

(2008) 02 J&K CK 0014
In the Jammu And Kashmir High Court

Khurshid Ahmad Din and Others

APPELLANT

Vs

State of Jammu & Kashmir and Others

RESPONDENT

Date of Decision : 20-02-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 144

Citation : (2008) 2 JKJ 382

Hon'ble Judges : Mohammad Yaqoob Mir, J; Hakim Imtiyaz Hussain, J

Bench : Division Bench

Judgement

M. Yaqoob Mir, J.—Order dated 01.03.2007 passed by learned Sub-Judge, (CJM) Anantnag, has been questioned through the medium

of petition bearing OWP No. 134/2007 same has been disposed of by learned Single Judge vide order dated 09.3.2007 which is impugned

herein.

2. By virtue of order impugned learned Single Judge, has opined that appropriate remedy against the impugned order was to approach the same

court or to file the appeal. Both the remedies are envisaged by C.P.C. remedy for impleadment is also available before the same court.

3. During the pendency of the LPA, appearing counsel for respondents, Mr. M.A. Rathore, AAG, while producing copy of the order dated

24.10.2007 passed by Sub Judge (CJM) Anantnag, whereby suit has been dismissed as withdrawn and all interim/interlocutory orders have been

vacated, submits that no cause survives for the appellants, therefore, LPA may be dismissed.

4. Mr. Reshi, appearing counsel for the appellants submits that improvement i.e. in the shape of raised structure/bunkers under the orders of trial

court, were required to be removed and status -quo ante as obtained on 07.10.2006 should have been restored, which has not been done,

therefore, disposal of the LPA without addressing that issue will prejudicially affect the rights of the appellants.

5. Considered the submissions. For appreciating the matter in its right direction, it shall be quiet advantageous to precisely notice the facts and

circumstances of the case. SSP Anantnag, respondent No. 4 (Plaintiff) had filed suit titled SSP Anantnag v. State and Ors. for declaration with

consequential relief of permanent /prohibitory injunction, projecting therein that ten kanals of land is in their possession for/more than sixty years, so

have become owners by prescription. To the said suit, appellants were not party but later on appellants were impleaded as party defendants.

Learned court of Sub Judge (CJM) Anantnag, has issued restraint order on 27.03.2006. Appellants after filing application for impleadment, filed

one more application before the said court praying therein that Police Department shall not take forcibly possession of the suit land. Learned Trial

court on this motion passed order on 07.10.2006 to the effect that ""...it is directed that status-quo be maintained on spot till further orders."" After

passing of this order, appellants noticing violation of the order, agitated the matter again before the learned Sub Judge, (CJM) Anantnag,

consequent to which, two Advocates namely Mr. Abass Hamid Dar and Mr. Fayaz Ahmed Sodagar were appointed as commissioner for visiting

the spot, who submitted their report to the effect that neither any structure is raised nor any kind of construction was carried on spot but some

material in the shape of sand and Bajri which are essential for construction purposes have been dumped on the, suit land by plaintiff (Police

department).

6. Sensing the effect the emergence of the Commissioner's report what respondent No. 4 (plaintiff) did, is that he filed one more' application for

grant of permission to raise temporary structure/bunkers on the suit land. Learned Sub-Judge without issuing notice to other side vide his order

dated 01.03.2007, has passed direction to the following effect.

In view of the fact, that the matter is related to the security of the State and the applicant/plaintiff is permitted to raise the temporary

structure/bunkers in the suit land, however, the same would be subject to the

objections of the otherside.

7. Appellants instead of filing objections before the court of learned Sub Judge have directly filed OWP No. 134/07, which was not allowed.

Instead appellants were left to have recourse to the remedies available before the court of Sub Judge.

8. In view of the stand of the learned Counsel for respondents, AAG, Mr. M.A. Rathore, and pursuant to his advise, respondent No. 4 (Plaintiff)

has filed application for withdrawal of the suit, which has been resisted by the appellants. Two contentions were raised i.e.

I. that Interim /interlocutory orders shall be Vacated.

II. that temporary structure allegedly raised over the suit land by the plaintiff shall also ordered to be removed and the position of the suit land as it

existed on UK-institution of the suit be relegated.

9. Learned trial court repelling the first contention, rightly so, opined that when proceedings get terminated, all the interlocutory orders terminate,

therefore, no prayer is required to be made by the aggrieved party Regarding contention No. 2 trial court has opined that in case appellants are

aggrieved by the alleged raising of temporary structure over suit land subsequent to the institution of the suit, there is no scope for such plea in the

proceedings when the suit is dismissed as withdrawn. Finally, learned Sub Judge has dismissed the suit as withdrawn and has also opined that all

the interim/interlocutory orders are vacated.

10. Since the order dated 01.03.2007 was under challenge in OWP No. 134/07 which now ceases to be in existence, "therefore, the said OWP

has become infructuous. Order passed thereon also loses significance. Resultantly, this LPA also has become infructuous.

11. The important question for consideration in the larger interest of justice, has to be addressed is, as to, what will happen to the structure/bunkers

as are alleged to have been raised during the pendency of the suit, under the garb of order dated 01.03.2007.

12. Learned Sub Judge should have passed orders regarding the same by having recourse to restitutionary measures as warranted u/s 144 CPC

which is reproduced below.

(1) Where and in so far a decree is [varied or reversed in any appeal, revision or other proceeding or is set aside or modified in any suit instituted

for the purpose, the Court which passed the decree or order] shall, on the application of any party entitled to any benefit by way of restitution or

otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for

such decree or such part, thereof as has been varied, reversed, set aside or modified; and, for this purpose, the Court may make any orders,

including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly

[consequential on such variation, reversal, setting aside or modification of the decree or order].

(2) No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under Sub-section

(1).

13. Plain reading of the same provides for restitution i.e. to relegate the parties to the position which they occupied on the date of order which

stand vacated. Learned Sub Judge has lost site of this provision when the matter was projected by the counsel for the appellants therein and had

left them to take proper action under law.

14. Though the said order was open for question to be agitated before the appellate or revisional forum, but keeping in view the whole gamut of

the matter and larger interests of justice, this situation is required to be taken care of while disposing of this LPA, keeping in view the orders

passed in LPA on 17.07.2007, 13.08.2007, 19.09.2007 and 27.09.2007.

15. Learned Counsel for the appellants, Mr. J.H. Reshi, has rightly relied on the judgment reported in AIR 1994 SC 380 wherein it has been held:

16. The Law of Restitution encompasses all claims founded upon the principle of unjust enrichment 'Restitutionary claims are to be found in equity

as well as at law'. Restitutionary law has many branches. The law of quasi-contract is 'that part of restitution which stems from the common

indebitatus counts for money had and received and for money paid, and. from quantum meruit and quantum vexant claims "".

Common Law. Any civilized system of law' in bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit,

that is, to prevent a man from retaining the money of, or some benefit derived from another which it is against conscience that he should keep. Such

remedies in English law are generically different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasi-contract or restitution.

For historical reasons, contract has traditionally been treated as part, or together with, the law of contract. Yet independently, equity has also

developed principles which are aimed at providing a remedy for unjustifiable enrichment. It may be that today these two strands are in the process

of being woven into a single topic in the law, which may be termed 'restitution'.

22. The jurisdiction to make restitution is inherent in every court

and will be exercised whenever the justice of the case demands. It will be exercised under inherent powers where the case did not strictly fall

within the ambit of Section 144 opens with the words: "" Where and in so far as a decree or an order is varied or reversed in any"" appeal, revision

or other proceedings or is set aside or modified in any suit instituted for the purpose... ""The instant case may not strictly fall within the terms of

Section 144; but the aggrieved party in such a case can appeal to the larger and general powers of restitution inherent in every court.

16. Applying ratio of the judgment (supra) to the facts and circumstances of the instant case, inherent powers are required to be invoked so as to

undo the wrong. It is to be kept in view that two departments i.e. Police department and Revenue department were parties to the original suit that

means two Government departments were pitted against each other, which appears to be collusion and uncertainty and it is in that back ground,

orders dated 17.07.2007,13.08.2007, and 27.07.2007 were passed in this LPA. An improper order dated 01.03.2007 had been passed in ex-

parte which enabled the respondent No. 4 (plaintiff) to raise alleged temporary structure/bunkers If the position as it existed before, is not restored,

same will shake faith of the litigants in the judicial process. When the appellants were before the Court, order dated 01.03.2007 should not have

been passed in their absence. Now the said order stand vacated, therefore, any benefit derived under the order has to be undone.

17. Keeping in view the entire gamut of the matter as noticed hereinabove, we are constrained to invoke inherent powers. Any dishonest/unjust

benefit derived has to be upset. Therefore, while disposing of this LPA, respondents are directed to restore the position viz-a-viz suit property as it

existed on 07.10.2006 when the order of status-quo was passed.

Learned Sub Judge, shall ensure that the position as it existed on 07.10.2006 is restored with reasonable dispatch.

Disposed of.