhat, learned AAG appearing for the official respondents through Bench Secretary of this Court with due dispatch and against proper receipt.