

(2021) 11 J&K CK 0028

In the Jammu And Kashmir High Court

Case No : Writ Petition (C) No. 1554 Of 2021, Civil Miscellaneous No. 4327 Of 2021

Naseema Bano & Ors

APPELLANT

Vs

Ut Of J&K & Ors

RESPONDENT

Date of Decision : 10-11-2021

Acts Referred:

Constitution Of India, 1950 — Article 226
Jammu And Kashmir Migrant Immovable Property (Preservation, Protection And Restraint On Distress Sales) Act, 1997 — Section 4, 5
Agrarian Reforms Act, 1976 — Section 4, 5, 7
Jammu And Kashmir Land Revenue Act, 1996 — Section 31

Citation : (2021) 11 J&K CK 0028

Hon'ble Judges : Sanjay Dhar, J

Bench : Single Bench

Advocate : Hilal Ahmad Wani, B. A. Dar, Hakim Suhail Ishtiaq

Final Decision : Dismissed

Judgement

Sanjay Dhar, J

1) Petitioners have challenged order No.DCA/MC/17-18/796-98 dated 08.03.2018, passed by District Magistrate, Anantnag, whereby Tehsildar, Pahalgam, has been directed to take custody of land measuring 5 kanals 7 marlas bearing Khasra No.586/100 situated at Jummoo, as per Sections 4 and 5 of the Jammu & Kashmir Migrant Immovable Property (Preservation, Protection and Restraint on Distress Sales) Act, 1997 (hereinafter referred to as the Act of 1997).

2) The case set up by the petitioners is that they are owners in possession of land measuring 12 kanals 7 marlas falling under Survey No.286/100, out of which 5 kanals 7 marlas fall under Survey No.286/100 and 7 kanals under Survey No.584/101. The land is situated at Jummoo Tehsil Pahalgam District Anantnag. It is averred that the respondent No.7 has filed an application before

respondent No.4 claiming right over the aforesaid land on the basis of which respondent No.4, without following the procedure of law and without holding any enquiry, issued the impugned order, in terms whereof respondent No.6 has been directed to take possession of the property in question.

3) It is further averred that during enquiry it was found that the land in question was never in possession of respondent No.7 i.e. migrant even before 1989. In this regard, petitioners have relied upon communication dated 27.04.2018 of Tehsildar, Pahalgam.

4) The impugned order of eviction has been challenged by the petitioners on the grounds that the said order has been passed without holding any enquiry and without determining the fact as to whether the property in question is a migrant property; that while issuing the impugned order, respondent No.4 has not followed the provisions of law nor has he determined the question as to whether the property in question belongs to a migrant and that the possession of the petitioners over the same is unauthorized in nature.

5) The official respondents in their reply have submitted that vide mutation No.471 attested under Section 4 of Agrarian Reforms Act, 1976, the subject matter of the petition i.e., land in question was mutated in the name of Gh. Nabi and Gull Mohammad and others.

The said mutation order No.471 of Village Jummoo to the extent of land measuring 12 kanals 7 marlas, which is subject matter of instant writ petition, upon being challenged, was set aside restoring the previous entries. This was done by Additional Deputy Commissioner (Commissioner Agrarian Reforms), Anantnag, in an appeal filed by respondent No.7, in terms of his order dated 05.02.2016. It is further averred that Gh. Nabi and others filed a revision petition before J&K Special Tribunal against the aforesaid order and the said revision petition came to be dismissed by the Tribunal in terms of its order dated 12.01.2017. It is contended that while passing the impugned order, the respondent No.4 has followed the procedure prescribed by law and has taken into account the reports of field agencies.

6) Private respondent No.7 has also filed reply to the writ petition. In his reply it is claimed by the said respondent that he is owner of the land in question. According to him, the land falling under Khasra No.101-min measuring 7 kanals was purchased by his father by virtue of a sale deed from the owners of the land. He has claimed that he was in possession of land under Khasra No.100-min till his migration from Kashmir in the year 1990 and that land falling under Khasra No.101-min was already mortgaged at the time of purchase of the same by his father and the period of mortgage has expired. Thus, he was in constructive possession of the said land. It is averred that taking advantage of absence of respondent No.7, the petitioners and their predecessor-in-interest got the land in question mutated in their name by misusing the provisions of Agrarian Reforms Act when in fact nature of the land was Banjar-e-Qadeem which does not fall

within the ambit of Agrarian Reforms Act. It is in these circumstances that Agrarian Reforms Commissioner, Anantnag, on an appeal filed by respondent No.7, set aside mutation order vide his order dated 19.01.2016, which order was challenged by predecessor-in-interest of the petitioners by way of a revision petition which also stands dismissed. A preliminary objection to the maintainability of the writ petition has also been raised by respondent No.7 by contending that the impugned order is appealable in terms of Section 7 of the Act of 1997 and, as such, the writ petition is not maintainable.

7) I have heard learned counsel for the petitioners and learned counsel for the respondent No.7. I have also gone through the petition, documents attached thereto, particularly the impugned order passed by respondent No.4.

8) Before proceeding to consider the merits of the writ petition, it would be apt to deal with the preliminary objection raised by learned counsel for the respondent No.7 as to the maintainability of the petition on the ground that the impugned order of eviction passed by respondent No.4 under Section 5 of the Act of 1997 is appealable under Section 7 of the said Act.

9) According to the learned counsel for the petitioners, the land, which is subject matter of dispute, was not under unauthorized occupation of the petitioners but they were in occupation of the said land in their own right and, as such, respondent No.4 had no jurisdiction to pass the impugned order by taking resort to the provisions contained in the Act of 1997. It has been further contended by learned counsel for the petitioners that because respondent No.4 lacked the jurisdiction to pass the impugned order, as such, alternative remedy of appeal would not be a bar to petitioners to invoke the writ jurisdiction of this Court. The learned counsel has relied upon the judgment of the Supreme Court in the case of *Radha Krishan Industries v. State of Himachal Pradesh and others*, (2021) 6 SCC 771, wherein the following principles of law were laid down:

"27.1. The power under Article 226 of the Constitution to issue writs can be exercised not only for the enforcement of fundamental rights, but for any other purpose as well;

27.2. The High Court has the discretion not to entertain a writ petition. One of the restrictions placed on the power of the High Court is where an effective alternate remedy is available to the aggrieved person;

27.3. Exceptions to the rule of alternate remedy arise where (a) the writ petition has been filed for the enforcement of a fundamental right protected by Part III of the Constitution; (b) there has been a violation of the principles of natural justice; (c) the order or proceedings are wholly without jurisdiction; or (d) the vires of a legislation is challenged;

27.4. An alternate remedy by itself does not divest the High Court of its powers under Article 226 of the Constitution in an appropriate case though ordinarily, a writ petition should not be entertained when an efficacious alternate remedy is

provided by law;

27.5. When a right is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before invoking the discretionary remedy under Article 226 of the Constitution. This rule of exhaustion of statutory remedies is a rule of policy, convenience and discretion; and

27.6. In cases where there are disputed questions of fact, the High Court may decide to decline jurisdiction in a writ petition. However, if the High Court is objectively of the view that the nature of the controversy requires the exercise of its writ jurisdiction, such a view would not readily be interfered with.

10) There can be no quarrel with the proposition that when an Authority, against which a writ is filed, is shown to have acted without jurisdiction or in derogation of the provisions of the Act under which such Authority has been constituted, alternative remedy of appeal would not come in the way of maintaining a writ petition. The question arises whether or not in the instant case, the respondent No.4, while passing the impugned order, has acted without jurisdiction.

11) Learned counsel for the petitioners has contended that the documents on record including the enquiry conducted by respondent No.4 before passing the impugned order, would show that the petitioners were in possession of the property in question in their own right even prior to 1989. According to the learned counsel, once it was shown from the material on record that the petitioners were in possession of the property in question before 1989, it was not open to the respondent No.4 to pass the impugned order. It is also contended that the respondent No.4, in terms of provisions of the Act of 1997, was required to conduct an enquiry as to the claim of the petitioners which the said authority has failed to do thereby violating the provisions of the Act itself. To support his contention, learned counsel for the petitioner has relied upon the judgments of this Court in *Jagar Nath Bhan & Ors. Vs. State of J&K & Ors.*, 2006(3) JKJ [HC] 407, and *Rajeev Verma & anr. V. State & Ors.*, 2010 (2) JKJ [HC] 859

12) A perusal of the impugned order reveals that the respondent No.4, while passing the said order, has noted that mutation No.471 that was attested in terms of Section 4 of Agrarian Reforms Act in favour of predecessor-in-interest of the petitioners was set aside by Commissioner Agrarian Reforms, Anantnag, vide order dated 05.02.20216, whereafter revision petition filed by predecessor-in-interest of petitioners was also dismissed by J&K Special Tribunal. Thus, the mutation order, on the basis of which the petitioners claim their title to the land in question, stands set aside and as per entries in the revenue record, the land in question belongs to the predecessor-in-interest of respondent No.7. It seems that the respondent No.4, while passing the impugned order, has relied upon these revenue entries, to which presumption of correctness is attached in terms of Section 31 of the J&K Land Revenue Act.

13) It is true that there are reports of some revenue officials/officers which

indicate that the predecessors-interest of respondent No.7 were never in possession of the land in question and that the same was in possession of predecessor-in-interest of petitioners. The question that arises for consideration is whether this Court in exercise of writ jurisdiction can enter into arena of appreciation of evidence and material that was available before respondent No.4. The answer to the said questions has to be in negative. In writ proceedings, it is not open to this Court to re-appreciate the material and evidence on record which respondent No.4 has considered at the time of passing of the impugned order. It is only the Appellate Authority which can undertake such an exercise.

14) The question whether respondent No.4 should have relied upon revenue entries which are presumed to be correct unless rebutted by cogent and convincing evidence \or the reports of the officials/officers of the Revenue Department cannot be gone into in these proceedings. Merely because the respondent No.4 while passing the impugned order has relied upon the revenue entries ignoring reports of revenue officials/officers does not mean that he has acted without jurisdiction or that he has proceeded in violation of the provisions of the Act of 1997. If petitioners are aggrieved of the manner in which the respondent No.4 has appreciated the evidence on record, the only course open to them is to file an appeal under Section 7 of the Act of 1997. Thus, the bar of alternative remedy of appeal as provided under Section 7 of the Act of 1997 would come into play for maintainability of instant writ petition.

15) Thus, for the reason that the petitioners have an alternative and efficacious remedy of filing an appeal under Section 7 of the Act of 1997, the instant writ petition is held to be not maintainable and is, accordingly, dismissed along with connected CM(s). However, having regard to the fact that the petitioners have under a bona fide impression filed and presented the instant writ petition against the impugned order of eviction and as such, could not file an appeal before the respondent No.4 within the stipulated time of 15 days, liberty is given to the petitioners to approach the Appellate Authority within 15 days from the date of passing of this order.

16) No order as to costs.