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(2019) 12 J&K CK 0043

In the Jammu And Kashmir High Court

Case No : Others Writ Petition (OWP) No. 2426 Of 2018, IA No. 01 Of 2018

Ghulam Nabi Bhat APPELLANT

Vs

State Of Jammu And Kashmir & Ors RESPONDENT

Date of Decision : 13-12-2019

Acts Referred:

Code Of Civil Procedure, 1908 — Order 7 Rule 11
Jammu And Kashmir Land Revenue Act, 1996 — Section 94, 95

Citation : (2019) 12 J&K CK 0043

Hon'ble Judges : Ali Mohammad Magrey, J

Bench : Single Bench

Advocate : Hilal Ahmad Wani, N. H. Shah

Final Decision : Dismissed

Judgement

Ali Mohammad Magrey, J

1. Petitioner is aggrieved of the order passed by the Financial Commissioner (Rev), Jammu and Kashmir, Jammu/Srinagar on 27.11.2018, in terms whereof the application of the petitioner, seeking demarcation of land measuring 03 Kanals and 07 Marlas, falling under Khasra Nos. 228 and 237, Khewat No. 9 of revenue estate, Chanderpora, Harwan, stands disposed of in light of the demarcation made by Tehsildar North, Srinagar, as reported vide No. 1292/TNS/OQ dated 23.10.2018 and challenges the same on various grounds detailed out in the petition.

Brief facts of the case are summarized as under:-

2. The petitioner had filed application before the respondent No. 2, Financial Commissioner for a direction upon the revenue officials to constitute an enquiry team in order to demarcate the land of the petitioner as per the dimensions shown in the sale deed and further for restoration of his land, if not as per the dimensions recorded, but the application of the petitioner stands disposed of in terms of order dated 27.11.2018 on the basis of a report filed by the Tehsildar.

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3. Petitioner along with his four brothers, namely Mohammad Amin (01 Kanal), Gulzar Ahmad (12 Marlas), Mohammad yousuf (12 Marlas) and Mohammad Saleem (11 Marlas) and Ghulam Nabi, applicant(12 Marlas) claims to be the owners in possession of the said land comprising of 03 Kanals and 07 Marlas, covered under Survey No. 228 and 237 situated at, Harwan, Srinagar, purchased in the year 1973, on which petitioner has constructed residential house and is living therein from last 45 years.

4. The petitioner has filed a suit for declaration and permanent prohibitory injunction with a prayer to pass a decree of declaration in favour of petitioner, declaring the petitioner to use his land and residential house at the Khasra number mentioned above, further, restraining the respondents permanently from interfering into the peaceful possession of the petitioner before the learned Court of 1st Subordinate Judge, Srinagar. The respondents have filed written statement wherein they have contended that the suit is liable to be dismissed under Order 7 Rule 11 of CPC, as the status of the property is Migrant and the Civil Court has no jurisdiction, the contention of the respondents was accepted and the plaint was directed to be rejected vide order dated 13.09.2011.

5. The petitioner have not filed appeal against above said order, but the inhabitants of the Chanderpora including petitioner have filed one more suit and during the arguments of interim application, these facts were brought before the learned Court and the interim application was dismissed.

6. One Makhan Lal and others (01 Kanal) and Ratna Kumari (07 Marlas on south side), claim to be the owner in possession of the property belonging under Survey No. 238 measuring 01 Kanal and 08 Marlas along with structure which was purchased by respondent No. 7, under mutation No. 674 after getting the sale permission under the J&K Migrant immoveable property Restraint on Distress Sale Act and was also granted permission by the learned Divisional Commissioner, Kashmir vide order No. 1149 DIVK of 2007 dated 31.03.2007 and the said land has also been mutated, recorded in record of rights in his name, sharing common wall with applicant.

7. The respondent No. 6, who claims to be an Attorney Holder of the above said property has filed complaint before the respondent Deputy Commissioner that the petitioner has encroached on land measuring 02 Marlas and 25 Sfts, as such, has requested for demarcation of the property, the respondent No. 4 has taken the matter and had called the reports from the concerned revenue agencies, the respondent No. 3, has dealt the matter under Migrant Property Act, and issued order No. DMS/RD-705/Mig/140-41 dated 26.05.2012, pursuant to which it was directed for removal of encroachment.

8. The inhabitants of the area have filed joint application before the respondent No. 3 and have stated that they are eye-witness regarding the possession of petitioner on which structures have been erected, thus, the application of respondent is baseless and had requested that the above said order be deferred

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till the matter is resolved.

9. The respondent No. 4 has again called the report from the revenue agencies and considering the matter has issued order No. DMs/RO-705/Mis/277-78 dated 20.07.2012, and the earlier order dated 26.07.2012 was confirmed. The order of the respondent No. 4 was called in question before the learned Court of Financial Commissioner in appeal and same stands dismissed on 10.10.2012.

10. The petitioner has questioned the orders passed by the learned District Magistrate Srinagar and the learned Financial Commissioner (revenue) before this Hon'ble Court, the petition was diarized as OWP No. 1410/2012, and the Hon'ble Court vide order dated 17.03.2014, dismissed the petition. The operative portion of the Judgment reads as under:-

" This petition is, accordingly, dismissed as the petitioner cannot be allowed to pursue two remedies simultaneously on one and the same subject. However, it is made clear that the petitioner would be free to seek appropriate relief in the pending suit in regarding to the orders impugned in this petition, if not already sought."

11. The order of the learned Writ Court was questioned by the petitioner in appeal, the same was diarized as LPA No. 51/2014, and came to be dismissed on 08.05.2014, and the Hon'ble Division Bench observed that since order passed by the Civil Court rejecting the plaint has attained finality which has not been challenged, as such, the petitioner cannot be permitted to question the order passed by the subordinate revenue officials.

12. The petitioner submits that after the dismissal of the appeal, the Tehsildar concerned had illegally taken the possession of the 02 Marlas of the petitioner's land, without demarcating the land in question, as such, petitioner was again constrained to file application of his land, the parameters of which is given in the sale deed executed by the petitioner in 1973-74, the application was diarized and in terms of order No. 377-79/FCAP dated 22.06.2018, it was directed to the respondent No. 4 to visit the spot along with Director Survey and Land Records Srinagar to demarcate the land within two weeks.

13. In compliance to the order No. dMs/RD/705-II/297-305 dated 14.07.2018, the respondent No. 4 has constituted a Committee for the purpose of visiting the spot and demarcate the land in question. It is stated that the team constituted by the respondent No. 4 has never choosed to visit on the spot to address the grievances of the petitioner and in the meantime, the new incumbent has joined on the position of Financial Commissioner (Revenue) who of his own without perusal of the records has issued another order dated 20.09.2018 in terms of which he again delegated the power of demarcation to the respondent No. 6, without any notice to the petitioner.

14. It is stated that again the respondent No. 6 without any demarcation had prepared report in terms of communication No. 172/TNS/OQ dated 23.10.2018,

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in terms of which he had observed that petitioner is in short fall of 01 Marla and 20 Sft., and submitted that the land at present is approach road and can be recovered out of Khasra No. 237 only. It is stated that the respondent No. 2 without waiting to the petitioner had disposed of the petitioner's application for demarcation in terms of report submitted by the Tehsildar concerned in terms of order dated 27.11.2018. petitioner challenges the said order on the following grounds:-

A) That the respondent department has failed to discharge their statutory duty to ascertain the position on spot vis-à-vis the short fall of the land which is alleged by the petitioner, the petitioner contended firstly his land was taken and he was forcibly dispossessed on the application filed by the respondent No. 7, wherein he has taken benefit of Migrant Property Act, the petitioner submits that his land was taken by the respondent department illegally and without any procedure in this behalf, the petitioner is seeking restoration of his land which he has purchased by executing a registered sale deed, but respondent authorities in order to avoid the restoration of the possession of the land taken illegally and giving the cryptic reports, which resulted that the petitioner is suffering as the respondents have failed to discharge their duty in order to protect the interest of petitioner.

B) That the petitioner had filed application for demarcation of the property before the respondent No. 2 in order to settle his grievances by constituting an enquiry committee of Specialized Staff who would visit on spot and give status and position of the land in question, the petitioner submits that a Committee was constituted who were required to have a visit on spot for demarcation of the land in question, but the constituted committee choosed not to have the spot visit in time, which virtually resulted that after the new incumbent has taken the charge of the respondent No. 2, he filed another application and clubbed the same with the application of the petitioner and succeeded in getting a direction upon the respondent No. 6 to demarcate the land in question in absence of petitioner, the respondent No. 6 has visited the spot of his own without associating the petitioner and prepared a report on the instructions of respondent No. 7, the respondent No. 2 without waiting for the objections of the petitioner had disposed of the matter in terms of the report submitted by the respondent No. 6 as such, has thrown the petitioner again on road side.

C) That the petitioner submits that there are number of reports filed by the respondent revenue agencies from the year 2009, and none of which are varied in the narration, thus the only motive to settle the controversy before the respondent No. 2 was to constitute a full-fledged Committee who would have given a full text of the dispute in question by demarcating the land but again could not made clarification where the land of the petitioner can be restored, as such, the respondent No. 2 has failed to exercise his powers.

15. On notice respondents 2, 4, 5 and 6 have filed reply, wherein it is stated that the orders under challenge have been passed by the competent authority with

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complete application of mind to the facts and circumstances of the case and also as per law and the rules governing the field. As such, there is no legal infirmity in the impugned orders, hence challenge thrown to the same is misconceived and misdirected both on the facts as well as in law. On this score the writ petition is liable to be dismissed in limini.

16. That petitioner has no right accrued to him to invoke the extra ordinary writ jurisdiction of this Hon'ble Court so far as answering respondents are concerned, as none of the rights of petitioner have at all been infringed by the answering respondent.

17. That the petitioner has pleaded mixed disputes as well as pure question of fact, which cannot be gone into by this Hon'ble Court in its jurisdiction. As such, the writ petition is not maintainable, that too, as against the answering respondents. It is stated that petitioner has not approached with clean hands, he has also concealed/suppressed material facts from the Hon'ble Court, which is sufficient ground to dismiss the writ petition in limini as against the answering respondents.

18. The respondent No. 7, has also filed written statement, reiterated the same grounds, which are taken by the respondents 2, 4, 5 and 6 in their reply.

19. Heard learned counsel for the parties, perused the records and considered the matter.

20. The Financial Commissioner (Revenue) in his order dated 27.11.2018, said that the demarcation has now been done by the Tehsildar North, Srinagar, and a detailed report has been provided to this Court as well vide No. 1292/TNS/OQ dated 23.10.2018. The application seeking demarcation is accordingly disposed of and a copy of report received from Tehsildar be provided to the concerned parties.

21. The other aspect is that the obligation of the Revenue Officer under Section 95 of the J&K Land Revenue Act, Svt. 1996 (the Act) regarding reinstating possession of a party in proceedings under Section 94 thereof, apart from being subject to the condition of his attaining the satisfaction provided therein, is a step secondary to defining the limits of any estate, or of any holding, tenancy, field or other portion of an estate, and erection of survey-marks thereon. Since the condition precedent to the exercise of power under Section 95 of the Act, as provided in Section 94 thereof, has not yet been fulfilled, the question of exercise of the power under Section 95 of the Act would not arise and, consequently, the direction to that effect, as sought in the petition, cannot be issued. For facility of reference, the relevant provisions of the Act are quoted hereunder:

"94. Power of Revenue Officer to define boundaries

(1) A Revenue Officer may, for the purpose of framing any record or making assessment under this Act or on the application of any person interested, define the limits of any estate, or of any holding, tenancy, field or other portion of an

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estate, and may, for the purpose of indicating those limits, require survey-marks to be erected or repaired.

(2) In defining the limits of any land under sub-section (1), the Revenue Officer may cause survey-marks to be erected on any boundary already determined by, or by order of, any Court, or Revenue Officer, or restore any survey-mark already set up by, or by order of, any Court or any such officer.

(3) The Revenue Officer to whom an application under this section may be made may depute another Revenue Officer subordinate to him to take the necessary proceedings.

95. Power of Revenue officer in proceedings under section 94 to reinstate party dispossessed

(1) In any proceeding under section 94 if it appears to the Revenue Officer that any of the parties to the proceedings has, within a period of six months preceding the date of his order illegally encroached upon any land adjacent to the boundary defined, and previously in the lawful possession of any of the other parties to the proceeding, he may by his order direct that the party dispossessed be placed in possession of such land;

Provided that, no order under this section shall be passed by any officer below the rank of an Assistant Collector of the first class and if proceedings under section 94 are taken by an inferior officer, he shall submit the case for orders to the Assistant Collector of the first class having jurisdiction.

(2) The party dissatisfied with the order of the Revenue Officer passed under sub-section (1) may seek his remedy in the Civil Court and subject to the decision of the Civil Court such order shall be final."

A plain reading of Section 95 of the Act thus provides that if it appears to a Revenue Officer, not below the rank of an Assistant Collector, in any proceeding under section 94, that any of the parties to the proceedings has, within a period of six months preceding the date of his order, illegally encroached upon any land adjacent to the boundary defined, and previously in the lawful possession of any of the other parties to the proceeding, he may by his order direct that the party dispossessed be placed in possession of such land. In absence of any such satisfaction recorded by the concerned revenue officer, the prayer for issuance of the direction sought for is wholly misconceived. It is another thing that the first step is to define the limits and boundaries of the land, which, as said above, has not yet been done by the revenue officials. It may be observed here that a Mandamus can be issued only when it is shown that a duty is cast on a public officer to do a particular thing and that such duty has not been discharged. Once the land has not been demarcated and defined on the spot in terms of the provision of Section 94 of the Act, and the required satisfaction of someone having illegally encroached upon land within a period of six months preceding the date of order has not been attained/recorded, it cannot be said that the revenue

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officer has not discharged his duty of reinstating possession of the petitioners in the land in terms of the provision of Section 95 of the Act.

22. One thing is clear that the revenue officials, who have prepared the documents referred to above, have been skilfully unfair to the petitioner to believe that his land stands demarcated and identified on the spot which, as seen above, is not the case. This is dismaying and unfortunate, and it can by no standards be said to be the discharge of an official duty cast on the revenue officers commensurate with the avowed national polity and the conscious decision of the people of the nation to be governed by rule of law.

23. The issue raised in the writ petition has reference to seeking demarcation of the land detailed out in the forgoing paras by the petitioner as well as respondents. Perusal of the order passed by the Financial Commissioner, (Revenue) reveals that neither the parties in dispute, nor the revenue officer, viz Financial Commissioner, has followed the procedure as established under law in terms of the provisions of the Land Revenue Act.

24. As said above, this petition for the reliefs prayed for therein is misconceived. It is, therefore, dismissed, leaving the petitioner free to take recourse to the appropriate legal remedy available to him. This also disposes of the connected MP, vacating the interim order, if any, subsisting.

25. No order as to costs.

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