
(1973) 12 J&K CK 0002
In the Jammu And Kashmir High Court
Case No : Revenue 1st Appeal No. 10 of 1972

Tehal Singh & Ors.

APPELLANT

Vs

Ghulam Shah

RESPONDENT

Date of Decision : 28-12-1973

Acts Referred:

Jammu and Kashmir Tenancy Act, 1980 — Section 15A, 47(2), 47(3)

Citation : (1974) JKLR 425 : (1974) KashLJ 161

Hon'ble Judges : D.D.Thakur, J

Bench : Single Bench

Advocate : J.S.Kotwal, I.K.Kotwal, Advocates appearing for the Parties

Judgement

(1) This is an appeal under Section 86 of the Tenancy Act against the order of the Assistant Commissioner, Doda, dated 14/7/1972

(2) The facts which gave rise to this appeal are somewhat cumbersome. A short summary thereof is as follows :

The appellants were the landlords in respect of Khasra No. 3876/ min measuring 5 kanals situate in village Nagar Bhadarwah and the respondent,

Ghulam Shah, was the tenant under them. On 12/8/2011 the appellants instituted a suit for ejectment of the respondent from the land aforesaid in the

court of the Assistant Commissioner, Doda. The respondent appeared before the Assistant Commissioner, filed his written statement but

subsequently absented himself with the result that ex parte proceedings were taken against him by the Assistant Commissioner on 19/11/1958. The

respondent applied for setting aside the ex parte proceedings after an inordinate delay of about 4 years. This application was held by the Assistant

Commissioner to be barred by time and was accordingly dismissed. The Assistant Commissioner ultimately passed an ex parte decree in favour of

the appellants against the defendantrespondent. An application for execution of the decree passed ex parte was made by the decreeholders On

26/11/64. In the year 1966 the Jammu and Kashmir State Legislature passed the Jammu and Kashmir Tenancy (stay of ejectment proceedings) Act,

1966 On the date of the coming into force of this Act the proceedings in execution of the decree had not been delivered to the decreeholders By

force of Section 2 of the aforesaid Act, all proceedings had to be stayed for such period as the Government might by notification in the

Government Gazette determine Consistently with the provisions of Section 2 of the aforesaid Act the proceedings in the execution of the decree

pending before the assistant Commissioner on the date of the commencement of this act were stayed by the Assistant Commissioner and it appears

that the same remained stayed till the year 1969. On 11/9/1969, however, the decreeholders made another application for execution of the decree

but the same was dismissed in default on 6/1/1970. The decreeholder made yet another application on 22/2/1970. This application, however, brought

to an end the execution proceedings and the possession of the land was delivered to the decreeholders. Corresponding entries regarding delivery

of possession to the decreeholders also appear to have been made in the Register of Girdawari. The first Chapter of the chequered history of the

case can conveniently be said to have ended here.

(3) It appears that after the passing of the decree by the Assistant Commissioner the defendantrespondent made an application on 28/11/1964 for

setting aside the ex parte decree but this application was ordered to be kept pending vide an interim order of the Assistant Commissioner which is

dated 21/9/1966. On 17/3/1970 another application was made by the judgmentdebtor praying that the possession of the lands be restored to him as

he had acquired the status of a protected tenant in respect of the land in question and as under Section 47 of the Tenancy Act all ejectment suits

pending on the date of the commencement of the Jammu and Kashmir Tenancy (Amendment) Act, 1955, had abated. A grievance that he could

not have been dispossessed from the land in execution of the decree at a time other than that mentioned in Appendix (B) of the Act was also made

by the judgmentdebtor in the said application. The Assistant Commissioner vide his order dated 6/8/1970 came to the conclusion that the

judgmentdebtor had in fact acquired the status of a protected tenant by virtue of Act No. XII of 1955 and by virtue of Section 47 of the aforesaid

Act, the suit had abated against him and consequently the ex parte decree passed by his predecessorinoffice in favour of the landlords was an

absolute nullity. Despite this finding the Assistant Commissioner refused the relief to the judgment debtor holding that he had no jurisdiction to

reverse the judgment of his predecessorinoffice He however, submitted the proceedings to the Divisional Commissioner, Jammu, requesting him to

set aside the decree in exercise of his revisional powers. The records along with the findings of the Assistant Commissioner came before the

Divisional Commissioner. He declined to exercise his revisional powers holding that the Assistant Commissioner should have left the

judgmentdebtor to take resort to such remedies as were available to him in law. He directed the Assistant Commissioner by the same order to

pass final orders on the application of the judgmentdebtor in the light of the observations made by him. This order of the Divisional Commissioner

is dated 13101972 Thereafter the Assistant Commissioner disposed of the application of the judgmentdebtor dated 1731970 by the order

impugned in this appeal.

(4) It was contended before the Assistant Commissioner that the exparta decree passed in favour of the landlords was a nullity as the defendant

had acquired the Status of a protected tenant on the basis of his possession over the land on9.21955, when the Jammu and Kashmir Tenancy

(amendment) Act, 1955, came into force. The decree holders resisted the application on the ground that the Assistant Commissioner had no

jurisdiction to give relief to the judgmentdebtor as the decree stood satisfied with the delivery of possession of the land to them. The plea of the

judgment debtor that the suit had abated under Section 47 of the Tenancy Act was also vehemently contested A number of authorities were cited

before the Assistant Commissioner by the counsel for the parties. On a consideration of all the arguments advanced by the counsel for the parties

the Assistant Commissioner came to the conclusion that clause (iva) having been inserted in Section 15c of the Tenancy Act by the Jammu and

Kashmir Tenancy (Amendment) Act, 1965 (Act No. XIV of 1965) published in the Government Gazette dated 841965, the tenants of the land

belonging to the personnel of the Armed forces, could not acquire the status of a protected tenant, One of the appellants namely Gambhir Singh,

appellant No : 3, being a member of the Armed Force, the decree to the extent of his share, was held tightly passed and executed. Regarding the

remaining 2\ kanals of land it was held that the respondent had become a protected tenant and had no liability to ejectment in respect of that part of

the land. He accordingly directed restoration of possession of 2\ kanals of land to the respondent but maintained the decree and its execution in

respect of the remaining 2\ kanals of the land The present appeal to this court has been filed against this order of the Assistant Commissioner. The

Assistant Commissioner having the powers of the Collector the order in question was appealable and the appeal lay to this court.

(5) At the hearing of appeal it was contended on behalf of the appellants that suit did not abate on the passing of the Jammu and Kashmir Tenancy

(amendment) Act, 1955 as the suit did not fall within the purview of subsection (2) of Section 47 of the Act.

(6) On behalf of the respondent it was argued that the suit had abated with the passing of the Amendment Act of 1955 and therefore the decree

passed in the year 1964 was an absolute nullity. The delivery of possession, to the decree holders in execution of a decree which was a nullity,

was, therefore, wholly without jurisdiction and therefore the Assistant Commissioner was justified in directing restoration of possession to the

tenant judgmentdebtor.

(7) In my opinion the present suit cannot be said to have abated under subsection 2 of Section 47 of the Act. Sub section 2 of Section 47 of the

Act reads thus :

(2) All suits for ejectment pending on the date of the commencement of the Jammu and Kashmir Tenancy (amendment) Act, 1955, against

occupancy, protected or fixedterm tenants on any of the grounds other than those specified in clauses (a), (b), (c) and (d) of Subsection (1) of

section 44 shall abate and the plaintiffs in such suits shall, on application to the Collector, be entitled to a refund of court fee paid by them on the

plaint filed in such suits.

Explanation : Suit shall include execution applications and appeals arising out of such suits.

(8) A perusal of this section would show that suits for ejectment on grounds other than those specified in clauses (a), (b) (c) and (d) of Subsection

1 of Section 44 were to abate only if the tenants sued against were the occupancy, protected or fixed term tenants. It is not disputed that the

respondent was not either an occupancy or a fixed term tenant. He was a tenant at will. A suit, therefore, against a tenant at will filed before the

passing of the Amendment Act of 1955 had not to abate in consequence of subsection 2 of Section 47 of the Act. The continuance of the

proceedings in the suit, therefore, even after the passing of the Amendment Act of 1955 was not in any way irregular or illegal and the trial court

could proceed to take the suit to its logical conclusion by either dismissing it on merits or passing a decree in favour of the landlords. The decree,

therefore, passed in the year 1964 cannot be said to have been illegally passed so as to rob it of its executability and enforceability. Any attack

therefore on the decree on the ground that the suit from which it flowed had abated under subsection 2 of section 47 of the Act cannot be allowed

to prevail.

(9) The counsel for the respondent, however, relied upon Explanation to subsection 2 of section 47 and subsection 3 of Section 47 which was

added by Act No. XIV of 1965. The Explanation to subsection 2 reads thus :

"Explanation. Suit shall include execution applications and appeals arising out of such suits.

Subsection 3 of Section 47 of the Act reads thus :""(3) No suit shall lie for the ejectment of a tenant by the landlord for resumption of land for

personal cultivation and all such suits pending on the day of the commencement of the Jammu and Kashmir Tenancy (Amendment) Act 1965, shall

abate.

(10) On the basis of these two provisions it has been contended by the counsel for the respondent that the execution proceedings pending on the

date of the coming into force of Act No. XIV of 1965 would also abate under subsection 3 of Section 47 as a suit would include execution

applications also. He wants me to read the Explanation to subsection 2 as an Explanation to subsection (3) also. This in my opinion is not possible.

It is true that by Act No. XIV of 1965 all suits for ejectment of a tenant by the landlords for resumption of land for personal cultivation had to

abate regardless of the fact whether the tenant was an occupancy, protected, fixedterm tenant or a tenant atwill. But the difficulty in applying

subsection (3) to the facts of the present case is that on the date of the coming into force of Act No. XIV of 1965 there was no suit pending. The

suit had already culminated in a decree which was under execution on the date of the commencement of the Act. Execution proceedings therefore

in respect of a decree which had flowed from a suit which did not abate under subsection (2) of Section 47 on the commencement of the

amendment Act of 1955 would not abate under subsection 3 of the Act added by Act no. XIV of 1965. Explanation to subsection (2) could not

be made applicable to the provisions of subsection (3) of Section 47 of the Act) The legislature intended to hit the execution proceedings arising

out of the decrees passed only in the suits which fell within the purview of subsection (2) of Section 47 and not within the purview of subsection (3)

of Section 47 of the Act. The reason for such a provision, appears to be apparent and that is that the suits against occupancy, protected or

fixedterm tenants even if they had resulted in decrees were unmistakably intended to be wiped of by adding subsection (2) to Section 47 by the

Amendment Act of 1956 Whereas the suit for resumption of land for personal cultivation mentioned in subsection (3) of Section 47 only were hit

and not the decrees or the execution thereof in case a suit had already resulted in a decree (The agreement that the definition of a suit given in the

Explanation to subsection (2) must equally serve as an Explanation to subsection (3) is not possible to be accepted. In case legislature wanted to

apply such a definition of the suit to the provisions of subsection (3) also the legislature could have very conveniently at the time of the addition of

subsection (3) added a similar Explanation to that subsection also or could have put the explanation at the end of subsection (3) so as to be equal

applicable to subsection (2) and subsection (3) For these reasons therefore I am of the view that the execution proceedings in the present case

were not to be treated as a suit and therefore did not abate with the passing of Act No. XIV of 1965.)

(11) So far as the respondent in respect of the land except the land held by persons serving in the Armed Forces of India is concerned, the same is

based on a pat fallacy. If subsection (2) of Sec 47 which was added by the Amendment Act of 1955 did not bring about the abatement of a suit

filed against a tenant atwill and allowed the suit to proceed to a decree there was no question of such a tenant being given the status of a protected

tenant under either the Amendment Act of 1955 or of 1965. The right of a tenant atwill against whom a suit was pending on the date of the coming

into force of the Amendment Act of 1955, it appears to me, was considered to be a precarious one. The legislature therefore did not intend to give

protection to such a tenant by excluding a suit against a tenant atwill in subsection (2) of Section 47 of the Act. In my opinion therefore the

Assistant Commissioner was seriously in error in holding that simply because the respondent continued to be in possession even after the passing of

the decree in the year 1964 he had acquired the status of a protected tenant and therefore was entitled to restoration of possession which was

taken away from him on the basis of a decree which, according to the Assistant Commissioner, was a nullity in law.

(12) There is another aspect of the matter and that is that the decree was passed in the year 1964 and was executed in the year 1970. An

application for setting aside the decree was dismissed by the Assistant Commissioner' The respondent had a remedy of appeal available to him to

challenge the decree passed ex parte or in the alternative to challenge the order of the Assistant Commissioner dismissing the application for setting

aside the decree. No such remedy was availed of the decree was allowed to become absolute and was allowed to be executed. The respondent

judgmentdebtor, parted with the possession in execution of the decree. It was too late in the day for him to have made an application before the

Assistant Commissioner for restoration of possession to him on the ground that the dispossession was illegal. The court of the Assistant

Commissioner had become wholly functuous officio on the completion of the execution proceedings. It was not therefore legally possible for the

Assistant Commissioner to have entertained such an application and to grant the same by directing restoration of possession to the

Judgmentdebtor. Mr. I. K. Kotwal, on behalf of the respondent was fair enough to concede that even if the question, whether the decree was a

nullity or not, was debatable one, the Assistant Commissioner had no jurisdiction to give relief to the respondent long after the execution

proceedings had been shelved on completion.

(13) For the foregoing reasons therefore I am firmly of the view that the order passed by the Assistant Commissioner (Collector) directing

restoration of possession to the respondent to the extent of 21/2 kanals of land was illegal and bad in law.

(14) I accordingly allow this appeal, and set aside the order of the Assistant Commissioner. The parties, however, shall bear their own costs.