

IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

Reserved on 28.02.2023
Pronounced on 10.03.2023

WP (C) No.905/2022
CM Nos.2253/2022 and 5345/2022

Mohammad Shafi Naikoo ...Petitioner(s)

Through: M/s. Shabir Ahmad Bhat and M. Ashraf Wani, Advs'

Vs.

District Magistrate Anantnag and others ...Respondent(s)

Through: Mr. Abdul Rashid Malik, Sr. AAG
with Mr. Numan Idrees Malik, GA for R1 and R2
Mr. Shuja ul Haq, Advocate for R3 to R7

CORAM:

HON'BLE MR. JUSTICE WASIM SADIQ NARGAL, JUDGE.

JUDGMENT

1. This Court vide order dated 31st December 2022 granted Respondent No. 1 and 2 last and final opportunity of four weeks time for filing reply and in default it was made clear that the District Magistrate, Anantnag shall remain present before the court and the matter was directed to be listed on 4th February 2023.
2. On 4th February 2023, in pre-lunch session, when the matter was taken up, neither District Magistrate, Anantnag was present nor the reply was filed and the matter was directed to be taken up in post lunch session. In post lunch session, Mr. Abdul Rashid Malik, learned Sr. AAG appeared and submitted before the court that due to law and order problem, the District Magistrate could not appear and he assured the court that the District Magistrate will remain present along-with the record on the next date of hearing.
3. Mr. Abdul Rashid Malik, learned Sr. AAG further submitted that he has prepared the reply and the same will be filed on or before the next date of hearing, positively and accordingly, a direction was issued to the Registry to entertain the reply likely to be filed by the respondents. On the assurance extended by the learned Sr. AAG, the matter was directed to be adjourned and was also directed to be listed on 6th

- February 2023 for personal appearance of District Magistrate, Anantnag.
4. When the case was taken up on 6th February 2023, Mr. Abdul Rashid Malik, learned Sr. AAG appeared along-with Mr. Mohd. Ashraf, Additional Deputy Commissioner, Anantnag in such a manner making the court to believe as if District Magistrate, Anantnag was making his appearance before the Court in terms of the earlier order. The said fact came to the notice of the court only after hearing of the case was over and a slip was passed on to the concerned stenographer by the learned counsel disclosing the particulars of the official as Mohd. Ashraf (JKAS), Additional Deputy Commissioner, Anantnag. The said slip has been made part of the record. It is worthwhile to mention that the learned Additional Advocate General or even the officer present did not deem it proper to disclose before the court during the course of hearing that instead of District Magistrate, Anantnag, the Additional Deputy Commissioner, is present before the court, rather both of them have behaved in such a manner that as if the District Magistrate in terms of direction of this Court was present before the Court. The aforesaid act on part of the Additional Deputy Commissioner and Ld. Additional Advocate General was serious and grave in nature and amounts not only to misconduct but also tantamount to contempt of court and perjury, as he deliberately and intentionally mislead the court by playing fraud.
 5. This court by virtue of order dated 6th February 2023 has also observed that the District Magistrate, Anantnag despite directions for personal appearance, has tried to evade his appearance before the Court and no plausible reason has been pleaded for his non-appearance and thus, the conduct of the officer of such rank was unbecoming and contemptuous in nature. Accordingly, this court directed District Magistrate and Additional Deputy Commissioner, Anantnag, to remain present before the court on 13th February 2023 to explain their position and to show cause why the action as warranted under law be not taken against them.
 6. Mr. Abdul Rashid Malik, learned Sr. AAG was also directed to file his affidavit explaining as to why he has not brought to the notice of the court, the fact that the District Magistrate, Anantnag is not appearing

and in his place the Additional Deputy Commissioner, has caused his appearance. Pursuant thereto, the matter was listed on 13th February 2023, and on the said date, both Deputy Commissioner and Additional Deputy Commissioner, were present. The statement of both the officers has been recorded in open court and made part of the record. As per the statement of Additional Deputy Commissioner (ADC), Anantnag, Mohd. Ashraf, it was Mr. Abdul Rashid Malik, learned Sr. AAG who had told him that he (Ld. AAG) has sought permission of court to cause his (ADC) appearance on behalf of District Magistrate when in fact there was no such permission sought from the court.

7. On asking, whether he apprised the court that he is Additional Deputy Commissioner, the said officer submitted that he never apprised the court that he is the Additional Deputy Commissioner during the proceedings when the matter was considered by this court on 6th February 2023. He further submits that he was conveyed by the learned Sr. AAG that exemption has been sought from the court and consequently in his place, Additional Deputy Commissioner, can appear.
8. As per the statement of the District Magistrate which was recorded on 13th February 2023, he submits that he was not aware of the court order passed on 31st December 2022 and he came to know about the said direction only on 4th February 2023 when the case was taken up. He further submits that the order passed was conveyed to him by Mr. Abdul Rashid Malik, learned Sr. AAG on 4th February 2023 telephonically. He further submitted that he could not appear on the said date in light of the order passed in some public interest litigation with regard to the encroachment drive. He further submits that he was not aware about the court order dated 31st December 2022 till 4th February 2023. He further submits that there was apprehension of law and order problem, but there was no law and order problem which could have prevented him to appear before the Court. On asking whether any exemption was sought for his personal appearance, the District Magistrate submitted that he had made a submission to his lawyer to seek an exemption on his behalf and to request the court for appearance of Additional District Magistrate, Anantnag. On the

asking of the court whether Additional Deputy Commissioner, can appear in his place, when court has specifically directed his personal appearance. He replied that on 6th February 2023, he was conveyed by Mr. Abdul Rashid Malik, learned Sr. AAG, that the Additional Deputy Commissioner, can appear on his behalf. He further submits that he has not moved any application for seeking his exemption but on the assurance extended by Mr. Abdul Rashid Malik, learned Sr. AAG, that Additional Deputy Commissioner, can appear on his behalf, he accordingly directed Additional Deputy Commissioner, to appear on his behalf. The statement of District Magistrate that he was not aware of the passing of the direction dated 31st December 2022 for his personal appearance is factually incorrect in the light of the note of the Registry, that the order of the court was served to the concerned advocate and the District Magistrate, Anantnag vide endorsement No. 885/886 on 09.01.2023.

9. Mr. Abdul Rashid Malik, learned Sr. AAG has also filed an affidavit in terms of order dated 6th February 2023 in which the learned Sr. AAG has submitted that he has made submissions twice in the court that the Additional Deputy Commissioner, is present in the court in place of Deputy Commissioner. He further submitted that Additional Deputy Commissioner, along-with record was present, as the Deputy Commissioner, was dealing with law and order problem in the anti-encroachment drive against large scale encroachment of Kahcharaie land.
10. Learned counsel has further deposed in the affidavit that he apprised the court in this regard and the said submission was made in the open court in presence of Ms. Asifa Padroo, learned AAG and also in presence of Mr. Shuja-ul-Haq, learned counsel, besides seeking an unconditional apology from the court for his conduct.
11. The statement made by the aforesaid two officers is contrary to the affidavit and stand taken by Mr. Abdul Rashid Malik, learned Sr. AAG. On being confronted with the said position, Mr. Abdul Rashid Malik, learned Sr. AAG had accordingly submitted that he may be given an opportunity to file a better affidavit seeking unconditional apology from the court. He further submitted that the aforesaid two officers may also be permitted to file an affidavit seeking an

unconditional apology from the court. Keeping in view the request made by the Mr. Abdul Rashid Malik, learned Sr. AAG, the permission was granted to him and Deputy Commissioner, Anantnag and Additional Deputy Commissioner, Anantnag to file fresh affidavit seeking unconditional apology within a period of one week and the matter was directed to be listed on 28th February 2023. Pursuant thereto, fresh affidavit stands filed by Mr. Abdul Rashid Malik, learned Sr. AAG, Deputy Commissioner, and Additional Deputy Commissioner, Anantnag seeking unconditional apology.

12. *In L.D. Jaikwal v. State of U.P., AIR 1984 SC 1374*, the Hon'ble Supreme Court noted that it cannot subscribe to the 'slap-say sorry-and forget' school of thought in administration of contempt jurisprudence. Saying 'sorry' does not make the slapper poorer. So an apology should not be “paper apology” and expression of sorrow should come from the heart and not from the pen; for it is one thing to 'say' sorry, it is another to 'feel' sorry.
13. It goes without saying that anyone who takes recourse to fraud, deflects the course of judicial proceedings; or if anything is done with oblique motive, the same interferes with the administration of justice. Such persons are required to be properly dealt with, not only to punish them for the wrong done, but also to deter others from indulging in similar acts which shake the faith of people in the system of administration of justice. The stream of administration of justice has to remain unpolluted so that purity of court's atmosphere may give vitality to all the organs of the State. Polluters of judicial firmament are, therefore, required to be well taken care of to maintain the sublimity of court's environment; so also to enable it to administer justice fairly and to the satisfaction of all concerned.
14. It has also been laid down by the Hon'ble Supreme Court in **Chandra Shashi v. Anil Kumar Verma** (1995) 1 SCC 421 that a person who makes an attempt to deceive the court, interferes with the administration of justice and can be held guilty of contempt of court. The Hon'ble Supreme Court in Prashant Bhushan & Anr In Re. (2021) 3 SCC 160 upheld the stand taken in **M.Y. Shareef v. Nagpur High**

Court [AIR 1955 SC 19], wherein it has been held that “an apology is not a weapon of defence to purge the guilty of their offence; nor is it intended to operate as a universal panacea, but it is intended to be evidence of real contriteness”.

15. A four Judge Bench of this Court in **Mulk Raj v. State of Punjab [(1972) 3 SCC 839]** made the following observations which would throw considerable light on the present case;

“Apology is an act of contrition. Unless apology is offered at the earliest opportunity and in good grace apology is shorn of penitence. If apology is offered at a time when the contemnor finds that the court is going to impose punishment it ceases to be an apology and it becomes an act of a cringing coward. The High Court was right in not taking any notice of the appellant’s expression of apology “without any further word”. The High Court correctly said that acceptance of apology in the case would amount to allow the offender to go away with impunity after having committed gross contempt.”

*The Rules of Professional Ethics formed by the Bar Council for the advocates though couched under statutory power, are themselves not enough to prescribe or proscribe the nobility of profession in entirety. The nobility of profession encompasses, over and above, the Rules of Ethics. Lawyers, as a class, are looked by the public as intelligentsia, as observed in *R. Muthukrishnan v. The Registrar General of The High Court of Judicature at Madras*, (2019) 16 SCC 407. The relevant portion of the judgment is extracted hereunder:*

“25. The role of a lawyer is indispensable in the system of delivery of justice. He is bound by the professional ethics and to maintain the high standard. His duty is to the court, to his own client, to the opposite side, and to maintain the respect of opposite party counsel also. What may be proper to others in the society, may be improper for him to do as he belongs to a respected intellectual class of the society and a member of the noble profession, the expectation from him is higher. Advocates are treated with respect in society. People repose immense faith in the judiciary and judicial system and the first person who deals with them is a lawyer. Litigants repose faith in a lawyer and share with them privileged information. They put their signatures wherever asked by a lawyer. An advocate is supposed to protect their rights and to ensure that untainted justice is delivered to his cause.

15. *The high values of the noble profession have to be protected by all concerned at all costs and in all the*

circumstances cannot be forgotten even by the youngsters in the fight of survival in formative years. The nobility of the legal profession requires an advocate to remember that he is not over attached to any case as advocate does not win or lose a case, real recipient of justice is behind the curtain, who is at the receiving end. As a matter of fact, we do not give to a litigant anything except recognizing his rights. A litigant has a right to be impartially advised by a lawyer. Advocates are not supposed to be money guzzlers or ambulance chasers. A lawyer should not expect any favour from the Judge and should not involve by any means in influencing the fair decision making process. It is his duty to master the facts and the law and submit the same precisely in the court, his duty is not to waste the courts' time.”

16. Since, the Deputy Commissioner, Additional Deputy Commissioner, and Mr. Abdul Rashid Malik, learned Sr. AAG have tendered an absolute and unconditional apology and the language used in the aforesaid apology reflects regretful acknowledgment. The apology which has been tendered by the aforesaid persons seems to be tendered with a sense of genuine remorse and repentance and not a calculated strategy to avoid punishment. Although, the apology stands tendered at a belated stage, when the statements were recorded and the stand taken by Mr. Abdul Rashid Malik, learned Sr. AAG was dislodged by the aforesaid statements, yet Mr. Abdul Rashid Malik, learned Sr. AAG and both the officers have shown remorse and repentance by tendering an unconditional apology, the same is accepted by this Court being bona fide. Undoubtedly, the apology cannot be a defense of justification or an appropriate punishment for an act which tantamounts to contempt of court. The apology can be accepted in a case where the conduct for such an apology given is such that it cannot be ignored without compromising the dignity of the court. Apology cannot be accepted, in case it is hollow; there is no remorse, no regret, no repentance, or if it is only a device to escape the rigor of the law. Such an apology can merely be termed as a “paper apology”. So, an apology should not be “paper apology” and expression of sorrow should come from the heart and not from the pen; for it is one thing to 'say' sorry, it is another to 'feel' sorry.
17. The power to punish for contempt is a rare species of judicial power which by the very nature calls for exercise with great care and caution.

Such power ought to be exercised only where “silence is no longer an option.” Being a member of the Bar, it was a duty of Ld. Sr. AAG, Mr. Abdul Rashid Malik not to demean and disgrace the majesty of justice dispensed by a court of law. The judicial process is based on probity, fairness and impartiality which is unimpeachable.

18. Since the unconditional apology have been tendered by Mr. Abdul Rashid Malik, learned Sr. AAG and the two officers although belated, but same seems to be bona fide and as they have shown remorse and repentance of their acts, the same is accepted by this Court and the proceedings which were initiated by this Court in the present petition as such are closed for the reasons stated hereinabove.

BRIEF FACTS

SUBMISSION ON BEHALF OF PETITIONER.

19. The brief case of the petitioner is that he is the owner in possession of land measuring 5 marlas and 6 sirsais under Survey No.323 min situated at Bidder Hayatpora Hangulgund Tehsil Kokernag, District Anantnag on which the petitioner has already constructed his shopping complex and the same is functional on spot for the last so many years and said 5 marlas 6 sirsais of land is beneath and appurtenant to this shopping complex.
20. The further stand of the petitioner is that upto year 2010-11, he was owner in possession of the said land measuring 8 marlas and 1 ½ sirsais under Survey No.323 min. The petitioner became owner of 2 ½ marlas of land by virtue of Section 4 and Section 8 of Agrarian Reforms Act and also became owner of 5 marlas and 6 sirsais in the year 2002 by virtue of power of attorney

- and agreement to sell executed by the original owner namely Prithvi Nath Hangloo S/o Shri Mahadev Nath original owner resident of Bidder Hayatpora Pati Hangul Gund Tehsil Kokernag District Anantnag.
21. The further case of the petitioner is that in the year 2010-2011, 2 ½ marlas of land of the petitioner from the aforesaid Khasra number, of which petitioner became the owner under Section 4 and 8 of Agrarian Reforms Act came under the Kokernag Sinthan road alignment for which the petitioner has also received compensation from the government in the year 2011.
 22. It has been further averred in the writ petition that a complaint was lodged before the concerned District Magistrate Anantnag by some migrants namely Soma Devi D/o Late Shri Nand Lal Hangloo W/o Jawahir Lal Pandita and Chuni Lal Hangloo S/o late Shri Badrinath Hangloo on 09-12-2019 against the petitioner, wherein, the allegation was leveled that the petitioner has grabbed their land.
 23. The further case of the petitioner is that he has purchased the land measuring 5 marlas and 6 sirsais from co-sharer of the complainants by way of attorney and agreement to sell and with a view to substantiate his claim, the petitioner has also placed on record the copy of the Power of Attorney and the agreement to sell in the present petition.
 24. The impugned order of eviction has been challenged by the petitioner on the ground that the said order has been passed without holding any enquiry and without determining the fact as to whether property in question is a migrant property and the respondent No. 1 has not followed the provisions of law nor has he determined the question as to whether the property in question belongs to migrant and whether the possession of the petitioner over the same is unauthorized in nature or not.
 25. The petitioner through the medium of present writ petition is calling in question the impugned order dated 17-12-2021 attested by the Additional District Magistrate Anantnag and also seeking quashment of the order passed by the District Magistrate Anantnag bearing No.DCA/MC/(77/19)/21-22/1892-94 dated 23-03-2022, besides

seeking a writ in the nature of prohibition against the respondents from dispossessing the petitioner from the land measuring 5 marlas and 6 sirsais along-with shopping complex situated at Hangulgund Kokernag under survey no.323 min besides seeking other reliefs.

26. By virtue of the order impugned dated 17-12-2021, a direction has been issued to Tehsildar Kokernag to remove the encroachment and evict the unauthorized occupant (petitioner herein). The said order dated 17.12.2021 has been passed by the concerned District Magistrate, Anantnag in exercise of powers conferred under Section 4 and Section 5 of the Jammu & Kashmir Migrant Immovable Property (Preservation, Protection and Restraint on Distress Sales) Act, 1997.
27. Learned counsel appearing on behalf of petitioner submitted that the respondent No.1 while passing the order impugned has wrongly observed that the petitioner has unauthorizedly occupied the land of migrants measuring 3 marlas comprising survey No.323 Min in violation of law applicable, when the complainants have themselves admitted in their complaint that the petitioner has obtained 5 marlas and 6 sirsais of land from the Prithvinath who is the co-sharer of the complainant on the strength of Power of Attorney and Agreement to Sell. Accordingly, learned counsel for the petitioner argued that the impugned order cannot sustain the test of law and same is liable to be set aside. The further stand of the petitioner is that while passing the order impugned, the respondent No.1-District Magistrate Anantnag has not taken into consideration the revenue record which clearly proves that besides 5 marlas and 6 sirsais of land, the petitioner has also obtained further 2 ½ of land by virtue of Section 4 and Section 8 of Agrarian Reforms Act which came thereafter in 2010-2011 under road alignment and on the basis of said Agrarian Act, the petitioner has been compensated for these 2 ½ marlas of land by the concerned government at that relevant point of time and on this score also, the order impugned cannot sustain the test of law and liable to set aside.
28. Lastly, learned counsel for the petitioner has argued that otherwise also the impugned order is not sustainable on the ground that the respondent No.1-District Magistrate Anantnag has not himself constituted any team for the purpose of demarcation and neither any demarcation was done by any appropriate agency on spot in presence

of the petitioner and in absence of the demarcation, the order impugned dated 17-12-2021 cannot sustain in the eyes of law.

SUBMISSION OF THE RESPONDENTS.

29. Reply stands filed on behalf of respondents in which specific objections has been taken by Mr. Abdul Rashid Malik, learned Sr. AAG, towards the claim of the petitioner that he is the owner in possession of land measuring 8 marlas and 2 ½ sirsais falling under Survey No.323 Min upto the year 2010-11 is totally false in light of detailed report which has been obtained from the field agency which reveals that land measuring 03 Kanals 12 ½ Marlas covered under Survey No.323 Min is recorded in the name of migrants as per Jamabandi of year 2013-14.
30. The respondents have further taken a specific stand that there is no mutation under Section 4 and Section 8 recorded in the name of the petitioner under Khasra No.323 Min and therefore, the question of the petitioner being the owner of land measuring 2 ½ Marlas under Survey No.323 Min by virtue of Section 4 and Section 8 of Agrarian Reforms Act does not arise, as the land in question is recorded as self cultivation of the migrant till date.
31. As per the respondents, the claim of the petitioner is against the procession of The Jammu and Kashmir Migrant Immovable Property (Preservation, Protection and Restraint On Distress Sales) Act, 1997. The further stand of the respondents is that the remaining land measuring 5 marlas 6 sirsais under Khasra No.323 Min, which the petitioner claims to be the owner in possession by virtue of some Power of Attorney is also denied, being misconceived, (as the original owner Prathvi Nath Hangloo, who the petitioner claims to have executed the Power of Attorney for land measuring 5 marlas 6 sirsais under Khasra No. 323 Min). As per the revenue record, 2 ½ marlas under Khasra No. 323 Min is recorded in the name of petitioner by virtue of the share of the migrant owner in Khasra No. 323 min, which came under acquisition for widening of the SKA National Highway, for which the specific stand of the respondents is that the petitioner has illegally received the compensation without any permission for alienation of the migrant property granted by the competent authority.

32. The respondents have taken a specific stand that the petitioner is an illegal occupant of the migrant property and as such, the impugned order has been passed after proper enquiry on spot by field agencies and after strictly following the mandate of law. Besides the respondents have taken a specific stand that the petitioner has placed on record the Power of Attorney and agreement to sell with a view to substantiate his claim, the same cannot be accepted in light of fact that the same is attested by a Notary and the petitioner has himself stated in Para 3 of the writ petition that the executant of the said notarized Power of Attorney is now deceased which raises the question against the legality and validity of the said document and petitioner as such is illegal encroacher of the migrant land.
33. The respondents have further pleaded that the order impugned has been issued by the District Magistrate, Anantnag on the basis of a report obtained by Tehsildar, Kokernag vide No.881/OQ/Kng dated 02.11.2021 revealing land measuring 3kanals 12 ½ marlas recorded in the name of migrants as per the Jamabandi of year 2013-14 and the said report has not been called in question nor there is any challenge to the same by the petitioner. The learned counsel for the respondents has further submitted that the order impugned has been issued on the basis of said report by the field agency which till date has not been called in question and has been accepted by the petitioner without any demur.
34. Learned counsel for the respondents has further submitted that the order impugned has been passed by the concerned District Magistrate, Anantnag in exercise of powers conferred under Section 4 and Section 5 of the Jammu & Kashmir Migrant Immovable Property (Preservation, Protection and Restraint on Distress Sales) Act, 1997 and a direction has been issued to Tehsildar Kokernag to evict the unauthorized occupant i.e., petitioner herein, which is perfectly and legally justified and strictly in consonance with the rules in vogue.
35. It is further submitted that the petitioner was given chance to produce the documents/attorney regarding the land in his possession which he failed to produce.

SUBMISSION ON BEHALF OF RESPONDENT Nos. 3 TO 7.

36. Mr. Shuja-ul-Haq, learned counsel appearing on behalf of private respondent No.3 to 7 has submitted that he has filed an application bearing CM No.5345/2022 for seeking a direction against the respondent No.1 and 2 to ensure that the nature of property which is the subject matter of the writ petition is neither changed nor altered by the petitioner on spot. The said application has been treated as reply to the aforesaid writ petition filed by the petitioner by virtue of order dated 6th February, 2023.
37. The learned counsel Mr. Shuja-ul-Haq, appearing on behalf of private respondents has submitted that the petitioner has filed the present writ on suppression of material facts as the petitioner all along contested the case before the District Magistrate/DC Anantnag and has been heard by the respondent No.1 prior to the issuance of order impugned dated 17.12.2023. Learned counsel has further submitted that the petitioner has been continuously appearing before the District Magistrate Anantnag and other revenue authorities which is reflected in the order dated 17.12.2021. The learned counsel has further submitted that the demarcation report was submitted by Naib Tehsildar, Kokernag on 3rd August, 2021 before the Tehsildar Kokernag which was forwarded to District Magistrate Kokernag in terms of communication dated 02.11.2021 issued by the Tehsildar Kokernag. He further submitted that the demarcation of the land falling under Survey No.323 min was conducted in presence of petitioner and after conducting demarcation it has come to fore that the land measuring 2 ½ was vacant while as 3 marlas of land was under the possession of petitioner. He further submitted that the petitioner has also received compensation on account of acquisition of 2 ½ marlas of land from the revenue authorities.

LEGAL ANALYSIS

38. Heard learned counsel for the parties at length and perused the record.
39. Admit.
40. Since the petitioner through the medium of present writ petition has raised grievance that the order impugned has been passed without providing him an opportunity of being heard and the same is violative of the principles of natural justice as the petitioner has been condemned unheard. Besides, the petitioner has taken a specific stand

that the documents on which the petitioner is relying have not been accorded consideration by the respondent No.1 while passing the order impugned. Since the order impugned has been passed by the respondent No.1 on the basis of report obtained from Tehsildar Kokernag vide No.881/OQ/Kng dated 02.11.2021 which revealed that the land measuring 3 marlas12 ½ sirsais covered under survey no.323 min is recorded in the name of migrants as per Jamabandi of year 2013-14 and the report further reveals that the petitioner has received compensation for the road alignment unauthorizedly being an unauthorized occupant. Although, the petitioner has challenged the order impugned passed by the District Magistrate Anantnag dated 17.12.2021, but the petitioner has failed to challenge the said report which is the basis for passing the order impugned.

41. Counsel for the private respondents has further taken a stand that the petitioner has failed to challenge the aforesaid report obtained from the Tehsildar Kokernag vide No.881/OQ/Kng dated 02.11.2021 which is the basis for passing the order impugned. In absence of any specific challenge to the aforesaid report issued by the Tehsildar Kokernag, the challenge of the petitioner to the order impugned fails and cannot be gone into while exercising writ jurisdiction under Article 226 of Constitution of India with regard to the disputed questions of fact. Since the petitioner has failed to challenge the aforesaid report on the basis of which impugned order has been passed, the instant writ petition is not maintainable as the same raises disputed questions of facts which cannot be gone into while exercising writ jurisdiction.
42. The only grievance which has been projected by the petitioner is that he has been condemned unheard and the order impugned has been passed without providing him an opportunity of being heard and the documents on which the petitioner is relying upon has not been accorded consideration by the District Magistrate, Anantnag, while issuing the order impugned and accordingly, he prays that the matter be referred to District Magistrate, Anantnag to pass orders afresh after hearing both the parties by providing an opportunity to produce the revenue records. The respondents are not averse to the said proposition put forth by the petitioner.

43. The question whether respondent No. 1 should have relied upon the revenue entries which are presumed to be correct unless rebutted by cogent and convincing evidence or the report of the officials/officers of the revenue department cannot be gone into while exercising the writ jurisdiction under Article 226 of the Constitution.
44. Merely that the respondent No. 1 while passing the impugned order has relied upon a report obtained from Tehsildar, Kokernag, dated 2nd November 2021 by holding that the petitioner has unauthorizedly occupied the land of the migrants ignoring the revenue extracts formulated by the revenue agencies wherein as per the petitioner it has been shown in clear words that the petitioner besides aforesaid 5 marlas and 5 sirsai of land has obtained further 2 ½ marlas of land by virtue of Section 4 and 8 of the Agrarian Reforms Act, the order impugned cannot be quashed in the aforesaid proceedings by-passing the alternative and efficacious remedy of filing an appeal under Section 7 of the Act of 1997. Thus, the bar of alternative and efficacious remedy of filing an appeal as provided under Section 7 of the Act would come into play for the maintainability of the instant writ petition. Thus, for the reason that the petitioner has an alternative and efficacious remedy of filing an appeal under Section 7 of the Act of 1997, the instant petition is held not to be maintainable.
45. An unauthorized occupant is defined in Section 2 of The Jammu and Kashmir Migrant Immovable Property (Preservation, Protection and Restraint On Distress Sales) Act, 1997 as any person who has encroached upon or taken possession of any immovable property of the migrant without his written consent and authorities of law.
46. Sub-Section 5 of the Migrant Act provides that if any unauthorized occupant of any migrant property refuses or fails to surrender the possession, the force is to be used for taking over the possession.
47. In **Rajeev Verma and another v. State and others**, AIR 2011 J&K 117, it has been held by the Division Bench of this Court that unauthorized occupant as defined in Clause (i) of Section 2 of the Migrant Act means a person who has encroached upon or has taken possession of any immovable property of a migrant without his written consent and authority of law.

48. The claim of the petitioner is that he is in possession of property in question on the basis of a Power Of Attorney and Agreement to Sell which have been placed on record. Admittedly, the Power of Attorney and Agreement to Sell which has been placed on record in the present writ petition is not a registered document but the same is a notarized document.
49. Before proceeding further in the matter on the auspices of Migrant Act, it would be profitable to have a glance of provisions of Section 138 of the J&K Transfer of Property Act, which has a direct bearing on the case in hand. For ready reference, Section 138 is reproduced hereunder:

“138. Transfer of immovable property after due registration

(1) No transfer of immovable property, except in a case governed by any special law to the contrary, shall be valid unless and until it is in writing, registered and the registration thereof has been completed in accordance with subsection (3) of section 61 of the Registration Act, 1977.

(2) No Court shall entertain a suit for pre-emption in respect of transfer of any such immovable property unless the transfer complies with the provision of subsection (1).

(3) No person shall take possession of, or commence to building or building on, any land in the province of Kashmir which has been transferred or has been contracted to be transferred to him unless and until such transfer becomes valid under the provisions of subsection (1).

(4) No person who has obtained a transfer of immovable property referred to in subsection (1) shall apply for and obtain from any Revenue or Settlement Officer or Court any alteration in any existing entry in any Settlement record or paper, unless such person produces before such officer or Court a duly executed registered instrument, the registration whereof has been completed in the manner prescribed in subsection (1).

And no such officer shall alter or cause to be altered any such entry except upon the production of an instrument registered in the aforesaid manner.

Provided that nothing in this section applies to a lease of agricultural land for one year or to a lease of any other land for a period not exceeding seven years;

Provided also that nothing in sub section (3) (4) shall be deemed to apply to transfers by will or by any rule of intestate succession or by the operation of the law of survivorship.”

50. In the present case, there is no valid document, shown to have been executed in favour of the petitioner, other than the aforesaid document of irrevocable Power of Attorney and Agreement to Sell by virtue of which the petitioner claim to have taken possession of the property. Therefore, the possession of the petitioner if seen within the ambit of Section 138 cannot be said to be a legal possession but it would be an unauthorized possession. Reliance is placed on **2004 (II) SLJ 736 titled Gh. Mohammad Matoo Vs. Gh. Rasool Sofi and Ors.**
51. The only grievance which has been projected by the petitioner is that respondent No. 1 while passing the impugned order by holding the petitioner as an unauthorised occupant has not provided him an opportunity of being heard or accorded due consideration to the revenue extracts formulated by the revenue agencies and thus he prays that the matter be referred back to the respondent No. 1 for providing an opportunity of hearing so that justice is done to the petitioner.
52. In light of the consensus of parties, the writ petition is taken up for final disposal without commenting upon the merits of the case or with regard to maintainability of present writ petition. The present petition in light of consensus made by learned counsel for the parties is disposed of with the direction to the respondent No.1 to pass fresh order within four weeks from today with regard to land in question situate at village Hayatpora Hangulgund Tehsil Kokernag, District Anantnag, after hearing both the parties i.e., petitioner herein and private respondent No.3 to 7 who are at liberty to produce the revenue records which are in their possession before District Magistrate/Deputy Commissioner Anantnag, without being influenced

by the observations made by this court in the present petition. The parties are directed to appear before the concerned authorities i.e., District Magistrate Anantnag on 15th March, 2023 and till the fresh order is passed by the District Magistrate, Anantnag, the status quo as it exists today shall be maintained. As a necessary corollary, impugned orders stand quashed.

53. Petition along-with all connected CMs shall stand disposed of.

(WASIM SADIQ NARGAL)
JUDGE

SRINAGAR

10.03.2023

“Shameem H. & Altaf

