

(2007) 11 J&K CK 0005
In the Jammu And Kashmir High Court

Ghulam Hassan Wani

APPELLANT

Vs

State and Others

RESPONDENT

Date of Decision : 03-11-2007

Acts Referred:

Citation : (2008) 1 JKJ 523

Hon'ble Judges : Bashir. A. Kirmani, J

Bench : Single Bench

Judgement

Bashir A. Kirmani, J.—On 31.12.2003 petitioner herein filed a civil suit before Munsiff, Kupwara pleading that with official approval, he

had set up a fair price medical shop within premises of Sub-District Hospital, Tangdhar and alleging that defendants besides withholding regular

allotment of space to him were also intending to auction the site for opening of a new shop prayed for issuance of a decree to have himself

declared entitled to the allotment along with injunctive relief for having respondents prohibited from conducting auction/opening of tenders if

received. In their written statement, defendants while objecting to maintainability of suit also pleaded that the site had been put to auction under a

government order where under plaintiff also submitted his tenders and having occupied the shop under reference without proper allotment, he had

no cause to agitate against its regular allotment and accordingly sought dismissal of the suit. With that factual conflict the concerned Muinsiff initially

directed defendants not to put the shop under reference to auction and confirmed the same vide order dated: 8.7.2004 directing them not to

interfere with fair price medical shop of petitioner/plaintiff and restraining auctioning of any portion of the land appurtenant thereto, for

establishment of any other fair price medical shop. This order appears to have been challenged by one Sonullah, respondent No. 5 herein before

Pr. District Judge, Kupwara in a Misc. Appeal, who under appellate order of 27.9.2006 set aside Munsiff's order dated 8.7.2004 leaving

defendants at liberty to recommence the process of auction of medical shop under reference and also directed consideration of appellant's

application for impleadment in the suit.

2. It is this order that is impugned in this revision petition by petitioner/plaintiff on the ground that after allotment of space within hospital premises

he himself constructed the structure of shop and was running the same since 2004 as a licensee of defendant/respondents in terms of the rent

agreement where under he is required to pay a monthly ground rent of Rs. 150/- to defendants which he is doing due to which the shop could not

be put to auction and as such the learned District Judge erred in setting aside the injunction order passed by learned Munsif and as such failed to

examine his jurisdiction properly particularly because the appeal had been preferred by a stranger to the suit who had no right or interest in the

matter except having offered his bid during tendering process which did not cloth him with any actionable claim. Respondents have not filed any

rejoinder and during course of submissions while petitioner's counsel besides elucidating the grounds urged in memo of petition contended that in

view of the licence deed executed by official respondents in petitioner's favour, the site of the medical shop could not be put to auction because in

case the same is allotted to some other person he would be non suited which would badly affect his legal rights under the licence deed particularly

because auction of the shop by respondents would not per se terminate the licence. In reply learned Counsel for respondent No. 5 while submitting

that petitioner has tried to project a case in the revision petition, different from the one set up in his plaint before trial court which as such was not

maintainable especially because he had also participated in the bid which disentitles him from challenging the process of auction. The counsel for

official respondents had added that since no formal allotment had been ordered in petitioner's favour he had no cause to agitate against proposed

auction of the shop under reference.

3. I have heard learned Counsel and considered the matter. Perusal of trial court

file reveals that on 26.6.2003 the petitioner/plaintiff applied to the then Health Minister for permission to run the fair price medical shop in Sub-District Hospital, Tangdhar who marked it to the BMO with an endorsement ""allow the applicant under rules"". However, it is not clear as to what was the action taken by BMO, but under a communication dated 18.7.2003 Tehsildar of Karnah appears to have written to Director, Health services Kashmir for allowing petitioner to run a fair price medical shop in Sub-District Hospital complex. Previous to that SHOP/S Tangdhar also informed Director Health Services that he would have no objection if petitioner was allowed to establish the fair price shop as already recommenced by Health Minister. This in sequence appears to have been followed by an auction notice issued by CMO, Kupwara under his communication No. 4006-09 dated 15.12.2003 seeking bids from retail drug licence holders for space/shops available within premises of Government hospitals of many stations including Sub-District Hospital, Tangdhar and asking for deposit of CDRs of different valuations for different stations the same being Rs. 1.00 lac for Tangdhar hospital with a stipulation that allotment would be for a period of two years only etc. The date of auction, however, appears to have been extended up to 26.12.2003 vide CMO's communication No. CMOK/4667-71 dated: 19.12.2003. Meanwhile, before concerned Minister's endorsement on petitioner's application as already mentioned, the concerned MLA, Karnah who also appears to have been a Minister of State for some department had also recommended his case to concerned BMO who appears to have taken up the matter with Director, Health Services under his No. Estt/268 dated 18.6.2003 recommending petitioner's case for permission to run the medical shop within hospital premises.

At the same time, however, the trial court file or the records as such do not contain any material to indicate that petitioner/plaintiff was ever allotted any parcel of land for construction of the shop. On the other hand, perusal of materials available on appeal file reveal that under his fact report submitted to concerned CMO, the BMO vide his No. Estt/327 dated: 27.3.2004 appears to have informed that he had ""no way but to allow the plaintiff to run the fair price medical shop in the premises of Sub-District Hospital, Tangdhar especially because the shop was constructed by the

plaintiff on his own expenses which was mainly the public interest so he was bound to order and allowed him to run the said medical shop with effect from 13.2.2004 purely in the public and state interest"". Thus even without a formal order land allotment concerned BMO allowed the petitioner to run fair price medical shop ""because the same had been constructed by him"" within the hospital premises. The BMO has, however, not mentioned anything to suggest as to whether or not the construction had been made with his permission or the petitioner had done it on his own. The communication clearly reveals that concerned CMO of the District had no information about construction of the shop, under reference by petitioner or commissioning of fair price shop therein. The whole matter as such appears to have been restricted to petitioner and concerned BMO without authentication of any of the higher authorities. During course of submissions petitioners counsel has, however furnished photo copy of a document stated to be a rent deed reportedly executed by petitioner/plaintiff and BMC), Tangdhar after construction of the shop by petitioner under BMO's Order No. 1295-98 dated: 13.2.2004.

4. With that circumstantial backdrop comes the government Order No. 2-HME of 2004 dated 1.1.2004 where under ""in order to streamline the policy of allotment of fair price shops and effect transparency in the system"" it was decided that existing shop in health and medical education department would be allotted through open auction duly publicized, which was followed by the auction notice already mentioned where under concerned CMO appear to have sought tenders from interested parties and in response whereto some persons including the petitioner and respondent No. 5 appear to have entered the bids but the whole process was arrested half way by the injunctive order passed the Munsiff, as aforesaid with the result that tenders could not be opened for further follow up action. It would be appropriate to notice at this stage that in temporary injunction order the concerned Munsiff while observing that petitioner had voluntarily come forward to establish the medical shop under reference and constructed the structure, investing huge amount, also opined that petitioner had strong prima-facie case and a prior right to run the fair price Medical shop. The order, however, does not contain anything to suggest as to on what basis did the concerned Munsiff find that

petitioner had a strong prima-facie case for forbidding official respondents from opening the tenders and directing that no portion of the land

appurtenant to Sub-District Hospital concerned be allowed to be used for establishment of any other medical shop. It is quite curious that the trial

court file does not contain the rent deed copy whereof has been filed by petitioner's counsel during these proceedings nor does the memo of plaint

contain any averment regarding its existence nor as a matter of fact has the petitioner anywhere pleaded in the suit that he was holding the premises

as a tenant or was paying any rent in lieu thereof. As a matter of fact his total case before the trial court has been that he was entitled to regular

allotment of the site in view of the recommendations made in his favour by Minister, MLA and some other officials, which, however, did not find

favour with the learned District Judge who while opining that petitioner/plaintiff did not have a prima-facie case allowed the appeal and set aside

the order of interim injunction after condonation of delay in filing the appeal with an observation that being a proper party the appellant/respondent

No. 5 had a right to challenge the Munsiffs order. Perusal of appeal file reveals existence of some more documents, the first one being an order

purporting to have been passed by concerned BMO of Karnah under No. Estt/486-496 dated: 8.9.2005 where under while referring to Health

Minister's above mentioned endorsement dated: 1.9.2005 he ordered that in ""augmentation and continuation of order No. Est/1195-98 for running

of fair price shop at Sub-District Hospital, Tangdhar"" the petitioner was allowed to continue fair price medical shop ""as he has a legal right because

of his service provided in very odd/difficult times"". Among others he has endorsed a copy of the said order to Pr. District Judge, Kupwara also for

information. In addition thereto are a few certificates issued by one Mehboob Illahi, Public Notary, Ghulam Hassan, sarpanch of village Hallon,

Tangdhar and concerned BMO certifying petitioner's efficiency in running the drug store under reference.

5. Before proceedings ahead, however, a brief reference to the materials which have come on record after institution of the suit way back in

March, 2003 would be appropriate to put the matter in proper jacket. The concerned BMO's fact report which he has sent to CMO in response

to his and Director's, queries one of which shown to have been dated: 27.2.2004 which appears to be loaded with its own quote of peculiar

features requiring a mention. First, that it does not make any mention of the order purported to have been issued by BMO under his No. 1195-98

dated: 13.2.2004 as aforementioned where under he as also the petitioner claim the permission to have been accorded to him for running the

medical shop which to say the least appears to be quite curious, as BMO was apprising his higher authorities about the fact situation of the case.

Further the reference therein to Director's letter No. Legal/Kup-107/1701-02 dated: 27.2.2004 amply suggests that even till that date the

director of health department had no intimation of the order purporting to have been passed by BMO on 13.2.2004 which in case it had been

passed on that date should ordinarily have been within the knowledge of CMO and the Director before 27.2.2004. The fact that it was not so

reflects adversely upon the nature and veracity of this order, no copy whereof has not been placed on record by any of the parties including the

petitioner and the BMO nor has any copy thereof been furnished.

Next in the row is the rent deed purported to have been executed pursuant to aforesaid order which incidentally does not bear any date but since it

refers to BMO's order of 13.2.2004 by implication it can be deemed to have been executed any time thereafter and in no case there before. At the

same time trial court's original order of injunction appears to have been passed on 8.7.2004 but incidentally till then even none of the

aforementioned documents appear to have been brought on the trial court record. Ordinarily, had the documents been in possession of any of the

parties particularly the petitioner, by then the same would obviously have been placed on record. Together with all these features is the unusual

manner in which the concerned BMO has endorsed copy of his aforementioned order No. Estt/486-496 dated: 8.9.2005 to learned Pr. District

Judge also who was hearing appeal at that time. Why did the BMO think necessary to endorse the copy to learned appeal Judge is not known but

the fact that it should not have been so hardly needs any mention, particularly because the BMO has been one of the defendants in the main suit to

whom the written statement filed by official respondents is fully attributable unless he denies the same, in view whereof he can be held to be guilty

of making a wrong statement before the trial court through written statement by pleading that the petitioner/plaintiff had no valid order of allotment

lease in his favour. As a matter of fact he being the apparent author of order dated: 13.2.2004 and a party to the rent deed, copy whereof has been furnished by petitioner's counsel in this Court should have informed his higher authorities, rather persuaded them to accommodate these two documents in the official stand taken by authorities before the trial court and appellate court below. With all these documents along with peculiarities attending them the consideration purporting to have been given to the matter by trial court and the appeal court below appears to require a review because had all these documents been on their respective files perhaps the appreciation of the whole controversy with all its features might have been more comprehensive.

6. In overall consideration of the fact situation summarized above, I feel that the question of grant or refusal of interim injunction in the matter as sought by petitioner/plaintiff before the courts below requires a review at the level of trial court with full consideration of the aforesaid documents which as already said have come on record later. Both the orders passed by courts below i.e. trial court dated: 8.7.2004 and the appeal court dated 27.9.1996 impugned herein are set aside and the matter remanded to trial court for fresh consideration of the injunctive relief in given circumstances of the case. While ordering so it is directed that:

(a) The suit is transferred from Munsiff, Kupwara to Sub-Judge, Kupwara where the parties through their counsel are directed to appear on 24.12.2007.

(b) All bidders who participated in the auction including respondent No. 5 stand impleaded as parties in the array of defendants in the main suit.

They be accordingly summoned and heard by the trial court

(c) Till trial court passes an appropriate order on the question of interim injunctive relief status quo shall prevail in so far as existence of the medical

shop within premises of Sub-District Hospital, Tangdhar is concerned subject to the condition that petitioner executes a bond in favour of

respondent/department that structure of the shop, if ultimately found to have been constructed by him, shall not give him any right to lay any claim

to the land underneath thereto or the approaching thereto which admittedly is a part of compound of Sub-District Hospital and that if not found

entitled to continue his shop, he would remove the structure at his own cost

within a period to be specified by respondent/authorities failing which the same shall vest in the State. The respondent/authorities shall, however, not be precluded from opening the tenders and preparing the comparative statement of bids and bidders without making the final formal allotment to any person.

(d) Nothing shall prevent respondent/authorities from considering establishment of more than one retail fair price shops in the hospital premises on such terms as they think proper.

(e) The learned trial judge shall frame a rule against concerned BMO who passed the order No. 1295-98 dated: 13.2.2004 above mentioned

irrespective of his present place of posting asking him to explain as to whether he stands by the orders/communications/rent deed owned by or

attributed to him or by the pleas taken on his behalf along with other defendants in the written statement and thereafter proceed suitably in the

matter of making wrong statement, if any, that he may appear to have made before the court.

(f) The learned trial judge shall conclude the hearing on interim injunction matter within a period of one week after the parties appear before him

pursuant to this order; in any case before 31.12.2007.

(g) Revision petition stands accordingly disposed of along with connected CMPs. Copies of this order be transmitted to Director, Health Services

and Chief Medical Officer, Kupwara for requisite follow up in terms hereof.