

(2008) 06 J&K CK 0003
In the Jammu And Kashmir High Court

Mst. Raja and Others

APPELLANT

Vs

J and K Special Tribunal and Others

RESPONDENT

Date of Decision : 04-06-2008

Acts Referred:

Jammu and Kashmir Agrarian Reforms Act, 1976 — Section 10, 4, 8

Citation : (2008) 3 JKJ 17

Hon'ble Judges : M. Yaqoob Mir, J

Bench : Single Bench

Judgement

M. Yaqoob Mir, J.—The litigating process in between the parties is likely to complete four decades. Methods and process adopted by the

petitioners for this prolongation is compounded by the revenue officers at the level of Tehsildar and Assistant Settlement officer. There have been

rounds of litigation which are now required to be set at rest.

2. The precise flash back of the factual matrix for proper adjudication is required to be noticed.

3. One Mst. Azizi widow of Wahab Najar had mortgaged with possession, the land measuring 13 kanals and 13 marlas covered by survey Nos.

302, 369, 370 and 371 situated in Village Choyan Tehsil Kulgam. Mortgage deed seem to have been executed in favour of one Shaban Najar on

20.12.2004 Bikrami which corresponds to year 1948 A.D. Mortgage was for unlimited period of time.

4. Mst. Azizi died in the year 1964, thereafter in the year 1970, collaterals instituted suit before the Court of Munsiff at Kulgam wherein mortgage

deed was challenged being fraudulent. Petitioner (Mortgagee) contended that the land was under their occupation pursuant to valid deed of

mortgage. The proceedings of the suit continued but in the meantime, in the year 1976, Agrarian Reforms Act came into force. Munsiff, Kulgam,

seems to have remitted the case to Collector. Collector, vide his order dated 11.11.1983 came to the conclusion that the matter can be

adjudicated upon by Civil Court. Same was upheld by the Joint Agrarian Reforms Commissioner vide his order dated 03.04.1985 Special

Tribunal in exercise of revisional powers, vide order dated 01.08.1996, remanded the case to the Assistant Settlement Officer/Collector with

direction to conclude adjudication in terms of Section 10 of J&K Agrarian Reforms Act. Assistant Settlement Officer vide his order dated

04.11.1997 came to the conclusion that mortgage was not subsisting on the date when the Agrarian Reforms Act 1976 came into force, therefore,

position of the petitioners cannot be disturbed. This order was challenged before Agrarian Reforms Commissioner, who vide his order dated

06.04.1999, remanded the case opining therein that the issue of subsistence of mortgage is established, therefore, Assistant Settlement officer is

directed to dispose of the application for redemption of mortgage u/s 10 of the Agrarian Reforms Act (hereinafter referred to as ""Act"").

5. Order dated 06.04.1999, passed by Agrarian Reforms Commissioner, was challenged by medium of Revision petition before the Special

Tribunal. Special Tribunal, vide its order dated 30.01.2001, concluded that the revision was devoid of merit, and dismissed the same but at the

same time, while parting with the file, for advancement of interests of justice, made observations to work as guideline to Assistant Settlement

Officer for disposal of the matter.

6. Dissatisfied with the order dated 30.01.2001 passed by Special Tribunal, writ jurisdiction has been invoked.

7. Thoughtfully considering the submissions as have been advanced by either side as well as the record available, certain facts are admitted i.e.

execution of mortgage deed for unlimited period by Mst. Azizi then her death in the year 1964. The position of the petitioner and proforma

respondents could not be refuted having stepped in the shoes of mortgagor and the position of contesting respondents having stepped into the

shoes of mortgagee.

8. Consistent view of the Agrarian Reforms Commissioner as well as Special

Tribunal that the mortgage subsisted on the date of enforcement of the "Act" is fully established though contesting respondent while filing the suit had challenged the validity of mortgage deed but petitioners and proforma respondents in their pleadings had taken the positive stand that they are in possession of the land pursuant to the deed of mortgage. Had the mortgage been restricted in point of time, then it could be said that with the expiry of time, mortgage has come to an end. The mortgage being unlimited cannot be stated to be not subsisting. When mortgage is subsisting on the date of enforcement of Act, it has to be dealt with strictly in accordance with Section 10 of the Act which has overriding effect over other laws to the extent of inconsistency envisaged by Section 32 of the Act". - -

9. Section 10 of the "Act" provides, as to how mortgaged property is to be dealt with. Joint Agrarian Commissioner in his judgment dated 06.04.99, has rightly concluded that mortgage subsists so it was to be dealt with by Assistant Settlement Officer in terms of Section 10 of "Act".

10. In the first round of litigation, the Special Tribunal in its order dated 01.08.1996 had also qualified that the Collector shall dispose of the matter in terms of Section 10 of the "Act". How the Assistant Settlement Officer could afford to observe that Section 10 is not applicable, is quite shocking either he has exhibited his innocence or could have some extraneous considerations to ignore the finding of the Special Tribunal which is the highest forum in the hierarchy of the Agrarian Reforms Authorities.

11. Learned Special Tribunal vide its detailed and elucidated judgment dated 30.01.2001 has correctly upheld the order of Agrarian Commissioner dated 06.4.1999 but while parting with the file, learned tribunal has made observation as to how the Assistant Settlement Officer has to deal with the matter, in conformity with the provisions of Section 10 of the "Act".

12. The guidelines issued in the peculiar facts of the case, more particularly, the proviso 2nd to sub Section 2 of Section 10 of the "Act" has been lost sight of i.e. learned Tribunal has observed to evaluate the usufruct, to calculate the amount due and after calculation payment to be made in installments and then to hand over the possession of mortgage land to the contesting respondents.

13. The concern of the learned Tribunal to see end of the litigation is quite appreciable but the calculation part of the order is not warranted under proviso 2nd to Clause (b) of Sub-section 2 of the Section 10 of the Act which reads as under:

Provided also that where the mortgagee has been in possession of the mortgaged land for a period of ten years or the period during which the mortgage was to subsist according to the terms of the mortgage deed, whichever is less, it shall be conclusive proof of the fact that the mortgagee has received one and a half times the amount of principal money as well as the cost of improvements, if any.

14. The mortgagee has been in possession of the mortgaged land from the year 1943 so it was conclusive proof of the fact that the mortgagee had received the amount of principal manifold times so there should be clear order for handing over the possession of the mortgaged land to the claimants. The observations made by the Tribunal to the extent of No. 1, 2, 3 and 5 are to be ignored.

15. Appearing counsel for the petitioner first contended that Mst. Azizi had mortgaged the property, on her death in the year 1964, mortgage has come to an end. Therefore, petitioners and proforma respondents hold the land adversely. Section 10 of the "Act" has no applicability. This submission is only to be rejected being illogical and bereft of any legal sanctity because with the death of Mst. Azizi property has devolved on the collaterals so the possession of mortgagee did not get disturbed. If the submission of learned Counsel is accepted, then with the death of the executant of the document the position of the document will become redundant. Then people will lose faith in law and nobody will afford to execute any document. No doubt the widow had the limited interest but with the death of executant, succession is the automatic process, therefore, position of mortgagee would bind the collaterals and their position will be simply as mortgagors.

16. Petitioners (mortgagee) cannot turn around to claim ownership by prescription when in their statement before the Court of Munsiff, they have contended to be in possession as mortgagees. Once the mortgagee is always the mortgagee till its term expires or till mortgage is redeemed. There can be no question of adverse possession.

17. Appearing counsel next contended that the mortgage having come to an end in the year 1964 with the death of the mortgagor they continue to

be in possession as ""tillers"" so stand conferred attested under the said sections have not been challenged.

18. The submission of appearing counsel is totally un imaginable because the petitioner cannot claim to be the ""tillers"". Section 3 Sub Section 17 of

the ""Act"" defines as to what a ""tiller"" means. For brevity is reproduced herein below.

tiller"" means tenant cultivating land personally and shall mean and include a person who was tiller in Kharif, 1971 or his legal heirs or his transferee

in the case of any valid transfer of land made between 1st September, 1971 and 1st May, 1973, subject to the competent Revenue Officer being

satisfied about the existence of a bona fide transfer to this effect.

19. As per the definition ""tiller"" means the tenant. Definition of tenant is not given in the Act but as per Sub Section 18 of Section 3 the words and

expressions not defined in the Act shall have meaning as assigned to them in other Acts which include Tenancy Act.

Sub Section 5 of Section 2 of Tenancy Act reads as under:

tenant"" means a person who holds land, under the State, or under another person, and is, or but for a special contract in that behalf would be,

liable to pay rent for that land, to the State or to that person; but it does not include-

(a) an inferior land holder, or

(b) a person to whom a holding has been transferred, or an estate or holding has been let on farm, for the recovery of an arrear of land revenue, or

of a sum recoverable as such, or (c) a mortgagee of the rights of landholder,

20. Plain reading qualifies as to what the tenant means whereas as the mortgagee in possession is not included in the category of tenant as is clear

from clause ""C"".

21. The position of the petitioners to be the mortgagees not the tenants is fully established, therefore, claim of the petitioner being tillers then

ownership rights under Sections 4 and 8 of the Act is aimed to defeat the legitimate rights of the petitioners.

22. Attestation of mutations under Sections 4 and 8 of Act is not only surprising but matter of shame for the revenue officer who has attested the

same when all along legal battle right from the year 1971 traveling from forum to forum upto highest forum of revenue agency then during {he

pendency of the case attestation of mutations u/s 4 and 8 of the ""Act"" is a question mark the same has surfaced when the writ petition has been filed.

23. Mutation attested u/s 4 and 8 of the Act seem not to have been challenged but are to be ignored as being nullity in the eye of law. It is in this

background at the very outset it was clarified that the problem has been compounded by the subordinate Revenue officers and the field officers. To

clarify it, mutation always is entered by the patwari then attested by the Tehsildar or Naib Tehsildar and both have been in know of the legal

proceedings but still have dared to attest the mutation under Sections 4 and 8 of the Act.

24. The judgments as referred to by learned appearing counsel for the petitioner are not helpful to the petitioners as this case has its own facts and

features and law has to be applied depending upon the particular facts and features of the case.

25. Learned appearing counsel for the petitioner relied on the judgment reported in Pune Municipal Corporation Vs. State of Maharashtra and

Others, . In the peculiar facts of the case dealt with by the Apex Court the order being passed u/s 8 of the Urban Land (Ceiling and Regulation)

Act (33 of 1976) which was not challenged and it became final. Perhaps learned Counsel tried to take benefit of attestation of mutation u/s 4 and 8

as having not been Challenged but both these mutations have been attested mysteriously during the pendency of the long drawn litigation spreading

over a period of 38 years.

26. Next learned Counsel has relied upon AIR (2004) SCC 376 wherein it has been laid down as to what are the elements to be proved for

claiming ownership on the basis of adverse possession. In the case in hand, question of adverse possession is beyond comprehension as the

position of petitioners is simply that of mortgagee. Petitioner in his own petition has taken contradictory stands. The policy of approbation and

reprobation is not permissible, on the one hand initially has claimed to be the mortgagee then has claimed to be the owner by adverse possession

and now has claimed to be the tiller to claim benefit under Agrarian Reforms Act.

This all exposes the position of petitioner aimed at divesting the actual owners of their legitimate rights. The judgment cited is of no help to the petitioner.

27. Next it was contended by learned Counsel that J&K Muslim Personal Law (Shariat) Application Act 2007 (hereinafter referred to as ""Shariat

Act"")pro- vide for application of Muslim Personal Law not withstanding any customs and usage, therefore, succession has to be governed by

Section 7 of Muslim Personal Law. By referring to all these Acts perhaps he wants to show that execution of the Mortgage deed by widow was

unwarranted. The ""Shariat Act"" has come into force in the year 2007 whereas Mortgage deed has been executed in the year 1948, therefore,

benefit is not available to the petitioner under the ""Shariat Act"".

28. Learned Counsel for the contesting respondents, while relying on judgment reported in 1997 Madras Page 74 stated that after the death of the

mortgagor heirs of the mortgagor are entitled to redeemed mortgage after expiry of period fixed. In the instant case mortgage was for unlimited

period but with the enforcement of Act, Section 10 is to be followed. The successors of the mortgagor have every right to claim redemption of

mortgage.

29. The irresistible conclusion is that the contesting respondents legal heirs of Mst. Azizi (Mortgagor) who stepped in her shoes on succession are

the owners.

30. Mortgage subsisted on the date of enforcement of the Act. Any further over stretching is unwarranted. Collector concerned shall ensure

handing over of the possession of the mortgaged land under dispute to the contesting respondents within four weeks from the date of receipt of this

order.

31. Divisional Commissioner, Kashmir, is hereby commanded to get the officers/ officials located who have initially attested the mutation u/s 4 and

8 of the Act during the pendency of the proceedings and disciplinary action be taken against both of them, adverse entry be recorded in their

service records after enquiry.

32. Assistant Settlement officer, who has passed the order dated 04.11.1997, be also got located as he has over looked the order of Special

Tribunal dated 01.08.96 so shall also be dealt with at administrative level.

33. Both the orders dated 06.4.94 passed by Agrarian Reforms Commissioner and order 31.01.2001 passed by J&K Special Tribunal are found in consonance with law.

34. Issuance of writ of certiorari is un warranted.

35. Writ petition is, therefore, dismissed with costs which are quantified at Rs. 10,000/- payable to the contesting respondents.

36. Petition disposed of alongwith connected CMP(s).