

(2018) 02 J&K CK 0030
In the Jammu And Kashmir High Court
Case No : 135 of 2018

Mst. Zaina Begum and another.

APPELLANT

Vs

State of J&K and others.

RESPONDENT

Date of Decision : 05-02-2018

Acts Referred:

[Constitution of India](#), [Article 21](#), [Article 226](#) - Amendment of the Schedule - Power of High Courts to Issue certain writs

Citation : (2018) 02 J&K CK 0030

Hon'ble Judges : Sanjeev Kumar

Bench : Single Bench

Advocate : R.A.Jan, Amina, B.A.Dar

Final Decision : Disposed Off

Judgement

1. This petition is primarily directed against the action initiated by respondent No.3 under the provisions of the Jammu & Kashmir Public Premises

(Eviction of Unauthorized Occupants) Act, 1988 (hereinafter referred to as "the Act") for the eviction of the petitioners from the Government

accommodation, i.e., Flat No.10-S, Tulsi Bagh, Srinagar. Although, the petitioners have not specifically called in question the notice of eviction

issued by respondent No.3 including the show cause notice issued under Section 4 of the Act on 12.09.2017, yet the petitioners have sought

issuance of directions which, if granted, would have the effect of restraining the respondents from proceeding against the petitioners under the Act

for seeking their eviction.

2. The facts, as projected by the petitioners in this petition, are that the predecessor-in-interest of the petitioners, namely, Sh. Ghulam Nabi Yatoo

who was a political worker having allegiance to CPI (M) was allotted government accommodation, i.e., Flat No.10-S, Tulsi Bagh, Srinagar vide

Government Order No.296 of 1999 dated 25.10.1999. The allotment was initially for a period of one year. The said Sh. Ghulam Nabi Yatoo died

in the year 2012 leaving behind the petitioners as his legal heirs. It is submitted that after the death of Sh. Ghulam Nabi Yatoo, the petitioners being

his legal heirs were permitted to occupy the aforesaid quarter, though no specific order in their favour was made. The petitioners also claim to have

applied for formal allotment of the quarter in question on security grounds and respondent No.3 vide his communication dated 18.07.2012

forwarded the request of the petitioners to respondent No.2 but no order for formal allotment in favour of the petitioners was issued, nor their

application was rejected by any formal order. It is, thus, stated that the petitioners continued to be in possession of the quarter in question and paid

the monthly rent regularly. The petitioners, however, were served with a show cause notice dated 12.09.2017 issued by respondent No.3 under

Section 4 of the Act, calling upon them to produce documentary or other evidence within a period of seven days from the date of issuance of

notice to prove that they had been duly authorized to occupy the flat in question. The petitioners responded to the aforesaid show cause notice by

submitting their written reply. The possession of the quarter in question was sought to be justified by the petitioners on the ground that though there

is no formal allotment in their favour, yet in view of threat perception, they cannot be treated to be unauthorized occupants liable to eviction.

3. On the basis of aforesaid averments the petitioners claim that the respondents without further proceeding and declaring them as unauthorized

occupants by following the procedure laid down under the Act are threatening their eviction and, therefore, they have been left with no other option

but to approach this Court to safeguard their right to life and liberty guaranteed under Article 21 of the Constitution of India.

4. I have heard learned senior counsel appearing for the petitioners as also the state counsel who, besides making oral submissions also produced

the relevant record.

5. Admittedly, the allotment of the quarter in question was made by the respondents in favour of Ghulam Nabi Yatoo, a political person having

affiliation with a political party, i.e., CPI(M). The allotment was for a period of one year. The petitioners have not placed on record any order of

extension issued in favour of Sh. Ghulam Nabi Yattoo. He, however, continued in possession till the year 2012 when he passed away. After his

death, the petitioners being his legal representatives continued in occupation of the accommodation in question It is also borne out from the record

that they have already made an application for allotment of the accommodation citing threat perception as a ground for allotment. This application,

though forwarded by respondent No.3 to respondent No.2 to take a view in the matter, yet no decision thereon was ever taken. There is, thus,

admittedly no order of allotment in favour of the petitioners. The petitioners are primarily occupying the accommodation in question without any

formal order of allotment issued in their favour. As a matter of fact, they were not even regular in depositing the monthly rent. However, the arrear

of rent appears to have been deposited by the petitioners when they were put on notice by respondent No.3 vide his communication dated

29.11.2016. The eviction proceedings against the petitioners were initiated by respondent No.3 being an Estate Officer by issuing show cause

notice dated 12.09.2017 under Section 4 of the Act. The petitioners responded to the aforesaid notice and submitted their written reply.

6. Although, the petitioners have not stated anything as to whether any action pursuant to the notice issued under Section 4 of the Act was taken

by the respondents but from a perusal of the record produced by the respondents, it transpires that respondent No.3 after considering the reply

submitted by the petitioners to the show cause notice passed an order under sub section 1 of Section 5 of the Act vide his No.

DDES/Evc/2018/10-S/TB dated 08.01.2018. However, this order has not been called in question by the petitioners. When confronted with the

aforesaid position, learned senior counsel appearing for the petitioners submitted that the petitioners are not aware of any order having been

passed under Section 5(1) of the Act and even if there is one, the same has not been served upon the petitioners. From the perusal of the record

also it is not coming forth as to when the aforesaid order was served upon the petitioners.

7. Be that as it may, the fact remains that respondent No.3 has now issued eviction notice under Section 5(1) of the Act calling upon the petitioners

to vacate the premises within seven days from the date of receipt of the order/ notice and the same is required to be served upon the petitioner, if

not already served. The petitioners, when served with the aforesaid order of eviction issued in terms of Section 5(1) of the Act, would have a

remedy of challenging the same by way of an appeal before the District Judge in terms of Section 12 of the Act. For facility of reference Section

12 of the Act is reproduced hereunder:-

12. Appeals.-- (1) An appeal shall lie from every order of the estate officer made in respect of any public premises under section 5

or section 7 or section 8 or section 10 to an appellate officer who shall be the District Judge of the district in which the public

premises are situate or such other judicial officer in that district of not less than ten years" standing as the District Judge may designate

in this behalf.

(2) An appeal under sub-section (1) shall be preferred,-

(a) in the case of an appeal from an order under section 5, within twelve days from the date of publication of the order under sub-

section (1) of that section;

(b) in the case of an appeal from an order under section 7 or 10 within twelve days from the date on which the order is

communicated to the appellant; and

(c) in the case of an appeal from an order under section 8, within twelve days from the date of such order:

Provided that the appellate officer may entertain the appeal after the expiry of the said period of twelve days, if he is satisfied that the

appellant was prevented by sufficient cause from filing the appeal in time.

(3) Where an appeal is preferred from an order of the estate officer, the appellate officer may stay the enforcement of that order for

such period and on such condition as he deems fit:

Provided that where the construction or erection of any building or other structure or fixture or execution of any other work was not

completed on the day on which an order was made under section 7 for the demolition or removal of such building or other structure

or fixture, the appellate officer shall not make any order for the stay of

enforcement of such order, unless such security as may be sufficient in the opinion of the appellate officer, has been given by the appellant for not proceeding with such construction, erection or work pending the disposal of the appeal.

(4) Every appeal under this section shall be disposed of by the appellate officer as expeditiously as possible.

(5) The costs of any appeal under this section shall be in the discretion of the appellate officer.

8. The aforesaid remedy of appeal provided under the Act is undoubtedly statutory and equally efficacious. The appellate authority prescribed is

none other than a District Judge or such other judicial officer having a standing of not less than ten years. That being so, this writ petition cannot be

entertained in view of the availability of the equally efficacious statutory remedy available under law. I am aware that the rule requiring exhaustion of

statutory remedies before the writ will be granted is a Rule of convenience and discretionary rather than Rule of law and instances are not far to

find where the Courts have issued writs inspite of the fact that aggrieved party had alternate equally efficacious remedies available. But it is equally

true that where an equally efficacious statutory remedy is available, it would not be sound exercise of discretion to entertain the writ petition under

Article 226 of the Constitution of India. It is only where the exceptional circumstances like the order impugned has been issued in blatant violation

of the principles of natural justice or where the order or proceedings impugned are wholly without jurisdiction or vires of the Act is under challenge,

exist, the Court may entertain the writ petition, availability of adequate alternate remedy notwithstanding. Law on the Rule of requiring the party to

exhaust the statutory remedies before a writ is granted has been considered by the Supreme Court in numerous judgments. To cite the few, see

Baburam Parkash Chandra Maheshwari v. Antarim Zila Parishad; AIR 1969 SC 556, Whirlpool Corporation v. Registrar of Trade marks,

Mumbai; (1998) 8 SCC 1 and Harbanslal Sahnia and another v. Indian Oil Corporation Ltd. and others; (2003) 2 SCC 107.

9. When the facts of the instant case are examined in the light of settled position of law, it cannot be said that the remedy of appeal provided under

Section 12 of the Act is not equally efficacious and that there are exceptional

circumstances warranting interference by this Court under Article 226 of the Constitution of India despite availability of adequate statutory remedy. The remedy provided under Section 12 of the Act is not only statutory but equally efficacious. As stated above and reiterated, the prescribed appellate authority is none other than the District Judge or such other judicial officer having standing of not less than 10 years. This itself makes the remedy of appeal very efficacious and adjudicatory in nature. It is not the case of the petitioners that respondent No.3 is not an estate officer or authority under the Act to issue a notice of eviction under the Act nor the vires of the Act is under challenge before this Court. Before issuance of order/notice dated 08.01.2018, the petitioners were put on show cause notice under Section 4 of the Act which notice was duly replied by the petitioners. It does not; therefore, lie in the mouth of the petitioners to say that notice of eviction dated 08.01.2018 has been issued in violation of the principles of natural justice. In short, the case set up by the petitioners in the writ petition does not fall within the ambit of exceptions carved out for exercise of discretion to interfere under Article 226 of the Constitution of India despite availability of adequate alternate remedy.

10. To be fair to the petitioners, I considered the judgment of the Supreme Court, relied upon by the learned senior counsel appearing for the petitioner, in the case of *New India Assurance Company Ltd. v. Nusli Neville Wadia and another*; (2008) 3 SCC 279. The aforesaid judgment is totally distinguishable and has been rendered by the Supreme Court in a different set of circumstances. The plea of alternate remedy available to the aggrieved alleged unauthorized occupant was not subject matter of consideration in the aforesaid case. It is, thus, not understandable as to how the aforesaid judgment could come to the rescue of the petitioners. In any case, the petitioner shall have ample opportunity to raise all these contentions as have been raised in this petition as also draw support from the aforesaid judgment, should they choose to avail of the remedy of appeal before the District Judge.

11. In view of the aforesaid analysis, this petition is held not maintainable and the petitioners are relegated to the statutory, alternate and equally efficacious remedy of appeal as provided under Section 12 of the Act. Respondent No.3 shall immediately and forthwith serve upon the petitioners

a copy of the order dated 08.01.2018 issued under Section 5(1) of the Act, so as to enable the petitioners to exercise their right of filing appeal

within the period stipulated. Needless to say that no action for eviction of the petitioners shall be taken till the eviction notice dated 08.01.2018 is

properly served upon the petitioners and in any case not before the expiry of seven days from the date of receipt of eviction notice as is envisaged

under sub section 2 of Section 5 of the Act.

12. Nothing stated in this order shall be construed as any expression of opinion on the merits of case and the appellate authority under the Act, if

approached, shall deal with the appeal uninfluenced by the observations made herein above.

13. The writ petition along with connected MP, accordingly, stands disposed of.