

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

LPA no.73/2010

Reserved on: 20.04.2023

Pronounced on: 09.06.2023

Manzoor Ahmad Narwari

.....Appellant(s)

Through: Mr Z.A.Shah, Senior Advocate with
Mr A. Hanan, Advocate

V/s

State of J&K and others

.....Respondent(s)

Through: Mr Faheem Nisar Shah, GA

CORAM:

HON'BLE MR JUSTICE TASHI RABSTAN, JUDGE
HON'BLE MR JUSTICE PUNEET GUPTA, JUDGE

JUDGMENT

TASHI RABSTAN-J

1. This Letters Patent Appeal is directed against the judgement and order dated 23rd April 2010, passed by the learned Single Judge in a writ petition, being OWP no.779/2002, titled as *Maharaj Krishan Dass and another v. State of J&K and others*.
2. We have heard learned counsel for parties. We have gone through the impugned judgement, writ record and considered the matter.
3. Assailing the impugned judgement, Mr Shah, learned senior counsel appearing for appellant has stated that appellant was put in possession by respondent no.4, as tenant on 24th December 1996 and, therefore, J&K Migrant Immoveable Property (Preservation, Protection and Restraint on Distress Sales) Act, 1997 (for short "*Act of 1997*") has no

application to the case in hand. Besides, appellant's possession vis-à-vis shop in question is authorised and lawful as it has been given to him by its owner.

3.1. While dilating his submissions, learned senior counsel would contend that respondents 5&6 filed a writ petition claiming therein that shop no.16 at Budshah Chowk, Srinagar, stood rented out to them since 1961 and business in the shop was carried on under the name and style of Janki Dass and Company Chemists. According to respondents 5&6 father of writ petitioner no.1 was the tenant of shop. Their further case in writ petition is that in 1992 a huge bunker adjacent to the shop was constructed by the Security Forces, which prevented them from conducting business. A communication was addressed by them to Additional Deputy Inspector General, Border Security Force, dated 9.9.1996 and to Divisional Commissioner Kashmir in which they requested for grant of compensation to the owner of the shop if deemed fit. Their further case is that respondent No: 4 broke open the locks of shop when the said respondents had migrated and all the documents were removed, so FIR no.08/1997 dated 14.01.1997 was lodged by them with Police Station Maisuma. It is also stated by writ petitioners in their writ petition that upon a request made by them to Inspector General of Police on 3.3.1997 about the progress in the investigation, a report was called in which it was stated that the management of the Trust had broken the locks of the shop and after destroying the expired medicine the shop was rented out by the Trust to the appellant herein. Writ petitioners on the aforesaid facts claimed protection of their property under the provisions of the Act of 1997.

Further case of writ petitioners/respondents 5&6 is that they filed an application before District Magistrate, Srinagar, but since no action was taken, they filed a writ petition, being OWP no.948/1997, which was decided on 10.11.1999 and Writ Court directed District Magistrate to take necessary action under the Act within a period of two months.

3.2. Learned senior counsel for the appellant would also contend that respondents/writ petitioners filed a Contempt Petition, wherein District Magistrate filed his report dated 30.09.2000, stating therein that order dated 10.11.1999 had been complied with. Aggrieved of the decision of the Contempt Court, the further case of these respondent-writ petitioners is that they filed a Letters Patent Appeal before the Division Bench, which upheld the order of the contempt court. According to these respondents the Appellate Court allowed respondents/writ petitioners to challenge the order of District Magistrate. After obtaining copy of the order dated 30.09.2000 the respondent-writ petitioners challenged the said order in OWP no.779/2002. The writ court quashed the order dated 30.09.2000 and directed that the appellant be dispossessed from shop No. 16.

3.3. Learned senior counsel for appellant has also averred that Writ Court identified two questions for consideration. According to Writ Court, respondents/writ petitioners were tenants of respondent no.4 and their right stands protected under the Act of 1997. The second question framed by the court is that the tenancy right of the respondent-writ petitioners has been encroached without their written consent.

3.4. It is further contention of learned senior counsel that appellant was put in possession by respondent no.4 as tenant thereof on 24.12.1996 and he has not on his own entered in the shop or encroached upon the shop and, therefore, the Act of 1997 has no application to the case of appellant. His possession vis-à-vis shop is authorized and lawful having been provided to him by the owner.

3.5. As per learned senior counsel the Writ Court has made Section 11 of the Act of 1997 basis for its consideration. According to the writ court the possession of the shop could not have been taken without the written consent of the earlier tenants and if the possession was required to be taken, it could be done only by any decree or order passed by the Civil Court. The Writ Court has also noticed the contention of the respondents/writ petitioners that they were dispossessed by respondent No: 4 unauthorizedly and subsequently if respondent no.4 has handed over the shop to the appellant the same cannot be said to be authorized occupation of the shop.

3.6. As regards the application of the Act, Mr Shah has stated that the Writ Court has proceeded to observe that the cause of action had accrued to respondents/writ petitioners in the year 1996 and the right to sue was available to them for the period provided by Limitation Act. The writ court has observed that there is no period of limitation provided Ibi' recovery of possession by the tenant dispossessed illegally and as such Article 119 of the First Schedule of Limitation Act would become applicable which provides period of six years to file the Civil Suit. It is maintained by writ petitioners that they were dispossessed on 08.01.1997, the period of six years would commence

from the said date. But after the Act of 1997 came into force on 30.05.1997 and published in Government Gazette on 02.06.1997 the remedy of suit was not available to the respondent-writ petitioners though they were within the period of limitation. According to the writ court the remedy against dispossession, therefore, lie with District Magistrate under the Act. On the said basis the writ court has ruled that the respondent-writ petitioners could not have filed a Civil Suit for recovery of possession and their remedy would be squarely covered under the Act of 1997.

3.7. Learned senior counsel would also contend that conclusions drawn by the Writ court both on facts and law are clearly unsustainable in law. If a person, whatever be his status, is dispossessed, the law provides definite remedies against his dispossession. These remedies are:

- i) If the act of dispossession results in breach of peace, remedy under Section 145 Cr. P.C. is available to a party dispossessed.
- ii) A Civil Suit within a period of six months can be maintained against an act of dispossession and in such a suit the dispossessed party has only to prove that it was in settled possession and has been illegally dispossessed. The dispossessed party has not to prove title.
- iii) That if a suit for recovery of possession is to be filed after a period of six months the party dispossessed has to prove that it has title to the property and on the basis of the title possession is sought.

3.8. Learned counsel has further stated that finding of the writ court that a tenant has no remedy available in civil law against recovery of possession is patently erroneous finding. It is, therefore, averred by learned counsel that assuming, without admitting, that respondents/

writ petitioners had been illegally dispossessed from the shop by respondent no.4, the remedy of civil suit was available to these respondents. Since they did not avail any remedy, the said respondents could not subsequently rely on the provisions of the Act of 1997. The writ court has also observed that the respondents/writ petitioners had the remedy under the Act of 1997. It is submitted by the appellant herein that these respondents had no remedy under the Act of 1997. The act of alleged dispossession had taken place much earlier.

3.9. It is also averred by Mr. Shah, learned senior counsel for appellant, that the writ court has also proceeded to examine the issue as to whether respondents/writ petitioners could be dispossessed by the landlord without taking recourse to law. The writ court has recorded the finding based on Transfer of Property Act and Houses and Shops Rent Control Act that the writ petitioners could not have been dispossessed under the said statutes except in accordance with the procedure established by law. According to the writ court since the procedure of eviction had not been followed, the action of respondent no.4 was unauthorized and illegal. The finding of the writ court on the aforesaid questions is not correct. It is a general law that a lawful tenant can be evicted under the provisions of Transfer of Property Act and/or under the provisions of Houses and Shops Rent Control Act, if the said Act applies by observing process of law. In the facts and circumstances of the case and compelled by the security forces respondent no.4 having found that the shop had been abandoned and was a security risk, under the doctrine of necessity took over possession of the shop, and handed over the shop and such

circumstances it cannot be said to have acted illegally or unauthorizedly.

3.10. It is also stated by learned senior counsel that the writ court has not at all considered the circumstances as emerged from the material placed on record that the locks were broken in good faith on directions of B.S.F. authorities. The case which stood registered has reached its logical conclusion and Police has arrived at a conclusion that no offence can be said to have been committed by respondent no.4 muchless by appellant. The records of the case clearly demonstrate the circumstances in which respondent no.4 handed over the shop to appellant herein as tenant. Impugned judgment is contrary to facts and law. It does not resolve the controversy in accordance with law. The order of the Deputy Commission was in accordance with law.

3.11. It is submitted that the jurisdiction of the Civil Courts is only barred in respect of matters which require to be determined by District Magistrate or by Appellate Authority under the Act of 1997. Since neither District Magistrate nor Appellate Authority had any jurisdiction to adjudicate the controversy which had arisen between the parties, the jurisdiction of the Civil Court was not barred. The view taken by the writ court on interpretation of Sections 11, 8 and 5 of the Act is erroneous. Appellant's positive case is that he is lawful tenant of Shop No; 16. It has lawfully been provided to him by respondent no.4. There is a valid Rent Agreement between the parties. The order of the writ court is erroneous and unsustainable. The view taken by the writ court is not legally the correct view. Impugned judgment deserves to be set aside and OWP no.779/02 dismissed.

4. Perusal of the file would reveal that writ petitioners (respondents in this appeal) had earlier filed a writ petition, bearing OWP no.948/1997, claiming therein that they were migrants within the meaning of the Act of 1997 and that they were in occupation of a shop in question and during their absence, respondent no.4 (appellant in this appeal) had illegally and unauthorizedly come into possession of the premises and they approached Deputy Commissioner for initiating action under the provisions of the Act of 1997 for taking possession of the premises and for compensation as permissible under law, but without any success. It was also contention of writ petitioners that they had also approached Divisional Commissioner, Kashmir, who vide letter dated 21st August 1997 requested Deputy Commissioner, Srinagar, to take action under law and evict unauthorized occupant, but the same did not generate any response and, as such, they filed writ petition. Petitioners sought a direction to respondent-Deputy Commissioner to initiate action and discharge his statutory obligation under the Act of 1997.

4.1. Appellant herein (respondent no.4) responded to writ petition by maintaining that writ petitioners were not migrants and, therefore, premises was not a migrant property and that he has been put in possession of the premises by the owner, i.e., Dashnami Akhra Trust and as such, is not an unauthorized occupant.

4.2. The Writ Court settled a question as to whether writ petitioners were migrants and disputed premises was migrant property, was to be decided by the District Magistrate and that even term “unauthorized occupant” had to be decided by the authority and therefore, such

questions could not be adjudicated in writ proceedings. The Writ Court disposed of writ petition vide Order dated 10th November 1999, directing official respondents therein to take all necessary action under the provisions of the Act of 1997. Respondent no.4 there (appellant here) was also given liberty to appear before District Magistrate and plead his case.

4.3. Writ petitioners also filed a contempt petition, bearing COA(W) no.104-B/2000, in which District Magistrate filed his report dated 30th September 2000, stating therein that the order dated 10th November 1999 was complied with. It would be advantageous to reproduce relevant portion of the order dated 18th May 2001:

“Petitioners seek implementation of Court order dated 10.11.1999 whereby District Magistrate, Srinagar has been directed to determine the question of status of the petitioners as ‘Migrants’ and decide the dispute with regard to the property mentioned in the petition under the provisions of the Migrant Immoveable Property (Preservation, Protection and Restraint on Distress Sales) Act, 1997.

Respondent has filed statement of facts and also the consideration order dated 30.09.2000 observing therein that the shop in question has been rented out through trustee. The case does not fall within the purview of the Act of 1997 and the dispute being civil, the parties shall approach appropriate forum. The court direction has been complied with. Contempt petition is disposed of. Rule, if any, issued is discharged.”

4.4. As is gatherable from order dated 18th May 2001, the Court has observed that case does not fall within purview of the Act of 1997 as the dispute being civil in nature and the parties should approach appropriate forum. However, writ petitioners felt aggrieved of the order of the said order and filed LPA. The Division Bench vide order dated 1st May 2002, upheld the order of the Contempt Court on the following lines:

“The present appeal has been preferred against an order passed by the learned Single Judge of this Court. Learned Single Judge has come to the conclusion that no case is made out for initiating or continuing with the contempt proceedings. We are of the opinion that the view expressed by the learned Single Judge cannot be faulted. The appellants are left free to challenge the order which is said to have been passed in pursuance of the judgment given by this Court in OWP No:948/1997 dated 10.11.1999 in forums available to them.”

4.5. Writ petitioners/respondents, however, again filed writ petition, seeking vouchsafe of following reliefs:

“In the premises it is respectfully prayed that this Hon’ble Court may graciously be pleased to allow this Writ petition and to pass an appropriate Writ, direction or Order including a Writ of certiorari and be pleased to quash the Order of the District Magistrate dated 30.9.2000 passed in the case titled Maharaj Krishan Dass and Sheela Dass Versus Shri Manzoor Ahmad

A N D

Further be pleased to issue a Writ of mandamus and command the Respondent No.2 to take action under Sections 4,5,6 and 13 of the J & K Migrant Immovable Property (Protection, Preservation and Restriction on Distress Sales) Act 1997 and evict the Respondent Manzoor Ahmad and take the vacant possession thereof in his custody.

A N D

To recover compensation at double the market rate of rent from 1.8.1996 till his eviction in terms of Section 13 of the said Act.

A N D

Present a Charge Sheet against the accused persons in a Court of Competent jurisdiction.”

4.6. Reply was filed by appellant/respondent no.4 (Manzoor Ahmad Narwari) before the Writ Court. He stated in his reply that he has been lawfully inducted tenant in the shop in question by its lawful owner inasmuch as provisions of the Act of 1997 could not be invoked retrospectively. It is also insisted in the reply that there is no documentary evidence brought on record by writ petitioners regarding any relationship between Dashnami Akhara Trust and M/s Janki Dass and Co. and there is no evidence brought on record about subsistence of tenancy in respect of shop in question. It is also stated in the reply that contents regarding location of bunker are totally incorrect because

the business is being smoothly run even by him and there seems to be an attempt on part of petitioners to carve out a case in their favour which in fact was not there. Appellant has also stated that plea of breaking open the locks of the shop in question by him has already been negated by the inquiry conducted by competent authority, i.e., Deputy Commissioner, Srinagar, who has come to the conclusion that shop in question has been rented out to appellant on 26th December 1996 by the Trust and that the case does not fall within the purview of Act of 1997 but is a matter of civil nature and if petitioners are aggrieved, they may approach the proper forum. It is also stated by appellant in his reply that he was put in possession by the Trust much before coming into being of the Act of 1997 and, therefore, the Act of 1997 cannot be given effect retrospectively.

4.7. The Writ Court vide judgement impugned concluded as under:

“For the reasons stated hereinabove, I find that respondent no.4 is an unauthorized occupant of the Shop No.16 in the building owned by Mahadev Gir Dashnami Akhara Trust, Srinagar and is required to be dispossessed from it. Accordingly, respondent no.2 is directed to remove respondent no.4 who is an unauthorized occupant of the shop in question and handover the possession of the same to the petitioners.”

- 5. The Writ Court, while passing judgement impugned, has taken note of the fact that the parties had already been pursuing the matter before the learned Writ Court, Contempt Court and the Division Bench. Nevertheless, an important aspect of the matter, which has been ignored and overlooked by the Writ Court is Order dated 30th September 2000, passed by District Magistrate, Srinagar, which was even under challenge in writ petition and quashment thereof was also sought for by writ petitioners/respondents.**

5.1. District Magistrate, Srinagar, in terms of Order dated 30th September 2000, had given all facts of the case as had been projected before it by writ petitioners/respondents. Report had also been sought from field functionaries by District Magistrate. It was found that appellant herein had not entered into the shop on his own illegally, unlawfully or unauthorizedly, but has been put in possession of shop in question by its owner, i.e., Mahadev Gir Dashnami Akhara Trust, Budshah Chowk, Srinagar. To this effect, statement of Mahantji had also been recorded by Tehsildar, Srinagar. In view of this fact situation, it has been held by the authority/custodian as provided under and in terms of the Act of 1997, i.e., District Magistrate, that appellant as per Section 2(i) of the Act of 1997 is not an illegal or unauthorized occupant but a legal and lawful occupant as he has been put in possession of shop by its owner. And as a consequence of which, District Magistrate has concluded that the matter does not fall within the purview of the Act of 1997 but is of a civil nature and if writ petitioners are aggrieved, they may approach the proper forum.

6. The Writ Court has in impugned judgement mentioned that writ petitioners maintain that they were tenants of respondent no.5 and their right as tenant are protected under the Act of 1997 and that encroachment on the tenancy rights of writ petitioners regarding immovable property could not be taken away unless there is a written consent in this behalf. It had been the plea of writ petitioners that they could not have been dispossessed and their right on the property could not have been encroached upon without their written consent.

6.1. On the other hand, it has been contention of appellant (respondent no.4) before the Writ Court that he has been put in possession of property on 26th December 1996 by its owner, as such, the Act of 1997 has no application in the present case. The title of writ petitioners is very much in dispute, so disputed questions relating to title cannot be satisfactorily gone into or adjudicated upon in a writ petition. Appellant also disputes the status of writ petitioners as according to him the writ petitioners have not even placed an iota of documentary evidence on record and still, they want to act as tenants of shop inasmuch as there is no documentary evidence brought on record by writ petitioners regarding any relationship between the Trust and writ petitioners; besides there is no evidence brought on record about subsistence of tenancy in respect of shop in question. It is also mentioned by appellant in his reply that plea of alleged breaking open the locks of the shop in question by respondent no.5 has been negated by inquiry conducted by Deputy Commissioner, Srinagar. It is also stated by appellant in his reply that writ petitioners appealed the order of learned Single Judge before the Division Bench but the Division Bench concluded that the opinion expressed by learned Single Bench cannot be flouted and that in view of finality attached to the order of dismissal by learned Single Judge, writ petitioners cannot be permitted in law to agitate the same issues time and again that too by raising disputed questions of fact. It has also been contention of appellant that on one hand writ petitioners rely upon the provisions of the Act of 1997, in which District Magistrate

has been given full powers to act upon and on the other hand they challenge order of District Magistrate that too in a writ petition.

6.2. The Writ Court has taken contentious contentions of writ petitioners surefire by ignoring the fact that the Act of 1997 cannot be given retrospective effect qua subject-matter of writ petition/appeal. It is a matter of fact that possession of shop in question has been given to appellant by its owner in the year 1996 and the Act has come into being in the year 1997. And this fact has been admitted by the Writ Court, but at the same time it has declared appellant as unauthorized occupant under and in terms of Act of 1997. As noted above appellant has not entered into the shop in question of his own. The shop in question, as record would show, has been in under control of security forces and it had been in view of the concerns raised by security forces that shop in question was cleaned and thereafter rented out to appellant.

6.3. The Writ Court while declaring appellant as unauthorized occupant has not taken into consideration the fact that under and in terms of the law, viz., the Act of 1997, it is exclusive domain of District Magistrate concerned to declare a person an unauthorized occupant of a particular property, including shop in question. The shop in question, in the present case, was/is not proprietary/ownership of writ petitioners but is a property of a pious, virtuous and religious Trust, viz. Mahadev Gir Dashnami Akhara Trust, Budshah Chowk, Srinagar. The action of Trust taken cannot and does not fall under the purview of the Act of 1997 inasmuch as instant case is totally and exclusively a matter that falls under civil realm.

- 6.4.** Perusal of the file reveals that Company Commander, 106 Bn, BSF, Budhshah Chowk, Srinagar, vide letter dated 20th November 1996, informed the Trust about the dangerous and spoiled smell of chemical lying in the shop in front and near the bunker where often blasts took place, with a request to remove such exhausted and spoiled chemicals lying in the shop as immediately as possible otherwise chemicals would absolutely prove dangerous, fatal and fire to the property of the Trust building as well as security personnel living in the building.
- 6.5.** Thereafter a communication bearing Ref. No.MGDAT/82 dated 7th December 1996 was made, which reveals that it had been written by Supervisor of the Trust to Station House Officer police station Maisuma, in which it was mentioned that after perusal of complaint from Company Commander, B.S.F. 106 Bn Budshah Chowk, Srinagar, dated 20th November 1996, the Trust had been directed by the Trustee to take necessary action so that the spoil chemicals from the shop would be destroyed after taking the same out of the shop in order to save human lives and the Trust property.
- 6.6.** Perusal of the file also reveals that the Trust in terms of letter dated 24th December 1996, possession of shop in question was handed over to appellant by the trust subject to the condition that he would pay Rs.4.00 Lacs as also monthly rentals. Thereafter, a Rent Agreement was also executed by the Trust in favour of appellant. So, appellant has been put in possession of the shop in question by the authorities of the Trust, so he cannot be declared an unauthorized occupant under the Act of 1997 that too in writ proceedings under Article 226 of the Constitution of India as it would amount to conferring in itself the

jurisdiction of Civil Court as well as the authority as envisioned under the Act of 1997. The authority under the Act of 1997 has already declared that appellant is not an unauthorized occupant in terms of the Act of 1997, so the Writ Court has wrongly declared appellant as unauthorized occupant of the property in question.

6.7. It may be added here that the Writ Court at one place has made reference to provisions of the Transfer of Property Act and the Houses and Shops Rent Control Act, to observe that the case falls under these Acts and that action of the Trust was in contravention of the said Acts, but at another place the Writ Court has said that provisions of Act of 1997 apply to the case in hand. This reflects contradictory opinions and views of the Writ Court. So, it would have been better for the Writ Court to ask the parties to fall back on the remedy as made available to them and as said by District Magistrate, Srinagar, while passing order dated 30th September 2000.

6.8. It is worthwhile to mention here that District Magistrate vide order dated 30th September 2000 has declared that the present case does not fall within the purview of the Act of 1997 as it is civil in nature. Better it would have been for writ petitioners to avail appropriate remedy of filing the civil suit where the parties could be able to adduce evidence and produce proof in support of their rival pleadings, more particularly when the matter requires full-fledged trial. When impugned judgement and order is looked into in the backdrop of above discussion, it calls for interference.

7. In the context of foregoing discourse, the appeal in hand is **allowed** and judgement and order dated 23rd April 2010, passed by the learned

Single Judge in a writ petition, being OWP no.779/2002, titled as *Maharaj Krishan Dass and another v. State of J&K and others*, is **set-aside**. Respondents/ writ petitioners are, however, free to avail appropriate remedy as has been said and held by the District Magistrate, Srinagar, while passing order dated 30th September 2000.

8. Disposed of as above.

(Puneet Gupta)
Judge

(Tashi Rabstan)
Judge

SRINAGAR
09.06.2023
Madan Verma-PS

Whether approved for reporting? Yes/No.

Pronounced today by me in terms of Rule 138(4) of J&K High Court Rules, 1999.

(Tashi Rabstan)
Judge

Srinagar
9th June, 2023

