
(2010) 05 J&K CK 0013
In the Jammu And Kashmir High Court
Case No : LPA No. 39 of 2010

Mehraj ud din Mir

APPELLANT

Vs

State of Jammu & Kashmir and Others

RESPONDENT

Date of Decision : 01-05-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 122

Citation : (2010) 2 JKJ 343

Hon'ble Judges : Muzaffar Hussain Attar, J;H. Imtiyaz Hussain, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Muzaffar Hussain Attar, J.—Respondent No. 8 entered into an agreement for sale of land measuring 1 kanal bearing Khasra No. 2002/1478

situated at Gupt-Ganga Srinagar with Appellant. The sale price was fixed at Rs. 3.05 lacs. The agreement was executed on 20th Nov. 1997. An

amount of Rs. 50,000/- was paid at the time of execution of the agreement to sell. One of the terms and conditions of the agreement to sell was

that the Appellant will become sole and absolute owner of the property only after making full and final payment of the consideration amount and

until such time the Appellant will not be empowered to take the possession of the property in any manner nor would be authorized to use it or

construct house on the said property. It was also provided that anything done contrary to the terms and conditions, shall be termed as illegal.

2. An application was filed by the Respondent No. 8 before Respondents 3 & 4, praying therein for initiation of action against the Appellant in

accordance with the provisions of Jammu and Kashmir Migrant Immovable Property (Preservation, Protection and Restraint on Distress Sales)

Act, 1997 (for short Act of 1997), for having unauthorizedly occupied the property in question.

3. On notice issued to the Appellant, objections were filed wherein details of the consideration amount paid to Respondent No. 8 were given. The

Appellant stated that in total he has paid Rs. 2.55 lacs to Respondent No. 8 and only Rs. 55,000/- remained unpaid for the reason that neither

Sale Deed nor Power of Attorney was executed by Respondent No. 8 in favour of Appellant. The Appellant claimed to be in lawful possession of

the land in question. The Appellant also objected to the initiation of proceedings and sought dismissal of the application filed by Respondent No. 8

on the ground that the Respondent No. 8 had suppressed the correct facts and also with-held the information from the authority, in as much as, no

mention was made about the agreement to sell as also receipt of money. It was also not brought to the notice of the authority under the Act of

1997 that application was filed for seeking permission from the competent authority for declaring that the intending sale is not distress sale.

4. Respondent No. 4 vide his order dated 25th Sept. 2005 disposed of the application of Respondent No. 8 by directing Respondent No. 6 to

proceed on spot along with concerned SHO and to take over the property in question in his custody on behalf of Respondent No. 4 in accordance

with the mandate of Act of 1997.

5. Appellant being aggrieved of the said order challenged the same in OWP No. 481/08 before this Court on the ground that he has not illegally

occupied the land in question and that he has paid substantial sale amount to Respondent No. 8. The single Judge vide judgment dated 26th March

2006 dismissed the writ petition providing liberty to Appellant to challenge the order of Respondent No. 4 before the appellate forum constituted

under the Act of 1997.

6. The single Judge dismissed the writ petition on twin grounds viz. that disputed questions of fact have been raised which cannot be adjudicated

upon under the extra ordinary writ jurisdiction of this Court and that the order impugned in the writ petition can be challenged by filing statutory

appeal under the Act of 1997, and the alternate remedy requires to be availed of by the Appellant. The single Judge did not record any finding

on the merits of the case. The Appellant being not satisfied with the judgment of

the single Judge challenged the same in LPA No. 243/06. The

Letters Patent Bench of this Court vide its judgment dated 31st of August 2007, dismissed the appeal. The relevant part of the judgment is

reproduced as under:

A. the applicant and non applicant have agreed to sale/purchase land measuring 1 kanal against the consideration of Rs. 3.05 lacs.

B. Non applicant has paid an amount of Rs. 50,000/- to applicant through bank draft as advance/part payment against sale consideration.

C. Non applicant has failed to produce any authentic document in support of his claim that he has paid Rs. 2.50 lacs or balance amount of consideration.

D. The applicant has received an amount of Rs. 50,000/- from the non applicant as part payment against the sale of property in question.

E. The parties have not executed any legal/authentic document in connection with sale/purchase of the property in question till date. Learned

Counsel further submitted that in view of the findings at 'A' 'B' and 'D' the Appellant (writ Petitioner) could not be described as unauthorized

occupant of the property within the meaning of Section 2(1) of the Act. Hence, the Collector's direction for the Appellant's forcible eviction was

contrary to his own findings. The submission plainly overlooks the terms and conditions of the agreement to sell that constitutes the very basis of

the Appellant's case. In the agreement to sell it was categorically stipulated that till the entire consideration money was paid the Appellant would

not be empowered to take possession of the property in any manner nor he would have the authority to use or construct any house or any

property on it in any manner. The agreement to sell also stipulated that full consideration money would be paid by the first week of January, 1998

failing which the Respondent could forfeit 25% of the earnest money (Rs.50,000.00). The findings recorded by the District Magistrate seen in light

of the stipulations in the agreement to sell leave no room for doubt that the possession of the Appellant over the property in question was

unauthorized within the meaning of the Act and it plainly attracted the provisions of Section 5 of the Act.

On hearing Mr. Qayoom, we find no merit in the appeal. It is, dismissed.

7. The Letters Patent Bench thus, recorded a finding that the possession of the

Appellant over the property in-question was unauthorized within the meaning of the Act of 1997 and it attracted the provisions of Section 5 of the said Act.

8. The Appellant while following the mandate of the judgment passed in OWP No. 481/05 on 22.03.2006, had filed statutory appeal u/s 7 of the

Act of 1997 throwing challenge to the order of Respondent No. 4 as also further direction issued by Respondent No. 5. The statutory appeal was

dismissed having been rendered infructuous by the appellate authority under the Act of 1997, in view of the findings recorded by the Letters Patent

Bench in LPA No. 243/06 wherein as aforementioned a finding was recorded that possession over the property in question was un-authorized.

The order of the appellate authority was called in-question by the Appellant in OWP 113/2010. The single Judge vide its judgment dated 17th

March 2010 dismissed the writ petition in view of the finding recorded by Letters Patent Bench in LPA No. 243/06.

9. It is this judgment which is called in question in this Letters Patent Appeal.

10. We have heard Id counsel for Appellant and Id counsel for Respondent No. 8.

11. Mr. M.A. Qayoom Id counsel for Appellant, submitted that the single Judge vide its judgment dated 22.03.2006 passed in OWP No. 481/05

gave liberty to the Appellant to challenge the order impugned passed by the statutory authority by filing the appeal before the appellate authority

constituted under the Act of 1997. The Id counsel submitted that the appellate authority constituted under the Act of 1997 was duty bound to

decide the appeal on its merits. The Id counsel further submitted that the appellate authority, however, did not comply with the mandate of the

judgment and statute by not disposing of the appeal on its merits and instead dismissed the same by observing, that it has been rendered

infructuous, in view of the judgment dated 31st August 2007 passed in LPA No. 243/06. The Id counsel submitted that by dismissing the statutory

appeal as infructuous without considering the same on its merits has deprived the Appellant of right to appeal available under the Act of 1997. The

Id counsel submitted that Letters Patent Bench in its judgment dated 31st of August 2007 had confirmed the judgment of the single Judge dated

22nd March 2006 which reserved the liberty to the Appellant to challenge the order of the statutory authority before appellate forum. The Id

counsel on the basis of these submissions submitted that order of the appellate authority constituted under the Act of 1997 as also the judgment of

the single Judge passed in OWP No. 113/2010 dated 17th March 2010 is thus rendered illegal and deserves to be set-aside.

12. Mr. Q. Shamus Id counsel appearing for Respondent No. 8, submitted that the Appellant indulged in sharp practice, in as-much-as, the

Appellant on the one hand filed statutory appeal under the Act of 1997 against the order passed by Respondent No. 4, and on the other hand

challenged the judgment of the Single Judge by filing LPA No. 243/06. The Id counsel also submitted that Letters Patent Bench in LPA No.

243/06 has recorded a finding that the possession of the Appellant over the property in-question was un-authorized within the meaning of Act of

1997, and, accordingly, Section 5 of the Act of 1997 was attracted. The Id counsel submitted that the judgment of the Single Judge passed in

OWP No. 481/05 has merged in the judgment of the Letters Patent Bench dated 31st August 2007. The Id counsel further submitted that in view

of the finding recorded by the Letters Patent Bench, the appellate authority under the Act of 1997 could not proceed further in the matter, as the

appellate authority was also to return a finding as to whether the possession of the Appellant over the property in question is authorized or not. This

issue having been concluded by the judgment passed in LPA No. 243/06, the statutory authority was thus duty bound to dismiss the appeal having

been rendered infructuous. The Id counsel accordingly submitted that the LPA being meritless deserves to be dismissed in limine.

13. A very important question of law requires to be answered in this appeal. The submission of the Id counsel for Respondent No. 8 about merger

of the judgment passed by Single Judge in OWP No. 481/05 dated 22nd March 2006 in the judgment dated 31st August 2007 passed in LPA

No. 243/07 by LP Bench requires consideration. The concept of merger of order(s)/judgment(s) is attracted in a situation where an

order/judgment of an inferior Court is challenged before a superior Court in accordance with the mandate of the statute, and the superior Court

decides the matter on merits and either set-aside or modifies or confirms the impugned judgment. Para 12 of case titled Kunhayammed and Others

Vs. State of Kerala and Another, , is reproduced as under:

The logic underlying the doctrine of merger is that there cannot be more than one decree or operative orders governing the same subject matter at a given point of time. When a decree or order passed by an inferior court, tribunal or authority was subjected to a remedy available under the law before a superior forum then, though the decree or order under challenge continues to be effective and binding, nevertheless its finality is put in jeopardy. Once the superior court has disposed of the lis before it either way-whether the decree or order under appeal is set aside or modified or simply confirmed, it is the decree or order of the superior court, tribunal or authority which is the final, binding and operative decree or order wherein merges the decree or order passed by the court, tribunal or the authority below. However, the doctrine is not of universal or unlimited application. The nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or which could have been laid shall have to be kept in view.

14. The Hon'ble Supreme Court in case *Amba Bai and Others Vs. Gopal and Others*, has ruled as under:

If the judgment or order of an inferior Court is subject to an appeal or revision by the superior Court and in such proceedings the order of judgment is passed by the superior court determining the rights of parties, it would supersede the order or judgment passed by the inferior court.

The juristic justification for such doctrine of merger is based on the common law principle that there cannot be, at one and the same time, more than one operative order governing the subject-matter and the judgment of the inferior court. In the course of time this concept which was originally

restricted to appellate decrees on the ground that an appeal is continuation of the suit, came to be gradually extended to other proceedings like

Revision and even the proceedings be quasi-judicial and executive authorities.

15. The Hon'ble Supreme Court in case titled *Gojer Bros. (Pvt.) Ltd. Vs. Shri Ratan Lal Singh*, has ruled as under:

The juristic justification of the doctrine of merger may be sought in the principle that there cannot be, at one and the same time, more than one

operative order governing the same subject-matter. Therefore, the judgment of an inferior court, if subjected to an examination by the superior

court, ceases to have existence in the eye of law and is treated as being

superseded by the judgment of the superior court. In other words, the judgment of the inferior court loses its identity and its merger with the judgment of the superior court.

16. For attracting doctrine of merger, what is required to be established is; a) that there is relationship of inferior and superior Court/forum; b) the

law occupying the field provides for challenging the order of inferior court before superior court by way of filing appeal/revision; c) the

appellate/Superior court/forum decides the case after notice and after hearing the parties. The fusion/merger of order(s)/judgment(s) can arise only

when the above referred circumstances are available in a particular case.

17. Thus, what emerges from the above discussions is that for applying the doctrine of merger, there has to be relationship of inferior and superior

Court, and when a judgment of inferior Court is modified/reversed/or confirmed it gets merged into the appellate judgment.

18. In law in such circumstances the original judgment gets erased, and it is the only judgment of the appellate/superior Court which remains in

existence and is thus to be followed.

19. The question as to whether doctrine of merger can be said to be applicable to an intra court appeal in the High Court, now requires to be

considered.

Part-VII of the Constitution of Jammu and Kashmir refers to "the High Court". Section 93 refers to Constitution of High Court which is

reproduced as under:

(1) There shall be a High Court for the State, consisting of a Chief Justice and two or more other Judges.

(2) The High Court exercising jurisdiction in relation to the State immediately before the commencement of this Constitution shall be the High Court

for the State.

Article 216 of the Constitution of India also refers to Constitution of High Court and is reproduced as under:

216. Constitution of High Courts.- Every High Court shall consist of a Chief Justice and such other Judges as the President may from time to time

deem it necessary to appoint.

20. In view of the Constitutional scheme, there has to be a High Court for the

State consisting of Chief Justice and two or more other Judges. The High Court thus, is one composite unit comprising of Chief Justice and two or more other judges. The very language used in the above referred constitutional provisions do show that excepting for the Chief Justice who is given the precedence by Constitution, all other judges are equal and Constitution does not envisage one judge to be inferior and other to be superior. The business in the High Court is being conducted in the writ cases in accordance with the "Writ Proceeding Rules, 1997". The High court in exercise of it's powers conferred by Section 102 of the Constitution of J&K read with Section 67 of J&K Constitution Act, 1996 (XIV of 1996), Section 122 of Code of Civil Procedure, Samvat 1997(X of 1977), Section 8 of J&K State Civil Courts, Act, Samvat 1997 and Clause 26 of the Letters Patents (Jammu and Kashmir) and all other powers enabling and with previous approval of the Governor, has made the Rules called "High Court Rules 1999" (for short Rules of 1999).

21. Rule 34 of the Rules of 1999, provides that every decision of the Full Bench shall be binding on all, including Division Bench upon the point of law or usage having the force of law determined by the Full Bench and the decision of Division Bench on a point of law or usage having the force of law shall be binding on a Single Bench. The said rule is reproduced as under:

- (1) Every decision of the Full Bench shall be binding on all Division and Single Benches upon the point of law or usage having the force of law determined by the Full Bench unless it is subsequently reversed by another Full Bench of equal or larger strength.
- (2) A decision of a Division Bench on a point of law or usage having the force of law shall be binding on a Single Bench.

Chapter VII provides for Appeals, Revisions, References and review. Rule-49 of the Rules of 1999, provides that Appeals under clause 12 of the Letters Patent shall be designated as 'Original Side Appeals'.

Rule 50 provides form in which the said Appeal is to be filed as also the time limit within which the same shall be filed.

Clause 12 of Letters Patent (Jammu and Kashmir) provides for filing of appeal and creates forum for an Appeal from the judgment of a judge of the High Court. Clause 12 is reproduced as under:

And we do further ordain that an appeal shall lie to the said High Court of

Judicature from the judgment (not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, and not being an order made in the exercise of revisional jurisdiction, and not being a sentence or order passed or made in the exercise of powers of superintendence) of one judge of the said High Court or one judge of any Division Court and that notwithstanding anything herein before provided an appeal shall lie to the said High Court from a judgment of one judge or the said High Court or one judge of any Division Court, consistently with the provisions of the Code of Civil Procedure, made in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a court subject to the superintendence of the said High court where the Judge who passed the judgment declares that the case is a fit one for appeal, but that the right of appeal from other judgments of the judges of the said High Court or of such Division court shall be to Us, Ours heirs or successors and be heard by our Board of Judicial Advisors for report to us.

Rule 31 of the Rules of 1999 provides that appeal preferred under Clause 12 of the Letters Patent from the judgment of one judge shall be heard

by a Bench consisting of at least two judges. Rule 31 is reproduced as under:

31. Appeals preferred under Clause 12 of the Letters Patent from the judgment of one Judge shall be heard by a Bench consisting of at least two judges other than the Judge from whose judgment the appeal is preferred.

22. On the consideration of the constitutional provisions, High Court Rules and Letters Patent, what emerges is that an LPA is an intra court

appeal. The appeal under Clause-12 of the Letters Patent is not an appeal from inferior to superior Court, but is an appeal against the judgment of

one judge to the Bench of two or more judges. The L.P appeal conferred on the High Court thus, may not attract the principles underlying the

doctrine of merger/fusion of judgment. As already stated in this judgment doctrine of merger/fusion has to satisfy some conditions and one of such

condition is existence of relationship of inferior and superior Court. There may thus be no merger of judgment of the single Judge in the judgment of

the Division Bench.

23. One more important question which arises for consideration is, what would be affect of the judgment of the appellate Bench in an intra court

appeal in the High Court on the judgment of the single Bench. Two judgments in law cannot operate simultaneously one of the single bench and

other of the L.P Bench.

24. Rule-34 of. the Rules of 1999 provides that every decision of Full Bench shall be binding on all Division/Single Bench upon point of law or

usage having force of law determined by Full Bench and a decision of D.B upon point of law or usage having the force of law shall be binding on a

single Bench. The declaration made under rule 34 of 1999 refers to the point of law, and it does not talk of merger of the judgment of the single

Judge in the judgment of the Division Bench.

25. In this scenario what would be the affect of the judgment handed down by single Bench when the said judgment is challenged in appeal. Under

clause-12 of the Letters Patent, a party which is not satisfied with the judgment of the single Judge can file an LPA against the same before L.P

Bench which comprises of two or more judges. The intention of the aggrieved person is to get the judgment of the Single Judge modified or set-

aside on the basis of the facts and law available in the case. The aggrieved person who throws challenge to the judgment before appellate forum

thus of his own volition gives-up it's claim over the judgment of the Single Judge and invites upon itself a judgment from the L.P Bench. The

consequence of such action of aggrieved person would be that the judgment passed by the L.P Bench will be binding on him as he invokes the said

jurisdiction and invites a judgment out of his own volition. Since two judgments, one from Single Bench and other from Division Bench cannot

operate at one point of time, on the doctrine of election by aggrieved person, the judgment of the L.P Bench will prevail and the judgment of the Id

Single Judge will cease to be in existence. It is the judgment of the Division Bench which will hold the field and govern the subject matter of the

dispute between the parties and will bind them.

26. When aggrieved person approaches court of law, it seeks determination of the issues raised. The court of law decides the issues and its

reasoning gets crystallized into the judgment, the judgment thus binds the parties. When the aggrieved person is not accepting the judgment of the

single Judge and files an LPA then the judgment of the LP Bench bind the parties thereto and it's only this judgment which is to be given effect to.

After the judgment of Letters Patent Bench the judgment of Single Bench ceases to exist in law and it is the judgment of Letter Patent Bench which

occupies the field. A Division Bench of Andhra Pradesh High Court in case titled Smt. A. Santhi Kumari, I.A.S., Secretary, A.P. Social Welfare

Residential Educational Institutions Society Vs. K. Ravi and Another, has ruled as under:

In our considered opinion, the Contempt Case filed by the Respondents-writ Petitioners, which itself arises out of the order passed by the learned

Single Judge in W.P No. 17560 of 1999, is not maintainable in law since the order passed by the learned single Judge no more subsists in the eye

of law. The order passed by the learned single Judge is sunk or disappeared and stood absorbed into the order of the writ appellate Court.

27. The judgment passed in LPA No. 243/06 dated 31st August 2007 having not been challenged by the Appellant has attained finality and it is

this judgment which is to govern the relationship between the parties. The judgment binds the parties inter se. The judgment dated 31.08.07 passed

in LPA No. 243/06 is thus the judgment which is executable in law. The Hon'ble Supreme Court in case titled Authorised Officer (Land Reforms)

Vs. M.M. Krishnamurthy Chetty[OVERRULED], has ruled as under:

1. This appeal has been filed on behalf of the Authorized Officer under the Tamil Nadu Land Reforms (Fixation of Ceiling of Land), Act, 1961 for

setting aside the judgment of the learned Judge of the High Court of Madras. It appears that about 4.81 standard acres of lands belonging to the

Respondent were declared surplus. Ultimately the matter came to the High Court. A learned Judge of the High Court set aside the orders passed

by the authorities concerned and remanded the case for fresh consideration in the light of the judgment of the High Court in the case of Naganatha

Ayyar v. Authorized Officer. While the matter was pending before the Authorized Officer this Court reversed the aforesaid judgment in Naganatha

Ayyar v. Authorized Officer in the case of Authorized Officer v. S. Naganatha Ayyar. The Authorized Officer decided the ceiling proceedings in

the light of the judgment of this Court. The land holder went in revision before the High Court challenging the order of the Authorized Officer. A

stand was taken before the High Court that the order of remand passed by the High Court directing the Authorized Officer to decide the dispute in

respect of the ceiling area in the light of the judgment of the High Court in the case of Naganatha Ayyar v. Authorized Officer was not challenged

by the Authorized Officer before the Supreme Court and as such it has become final. In other words the Authorized Officer was bound by the

order of remand passed by the High Court and it was not open to the Authorized Officer to consider the dispute in respect of the ceiling area in the

light of the judgment of this Court. The High Court accepted this contention and allowed the civil revision filed by the land holder, the Respondent.

2. According to the Appellant once the judgment on the basis of which the High Court had directed to dispose of the dispute relating to the excess

land had been reversed by this Court, the Authorized Officer was justified in following the judgment of this Court instead of the judgment of the

High Court. It need not be pointed out that the order passed by the High Court attained finality as it was not challenged before the Supreme Court.

The order passed by the High Court directing the Authorised Officer to examine the dispute in the light of the judgment of the High Court in the

case of Naganatha Ayyar v. Authorised officer became final although the judgment on which the grievance had to be examined itself was reversed

later by this Court. We find no fault with the reasoning of the High Court. It is well settled that even orders which may not be strictly legal become

final and are binding between the parties if they are not challenged before the superior courts. In the result the appeal fails and it is dismissed. No

costs.

28. The judgment in LPA No. 243/06 has in unequivocal terms rendered a finding that possession of the Appellant over the land is unauthorized

under the Act of 1997 and Section 5 of the said Act is attracted. Section 5 of the Act of 1997 provides for eviction of unauthorized occupants.

The statutory appeal filed by Appellant under the Act of 1997 in view of the finding recorded by the L.P Bench in it's judgment dated 31st August

2007 is rendered otiose and in-consequential. The statutory appeal was rightly dismissed by appellate authority having been rendered infructuous

and the Single Judge was also right in dismissing the writ petition filed by the Appellant.

29. For the above stated reasons, this appeal being meritless, is dismissed in limini.

30. Dismissal of this appeal shall not preclude the Appellant from filing appropriate proceedings for recalling/reviewing of the order passed in LPA

No. 243/06 dated 31st August 2007. If any, such proceedings are filed, the result thereof will bind the parties irrespective of dismissal of this

appeal. The Respondent No. 8 has admitted about receipt of part of sale amount. In case the Appellant, chooses not to seek the land then

Respondent No. 8 shall repay the amount received by him to the Appellant as that will be in-consequences with settled principles and norms of

ethics and morality for attaining of which laws have been framed and institutions are created.