
(2006) 09 J&K CK 0009
In the Jammu And Kashmir High Court
Case No : OWP 501/2001

Union of India and Anr.

APPELLANT

Vs

Farman Ali and Anr.

RESPONDENT

Date of Decision : 18-09-2006

Acts Referred:

Jammu and Kashmir Public Premises (Eviction of Unauthorised Occupants) Act, 1988
— Section 10

Citation : (2006) 3 JKJ 322

Hon'ble Judges : J.P.Singh, J

Bench : Single Bench

Advocate : N.A.Choudhary, Advocates appearing for the Parties

Judgement

1. Dispute between Union of India, the writ petitioner, and one Farman Ali, the first respondent, pertains to land measuring 1 Kanal 19 marl as

situated in Sunjwan Complex, Jammu.

2. Writ petitioners say that respondent No. 1 had encroached upon 1 Kanal 19 marlas of land comprised in Khasra No. 356 min, which led to

initiation of proceedings against him under the Public Premises (Eviction of Unauthorized Occupants) Act, 1971, hereinafter referred as PP Act.

3. Eviction order passed under the PP Act was initially questioned in a suit and thereafter in an appeal before the learned Additional District Judge,

Jammu, the appellate officer, by the first respondent. Appeal before the appellate officer succeeded in ex parte. Application of Union of India

seeking withdrawal of ex parte order and rehearing of the appeal, filed within the prescribed period of limitation, was rejected by the appellate

officer vide his order dated 27th of April 2001.

4. Union of India has invoked the writ jurisdiction of this Court to seek quashing

of orders passed by learned Additional District Judge, Jammu, the appellate officer, on 4th of November 1997 in file No. 3/Civil Appeal and on 27th of April 2001 in file No. 16/Misc of 1997. The first respondent says in his objections that land measuring 1 Kanal 19 marlas comprised in Khasra No. 356 min situated at village Sunjwan Tehsil and District Jammu had not been acquired by Union of India and that a double storeyed house had been constructed by him on the land about 30 years back. He claims to have inherited this land from his forefathers. Order passed by the appellate officer on 4th of November 1997 had attained finality and application moved by the petitioner for setting aside ex parte order and rehearing of the appeal was not maintainable, asserts the respondent in his objections. Reliance has been placed on Section 13 of the Act. Respondent had however opted to remain absent at the time of consideration of this writ petition.

5. I have gone through the averments made in the writ petition.

The grievance of Union of India, appears to be that learned Additional District Judge Jammu had erred in holding that while acting as an Appellate

Officer under the PP Act, the District Judge or his designate Judge does not act as a Court and hence, did not possess the power and authority to

exercise those powers which the Civil Court has, in setting a side exparte judgments.

6. Before dealing with the question which arises for consideration in this writ petition, discussion of learned Additional District Judge Jammu on the subject needs to be noticed:

I have heard LC for the parties and perused the record on the file as also the relevant provisions of law for the purposes of determining the

controversy between the parties. LC for the applicant has placed reliance on a case of the Hon'ble Apex Court of the Country in New India

Assurance Company Limited v. K. Srinivasan reported in 1 (2000) CPJ19 (SO and submitted that there is legal impediment in considering (his

application and setting aside the order dated 4.11.1997. According to him the ratio decidendi in New India Assurance Company's case (Supra)

wherein the Hon'ble Apex Court of the country held that where a complaint instituted by respondent before the Stale Commissioner was dismissed

in default and the Commission had refused to restore it, a fresh complaint on the

same cause of action was not maintainable. On the other hand LC

for the nonapplicant (Farman AH) has taken me through Section 13 of the Act and argued that this court cannot exercise powers as it does not

exercise in other cases of civil nature as this court has to act only as an "Appellate Officer" and not an "Appellate Court", therefore, the provisions

of Code of Civil Procedure would not be applicable in order to set aside the ex parte order/judgment dated 4/11/97 passed against the applicants

herein.

Section 12 of the Act envisages that an appeal shall lie from every order of Estate Officer made in respect of Public Premises under Section 5 or 7

or 8 or Section 10 to an appellate officer who shall be the District Judge. Similarly Section 13 of the Act deals with the finality of orders' and reads

as under:

Finality of Orders Save as otherwise expressly provided in this Act, every order made by an estate officer or appellate officer under this Act shall

be final & shall not be called in question in any original suit, application or execution proceedings & no injunction shall be granted by any court or

other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.

In both the sections Ss. 12 and 13 of the Act the word used for appeal etc. is 'appellate officer' may be a District Judge of a District, for appeals

etc. and the words appellate court' has been purposely omitted in both the sections. Whereas a court may be empowered to use the provisions of

the Code of Civil Procedure to set aside an ex parte proceedings or ex parte decree under the relevant provision of the Code of Civil Procedure but

I am afraid this is to be ascertained as to whether an 'appellate officer' will still have the same powers as are vested in the appellate court in the light

of the provision of Section 12 and 13 of the Act. In this connection case titled Shanta Hai vs. Tara Chand reported AIR 1996 M.P.7 has been

referred to in which His Lordship of the High Court of Madhya Pradesh had been dealing with Ss. 9 & 10 of the Public Premises (Eviction of

unauthorised occupants) Act, as is applicable in the State of Madhya Pradesh and held in para 5 as under:

Having heard both the learned counsels. I am of the view that the preliminary objection is well founded. Section 10 of the Act provides that Save

as otherwise expressly provides in this Act. Every order made by an estate officer or appellate officer under this Act shall be finally and shall not be called in question in any original suit application or execution proceeding

Under Section 9 Subsection (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 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. It is from the language of the above mentioned

provisions that an appeal lies to the District Judge as a persona designate and not to a court of the District Judge. This means that the decision of

the District Judge does not give rise to a revision application under section 115 of the Code of Civil Procedure. The language used in section 10 of

the Act provides a very wide prohibition by enacting that the order of the appellate officer shall not be called in question in any original suit,

application or execution proceedings. The word "application" is wide enough, in my opinion to cover an application made under section 115 of the

Code of Civil Procedure.

A bare reading of the above referred para from Shanta Gat's judgment (Supra) categorically shows that the language of Ss. 9 and 10 of the M. P

Act is same as the language of Ss. 12 and 13 of the J&K Act and the Hon'ble court has held, that, a very wide prohibition has been provided by

enacting that the order of appellate officer shall not be called in question in any original suit, application or execution proceedings, which are the

words used in Section 13 of the J&K. Act. In Shanta Dai's case (Supra) the court was considering as to whether revision under section 115 CPC

lies and held that the word application is wide enough to cover an application u/s 115 of the CPC also. Similarly this is an application for setting

aside exparte order/judgment passed by this court (appellate officer) on 4/11/1997 and in view of the law laid down in Shanta Oat's case (supra)

which is in consonance with the provision of section 13 of the Act, same cannot be considered and as such the same is hereby dismissed. Learned

counsel for the nonapplicant has also placed reliance on the case of Isher Singh Vs. District and Sessions Judge, reported in AIR 1999 SC 1425,

which judgment is also under the Public Premises (Eviction of unauthorised

occupants) Act and at para 6 the Hon'ble Apex Court of the country has held as under:

'Isher Singh then filed a petition in the High Court invoking its jurisdiction under Article 226 and 227 of the Constitution, High Court by the

impugned judgment dismissed the writ petition at the admission stage holding that resumption proceedings had since been finalized and Isher Singh

and other coowners had hardly left any interest in the public premises and that all concerned had been duly served and heard in the matter. Both

the District Court and the High Court held that notices had been properly served.

This judgment of the apex Court also supports the contention raised by LC for the nonapplicants. As such, the application on behalf of Union of

India and others filed for setting aside exparte order judgment dated 4.11.1997 merits no consideration and is accordingly dismissed

7. Learned Additional District Judge has rejected the application of the writ petitioners on twin grounds viz. (1) Section 13 of the Act provides

finality to the orders passed by the Estate officer or Appellate Officer and (2) while hearing appeals under PP Act, District Judge acts as an officer

and not as a Court; the provisions of Civil procedure Code would not apply to proceedings in the appeals thereby debarring the appellate officer

to entertain application for setting aside exparte judgment in the appeal.

8. Section 10, attaching finality to the orders passed by the Instate Officer or the Appellate Officer provides that orders of those officers would not

be called in question in any original suit, application or execution proceedings and no injunction shall be granted by any Court or other authority in

respect of any action taken or to be taken in pursuance of any power conferred by or under the Act.

9. What is contemplated by Section 10, is a bar to question the merits of the order of the Estate Officer or the Appellate officer passed on

determination of the dispute, of course, after hearing the parties entitled to such hearing. Section 10, would not, therefore, in my view, come in the

way of the Estate officer or the Appellate Officer to deal with any application of an aggrieved party to seek either restoration of the proceedings or

setting aside of an ex parte order, for such proceedings do not contemplate any decision on the merits of the controversy involved in the

proceedings and, on the other hand, seek disposal of the proceedings after

hearing the parties entitled to such hearing on merits. The view taken by learned Additional District Judge is, thus, erroneous.

10. I do not subscribe even to the view taken by learned Additional District Judge when he proceeds to hold that a District Judge seized of an

appeal under the PP Act, does not possess the powers of a "Civil Court" thereby disabling it to restore the proceedings or set aside the ex parte

orders, as the case, may be. This is so because the District Judge or his designate Judge functions as a "court" and not as a "persona designata

while exercising powers under the PP Act. I am supported, in taking this view, by a judgment of this Court reported as AIR 1977 Jammu and

Kashmir 38. Paragraph 7 of this judgment reads thus:

7. A perusal of Section 9 of the Act shows that an appeal lies to the, District Judge of the District concerned. The District Judge is not prescribed

as an appellate authority by his name and no District Judge has been singled out from the class of District Judges to whom the appeals may lie

under Section 9 of the Act. The term 'persona designata' implies the appointment of a person or the selection of a person in his individual and

personal capacity as opposed to his capacity as a member of a particular class. With a view to determine whether the appointment of a person has

been made as a persona designata or as a particular member of a class, it is necessary to find out whether the person appointed has been

appointed by his name only or has he been appointed because of his occupation, profession or the post held by him. In the Full Bench authority of

our High Court, 1971 JKLR 157= (AIR 1971 J&K 76) (supra) it was held the question whether an authority has been appointed as a persona

designata or as a court depends also on the nature of the duties and the manner in which the duties are performed by the authority concerned.

Their Lordships went on to hold:

if the appointment is by name in the individual capacity of the officer he is persona designata; if the Presiding Officer of a Civil Court is selected as

an authority and empowered to act judicially and possesses all the trappings of a court and has to abide by the rules of evidence, the appointment

is as a court and not as a persona designata.

In view of this clear pronouncement of the Full Bench of this Court, there remains no manner of doubt to hold that the District Judge while hearing

the appeal under Section 9 of the Act does not act as a persona designata but acts as a Civil Court subordinate to the High Court. The District

Judge has been prescribed the appellate authority not in his personal or individual capacity but by virtue of the post that he is holding and no District

Judge has either been designated as the appellate authority by name nor has any District Judge been singled out for functioning as the appellate

authority. Moreover, the nature of his duties enjoin upon him to act judicially and he possesses all the trappings of a Court. In the face of the

binding authority of this Court, the rulings cited by Shri Bakshi cannot come to his aid. I would, therefore, hold that the District Judge while acting

under Section 9 of the Act, acts as a court subordinate to the High Court and not as a persona designata. I, therefore, do not find any force in the

objection raised by the learned counsel for the respondent that the District Judge hearing the present appeal is only a persona designata and his

order is not revisable under Section 15, Code of Civil Procedure and overrule the said objection.

11. Judgment delivered by this Court, referred to hereinabove, is a complete answer to the issue which had been discussed by the learned

Additional District Judge on the basis of case titled Shanta Bai vs. Tara Chand reported as AIR 1996 MP 7. Reliance of learned Additional

District Judge on AIR 1999 SC 1425 too was misplaced as the judgment had no application to the issue in question.

12. View taken by the learned District Judge in dismissing the application of the petitioners seeking setting aside of the ex parte order passed by the

appellate officer, cannot thus be sustained.

13. Allowing this writ petition, order dated 24.7.2001 of the learned Additional District Judge, is accordingly set aside and the learned Additional

District Judge, Jammu is directed to decide the application of the petitioners afresh in accordance with law. As respondent No. 1 has chosen to

remain absent in these proceedings, learned Additional District Judge, the appellate officer, shall issue fresh notice to the respondent before

deciding the application of the writ petitioners.

14. In view of the setting aside of the order dated 24.7.2001, there is no need to go into the legality or otherwise of order dated 4th of November

1997, on merits.

15. No costs.