
(2010) 04 J&K CK 0009

In the Jammu And Kashmir High Court

Case No : Others Writ Petition (OWP) No. 779 of 2002

Maharaj Krishan Dass and Another

APPELLANT

Vs

State and Others

RESPONDENT

Date of Decision : 23-04-2010

Acts Referred:

Transfer of Property Act, 1882 — Section 106, 108, 111, 116

Citation : (2010) 3 JKJ 231

Hon'ble Judges : Sunil Hali, J

Bench : Single Bench

Judgement

Sunil Hali, Judge

1. Dashnami Akhara Trust, Srinagar (hereinafter referred to as ""Trust"") owns a huge complex which contains number of shops and offices. One of

the shops was given on rent to the father of petitioner no.1 who was running a Chemist Shop under the name and style of M/s Janki Nath Dass and

Co.

2. The eruption of militancy in 1990 and its distress consequence led to migration of the members of the minority community out of Kashmir

Valley. The petitioners being members of the said community also moved to Jammu and got themselves registered as migrants. To take counter

measure to curb militancy, a bunker was installed in front of the shop of the petitioner no.1 as a result of which ingress and egress inside the shop

stood blocked. The business in the shop absolutely got standstill as removal of bunker was not found proper due to security reasons.

3. It seems that shop in question was handed over to respondent no.4 by respondent no.5. It further reveals that the respondent no.4 was inducted

into shop as tenant after illegally breaking open the shop which was in possession of the petitioners. On coming to know of this fact on

08.01.1997, an FIR No.08/1997 dated 14.01.1997 came to be lodged in Police Station, Maisuma. On this FIR being lodged, a report was called

from the concerned Police Station. The report submitted by the SHO concerned indicates that the shop was leased out by respondent no.5 to the

father of petitioner no.1 in the year 1961. The report also suggests that BSF authorities contacted management of the Trust and asked them to

remove the expired medicines from the shop as the same could be dangerous in case of any explosion near the Trust building. On this, locks were

broken by the management of the Trust and after destroying the expired medicines, the possession of the said shop i.e. shop No.16 was handed

over to one Manzoor Narwari son of Ali Mohmad Narwari resident of Natipora, Srinagar (respondent no.4 herein) as tenant with an agreement to

enter into a rent deed.

4. After receipt of the report, it seems that no progress was made in the investigation. However, what is discernible is the fact that the petitioners

were tenant of respondent no.5 in the shop No.16 and they were dispossessed by said respondent who handed over the possession of the same to

respondent no.4.

5. Feeling aggrieved of this, the petitioners approached the District Magistrate, Srinagar by filing an application for eviction of unauthorized

occupant of shop No.16 in terms of Sections 4 and 5 of the Jammu and Kashmir Migrants Immovable Property (Preservation, Protection and

Restraint on Distress Sales) Act 1997 (hereinafter referred to as 'Act of 1997'). Having failed to persuade the District Magistrate to take action in

the matter, the petitioners were compelled to file writ petition (OWP No.948/97) in this Court, which came to be disposed of vide Order dated

10.11.1999 with a direction to the District Magistrate to decide all the questions relating to the status of the petitioners as migrants and a finding as

to whether occupation of the Shop No.16 by respondent no.4, was unauthorized or not. Even after issuance of the direction aforesaid, no steps

were taken by the District Magistrate, which impelled the petitioner to file contempt petition bearing COA (W) No.104-B/2000 and the said

contempt petition came to be disposed of vide Order dated 18.05.2001 on the

ground that purview of Act of 1997 was not applicable to the case

of the petitioners and the dispute being civil in nature, the parties shall approach the appropriate forum for its redressal. It seems that thereafter,

Letters Patent Appeal bearing LPA(C) No. 58/2002 came to be preferred against contempt Order and learned Division Bench of this Court

permitted the petitioners to question the Order passed by the District Magistrate in pursuance of the judgment passed by this Court in OWP

No.948/1997.

6. It be noted that these orders were preceded by the decisions of the District Magistrate, Srinagar who vide Order dated 30.09.2000 found that

respondent No.4 was not an authorized occupant of the land as the same was handed over to him by respondent no.5 being owner of the building.

It was further indicated that Act of 1997 has no application to the present case as the shop was handed over to respondent No.4 on 26.12.1996

prior to coming into force the Act of 1997.

7. It is under these circumstances, the present writ petition has been preferred by the petitioners.

8.I have heard learned counsel for the parties and perused the record.

9. The State of Jammu and Kashmir promulgated the Act called Jammu and Kashmir Migrant Immovable Property (Preservation, Protection and

Restraint on Distress Sales) Act, 1997. The object and purpose of this Act is to protect the property of the migrants who left the Kashmir Valley

due to militancy. The definition clause of Act defines ""Immovable Property"" and ""unauthorized occupant"". The ""immovable property"" shall include

tenancy rights or interest created under any law for the time being in force. ""Unauthorized occupant"" means any person who has encroached upon

or taken possession of any immovable property of migrant without his written consent and authority of law.

10. Section 4 of the Act of 1997 provides that the District Magistrate within 30 days from the commencement of this Act, shall take over the

possession of immovable property belonging to the migrants.

11. Section 5 of the Act of 1997 deals with eviction of the unauthorized occupant by the District Magistrate. Section 8 of the Act of 1997 bars the

jurisdiction of the civil court, which for facility of reference is indicated below:-

8. Bar of jurisdiction of Civil Court.

Notwithstanding anything contained in any law for the time being in force-

(a) no civil court shall have jurisdiction to settle, decide or deal with any question or to determine any matter arising under this Act, or the rules

made thereunder; and

(b) no order of any officer or authority passed under this Act or the rules made thereunder shall be called in question in any civil court.

12. The case set out by the petitioners is that :-

(a) they were tenants of respondent no.5 and their right as tenant has been protected under the Act while defining the word ""Immovable Property"";

and

(b) encroachment on the tenancy rights of the petitioners regarding immovable property cannot be taken away unless there is a written consent in

this behalf;

13. The argument in nutshell is that being in occupation of the immovable property, the petitioners should not have been dispossessed and their

right on the property could not have been encroached upon without their written consent and authority of law. Handing over the possession by

respondent No, 5 of the immovable property in possession of the petitioners, was unauthorized and would not confer any right upon respondent

no.4 who held the property as tenant of respondent no.5 for all purposes, his occupation of the property is unauthorized.

14. The contention of respondents is that :-

(a) respondent no.4 has been put in possession of the property on 26.12.1996 as such, Act of 1997 has no application in the present case.

(b) even if it is assumed that the Act of 1997 is applicable, his possession of the shop is authorized as being tenant of respondent no.5.

15. In order to appreciate the rival contentions raised by the petitioners, it is necessary to examine some provisions of the Act.

16. Section 11 of the Act of 1997 provides that the provisions of this Act, the Rules made and the Instructions issued thereunder, shall have the

effect notwithstanding anything contained in any other law or custom or usage or any contract express or implied or instrument inconsistent with the

provisions of this Act.

17. The import of aforesaid Section clearly shows that even if any Act which has been done in pursuance of any law or custom or usage or any

contract, express or implied which if found to be inconsistent with the provisions of the Act, shall be deemed to be inoperative to the extent of

inconsistency with the present Act. It is in the light of this, the present controversy is required to be addressed.

18. The question that requires consideration is that the father of petitioner no.1 was a tenant of respondent no.5 and had left the Kashmir Valley in

1990 and his status as a tenant has not been denied, the possession of the shop could not have been taken away from him without his written

consent and by authority of law. What is envisaged is that possession of the petitioners of the shop could be taken except with their written consent

or by any decree or order passed by any civil court of competent jurisdiction.

19. The contention of petitioners is that they were dispossessed from the shop by respondent no.5 and possession being handed over to

respondent no.4 was an act which was unauthorized and any person, who has been put in possession after unauthorizedly dispossessing the

occupant, cannot be said to be an authorized occupant of the shop in terms of the Act of 1997.

20. Undoubtedly, the act of dispossession has taken place in December, 1996 when Act of 1997 was not in force. The contention of respondents

is that if it is illegal act on their part to dispossess the petitioners, remedy available to the petitioners was to file suit. The provisions of the present

Act, cannot be invoked as it does not have retrospective effect.

21. The argument is catchy but on deeper scrutiny, it reveals that such an argument may not be available to the respondents. There is no dispute

that remedy available in 1996, was to file the civil suit for recovery of the possession. The cause of action had accrued to the petitioners in the year

1996, when they were dispossessed. However, right to sue would be available to the petitioners for a period provided by Limitation Act. They

could question dispossession within a period provided under the Limitation Act. There is no period of limitation provided for recovery of

possession by the tenant dispossessed illegally as such Article 119 of the First Schedule of Limitation Act will come into effect which provides

period of six years to file the civil suit. The petitioners admittedly are said to

have been dispossessed on 08.01.1997 and they could file the suit on the same date or within a period of six years. Admittedly, before expiry of six years, Act in question received the assent of the Governor on 30.05.1997 and came to be published in the Government Gazette on 02.06.1997. After coming into force of the Act of 1997, Section 8 thereto clearly bars filing of the civil suit to settle, decide or deal with any question or to determine any matter arising under this Act or the Rules made there under. Act provides new forum for redressal of grievance regarding dispossession. Instead of filing civil suit, filing of a petition u/s 5 of the Act of 1997 before the District Magistrate seeking dispossession of an unauthorized occupant, is provided. I say so because Section 8 of the Act clearly bars the jurisdiction of the civil court for entertaining any dispute which arises under the Act.

22. In view of the above position, the petitioners could not have filed the civil suit for recovery of possession and their remedy would be squarely covered under this Act.

23. The next question that is required to be determined is as to whether the petitioners were entitled to any protection being a tenant of respondent

no.5. To say it otherwise whether the petitioners could be dispossessed by the Landlord without taking recourse to law. In order to appreciate this

controversy, it is necessary to examine relevancy of Transfer of Property Act and Houses and Shops Rent Control Act which provide protection

to the tenant against forcible eviction. Under the Transfer of Property Act, after the period of tenancy is over, lease can be determined by issuing notice.

24. Section 106 of the Transfer of Property Act deals for duration of certain leases in absence of written contract or local usage, which is

reproduced as under:-

In the absence of a contract or local law or usage to the contrary, a lease of immovable property for agricultural or manufacturing purpose shall be

deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months's notice expiring with the end of a year of

the tenancy; and lease of immoveable property for any other purposes shall be deemed to be a lease form month to month, terminable, on the part

of either lessor or lessee, by fifteen days' notice expiring with the end of a month

of the tenancy.

25. The aforesaid Section provides that lease of immoveable property for any other purposes shall be deemed to be a lease from month to month,

terminable, on the part of either lessor or lessee, by fifteen day's notice expiring with the end of a month of the tenancy.

26. Section 111 of the Transfer of Property Act deals for determination of lease which reads as under:-

A lease of immoveable property determines-

(a) by efflux of the time limited thereby;

(b) where such time is limited conditionally on the happening of some event-by the happening of such event;

(c) where the interest of the lessor in the property terminates on, or his power to dispose of the same extends only to, the happening of any event-

by the happening of such event;

(d) in case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right;

(e) by express surrender; that is to say, in case the lessee yields up his interest under the lease to the lessor-by mutual agreement between them;

(f) by implied surrender;

(g) by forfeiture; that is to say, (1) in case the lessee breaks an express condition which provides that on breach thereof the lessor may re-enter or

(2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself, or (3) the lessee is

adjudicated an insolvent and the lease provides that the lessor may re-enter on the happening of such event; and in any of these cases the lessor or

his transferee gives notice in writing to the lessee of his intention to determine the lease;

(h) on the expiration of notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by the one part to the other.

27. This section provides the manner in which lease can be determined.

28. Section 116 of the Transfer of Property Act deals with effect of holding over, which reads as under :-

If a lessee or under-lessee of property remains in possession thereof after the determination of the lease granted to the lessee and the lessor or his

legal representative accepts rent from the lessee or under-lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of

an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as

specified in Section 106.

29. This Section provides that if a tenant continues to be in possession of the property after the period of lease has expired, the lease is, in the

absence of an agreement to the contrary, renewed from year to year or from month to month according to the purpose for which the property is

leased.

30. What transpires from the aforementioned provisions of the Transfer of Property Act is that expiry of lease itself does not result in automatic

surrender of the possession. Notice is required to be issued u/s 106 of the Act before lease is to be determined and even after expiry of lease, the

tenant continues to remain in possession of the property as tenant holding over. The tenant continues enjoying the protection of statute till he is

actually evicted by the order of the Court.

31. Under the Houses and Shops Rent Control Act, protection is provided to the tenant against eviction.

32. Section 11 of the Houses and Shops Rent Control Act deals for protection of a tenant against eviction which reads as under:-

(1) Notwithstanding anything to the contrary in any other Act or law, no order or decree for the recovery of possession of any house or shop shall

be made by any Court in favour of the landlord against a tenant, including a tenant whose lease has expired:

Provided that nothing in this sub-section shall apply to any suit for decree for such recovery of possession-

(a) against a tenant who has transferred his tenancy right in whole or in part with possession otherwise than by sub-lease;

(b) against such transferee;

(c) against a tenant who has sub-let the whole or a major portion of the house or shop for more than seven consecutive months;

Provided that if a tenant, who has sub-let major portion of the house or shop, agrees to possess as a tenant the portion of the house or shop not

sub-let on payment of rent fixed by the Court, the Court shall pass a decree for

ejectment from only a portion of the house or shop sub-let and fix

proportionately fair rent for the portion kept in possession of such tenant, which portion shall thenceforth constitute house or shop under clause (3)

or clause (5) of section 2 and the rent so fixed shall be deemed fair rent fixed u/s 8:

Provided further that no order or decree for the recovery of possession shall be made in favour of the landlord if the tenant has sub-let the house or

shop or portion thereof with the written consent of the owner;

(d) where the tenant has done any act contrary to the provisions of clause (m), clause (o) or clause (p) of section 108 of the Transfer of Property

Act, 1977;

(e) where the tenant has been using the house or shop Or any part of allowing the house or shop or any part to be used for immoral or illegal

purposes;

(f) where the tenant fails to use or occupy the house or shop for a period of not less than seven consecutive months;

(g) where the condition of the house or shop has materially deteriorated owing to acts of waste by, or negligence or default of the tenant, or of any

person residing with the tenant or for whose behaviour the tenant is responsible;

(h) where the tenant has been guilty of conduct which is a nuisance or annoyance to occupiers of adjoining or neighboring houses or shops,

including the landlord;

(i) where the house or shop is reasonably required by the landlord either for purposes of building or re-building, or for his own occupation or for

the occupation of any person for whose benefit the house or shop is held:

Provided that all sub-tenants in the house or shop are made parties to the suit and allowed opportunity of contesting claim to decree for ejectment.

33. This section provides that no order of decree for the recovery of possession of any house or shop shall be made by any Court in favour of the

landlord against a tenant, including a tenant whose lease has expired. The decree of eviction can be passed only on the exception provided under

the Act itself.

34. Other provisions for eviction of the tenant are provided u/s 12 of the Houses and Shops Rent Control Act, which states that in case there is

default of any payment of rent, the tenant shall not be entitled to the benefit of protection against eviction.

35. Both the provisions of the Act (supra) pre-suppose filing of the suit before the tenant can be evicted. The tenant continues enjoying the

protection of statute till he is actually evicted by the order of the Court. This admittedly has not been done in the present case which renders that

whole action of respondent no.5 is unauthorized and illegal.

36. It is not in dispute that the petitioner was the tenant of respondent no.5. He was dispossessed in the year 1996 without taking recourse to the

provisions of the Houses and Shops Rent Control Act or Transfer of Property Act. Even though, the Act was not applicable at relevant point of

time, the remedy available, as already mentioned above, was to file civil suit for possession which could be done only when cause of action

accrued within the period prescribed under the Limitation Act. Since the Act had come into force in 1997 before the period of limitation to file suit

expired, the petitioners could only seek remedy under the Act of 1997 as stated herein supra. The petitioners had rightly approached the District

Magistrate in this behalf who has failed to appreciate this aspect. Hence, the order dated 30.09.2000 passed by the District Magistrate is quashed.

37. For the reasons stated hereinabove, I find that respondent no.4 is an unauthorized occupant of the Shop No. 16 in the building owned by

Mahadev Gir Dashnami Akhara Trust, Srinagar and is required to be dispossessed from it. Accordingly, respondent no.2 is directed to remove

respondent no.4 who is an unauthorized occupant of the shop in question and handover the possession of the same to the petitioners.

38. Disposed of along with connected CMP(s), if any.