

(2023) 12 J&K CK 0026

In the Jammu And Kashmir High Court

Case No : Latters Patent Appeal No. 243 Of 2023

Shabir Ahmad Rufai And Another

APPELLANT

Vs

UT Of J&K And Others

RESPONDENT

Date of Decision : 19-12-2023

Acts Referred:

Constitution Of India, 1950 — Article 226
Code Of Civil Procedure, 1908 — Section 224, Order 21, Rule 36
Jammu And Kashmir Migrant Immovable Property (Preservation, Protection And Restraint On Distress Sales) Act, 1997 — Section 3, 4, 5, 7, 7(b)

Citation : (2023) 12 J&K CK 0026

Hon'ble Judges : N. Kotiswar Singh, CJ; Moksha Khajuria Kazmi, J

Bench : Division Bench

Advocate : R.A.Jan, Nitin Dubey

Final Decision : Disposed Of

Judgement

Moksha Khajuria Kazmi, J

1 Feeling aggrieved and dissatisfied by the judgment and order dated 21.11.2023 passed by the Writ Court in WP(C) 2714/2022, the original writ petitioners have preferred this intra-Court appeal. The writ Court vide judgment impugned herein, dismissed the writ petition. The relevant extract of the impugned judgment is reproduced hereunder:

"The aim and objective of the Act of 1997 is to protect and preserve the property of migrants. The migrants, as is provided under Section 2(e) of the Act of 1997, are those persons who migrated from Kashmir valley or any part of the erstwhile State of Jammu and Kashmir after 1st November 1989 and are registered as such with Relief Commissioner. The migrants also include those persons who have not been registered with Relief Commissioner on the ground of they being in service of Government in any moving office or having left valley or any other part of erstwhile state of Jammu and Kashmir, in pursuit of occupation or vocation or otherwise and are possessed of immovable property at the place

wherefrom they have migrated but are unable to ordinarily reside there due to the disturbed conditions. In such circumstances, no interference as sought for in the instant writ petition is called for or warranted”.

Factual matrix of the case

2 The father of respondent No. 7 namely Sham Lal Fotedar approached the appellants herein in the year 1997 offering to alienate all the immovable property comprising gutted/dilapidated house with land underneath and appurtenant thereto measuring 4343 sq.ft falling in khasra No. 1230/546 situated at Mouza Bagati Barzulla. It is stated that in furtherance of the offer of sale of the aforesaid immovable property, aforesaid Sham Lal Fotedar executed Irrevocable General Power of Attorney signifying therein his willingness and desire to sell the aforesaid immovable property in favour of Shabir Ahmad Rufai and Shaheen the appellants herein. Contract for sale dated 22.07.1997 and personal affidavit was executed by Sham Lal Fotedar stating therein that he is the owner in physical possession of aforesaid immovable property and has sold the same with his sweet will consent and without any undue pressure from any quarter to the appellants herein. It is stated that an application was drawn and signed by Sham Lal Fotedar by his own hand seeking permission for effecting sale of the property in question and submitted to Minister for Revenue which was forwarded to the Divisional Commissioner, Kashmir for further necessary action which was a voluntary act done by the Fotedar and that all legal formalities to effectuate sale in favour of the appellants had been accomplished.

3 The judgment impugned is challenged on the ground that the Writ Court while rendering the judgment has erred in law in not appreciating that the appeal provided under Section 7 of J&K Migrant Immovable Property (Preservation, Protection and Restraint on Distress Sales) Act, 1997 ('the Act of 1997' for short) being subject to onerous condition of possession of the property is not and cannot be called an adequate or efficacious remedy and that even otherwise as is settled, the statutory appeal does not operate as a bar in the case the order impugned is challenged on the ground of being without jurisdiction. It is submitted that the Writ Court while rendering the judgment impugned has erred in law in not appreciating that respondent No.4 gets jurisdiction in law to pass an order under Section 5 of the Act of 1997 only in case of unauthorized occupation of a migrant property. It is further submitted that the Writ Court while rendering the judgment impugned has erred in law in not appreciating that the impugned action of respondent No.4 is ultra vires the power, authority and jurisdiction, therefore, non-est in the eye of law. It is submitted that the approach of the leaned Writ Court in dismissing the writ petition on the ground that the remedy of appeal is available to the appellant is not correct as the appeal could have been filed only after surrendering the possession and the statutory obligation casts upon the appellant to avail the remedy provided by the statute was onerous, therefore, the remedy cannot be termed as efficacious. In support of his submissions, learned counsel has relied upon a judgments of this Court

rendered in Ghulam Nabi Najar vs. State and others (OWP No. 505/2007, decided on 19.03.2009 and S. Hakeekat Singh vs. State (OWP No. 1329/1997, decided on 13.02.1998).

4 On the other hand, learned counsel for the respondent while supporting the impugned judgment has submitted that it is not necessary that a person in possession of an immovable property of a migrant ought to be in illegal or unauthorized possession as neither Section 3 nor Section 4 of the Act of 1997 contemplate about the nature of possession, rather provides that the District Magistrate shall take over possession of immovable property belonging to the migrants, meaning thereby that immovable properties belonging to migrants shall be deemed to be in possession of District Magistrate. It is submitted that the document relied upon by the appellants would not be treated as a formal sale deed. It is stated that the property in question can be transferred from one person to another only through the mode prescribed by law and, therefore, the agreement to sell relied upon by the appellants does not confer any right upon them with regard to the property in question.

5 Heard learned counsel for the parties.

6 Before proceeding further, it would be appropriate to reproduce Section 7 of Jammu and Kashmir Migrant Immoveable Property (Preservation, Protection and Restraint on Distress Sales) Act, 1997 ('the Act of 1997' for short).

7. Appeal. – (1) Any person aggrieved of an order passed under this Act, may file an appeal before the Financial Commissioner, Revenue:

Provided that no such appeal shall be entertained against–

(a) an interlocutory order;

(b) an order of eviction unless possession of the property is surrendered to the competent authority;

(c) an order of payment of compensation determined under this Act unless the amount of compensation is deposited with the appellate authority.

(2) The period of limitation for filing of an appeal under subsection (1) shall be fifteen days from the date of order appealed against”.

7 From a perusal of Section 7(b) of the Act of 1997, it clearly transpires that remedy of appeal against an order of eviction is available only when the occupant hands over the possession of the property to the competent authority.

8 Surrender of the possession is a condition precedent for filing an appeal under Section 7 of the Act. This is a statutory requirement. It is specifically provided under the Act that the appeal shall not be entertained against the order of eviction unless the possession of the property is surrendered to the competent authority. Possession of appellants over property in question, which belongs to a migrant, cannot be said to be an authorized possession on the basis of an

agreement to sell.

9 The Hon'ble Supreme Court in a case titled M/S South Indian Bank Ltd and others vs. Naveen Mathew Philip and another, 2023 LiveLaw (SC) 320 has discussed the issue regarding efficacious alternative remedy. In the aforesaid case, the Supreme Court has relied upon a judgment rendered in Radha Krishan Industries vs State of HP (2021) 6 SCC 771 wherein it has been held as under:

"25. In this background, it becomes necessary for this Court, to dwell on the "rule of alternate remedy" and its judicial exposition. In Whirlpool Corpn. v. Registrar of Trade Marks (1998) 8 SCC 1, a two-Judge Bench of this Court after reviewing the case law on this point, noted:

"14. The power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the Fundamental Rights contained in Part III of the Constitution but also for "any other purpose". 15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field".

26. Following the dictum of this Court in Whirlpool Corpn. v. Registrar of Trade Marks [(1998) 8 SCC 1], in Harbanslal Sahnia v. Indian Oil Corpn. Ltd. [(2003) 2 SCC 107], this Court noted that: (Harbanslal Sahnia case, SCC p. 110, para 7)

"7. So far as the view taken by the High Court that the remedy by way of recourse to arbitration clause was available to the appellants and therefore the writ petition filed by the appellants was liable to be dismissed is concerned, suffice it to observe that the rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies: (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice; or (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act 10 is challenged. (See Whirlpool Corpn. v. Registrar of Trade Marks [(1998) 8 SCC 1].)

The present case attracts applicability of the first two contingencies. Moreover, as noted, the appellants' dealership, which is their bread and butter, came to be terminated for an irrelevant and non-existent cause. In such circumstances, we feel that the appellants should have been allowed relief by the High Court itself instead of driving them to the need of initiating arbitration proceedings."

27. The principles of law which emerge are that:

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.

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 The Apex Court has observed that the High Court may exercise its writ jurisdiction in at least three contingencies: (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice; or (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged. We are of the view that the present case does not attract applicability of any of these contingencies.

11 Regarding the plea of the appellants that statutory obligation casts upon the appellant to avail the remedy provided by the statute is onerous, therefore, the

remedy cannot be termed as efficacious, we are of the view that when a statute confers a right of appeal, the legislature can impose conditions for the exercise of such right. Thus, we hold that the requirement of surrendering possession is mandatory and there is no reason whatsoever for not giving effect to the provisions contained in the Act. In that view of the matter, no court can interfere with the intent of the legislature with regard to the provisions of the statute. We have no hesitation in holding that in the present case, appeal against the eviction notice can be filed only after surrendering the possession of the property which is a condition precedent for preferring an appeal under the Act of 1997. The condition prescribed in filing an appeal is in tune with the object and purpose of the Act of 1997 and the said condition has been prescribed for filing of an appeal in view of the peculiar situation prevailing in the erstwhile State of Jammu and Kashmir. The said provision was incorporated in view of the extraordinary situation prevailing in the then State of Jammu and Kashmir because of migration from the then State and more particularly from the Kashmir valley.

12 Admittedly, in order to file an appeal against the order of eviction, the occupant has to hand over the possession of the property to the competent authority. Thus, the only remedy available to the appellant is to challenge the eviction notice in the appeal under Section 7 of the Act of 1997. However, without commenting on the merits of the case and in view of prevailing weather condition/ the extreme cold weather in Kashmir valley where the property in question situated, we are of the opinion that the appellants should be given some time to vacate the possession of the property in question for the simple reason that in case they are evicted at this stage, they would suffer a greater hardship.

13 Now the question arises as to how the relief aforesaid can be given to a party when statute does not provide so. In this regard, we are of the view that in view of the peculiar facts and circumstances of the case, the appellant can be given a liberty to file an appeal subject to handing over the symbolic possession of the property in question before the competent authority. It is well settled that symbolic delivery of possession amounts to actual delivery of possession. Reference in this regard may be made to a three-judge Bench judgment in the case of *Jayagopal Mundra vs Gulab Chand Agarwalla And: AIR 1974 Ori 173*. Relevant paragraph of the judgment is reproduced hereunder:

"So far as delivery of possession against the judgment-debtor or any person in occupation on his behalf is concerned, there is no distinction between the two modes of delivery of possession. Law is well settled that as against the judgment-debtor symbolical delivery of possession amounts to actual delivery of possession. In a Full Bench decision of five Judges rendered by the Calcutta High Court in (1880) ILR 5 Cal 584 (FB), (*Juggobundhu Mukherjee v. Ram Chunder Bysack*) their Lordships observed thus:

"In the one case, the delivery of the land is to be made by placing the plaintiff, in direct possession. In the other, the delivery is effected by the officer of the Court by going through a certain process prescribed by Section 224 (corresponding to

Order 21, Rule 36 CPC), and proclaiming to the occupants of the property that the plaintiff has recovered it from the defendant. This is the only way in which the decree of the court, awarding possession to the plaintiff, can be enforced; and as, in contemplation of law, both parties must be considered as being present at the time when delivery is made, we consider that, as against the defendant, the delivery thus given must be deemed equivalent to actual possession”.

14 The term ‘symbolic possession’ means where the occupant is not physically removed, but only possession in law is taken from him.

15 In view of the above, this appeal is disposed of with the following observations:

(i) Tehsildar concerned shall take the ‘symbolic possession’ of the immovable property in question from the appellants;

(ii) After handing over the symbolic possession of the property in question, the appellants shall file an appeal under Section 7 (b) of the Act of 1997 before the competent Authority against the eviction notice issued under Section 5 of the Act. The appellants shall give an undertaking before the competent authority to the effect that if they fail in the appeal, they shall vacate the possession of the property in question.

(iii) On receipt of such appeal, the competent Authority shall decide the same within a period of two months, of course, after giving the parties opportunity to lead evidence as they desire. Till the appeal is considered and decided by the competent authority within the aforesaid period, the interim directions passed by this Court shall remain in operation.

This is a one-time exercise which is permitted in view of the peculiar circumstances. Therefore, this order shall not be treated as a precedent.