

(1968) 12 J&K CK 0002
In the Jammu And Kashmir High Court

Gian Chand & Ors.

APPELLANT

Vs

Shiv Ram & Ors.

RESPONDENT

Date of Decision : 17-12-1968

Acts Referred:

Jammu and Kashmir Civil Procedure Code, 1977 — Section 60
Jammu and Kashmir Tenancy Act, 1980 — Section 63

Citation : (1969) KashLJ 172

Hon'ble Judges : J.N.Bhat, J and Jaswant Singh, J

Bench : Division Bench

Advocate : S.A.Salaria, Avtar Singh , Advocates appearing for the Parties

Judgement

(1) This application in revision has been referred to us by Hon'ble Gurtu J as he felt that the point involved in the matter was of great public

importance and required an authoritative pronouncement.

(2) The facts leading to the revision application are ; Fahmi, Mohamad Shafi and Mohamad Alam son of Rahim Bakash and respondent 2, 3 and 4

herein, who held one third share as occupancy tenants under Lal Chand, the father of the applicants herein sold their share of the occupancy rights

in the Land measuring 57 Kanals and 2 Marias entered in khewant No. 28 Khata No. 78/ 192, Khasra Nos. 157 and 532/159 of village Rehan,

Tehsil Rajouri, as also in the house standing thereon for a sum of Rs. 1,000/ in favour of Shiv Ram respondent I, herein, vide sale deed dated 23rd

April 1968. The sale having been effected in contravention of the mandatory provisions of section 60 of the Jammu and Kashmir Tenancy Act

1930 (1&23 A. D) Lal Chand instituted a suit under Section 66 read with Section 85 (3) (f) of the Act for declaration that the said sale was

invalid and ineffectual as also for dispossession of Fahmi and his two brothers

Mohammad Shafi and Mohd Alam. This suit though dismissed by the Collector, Poonch was ultimately decreed on appeal by a single Judge of the High Court vide judgment dated 4th May, 1963, which was upheld on appeal by a division bench of this court vide judgment dated 16/9/1963. Some time later Fahmi, Mohammad Shafi and Mohamad Alam got back the possession of the land as occupancy tenants. Shiv Ram then brought a suit against Fahmi and others for recovery of Rs, 1088 / i. e., for refund of the sale consideration and the costs incurred by him as stamp duty and registration fee in connection with the execution of the aforesaid sale deed dated 23rd April, 1958. This suit was decreed in favour of Shiv Ram by the Subordinate Judge, Rajouri, on the basis of a compromise arrived at between Shiv Ram on the one side and Fahmi and his brothers on the other and in execution of the decree the occupancy rights belonging to Fahmi, Mohamad Shafi and Mohamad Alam were attached at the instance of the decree holder. Gian Chand and his brothers who are applicants herein thereupon filed an objection petition contending that the occupancy rights were exempt from attachment and sale vide Section 60 of the Civil Procedure Code. The Executing court rejected the objection petition holding that the objection was untenable. Against this order, Gian Chand and his brothers have come up in revision to this court, which as stated above, has been referred to us for decision.

(3) The only point urged by Shri Avtar Singh, appearing on behalf of the applicants, is that under section 60 of the Code of Civil Procedure, ARAZUAT MAQBUZA ASSAMIAN MAURU I WA MALIKAN," cannot be attached and sold in execution of a decree.

(4) Shri S. A. Salaria, the learned counsel for Shiv Ram. has on the other hand, submitted that it is not the land which is being attached and sold but only the occupancy rights therein which are not exempt from attachment and sale,

(5) We have carefully considered the submissions of the learned counsel for the parties and are of the opinion that the order of the executing court is fully justified in view of the provisions of section 63 of the Jammu and Kashmir Tenancy Act the relevant part of which reads as under :

A right of occupancy may be sold in execution of a decree or order of a court to the provisions of Alienation of Land Act.

(6) Reading the provisions of Section 60 of the Code of Civil Procedure which the learned counsel for the applicants seeks to invoke to support

his submission and of Section 63 of the Tenancy Act in juxtaposition, it will be observed that what the law forbids to be attached or sold in

execution of a decree is the land (whether in the possession of a proprietor or his occupancy tenant) and not occupancy rights therein, Interpreting

the two provisions according to the cardinal principle of harmonious construction of statutes it must be held that the protection against attachment

and sale afforded by the general law with respect to the land does not extend to occupancy rights therein. Moreover, apart from the fact that the

provisions of Section 63 of the Tenancy Act are not to be read by the provisions of Section 60 (1) (C2) of the Code of Civil Procedure as held by

the erstwhile Board of Judicial Advisors in *Gian Chand v/s Madan Lal*, 1999 K. L. R. 370 it must be borne in mind that there is a clear and

fundamental distinction between 'sale of land' which implies the sale of totality of a bundle of rights and 'sale of occupancy right, therein which is

only a partial or limited right or interest, This would be amply clear by reference to rule 44 of Chapter VII of RULES AND ORDERS FOR THE

GUIDANCE OF COURTS SUBORDINATE OF THE HIGH COURT. It is because of this distinction that the legislature by means of Section

63 of the Tenancy Act appears to have ordained that the occupancy right will be liable to be sold in execution of a decree although it was

conscious that it had forbidden the attachment or sale of land in execution of a decree.

(7) Even if it be taken that the provisions of Section 60 (1) (C2) of the Code of Civil Procedure and Section 63 (1) of the Tenancy Act are

repugnant to each other, even then the provisions of the aforesaid section 63 (1) of the Tenancy Act which is a special law and also later in date

will override the provisions of the Civil Procedure Code as according to Section 4 of the Civil Procedure Code itself in case of a conflict between

the provision of the Civil Procedure code and Special Law, it would be Special Law that would prevail.

(8) Reference in this connection may usefully be made to *Gadhavi Mulu Bhoja*, appellant v/s *Gadhvi Shivubha Govind* and another respondents,

AIR 1956 Sourashtra. 29.

(9) As would be manifest from a reading of the application for execution of the decree and of the order executing court. What was sought to be

and actually attached in execution of the decree in the present case was not the land but only occupancy rights therein, which as already stated are

not protected from attachment and sale.

(10) For the foregoing reasons, we are clearly of the opinion that the occupancy rights are attachable and could be sold in execution of the decree

and executing court has not committed any error of law the or of jurisdiction in ordering the same. In the result the revision application fails and is

hereby dismissed but in the circumstances of the case without any order as to costs.