

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

Reserved on : 06.09.2022
Pronounced on : 22.09.2022

WP(C) No.1933/2021
CM No. 4831/2022

Mushtaq Ahmad Pandit

.....**Petitioner(s)**

Through:- Mr. M. A. Makhdoomi, Advocate.

V/s

Additional Deputy Commissioner and others

...**Respondent(s)**

Through:- Mr. Shuja-Ul-Haq, Adv. for R-03.

Coram: HON'BLE MR. JUSTICE SANJEEV KUMAR, JUDGE

JUDGMENT

1. The petitioner is aggrieved of and has called in question order dated 16.09.2021 and order dated 17th June, 2022, both passed by the Additional Commissioner (Commissioner Agrarian Reforms), Anantnag in an application for condonation of delay and appeal captioned Gh. Rasool Shah v. Mushtaq Ahmad Pandit respectively. Vide impugned order dated 16th September, 2021, Commissioner, Agrarian Reforms, Anantnag has condoned the delay for filing the appeal against the order of Assistant Commissioner Revenue (Collector Agrarian Reforms), Anantnag dated 16th July, 2005. By a subsequent order passed on 30th June, 2022, the Commissioner, Agrarian Reforms had allowed the appeal and set aside

order dated 16th July, 2005 passed by the Collector Agrarian Reforms, Anantnag.

2. Briefly put, the facts leading to the filing of this writ petition are in the following manner:-

On 29th June, 2005, the petitioner filed a suit for declaration with consequential relief of injunction before the Collector, Agrarian Reforms, Anantnag. In the suit, the petitioner sought a declaration to the effect that he was owner of the land measuring 2 kanal 11 marlas comprising Khasra No.339 situated at village Uranhall [“the subject land”] belonging to respondent No.3 by way of adverse possession. The case set up by the petitioner in the suit was that he was put in possession of the subject land in pursuance of a sale agreement drawn in his favour by respondent No.3 against a sale consideration of Rs.16,76,000/-. The petitioner paid a sum of Rs.5,01,100/- to respondent No.3 at the time of execution of the sale agreement. The petitioner also claimed that later the sale deed was not executed by respondent No.3. On the presentation of the suit, the Collector Agrarian Reforms summoned respondent No.3, who instead of contesting the suit entered into an amicable settlement with the petitioner. A compromise deed in writing entered into between the petitioner and respondent No.3, too, was submitted and as a result whereof, the Collector Agrarian Reforms declared the petitioner as owner of the subject land vide order dated 16th July, 2005.

While the petitioner and respondent No.3 had buried the hatchet in terms of the compromise deed, the Collector Agrarian Reforms acting *suo*

moto summoned the petitioner and respondent No.3 and reversed his earlier order dated 16th July, 2005 by passing a fresh order dated 01st September, 2005. The earlier order was recalled on the ground that the compromise was entered into between the petitioner and respondent No.3 was sham and attempted to defeat the provisions of Agrarian Reforms Act as also to effectuate transfer of immovable property in disguise of sale deed. Order dated 1st September, 2005 passed by the Collector Agrarian Reforms, Anantnag was challenged by the petitioner before the Financial Commissioner Revenue (with Powers of Commissioner, Agrarian Reforms), Srinagar in an appeal. The Financial Commissioner Revenue vide its order dated 20th May, 2009 accepted the appeal and set aside the order of Collector Agrarian Reforms, Anantnag.

Respondent No.3, feeling aggrieved by the order of the Financial Commissioner Revenue/ Commissioner Agrarian Reforms, Srinagar filed revision before the Jammu & Kashmir Special Tribunal. The revision petition was dismissed and the order of the Financial Commissioner/Commissioner, Agrarian Reforms was upheld by the Tribunal vide its order dated 28th June, 2013. It seems that while the revision petition was pending before the Jammu & Kashmir Special Tribunal, respondent No.3 filed an appeal against order dated 16th July, 2005 before the Additional Deputy Commissioner (Commissioner, Agrarian Reforms), Anantnag. The appeal was belated and was, thus, accompanied by an application for condonation of delay of more than four years. Vide order dated 16th September, 2021, the Additional Deputy Commissioner,

Anantnag condoned the delay and took up the appeal for consideration on merits. The appeal, too, was considered and disposed by the Additional Deputy Commissioner (Commissioner, Agrarian Reforms) Anantnag vide impugned order dated 17th June, 2022. Both the orders i.e. one passed on application for condonation of delay and another on the appeal on merits are subject matter of challenge in this petition.

3. The impugned order passed by respondent No.1 condoning the delay of more than four years in filing the appeal is assailed primarily on the ground that respondent No.1 has committed grave error in condoning the inordinate delay of more than four years without being satisfied about the sufficient cause, which prevented respondent No.3 to file appeal within time. The order is, thus, assailed being an outcome of non-application of mind.

4. The order passed in appeal is challenged by the petitioner primarily on the ground that no appeal was maintainable against the order passed on the basis of a compromise entered into between the parties. It is contended that respondent No.3, who had voluntarily executed a compromise deed acknowledging the petitioner to be absolute owner in possession of the subject land, could not have been permitted to resile from his solemn affirmation made before the Collector, Agrarian Reforms, Anantnag. Respondent No.1 without going into this important aspect of the matter accepted the appeal of respondent No.3 on the ground that the compromise entered into between the petitioner and respondent No.3 was only a device

to defeat the provisions of the Agrarian Reforms Act and to pass on the property without execution of proper sale deed and payment of stamp duty.

5. Learned counsel for the petitioner submits that respondent No.3, who was party to this alleged machination and manipulation could not have been permitted to take benefit of his own wrong. The appeal at the instance of respondent No.3 was, thus, not maintainable but unfortunately, respondent No.1 did not appreciate this vital aspect of the matter and accepted the appeal as if it was exercising *suo moto* powers of appeal or revision, which the statute i.e. the Jammu & Kashmir Agrarian Reforms Act does not confer on any authority.

6. *Per contra*, learned counsel appearing for respondent No.3 submits that respondent No.1 has rightly condoned the delay of four years, in that, respondent No.3 was *bona fide* litigating in different forums and, thus, lost four years in the process. He invited reference of this Court to *suo moto* order of the Collector, Agrarian Reforms, Anantnag recalling its earlier order, which, thereafter became subject matter of challenge before the Commissioner, Agrarian Reforms (Financial Commissioner), Srinagar and the Jammu & Kashmir Special Tribunal, Srinagar.

7. Mr.Shuja-ul-Haq, learned counsel for respondent No.3, submits that respondent No.3, realizing that his remedy would lie in challenging the order dated 06.07.2005 and litigation before Jammu & Kashmir Special Tribunal was only an exercise in futility, decided to challenge the basic order dated 16th July, 2005 before the appellate forum i.e. respondent No.1. He contests order dated 16.07.2005 by submitting that the compromise

entered into between the petitioner and respondent No.3 was unlawful and the order obtained from the Court of Collector, Agrarian Reforms, Anantnag was a result of fraud played by the parties upon the Court. He submits that that the order/decreed passed in favour of the petitioner declaring him to be the owner in possession of the subject land was in disguise of sale and not only it was in violation of the provisions of the Agrarian Reforms Act and it had the effect of evading huge amount of stamp duty.

8. Having heard learned counsel for the parties and perused the material on record, it is necessary to first notice few salient features of the Jammu and Kashmir Agrarian Reforms Act, 1976 [‘the Act’]. The Act enacted by the erstwhile Jammu and Kashmir Legislature was a progressive legislation aimed at providing for transfer of land to tillers and for better utilization thereof in the State of Jammu and Kashmir. The Act was brought into force w.e.f. First of June, 1978. In terms of Section 4 of the Act, all rights, title and interest in land of any person not cultivating it personally in Kharif 1971 shall be extinguished and deemed to be vested in the State with effect from 1st of May, 1973. The Section is given overriding effect over any law for the time being in force. That apart, under the Act, nobody, either owner or the tenant, is entitled to hold in personal cultivation land in excess of 182 kanals (sealing area) on the first day of September, 1971 and the rights, title and interest of such individual in the excess land shall be deemed to have been vested in the State on the first day of May, 1973. Section 7 provides for resumption of land by ex-landlord for bonafide personal cultivation. Section 8 of the Act, however, provides vesting of ownership rights in land

vested in State under Section 4 of the Act in the tenant who is found to be in personal cultivation thereof in Kharif 1971. Section 13 of the Act places restriction on utilization of land after the commencement of the Act. It provides that no person shall hold land otherwise than for personal cultivation or for residential purposes up to 2 kanals per family or for horticulture purposes subject to the provisions of the Jammu and Kashmir Prohibition on Conversion of Land and Alienation of Orchards Act, 1975. There is further provision for retaining some land for Industrial or Commercial purposes with the previous permission of the Revenue Minister or any officer nominated by him in this behalf. There is complete prohibition under Section 13 (2) for creation or continuation of tenancy after First day of May, 1973. Sub Section (3) of Section 13 clearly lays down that if a person who is possessed of land fails to utilize it in accordance with or utilizes in contravention of provisions of Sub Section (1) of Section 13 or lets land to a tenant in contravention of the provisions of sub-section (2), the rights, title or interest in land of such person, after an enquiry to be conducted as per the Agrarian Reforms Rules, 1977 [‘the Rules’] shall vest in the State. Section 17 of the Act imposes prohibition on transfer of Agrarian land.

9. With a view to implementing the provisions of the Act, Section 18 provides for appointment of following five classes of officers by the Government with the following hierarchy:-

- (a) Commissioner Agrarian Reforms and Joint Commissioner Agrarian Reforms;
- (b) Collector;

- (c) Assistant Commissioner;
- (d) Tehsildar; and
- (e) Naib-Tehsildar.

The general superintendence and control on those officers is vested in the Government.

10. Subject to the control of the Government, the Commissioner Agrarian Reforms has the overall control over the Collectors, Assistant Commissioners, Tehsildars and Nain Tehsildars. Similarly, subject to the control of the Commissioner, the Assistant Commissioner, the Tehsildar and the Naib Tehsildars shall be subordinate to and under the control of the Collector and so on and so forth. Section 19 of the Act deals with the powers of the Revenue Officers. Apart from the general functions to be discharged and powers to be exercised by these officers, as are specified by or under the Act, there are certain applications, suits and proceedings which are required to be disposed of by a Collector. Sub Section (3) enumerates such applications, suits and proceedings. Sub Section (3) is relevant for determination of controversy in this petition and is, therefore, reproduced hereunder:-

“(3) The following applications, suits and proceedings shall be disposed of by a Collector:-

- (a) proceedings under section 56 of the Jammu and Kashmir Tenancy Act, Samvat 1980;
- (b) proceedings under sub-section (2) of section 68-A of the Jammu and Kashmir Tenancy Act, Samvat 1980;
- (c) proceedings under Section 24 of the Jammu and Kashmir Big Landed Estates Abolition Act, Samvat 2007;
- (d) application by an owner or an intermediary that the person, who claims to be cultivating the land as a tenant, is not a tenant but a trespasser;

- (e) all other cases of dispute including those where the party in possession pleads adverse possession against the recorded owner/intermediary.”
(Emphasis supplied)

11. Clause (e) of sub-section 3 reproduced above clearly provides that the Collector Agrarian Reforms is competent to entertain even a dispute where the party in possession pleads adverse possession against the recorded owner/intermediary. Section 25 bars the jurisdiction of the Civil Court to entertain a suit in respect of any question or to determine any matter arising under the Act and the Rules framed thereunder. The Section makes it explicit that no order of any officer or authority passed under the Act or Rules framed there under shall be called in question in any civil court. Section 25, for facility of reference is set out below:-

“ 25. Bar of jurisdiction of Civil Court:

Notwithstanding anything contained in any law for the time being in force:

- (a) no Civil Court shall have jurisdiction to settle, decide or deal with any question or to determine any matter arising under this Act or the rules made thereunder; and
- (b) no order of any officer or authority passed under this Act or the rules made thereunder shall be called in question in any Civil Court.”

12. Section 21 deals with appeals and revisions and provides that final order of Collector or Revenue Officer of a class lower than that of a Collector is appealable before the Commissioner Agrarian Reforms at the instance of the person aggrieved. Initially when the Act was enacted, the Jammu and Kashmir Special Tribunal exercising powers of Revenue Minister was empowered to hear revision against the final order passed by the Revenue Officers provided it would find that a question of law of public

interest was involved in the case. This provision is now deleted by the Jammu and Kashmir Reorganization Act, 2019 read with the Jammu and Kashmir (Adoption of State Laws) Fifth Order, 2020. The Act has been retained with certain modifications and adoptions.

13. When the controversy raised in this petition is viewed in the light of salient provisions of the Act noticed hereinabove, it is seen that the respondent No.3 had entered into an agreement with the petitioner for sale of the subject land (admittedly land as defined under Section 2(a) of the Act) against a sale consideration of Rs. 16,76,000/-, out of which the petitioner had paid a sum of Rs. 5,01,100/- at the time of execution of the sale agreement. This happened on 17-06-2004 when the agreement to sell was executed between the petitioner and the respondent No.3. It transpires that the petitioner was also put possession of the subject land. It is, however, not discernable from the pleadings of the parties or record on file as to whether the balance payment was made or not but the fact remains that the petitioner and respondent No.3, in collusion with each other, decided to get a consent decree from the Collector Agrarian Reforms, Anantnag. Accordingly, a suit was presented by the petitioner on 29-06-2005 for a decree of declaration, declaring the petitioner owner in possession of the subject land by adverse possession. The respondent No.3, against whom the suit was filed by the petitioner, chose not to contest it and instead consented for passing of a decree of declaration as prayed for by the petitioner. The Collector Agrarian Reforms, Anantnag, without even realizing that as per own showing of the petitioner he was put into possession in June, 2004 that too pursuant to an agreement to sell executed between the parties, obliged

the petitioner and respondent No.3 and passed the decree prayer for. The petitioner and the respondent No.3 succeeded in evading the payment of the stamp duty and getting the document of conveyance registered under the Registration Act.

14. True it is that the Collector Agrarian Reforms, Anantnag, without having been vested with the powers of review, *suo moto* acted on realizing the mistake and reviewed the order/decreed of declaration of ownership passed in favour of the petitioner. Obviously, this order of the Collector Agrarian Reforms, Anantnag passed in exercise of review jurisdiction was set aside by the Commissioner Agrarian Reforms on appeal, relying upon sub-section (3) of Section 21 of the Act. It may be pertinent to note that sub-section (3) of Section 21 clearly provides that no application for review shall lie against any order passed under the Act and the Rules framed thereunder, except for correction of clerical or arithmetical mistakes in orders or errors arising therein due to accidental slip or omission. The respondent No.3, who had later resiled from the consent he had given before the Collector, filed a revision petition which at that point of time was maintainable before the Jammu and Kashmir Special Tribunal exercising the powers of the Revenue Minister. While the revision petition was pending, which was ultimately dismissed, the respondent No.3 filed an appeal against the consent decree obtained by the petitioner before the Commissioner Agrarian Reforms. The appeal was delayed by almost four years. On furnishing of sufficient cause for delay by the respondent No.3, which, as claimed, had occurred due to the *suo moto* review by the Collector Agrarian Reforms, Anantnag and filing of appeal and revision before the Commissioner Agrarian Reforms

and the Special Tribunal respectively, the Commissioner Agrarian Reforms condoned the delay vide impugned order dated 16-09-2021. The Commissioner Agrarian Reforms took up the appeal for consideration and after hearing both the sides, accepted the same vide impugned order dated 30-06-2022. The impugned order passed by the Collector dated 16-07-2005 was set aside. The petitioner has called in question both these orders on the grounds which have been taken note of in the earlier part of this order.

15. In the given facts and circumstances of the case and regard being had to the rival stand of the parties, an important question has cropped up for determination i.e. ‘whether the Commissioner Agrarian Reforms, the appellate authority under Section 21 of the Act, is competent in law to set aside an order passed by the Collector Agrarian Reforms with the consent of the parties, and whether a person who has consented for passing a decree against him, can be said to be a person aggrieved for maintaining such appeal’.

16. The concomitant question that would also require determination by this Court is; ‘whether the Commissioner Agrarian Reforms, the appellate authority, has the power and jurisdiction to declare an order passed by the Collector Agrarian Reforms null and void if the same is found to have been obtained by the parties in collusion and by plying fraud with the Collector’.

17. In the instant case, indisputably, the suit which was filed by the petitioner against respondent No.3 before the Collector Agrarian Reforms, Anantnag, was a collusive suit. Not only the possession of the petitioner over the subject land was permissive having been obtained in pursuance of agreement to sell but the same was only a year old. To claim a decree of

declaration of ownership by adverse possession, a person claiming ownership by adverse possession must plead and demonstrate by proof that he has been in continuous and uninterrupted possession of the property for over 12 years and that his possession is open and hostile to the actual owner. That apart, from the sequence of events narrated above, it should have been more than clear to the Collector Agrarian Reforms that the suit was a device to transfer the Agrarian land otherwise than by executing a proper sale deed and in contravention of the provisions of the Act.

18. I have noticed the salient provisions of the Act and the object for which it was enacted. There is clear prohibition on transfer of Agrarian land. It can only be possessed by a person for personal cultivation or for other permissible purposes like to limited extent for residential, horticulture, Industrial or Commercial purposes subject to permission of the competent authority. Without going much in details, suffice it to say that the subject property could not have been validly sold by the respondent No.3 to the petitioner in view of the prohibition contained under the Act. Assuming that the transfer of the subject land was permissible under the provisions of the Act, yet it could not have been done without executing a sale deed in writing, paying the proper stamp duty and getting it registered before the registering authority.

19. Obviously and there is not an iota of doubt that the order of the Collector Agrarian Reforms, Anantnag dated 16-07-2005 passed in the suit of the petitioner for ownership by adverse possession, was obtained by collusion between the petitioner and the respondent No.3. Collusion in judicial proceedings is a secret arrangement between two persons that the

one should institute a suit against the other in order to obtain a decision of a judicial tribunal for some sinister purpose (*Wharton's Law Lexicon, 14th Edn.*). It is an action between two parties that are not true adversaries and have no true controversy between them. The two parties are nominal adversaries merely for the goal of obtaining an answer to a legal question or favourable precedential view. The collusion connotes an agreement between two or more person to defraud a person of his/her rights or to obtain something that is prohibited by law. To understand the nature of a collusive decree/order better, it is necessary to survey the case law and the precedents on the subject.

20. Way back in the year 1956 a three Judge Bench of Hon'ble the Supreme Court in **Nagubai Ammal and others v. B. Shama Rao and ors, AIR 1956 SC 593**, in para 13 have very convincingly brought out the distinction between the proceeding which is collusive and the one which is fraudulent. Para 13 reads thus:-

“**13.** Now, there is a fundamental distinction between a proceeding which is collusive and one which is fraudulent. "Collusion in judicial proceedings is a secret arrangement between two persons that the one should institute a suit against the other in order to obtain the decision of a judicial tribunal for some sinister purpose". (*Wharton's Law Lexicon, 14th Edition, page 212*). In such a proceeding, the claim put forward is fictitious, the contest over it is unreal, and the decree passed therein is a mere mask having the similitude of a judicial determination and worn by the parties with the object of confounding third parties. But when a proceeding is alleged to be fraudulent, -what is meant is that the claim made therein is untrue, but that the claimant has managed to obtain the verdict of the court in his favour and against his opponent by practising fraud on the court. Such a proceeding is started with a view to injure the opponent, and there can be no

question of its having been initiated as the result of an understanding between the parties. While in collusive proceedings the combat is a mere sham, in a fraudulent suit it is real and earnest. The allegations in the petition of Abdul Huq set out above show that the suit itself was not attacked as collusive, but that the execution proceedings were impeached as fraudulent. It should be mentioned that on this petition the District Judge passed an order on 30-6-1932 directing the Official Receiver to take the necessary steps and report. But nothing came out of this.”

21. In **Rupchand Gupta v. Raghuvanshi (Private) Ltd. and anr**, **AIR 1964 SC 1889**, Hon’ble the Supreme Court in para 9 explained the definition of collusion in the following manner:-

“ 9. One of the simplest definitions of collusion was given by Mr. Justice Bucknill in *Scott v. Scott*. "Collusion may be defined", said the learned Judge, "as an improper act done or an improper refraining from doing an act, for a dishonest purpose". Substantially the same idea is expressed in the definition given by *Whatron's Law Lexicon*, 14th Edition, p. 212. viz.. "Collusion in judicial proceedings is a secret arrangement between two persons that the one should institute a suit against the other in order to obtain the decision of a judicial tribunal for some sinister purpose". This definition of collusion was approved by the Court in *Nagubai Ammal & ors., v. B. Shamma Rao*.”

22. Later in **Ramchandra Ganpat Shinde and anr v. State of Maharashtra and ors**, **(1993) 4 SCC 216**, Hon’ble the Supreme Court once again had the occasion to deal with the question of collusion in judicial proceedings. Placing reliance upon **Nagubai Ammal** and **Rupchand Gupta** (supra), Hon’ble the Supreme Court in para 9 held thus:-

“ 9. In *Nagubai Animal and Ors. v. B. Shamma Rao and Ors.* (1956) SCR 451 at 463, this Court held that collusion in judicial proceedings is a secret arrangement between two person that the one should institute a suit against the other in order to obtain the decision of a judicial tribunal for some sinister purpose. In such a proceedings, the claim put forward is fictitious, the contest over it

is unreal, and the decree passed therein is a mere mask having the similitude of a judicial determination and worn by the parties with the object of confounding third parties. This was reiterated in *Roop Chand Gupta v. Raghuvanshi Pvt. Ltd. and Anr.* (1964) 7 SCR 761 at 763, in which this Court held that the collusion is an improper act done by an improper refraining from doing an act, for a dishonest purpose. In these two cases this Court set aside the collusive decree obtained by the parties. Collusion, thus, is a foundation to put forward a format of judicial process and a pretext of contest which in effect is unreal and a force and the decree or order obtained on its basis is a mere mask having similitude of judicial determination with the object of confounding third parties. The offending order is vitiated by collusion and formed foundation for election to the committee of the society.

23. Following observations made by Hon'ble the Supreme Court in para 11 of the judgment in **Ramachandra Ganpat Shinde** (supra) are equally relevant and are therefore reproduced hereunder:-

“11. Undoubtedly, the order passed by the High Court under Article 226 is a judicial order exercising its constituent power but when its process is abused and an order of minutes obtained by consent hedged with collusion and fraud on the Court and obviously, though not pleaded, on general body of the members of the society, when the facts were brought to the notice of the High Court, it is the High Court alone or on appeal this Court which is to correct such and order.”

To the similar effect are the observations made in para 13 of the judgment, which is also set out below:-

“ 13. Respect for law is one of the cardinal principles for an effective operation of the constitution, law and the popular Government. The faith of the people is the source and succour to invigorate justice intertwined with the efficacy of law. The principle of justice is ingrained in our conscience and though ours is a nascent democracy which has now taken deep roots in our

ethos of adjudication - be it judicial, quasi-judicial or administrative as hallmark, the faith of the people in the efficacy of judicial process would be disillusioned, if the parties are permitted to abuse its process and allowed to go scot free. It is but the primary duty and highest responsibility of the court to correct such orders at the earliest and restore the confidence of the litigant public, in the purity of fountain of justice; remove stains on the efficacy of judicial adjudication and respect for rule of law, lest people would lose faith in the courts and take recourse to extra-constitutional remedies which is a death-knell to the rule of law.”

24. The position as expounded in the aforesaid judgments was reiterated by Hon’ble the Supreme Court in **Gram Panchayat of Village Naulakha v. Ujagar Singh and ors, (2000) 7 SCC 543**. Paragraph Nos. 4 to 8 are relevant and are reproduced thus:-

“ 4. On this point, we have heard the learned counsel for the respondents who contended that the principle laid down by the Full Bench in Jagar Ram's case is correct and that the earlier judgment in the present case is binding on the basis of the principle of res judicata. The panchayat cannot therefore raise a plea of collusion in the latter proceeding unless it has first filed a suit and obtained a declaration or unless it took steps to have the earlier decree set aside.

5. We may state that the view taken by the Full Bench of the Punjab & Haryana High Court in Jagar Ram's case is not correct and in fact, it runs contrary to the provisions of section 44 of the Indian Evidence Act. That section provides that: Any party to a suit or proceeding may show that any judgment, order or decree which is relevant under sections 40, 41, 42 and which has been delivered by a Court not competent to deliver it or was obtained by fraud or collusion.

(Section 40 refers to the relevances of previous judgments which are pleaded as a bar to a second suit or trial and obviously concerns section 11 CPC).

6. It appears from commentary in Sarkar's Evidence Act (13th Ed., reprint, at p. 509) on Section 44 that it is the view of the Allahabad, Calcutta, Patna, Bombay High Courts that before such a contention is raised in the latter suit or proceeding, it is not necessary to file an independent suit. The passage from Sarkar's Evidence which refers to various decisions reads as follows:

"Under Section 44 a party can, in a collateral proceeding in which fraud may be set up as a defence, show that a decree or order obtained by the opposite party against him was passed by a court without jurisdiction or was obtained by fraud or collusion and // is not necessary to bring an independent suit for setting it aside, *Bansi v. Dhapo*,; *Rajib Panda v. Lakhan Sendh Mahapatra*; *Parbati v. Gajraj Singh*, *Prayag Kumari Debi v. Siva Prosad Singh*, *Hare Krishna Sen v. Umesh Chandra Dutt*, *Aswini Kumar Samaddar v. Banamali Chakrabarty*, *Manchharam v. Kalidas*, *Rangnath Sakharam v. Govind Narasiny*, *Jamiraddin v. Khadejanessa Bibi*, *Bhagwandas Narandas v. D. D. Patel & Co.*, *Bishunath Tewari v. Mirchi and Gurajada Vijaya Lakshamma v. Yarlagadda Padmanabham*.

Thus, in order to contend in a latter suit or proceeding that an earlier judgment was contained by collusion, it is not necessary to file an independent suit as stated in *Jagar Ram's* case for a declaration as to its collusive nature or for setting it aside, as a condition precedent. In our opinion, the above cases cited in Sarkar's Commentary are correctly decided. We do not agree with the decision of the Full Bench of the Punjab & Haryana High Court in *Jagar Ram's* case. The Full Bench has not referred to Section 44 of the Evidence Act not to any other precedents of other Courts or to any basic legal principle.

7. The law in England also appears to be the same, that no independent suit is necessary. In *Spencer-Bower and Turner on Res Judicata* (2nd Ed., 1969) it is stated (para 369) that there are exceptions to the principle of *res judicata*. If the party setting up *res judicata* as an estoppel has alleged all the elements of an estoppel (i.e ingredients of *res judicata*), it is still open to the latter (the opposite party) to defeat the estoppel by setting up and establishing certain affirmative answers. Of these there are four main classes-fraud, cross-estoppel, contract and public policy. The

author clearly says that no active proceedings for 'rescission' of the earlier judgment are necessary. They state (para 370) as follows:

"The avoidance of a judicial act on the ground of fraud or collusion is effected not only by active proceedings for rescission.....but also by setting up the fraud as a defence to an action on the decision, or as an answer to any case which, whether by way of estoppel or otherwise, depends for its success on the decision being treated as incontrovertible."

Thus, the law is well settled that no independent suit as a condition precedent is necessary.

8. Collusion, say Spencer-Bower and Turner (para 378), is essentially play-acting by two or more persons for one common purpose-a concerted performance of a *fabula* disguised as a *judicium*-an unreal and fictitious pretence of a contest by confederates whose game is the same. As stated by Lord Selborne LC in *Boswell v. Cooks*:

there is no judge; but a person invested with the ensigns of a judicial office, is misemployed in listening to a fictitious cause proposed to him, there is no party litigating.....no real interest brought into question and to use the words of a very sensible civilian on this point, *fabula non judicium, hoc est; in scena, non in foro, res agitur.*

That, in our view, is the true meaning of the word 'collusion' as applied to a judicial proceeding."

25. From the above discussion and having regard to the law enunciated by Hon'ble the Supreme Court on the point, there is not even an iota of doubt that the suit filed by the petitioner against respondent No.3, which culminated into passing of a sort of consent decree by the Collector Agrarian Reforms on 16-07-2005, was collusive in nature filed with an aim of accomplishing a sinister purpose, that is, obtaining an order in contravention of the provisions of the Act. The intention of the parties in filing the suit was obvious and the sole purpose was to transfer the agrarian land from respondent No.3 to the petitioner without executing a proper sale

deed, without paying the stamp duty and without getting it registered as also to defeat the provisions of the Act. In the instant case the claim that was put forth by the petitioner was fictitious and the contest that was made by respondent No.3 was unreal. The petitioner and respondent No.3 succeeded in getting a decree passed, which was a mere mask having the similitude of judicial determination and worn by the parties to defeat the provisions of the Act. The petitioner and respondent No.3, by entering into a secret and unholy alliance, played a fraud on the court and obtained a decree which was not only a result of collusion between the two but was in contravention of the provisions of the Act. To repeat, what was said by Hon'ble the Supreme Court in **K. D. Sharma v. Steel Authority of India Limited, (2008) 12 SCC 481**, "fraud avoids all judicial acts, ecclesiastical or temporal" proclaimed Chief Justice Edward Coke of England before about three centuries. The judgment/decree obtained by fraud has to be treated as a nullity by every Court, tribunal or judicial/ quasi judicial authority. As is held in **A. V. Papayya Sastry v. Govt. of A.P, (2007) 4 SCC 221**, a judgment, decree or order obtained by playing fraud on the Court, tribunal or authority is nullity and *non est* in the eye of law. Such a judgment, decree or order, by the first court or by the final court, has to be treated as nullity by every court, superior or inferior. It can be challenged in any Court at any time in appeal, revision, writ or even in collateral proceedings."

26. Viewed the instant case in the context of legal position enunciated by Hon'ble the Supreme Court, I am of the considered opinion that the order of the Collector Agrarian Reforms, Anantnag dated 16-07-2005 was as a result

out of collusion between the petitioner and the respondent No.3 aimed at achieving the sinister purpose of conveying the agrarian land in contravention of the provisions of the Act and to avoid the payment of stamp duty and registration of document of conveyance.

27. This brings me to the argument of learned counsel for the petitioner that under Section 19 of the Act only a person aggrieved can file an appeal and, therefore, the respondent No.3, who was himself a party to the collusion or fraud, cannot be permitted to take the benefit of his own wrong and prefer the appeal before the Commissioner Agrarian Reforms. The petitioner has placed reliance on a Division Bench judgment of this Court in **Khati (Mst) and Ors v. Ali Mohammad Sofi and anr, 2014 (4) JKJ HC 106**. The Division Bench has relied upon the Single Bench judgment of **Mst. Zaina v. Financial Commissioner and ors, SLJ 1983 J&K 1**, in which this Court has opined that the order passed on mutation by Naib Tehsildar, being agreed order, was not amenable to challenge in revision. While I do not find any fault with the view taken by the Division Bench and the Single Bench in these cases, but both the aforesaid cases have been decided on their own facts. The case of the parties before this Court in the aforesaid judgments was not one of the orders passed in collusive proceedings or orders obtained by practicing fraud on the authorities under the Agrarian Reforms Act. Both the judgments are, therefore, distinguishable and not applicable to the facts of the instant case.

28. It is true that going by plain language of Section 19, an appeal against the order of Collector Agrarian Reforms before the Commissioner is

maintainable at the instance of a person aggrieved and ordinarily a person who has consented to an order cannot be said to be a person aggrieved. Had it been an appeal against the order of Collector simplicitor, in the ordinary course of things, the position would have been different. However, in the instant case what was brought to the notice of the appellate authority was the fraud and collusion of the seemingly adversaries which culminated into passing of the order under challenge in appeal. As the legal position has been elaborately discussed hereinabove, such order or decree obtained as a result of collusion or fraud is nullity in the eye of law and, therefore, does not even require a formal declaration. If the forum hearing appeal/ revision comes to a conclusion that the order impugned before it is passed by the forum below in a proceeding filed in collusion, such authority cannot shut its eyes and refuse to entertain the same on the ground that the appellant before him was also a party to such collusion and fraud. Such orders, as and when brought to the notice of the appellate or revisional authority, are required to be avoided without any delay.

29. Aside, this Court while exercising its extra ordinary writ jurisdiction vested in it under Article 226 of the Constitution, has vast powers to declare such orders, obtained by collusion or fraud, as null and void. Assuming that the appellate authority, i.e. Commissioner Agrarian Reforms could not have exercised the jurisdiction to set aside the order of Collector Agrarian Reforms, Anantnag dated 16-07-2005 at the instance of respondent No.3, nothing prevents this Court to hold order dated 16-07-2005 passed by Collector Agrarian Reforms, Anantnag, a nullity in the eye of law having

been obtained by the petitioner in collusion with respondent No.3 in contravention with the provisions of the Transfer of Property Act, the Registration Act and the Jammu and Kashmir Agrarian Reforms Act, 1976. Such order is non est in the eye of law and must be held so.

30. For the foregoing reasons and the legal exposition discussed above, I find no merit in this petition and the same is, accordingly, dismissed. The competent revenue authority shall take note of the contravention of the provisions of the Act made by the petitioner and the respondent No.3 in respect of the subject land and shall take appropriate action as envisaged under the Act, which may include vesting of the subject land in the State.

31. Before parting, I deem it appropriate to sound a note of caution to the courts subordinate to this Court exercising civil jurisdiction, that there is growing tendency in the litigants to file collusive suits and obtain decrees for accomplishing sinister purposes like avoiding registration of sale deeds, paying stamp duty and many a times getting their rights determined in contravention of law. Many a times decrees are passed by the civil Courts, which, on the face of it, are in contravention of law, merely, on the ground that the party opposing the suit consents for passing such decree. It is thus imperative to keep in mind, the legal position as adumbrated hereinabove, while considering such requests for passing consent decrees. The civil Courts must ensure that consent decree is not prayed for to achieve sinister purposes or that it does not contravene any law. A collusive decree cannot be used as a cloak for the sale deed. There could be numerous occasions where parties in collusion with each other may approach the civil Courts for

passing the decrees in contravention of law and for achieving the unlawful objects. It would be appropriate if Registrar General ensures the circulation of this judgment amongst the Judges subordinate to this Court.

(Sanjeev Kumar)
Judge

SRINAGAR
22.09.2022
Anil Raina, Addl. Reg/Secy

Whether the order is reportable : Yes