

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR**

**LPA No. 182/2019
CM Nos. 4693/2019; 7075/2020**

Reserved On: 3rd of March, 2023

Pronounced On: 10th of March, 2023

Abdul Khaliq Rather

... Appellant(s)

Through: -

Mr R. A. Jan, Senior Advocate with
M/s Suhail Mehraj and Adnan Naqash, Advocate.

V/s

State of Jammu and Kashmir & Ors.

... Respondent(s)

Through: -

Mr Mubeen Wani, Dy. AG for R-1 to 4;
Mr Zahoor Jan, Advocate for R-5, 6, 8, 9 & 10; and
None for R-7.

CORAM:

**Hon'ble Mr Justice Rajnesh Oswal, Judge
Hon'ble Mr Justice Mohan Lal, Judge**

(JUDGMENT)

(Oswal-J):

01. The Appellant had assailed the Order dated 23rd of December, 2008 passed by the Respondent No.3 through the medium of a Writ Petition bearing OWP No.915/2013; whereby the possession of the Appellant over land measuring 04 Kanals and 5 ½ Marlas comprising under Survey No. 206 Min situated at Awrenbal, Sonawari, Sumbal was found to be illegal and the land was ordered to be kept in the possession of Deputy Commissioner, Bandipora through Tehsildar, Sonawari till the handing over of the possession to the rightful owners. The Writ Court, vide Judgment dated 18th of September, 2018, dismissed the Writ Petition on the ground that the Appellant has a remedy of appeal available in terms of the Statute and that the Appellant has not placed any document on record so as to substantiate the fact that his possession was lawful at any point of time.

02. The Appellant, being aggrieved of the aforesaid Judgment dated 18th of September, 2018, has assailed the same through the medium of this *intra* Court appeal, *inter alia*, on the ground that the Writ Court has passed the Judgment impugned without appreciating the fact that in view of the onerous condition of surrendering the possession of the immoveable property to the competent authority, the remedy provided by way of appeal was not efficacious, but, in fact, onerous in nature. It is also stated that the impugned Judgment has been passed by the learned Writ Court in utter disregard of the fact that the Appellant was/ is in occupation of the land in question with the consent of Respondent Nos. 5 and 6 herein and once the possession was with consent, the Respondent No.3 had no jurisdiction to pass the Order of eviction as he would get the jurisdiction under Section 5 of the Jammu and Kashmir Migrant Immoveable Property (Preservation, Protection and Restraint on Distress Sales) Act, 1997 (hereinafter referred to as “the Act of 1997”) only in case of unauthorized occupation of the migrant immoveable property.

03. Mr R. A. Jan, the learned Senior Counsel, appearing on behalf of the Appellant, vehemently argued that the approach of the learned Writ Court in dismissing the Writ Petition on the ground that the remedy of appeal was/ is available to the Appellant is not correct as the appeal could have been filed only after surrendering the possession and the statutory obligation cast upon the Appellant to avail the remedy provided by the Statute was onerous, therefore, the remedy cannot be termed as efficacious. He further argued that the Respondent No.3 has himself observed in the Order dated 23rd of December, 2008 that there has been some private agreement between the parties as regards the land in question, so this alone is sufficient enough to oust the jurisdiction of the Respondent No.3 to proceed under Section 5 of the Act of 1997. Mr Jan further argued that the Appellant was not aware about the order dated 23rd of December, 2008 passed by the Respondent No.3 and that the same was served on the Appellant only on 4th of June, 2013.

04. Per Contra, Mr Zahoor Ahmad Jan, the learned Counsel appearing for the private Respondents, submitted that the document relied

upon by the Appellant is a forged one and otherwise also, the same cannot be considered as a valid document for the transfer of possession. He further vehemently submitted that the Appellant had concealed the material fact from the Writ Court as the Appellant, by way of document dated 30th of November, 2012, had already surrendered the possession and, therefore, the Appellant was not entitled to any relief and the learned Writ Court has rightly dismissed the Writ Petition filed by the Appellant.

05. Heard and perused the records.

06. From the records, it transpires that a Writ Petition bearing OWP No. 669/2005 came to be filed by Respondent Nos. 5 to 10 herein before the Jammu wing of this Court and the learned Writ Court, vide Order dated 13th of October, 2005, directed the District Magistrate/ Deputy Commissioner, Baramulla to decide the complaint of the Respondent Nos. 5 to 10 herein in accordance with the law expeditiously after hearing all the parties concerned in the dispute. In the said Writ Petition, the Respondent Nos. 5 to 10 herein had sought a direction in the name of Respondent No.3 to initiate the proceedings against the Appellant herein under Section 5 of the Act of 1997. It further appears that pursuant to the directions passed in the aforesaid Writ Petition, the Respondent No.3 put the Appellant on notice and during the proceedings, the Appellant produced one 'Hundi' to demonstrate his possession over the land in question. The Respondent No.3, after noting the contentions of the Appellant and taking into consideration the fact that the land was mortgaged with the Bank, declared the possession of the Appellant over the land mentioned hereinabove as illegal and after removing the possession of the Appellant over the aforesaid land, the land was ordered to be kept in his custody through Tehsildar, Sonawari. Simultaneously, the Respondent Nos. 5 to 10 herein/ owners of the land were permitted to get the possession of the land any time after settling the issue of encumbrance with the concerned Bank.

07. The first contention raised by the Appellant is that the remedy of appeal as provided under the Act of 1997 is onerous in nature as it casts an obligation upon Appellant to first of all hand over the possession of the

land to the competent authority and then only permit him to prefer an appeal against the Order passed under Section 5 of the Act of 1997. We, in this regard, are of view that the condition prescribed in filing the appeal under Section 7 of the Act of 1997 is in tune with the object and purpose of the Act and that the said condition has been prescribed for filing of an appeal in view of the peculiar situation prevailing in the Union Territory of Jammu and Kashmir. This provision was incorporated in view of the extraordinary situation prevailing in the then State of Jammu and Kashmir (now Union Territory) because of migration from the then State of Jammu and Kashmir (now Union Territory) and more particularly from the Kashmir Valley. From the records, it is evident that the Respondents had pleaded before the Writ Court that the Appellant has already vacated his illegal possession over the land mentioned hereinabove by executing a bond and therefore, he is estopped under law to agitate the matter any further. Perusal of the Writ Petition reveals that there is no whisper in the Writ Petition about the execution of the said bond, but nonetheless, the Appellant filed Rejoinder wherein he stated that the undertaking dated 30th of November, 2012 appended to the objections claimed to have been executed with regard to the immovable property constituting the subject matter of the Writ Petition is an outcome of fraud for the reason that the Appellant was an illiterate person and was asked to sign a blank paper in order to ensure that the property in question was not converted to an orchard or used for any commercial purpose and that the Appellant, in fact, never parted with the possession of the aforementioned immovable property. This appears to be a story concocted by the Appellant subsequent to the averment made in the objections to the Writ Petition because the said plea was not raised in the Writ Petition and, as such, the same cannot be believed and the learned Writ Court, too, has taken the said undertaking into consideration while passing the Judgment impugned.

08. As per Section 4 of the Act of 1997, the District Magistrate was required to take over the possession of the immovable property belonging to the migrant falling within his territorial jurisdiction and, on the expiry of 30 days, the said immovable migrant property was deemed to be

in the custody of District Magistrate concerned. Likewise, Section 5 of the Act of 1997 provides for the eviction of an unauthorized occupant and if the unauthorized occupant refuses or fails to surrender the possession to the competent authority, such authority may use force as is necessary for taking the possession of the said property. Section 7 of the Act of 1997 provides for an appeal against the order passed under Section 5 of the Act, but the appeal against an order of eviction cannot be entertained unless and until the possession of the property is surrendered to the competent authority. Whether a person is an authorized occupant or not is to be determined by the competent authority under the Act of 1997, which is the District Magistrate concerned. Once the person in occupation of migrant immovable property fails to establish that he was in the possession of the immovable property of a migrant with his written consent and authority of law, then only the order of eviction can be passed. Moreover, once the competent authority has determined the possession over the migrant immovable property as unauthorized, then the stipulation of handing over the possession for the purpose of entertaining the appeal cannot be termed as onerous. It appears that the Appellant has concocted the story of execution of undertaking fraudulently only to wriggle out of the limitation provided for filing the appeal under Section 7 of the Act of 1997. The learned Writ Court has examined the issue with regard to the availability of the remedy of appeal under Section 7 of the Act. Therefore, we do not find that there is any force in the contention of the Appellant, as such, the same is rejected.

09. The second contention raised by the learned Senior Counsel appearing for the Appellant is that the District Magistrate would get the jurisdiction to proceed under the Act of 1997 only when the possession of the occupant over the migrant property is unauthorized. An attempt was made to persuade us that the Appellant has been in possession of the property in question before the year 1971 and, more particularly when the Respondent Nos. 5 and 6 herein had handed over the possession of the property to the Appellant by virtue of a '*Hundi*' executed in the year 1987, but we are not convinced with the contention so raised by the Appellant as

there is no documentary evidence on record to demonstrate the fact that the Appellant was, in fact, in possession of the property before 1971. Besides the revenue record, particularly the mutation bearing No. 129, belies the contention of the Appellant. Further, the private Respondents have categorically stated that the '*Hundi*' is a forged and manipulated document. Otherwise also, on the basis of a '*Hundi*' only, the Appellant cannot claim possessory rights over the immoveable property in Kashmir in view of Sub-Section 3 of Section 138 of the Jammu and Kashmir Transfer of Property Act as it existed at that point of time, which categorically provides that no person shall take possession of any land in the province of Kashmir which has been transferred or contracted to be transferred to him, unless and until such transfer becomes valid under the provisions of Sub-Section (1) of Section 138, which provides that no 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 Sub-Section 3 of Section 61 of the Registration Act, 1977. Thus, on the basis of a '*Hundi*', no claim can be made with regard to immoveable property.

10. We have examined the Judgment impugned passed by the Writ Court and are of the considered view that the learned Writ Court has meticulously examined all the issues involved therein and, as such, the present appeal is found to be misconceived. Accordingly, the impugned Judgment dated 18th of September, 2018 passed by the learned Writ Court is upheld and the appeal is **dismissed**, along with the connected CM(s). Interim direction(s), if any subsisting as on date, shall stand vacated.

(Mohan Lal)
Judge

(Rajnish Oswal)
Judge

SRINAGAR
March 10th, 2023
"TAHIR"

i. Whether the Judgment is reportable?

No.