

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

...

OWP no.322/2016

Reserved on: 16.02.2023

Pronounced on: 09.06.2023

Mohammad Sultan Nagoo

.....Petitioner(s)

Through: Mr Z.A.Qureshi, Senor Advocate
with Ms Agha Faisal Ali, Advocate

Versus

Custodian Evacuee Property and others

.....Respondent(s)

Through: Mr G. J. Bala, Advocate

CORAM:

HON'BLE MR JUSTICE VINOD CHATTERJI KOUL, JUDGE

JUDGEMENT

1. Through the medium of this writ petition, petitioner seeks grant of writ of certiorari quashing Order dated 26th October 2015 passed by J&K Special Tribunal, Srinagar, in Revision Petition titled as *Mohammad Sultan Nagoo v. Hakeem Mohammad Amin and others* and in consequence thereof setting-aside Order dated 12th June 2014 passed by Custodian General, J&K in a Revision Petition titled as *Hakim Mohammad Amin and others v. Custodian Evacuee Property, Kashmir*.
A direction is also sought to be passed directing the Tribunal to rehear the whole matter and decide it in accordance with law after appreciating the arguments of petitioner and respondents.
2. It is contention of petitioner in the instant writ petition that it appears that respondent no.1 transferred the land admeasuring 4030 Sqfts and structure raised thereon situated at Sarai Payeen, Srinagar, belonging to

Evacuee Sheikh Aziz-ud-din, which was allotted to one Ghulam Qadir Nagoo, father of petitioner and respondent no.3, in the name of one of the sons of Ghulam Qadir Nagoo (respondent no.3) and one Hakeem Mohammad Amin (respondent no.2), without affording an opportunity of being heard to petitioner. After death of father of petitioner, a mutual agreement was executed on 18th June 2005, in which respondent no.3, father of respondent no.3, petitioner, Mst. Khatija and others were party with regard to the property in question. It is being averred by petitioner that it seems that respondents 2&3 got the property in question allotted and transferred in their names by Custodian Kashmir on 1st April 2005 for a period of 40 years without affording opportunity of hearing or without the consent of petitioner and other shareholders. This order was passed on 7th September 2009 by Custodian, Kashmir. Against this order, a revision was filed before Custodian General, Evacuee Property, Kashmir, by Hakeem Mohammad Amin and Musthaq Ahmad Nagoo (respondents 2&3), inter alia, on the ground that they paid Rs.15.00 Lacs as consideration amount, which is not a fact, whereas only Rs.6.00 Lacs was deposited by them. It is also stated that when petitioner came to know about pendency of revision petition, he filed an application before Custodian General, J&K at Srinagar, for his impleadment as party respondent. According to petitioner, his application for impleadment was decided on 29th March 2012 on the ground that petitioner's right is not recognized by law and the claim so raised is belated in nature and if he has any remedy of his exclusion for allotment of subject matter land proportionately, he may do so before the proper forum in an appropriate manner. Petitioner sought review of Order

dated 29th March 2012, which, however, was also dismissed vide order dated 12th June 2014. Against this order, petitioner approached the Tribunal with a revision petition. However, the Tribunal has also dismissed revision petition.

3. Objections have been filed by respondent no.1. He states that evacuee property land measuring 4030 Sqft has been transferred and leased out to respondents 2&3 by respondent-Custodian Kashmir with the written consent of no objection of original/ex. Allottee, Ghulam Qadir Nagoo. According to respondent no.1, a mutual agreement executed by Ghulam Qadir Nagoo and his family members, after the lease was granted to respondents 2&3, was not binding upon respondent-department nor was it tendered/adduced before the authorities to act upon and is not tenable under law. It is also averred by respondent no.1 that allotment is a temporary use of right and after expiry of term period, the status of allottee becomes trespasser. The period of previous agreement of Ghulam Qadir Nagoo (father of petitioner) expired on 31st December 1989, which was only for a one year and allotment of evacuee property does not earn heritable rights as per law. He also contends that lease of respondents 2&3 was cancelled on 7th September 2009 and there was no requirement under law to seek consent of petitioner and others. Respondent no.1 denies the contention to the extent that only Rs.6.00 Lacs had been deposited by respondents 2&3 and that Rs.15.00 Lacs as premium had been received by respondent-department from respondents 2&3.
4. I have heard learned counsel for parties and considered the matter.

5. Perusal of the record on the file would reveal that subject-matter of writ petition, viz. land measuring 4030 Sqfts, situated at Sarai Payeen, Srinagar, is an Evacuee Property. It was leased out in favour of Hakim Mohammad Amin S/o Haji Ghulam Mohammad and Mushtaq Ahmad Nagoo S/o Ghulam Qadir Nagoo residents of Peer Bagh and Batamaloo, Srinagar, respectively by Custodian Evacuee Property, Kashmir, vide Order dated 25th April 2005 for commercial purpose, against premium of Rs.15.00 Lacs. Prior to that it had been in the name of father of petitioner, namely, Ghulam Qadir Nagoo.
6. Although the parties in the case in hand try to show that the subject-matter of writ petition is the parties *inter se* matter, yet it cannot be denied that property in question is an evacuee property, which is to be dealt with strictly in consonance and accordance with provisions of the Act and Rules framed thereunder and the Constitution of India.
7. Insofar as evacuee properties are concerned, these are regulated by the J&K State Evacuees' (Administration of Property) Act 2006 (1949 A.D.). The Act has been enacted with the purpose to provide for administration of evacuees' property in Jammu and Kashmir.
8. Section 2(a) provides that "allotment" means the grant by the Government or by Custodian or by any other person duly authorized by the Custodian in this behalf of a temporary right of use and occupation of any immovable property of an evacuee to any person otherwise than by way of a lease. Section 2 (g) envisions that an "unauthorized person" means any person, whether he is duly empowered by the evacuee or otherwise, who after 14th day of August 1957, has been

occupying, supervising or managing the evacuee property without the approval of the Custodian.

9. Section 3 of the Act says that the provisions of the Act and the Rules and orders made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any such law. While removing doubts, Subsection (2) of Section 3 of the Act provides that nothing in any other law controlling the rents of, or evictions from, any property shall apply or deemed ever to have applied to evacuee property.

10. Section 5 of the Act makes it clear that all evacuee properties situate in Jammu and Kashmir shall be deemed to have vested in the Custodian.

11. Section 7 of the Act says that if any person in possession of any evacuee property refuses or fails on demand to surrender possession thereof to the Custodian or to any person duly authorized by him in this behalf, the Custodian can use such force as is necessary for taking possession of such property and can after giving reasonable warning remove or break open any lock, bolt or any door or do any other act necessary for the said purpose.

12. Section 8 says the Custodian can take such measures which he considers necessary or expedient for administering, imposing, preserving and managing any evacuee property and generally for enabling him satisfactorily to discharge any of duties imposed on him by or under the Act and can do all acts.

13. Section 9-A of the Act relates to prohibition of erection or re-erection of buildings without permission/sanction in writing of the Custodian.

Subsection (1) of Section 9-A provides that no person possession of occupying any evacuees' property whether as an allottee or otherwise shall erect or re-erect any building thereon without the sanction in writing of the Custodian. Subsection (2) provides that where any building is erected or re-erected without the sanction as referred to in Subsection (1) of Section 9-A of the Act or in contravention of any condition subject to which such sanction has been granted, such erected or re-erected portion of the building shall be deemed to be the evacuee property under this Act and the person erecting, re-erecting, possessing or occupying the property whether as an allottee or otherwise shall have no right or claim for the ownership of such erected or re-erected portion or any compensation in lieu thereof.

14. Section 10 provides that the Custodian can cancel any allotment or terminate any lease or amend the terms of any lease or of any agreement on which any evacuee property is held or occupied by any person, whether such allotment, lease or agreement was granted or entered into before or after commencement of the Act.

15. Let me now advert to the case in hand. It appears from perusal of the file that property in question (an evacuee property) had been initially leased out to father of petitioner, namely, Ghulam Qadir Nagoo. This important aspect of the matter appears to have been buried by respondent-Evacuee Department. It is admitted position of respondent-department that property in question had been leased out to Ghulam Qadir Nagoo. Whether his consent was enough to give evacuee property to any other person or respondents 2&3. Answer thereto is no. Respondent-Evacuee Department cannot be permitted to indulge in

such acts as it is the U.T. of J&K which maintains all evacuee properties and incurs huge amounts on such evacuee properties.

16. When Section 10 of the Act and Rule 14 of J&K State Evacuees (Administration of Property) Rules, Samvat 2008 are read conjointly, they provide prohibition for transfer of evacuee property. Respondent-Evacuee Department is, thus, required to protect property of evacuees and evict unauthorized occupants. However, in the present case, allotment was made in favour of respondents 2&3. What has been the basis for that is not coming forth from pleadings of respondents. Whether respondents 2&3, in whose favour allotment has been made by respondent-Evacuee Department, possess extra qualification and special features that a common resident/citizen of J&K does not possess. Such an act on behalf of respondent-department is, as such, violative of Article 14, which provides right of equality to all.

17. As said above, evacuee property right from coming into being of the Act is under the custody of respondent-department. Respondent-department is a government department as provided under and in terms of provisions of Article 12 of the Constitution and as a result of which, any property being maintained and controlled by it since the year 1949 is also a government property and is to be taken care of strictly on the same lines on which other government properties are being taken care of and handled.

18. The Supreme Court on the subject of allotment of government properties has in plethora of judgements repetitively held is similar to distribution of largesse and such properties cannot be given, allotted or distributed otherwise than by following the procedure, which should be

in consonance with provisions of Article 14 of the Constitution and there should be fairness in State action. As noted above respondent-department is a statutory authority created under and in terms of Act of 1949 and is, therefore, duty bound to preserve, protect and better utilize evacuee properties. It cannot act arbitrarily and deal with properties of evacuee as being owner thereof with rights of alienation.

19. Although there is no specific provision in the Act of 1949 or Rules framed thereunder, which may provide for mode and manner in which evacuee property having commercial value and potential is to be allotted or leased out, yet Order no.LB/7-C of 1958 dated 5th of June 1958 lays down detailed procedure for allotment of evacuee agriculture land in favour of certain persons. Perusal of LB/7-C of 1958 reveals that allotment to be made under the said Rules cannot be done arbitrarily inasmuch as it provides elaborate procedure for such allotment, which is in conformity with Article 14 of the Constitution. To this extent principles have been laid down by the Supreme Court in *Manohar Lal Sharma v. Principal Secy.*, (2014) 9 SCC 516; *Bharti Airtel Limited v. Union of India*, (2015) 12 SCC 1; and *Goa Foundation v. Sesa Sterlite Ltd.*, (2018) 4 SCC 218.

20. Let me now advert to the case in hand. Petitioner herein moved an application before Custodian General for his impleadment as party in a Revision Petition of respondents 2&3, which was vide order dated 29th March 2012 dismissed. Against that order, he preferred Review Petition. While deciding the revision petition of respondents 2&3, Custodian General has rejected the plea of petitioner as according to Custodian General, petitioner is a step son and has not been able to

convince Custodian General either by arguments or by any documentary evidence.

21. In terms of order impugned dated 12th June 2014, after discussing facts of the case, the Custodian General found order dated 31st August 2009, terminating the lease, as a harsh treatment and consequently set-aside the said order. Petitioner's plea that he was not impleaded as party has no force in consequence of passing of order dated 12th June 2014, as it has decided the whole matter and there remains nothing to be adjudicated upon.

22. Against the order of Custodian General, petitioner preferred Revision Petition before the Tribunal, but there as well he failed as the Tribunal vide order dated 26th October 2015 rejected petitioner's revision and upheld order of Custodian General.

23. Insofar as grievance of petitioner is concerned, he has been given liberty by the Custodian General to avail appropriate remedy with regard to his rights vis-à-vis subject-matter of revision petition before appropriate forum. So, impugned orders do not warrant any interference.

24. For the reasons discussed above, the instant writ petition is devoid of any merit and is, accordingly, dismissed with connected CM(s). Interim direction, if any, shall stand vacated.

(Vinod Chatterji Koul)
Judge

Srinagar

09.06.2023

Ajaz Ahmad, PS

Whether approved for reporting? Yes/No.