

S.No.45

Regular List

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

WP(C) 674/2024
CM(1812/2024)

SHAMA KOUL AND ORS.

...Petitioner(s)/Appellant(s)

Through: Mr. Salih Pirzada, Advocate with
Mr. Bhat Shafi, Advocate &
Ms. Sharaf Wani, Advocate

Vs.

UNION TERRITORY OF J AND K AND ORS.

...Respondent(s)

Through: Mr. Hakeem Aman Ali, Dy. AG
Mr. Mohammad Ayoub Bhat, Advocate with
Ms. Mahajabeen, Advocate

CORAM:

HON'BLE MR. JUSTICE WASIM SADIQ NARGAL, JUDGE

ORDER

26-05-2025

1. The petitioners through the medium of the present petition have sought the following relief(s):

I. By a writ of Certiorari:

- a. The impugned communication bearing no E 3872288 dated 17.02.2024 and communication no Div.Com/RA-Avs-110/22 dated 26.12.2022 may be quashed.

II. By a writ of Mandamus

- a. The Respondent-Divisional Commissioner, Kashmir and the Respondent Deputy Commissioner, Baramulla be directed not to interfere with the peaceful possession of the petitioner nos. 7 to 12.
- b. The Respondent-Divisional Commissioner Kashmir and Respondent-Deputy Commissioner, Baramulla be directed to adhere to the provisions of the Jammu and Kashmir Migrant Immovable Property (Preservation. Protection and Restraint on Distress Sales) Act, 1997.

2. The brief facts of the case are that the petitioners No. 1 to 6 including Meenakshi D/o Lat Chaman Lal, Sunita D/o Late Chaman Lal and Mohan Rani w/o Mohan Lal are the owners of the land measuring 11 kanals, 16 marlas falling under khasra No. 995/309 (7 kanals 10 marlas) and khasra No. 305 (10 marlas) Khata No. 374 and Khewat No. 122 situated at village Hamlina (Sopore), Baramulla.
3. The petitioners 1 to 6 including other owners (supra) executed a General Power of Attorney in favour of the petitioners 7 to 12 and their grandfather namely Mohammad Ismail Mir (deceased) for the aforementioned immovable property. The General Power of Attorney was registered on 08.02.2012 upon payment of stamp duty of Rs. 3,92,000/- corresponding to land valuation. Subsequently all the owners entered into a sale agreement through the aforementioned attorney on 08.12.2012 for a consideration amount of Rs. 95.00 lakhs with petitioners 7 to 12 and Mohammad Ismail Mir (deceased).
4. It is stated that the petitioners and other owners including the owners approached the Divisional Commissioner, Kashmir through the attorney seeking permission for alienation under the Jammu and Kashmir Migrant Immovable Property (Preservation, Protection and Restraint on Distress Sales) Act, 1997 (for short "Migrant Act"). It is further stated that the Deputy Commissioner, Baramulla vide communication No. DVC/SQ/ahd/1684 dated 01.10.2015 relying upon the report furnished by the concerned Tehsildar recommended the case

for grant of permission for alienation under Migrant Act and the decision for grant of permission for alienation being protracted, constrained the attorney holders and the alienees (petitioners 7 to 12) to approach this Court by way of a writ petition OWP No. 947/2016, whereby, vide an order dated 18.09.2017, the petition was disposed of with a direction to Divisional Commissioner, Kashmir to pass appropriate orders on the application seeking permission for alienation of the land.

5. The Divisional Commissioner, Kashmir vide order dated 23.02.2018 rejected the permission for alienation on the ground of variation in the revenue records depicting 6 kanals 19 marlas and 5 sqft. instead of 08 kanlas as mentioned in the general power of attorney and also on the ground of presence of another general power of attorney dated 03.01.2019 in favour of the private respondent for the land measuring 11 kanals 16 marlas under khasra No. 990/39 and the survey number in the second power of attorney, as recorded in the order of the Divisional Commissioner Kashmir was at variance with the actual survey number of the land in question.

6. The order dated 23.02.2018 was assailed by the petitioners Nos. 7 to 12 (attorney holder and vendees) in a writ petition bearing OWP No. 116/2018, wherein, by virtue of an interim order dated 25.06.2018, the said order was statyed with a further direction to the respondents to reconsider the claim of the petitioners for alienation of land covered under khasra No. 995/309 and khasra No. 305, khata No. 374, Khweat No. 122

located in village Hamlina Sopore to the extent of 6 kanal 19 marlas and 05 sarsai instead of 08 kanals.

7. The interim order dated 25.06.2018 was assailed by the private respondent in LPAOW No. 85/2018, whereby a direction for reconsideration was stayed vide order dated 11.09.2018 and subsequently, LPA was disposed of vide an order dated 25.09.2018 by directing to learned Single Judge to dispose of the application for vacation of stay and till the time of decision the Hon'ble Division Bench directed that the stay would continue to remain in operation.
8. It is stated that second power of attorney dated 03.01.2009 in favour of the private respondent being forged was referred to the Crime Branch by the office of the Divisional Commissioner, Kashmir on 05.04.2010 and the said fact stands reflected in the order dated 23.02.2018.
9. The further case of the petitioners is that an FIR No. 282/2010 was registered by one of the predecessors-in-interest with Police Station, Udampur, under Sections 420, 462, 468 RPC on 06.12.2010 against the private respondent for forgery of general power of attorney dated 23.01.2009. The private respondent claims to be the beneficiary of the power of attorney granted by the complaint as one of the owners. The private respondent has challenged said FIR before this Court at Jammu by virtue of a petition being CRMC No. 118/2011, which was disposed of on 11.11.2022 permitting the investigation to proceed in terms of law.

10.The predecessors in interest addressed a communication no. P.family/2011-1/44 dated 16.06.2011 to Principal Resident Commissioner and Tehsildar, requesting that the Divisional Commissioner Kashmir and the Deputy Commissioner, Baramulla be informed about existence of a fake power of attorney in pursuance of which the land was sought to be encroached upon. Subsequently, the Assistant Commissioner, Baramulla addressed a communication No. IDC B/SQ/MC dated 06.11.2011 directing the Tehsildar, Sopore not to act upon the general power of attorney of the private respondent and take necessary steps for protection of the migrant property.

11.It is further submitted that one Mohammad Amin Dar claiming to have entered into an agreement to sell in the year 2009 with some of the predecessors in interest of land measuring 11 kanals and 16 marlas situated at village Hamlina, Sopore falling under khasra No. 995/309 as involved in the instant petition, who approached this Court by medium of a petition OWP No. 2413/2018 seeking permission of alienation under the Migrant Act and the said petition was disposed of at motion hearing stage, whereby, the respondent-Divisional Commissioner, Kashmir was directed to consider the case for alienation vide order dated 28.12.2018. That Mohammad Amin Dar filed a contempt petition for implementation of order dated 28.12.2018, which was closed vide order dated 07.2.2023 by noticing the pendency of the issue before the Crime Branch and the non-appearance of the petitioners, therein.

12. That during the pendency of the aforesaid contempt proceedings, the Divisional Commissioner, Kashmir in a status report while referring to the details of the issue, mentioned the ownership and entitlement of the land whereby the name of the petitioners 1 to 6 along with rest of the owners stand reflected in terms of the revenue records.

13. Thereafter, Mohammad Amin Dar filed a second petition bearing OWP No. 410/2019 seeking permission for fencing of the aforementioned land which came to be dismissed as withdrawn with liberty to pursue the matter before the concerned respondents vide order dated 09.04.2019. He filed, thereafter, a third writ petition bearing WP(C) No. 227/2020 seeking identical reliefs for fencing of the property as prayed for in OWP No. 410/2019 and the petition was disposed of vide order dated 03.02.2020 with a direction to Deputy Commissioner, Baramulla to consider the application for grant of permission to fence the land in question.

14. Pursuant to order dated 03.02.2020 (*supra*), a communication was addressed from the office of the Divisional Commissioner, Kashmir to the Deputy Commissioner, Baramulla vide No. Div.com/RA-AVS/1110/2020 dated 08.02.2020 requesting to take necessary action.

15. It is stated that recital of writ petition OWP No. 2413/2018 make a casual reference to the power of attorney of the private respondent, although, the same was irrelevant to the determination of the issue therein, but as per the petitioners, the

same is purportedly sponsored litigation at the behest of the private respondent. The said fact stands consolidated by the reliance placed by the private respondent on the orders passed by this Court in writ petitions filed by Mohammad Amin Dar as reflected in the application dated 17.02.2024 in pursuance of which the impugned order stands passed. In compliance of impugned order dated 26.12.2022, the Naib Tehsildar has purportedly handed over the possession of the property to the private respondent.

16. The further fact of the matter is that the predecessors in interest had earlier granted a Special Power of Attorney dated 08.12.2012 in favour of petitioner No. 8 (Farooq Ahmad Mir) to prosecute legal cases.

17. It is stated that private respondent preferred an application in pursuance of which the impugned orders stand passed and the private respondents taking the benefit of the impugned order has resorted to fencing of the property. The petitioners 1 to 6 being migrants and not currently residing in Jammu and Kashmir is incapacitated to effectively protect their property.

18. It has also been urged by the learned counsel for the petitioners that the official respondents have passed the impugned order without any adherence to the Act of 1997 and also no opportunity of being heard was granted to the petitioners and the orders are bereft of any reason and since the aforesaid orders have been passed for extraneous consideration, the same lacks any legal validity and are liable to be quashed. It has also

been urged by the learned counsel for the petitioners that it was in the active knowledge of the official respondents, the factum of the forged power of attorney and yet the official respondents seem to have deliberately suppressed such vital information with the sole object to shower undue benefit unto the private respondents. Thus, the strong foundation has been laid down by the petitioners in the instant petition that the impugned orders and communications have been manifestly issued in a clandestine manner without any reference or intimation to the petitioners and other co-owners with the sole object to dilute the ownership rights of the petitioners and protection which is to be granted under the Act to the petitioners.

19.The very passing of the impugned orders, according to the learned counsel for the petitioners tantamount to transferring the ownership rights in favour of the private respondents who are not migrants and that too without any justifiable cause to the detriment of the petitioners and other co-owners. On this ground, the order impugned according to the learned counsel cannot sustain the test of law and liable to be quashed.

20.It has also been urged by the learned counsel for the petitioners that the direction issued by Divisional Commissioner Kashmir to the SSP to initiate action under law has no statutory backing as such, direction do not conform to the mandatory provisions and the procedure envisaged under the Act and any action which has no statutory backing, cannot sustain the test of law and liable to be set aside.

21. Lastly, learned counsel appearing for the petitioners has submitted that the Divisional Commissioner has neither called for any enquiry or report from the concerned Deputy Commissioner before the passing of the impugned order nor the petitioners have been intimated about such action who are migrants and thus are entitled to protection for the property in question under the aforesaid Act.

22. This court places reliance on the judgment passed by this Court in the case titled *Ghulam Mohammad Mir And Another Vs. Union territory of J&K in a Writ Petition bearing No. WP(C) 2705/2024 decided on 25-11-2024*, wherein the following has been held:

4. It goes without saying that under J & K Migrant Immovable Property (Preservation, Protection and Restrain on Distress Sale) Act, 1997, the District Magistrate is the custodian of the migrant property and shall ensure that no distress sales take place with respect to such property and the migrant property is to be alienated with the consent of the migrant in accordance with law and not otherwise.

23. The record reveals that till date the respondents have chosen not to file any reply. The record further reveals that this Court on the very first date of hearing i.e., 3rd April, 2024 directed that the status quo with regard to the property in question comprising of khasra No. 995/309 and khasra No. 305 of village Hamlina, Sopore, shall be maintained and for that the Deputy Commissioner (District Magistrate) Baramulla has to take over the physical possession of the property in reference in

the said two khasra numbers under his control and custody allowing no access to anybody without the orders of this Court and the property shall be reckoned to be custodia legis and the said order was subject to objections from the other side.

24. Perusal of the record reveals that an affidavit has been filed on behalf of the Tehsildar Sopore on 31-12-2024, in compliance of order passed by this court on 03-04-2024 wherein it is stated that the possession of the landed property measuring 8 Kanal under survey No. 995/309 and 305 situated in estate Hamilina, Tehsil Sopore has been taken over and has been kept under the custody of Lumberdar of said village on *superdnama*, the copy of the said *superdnama* is also enclosed with the affidavit.

25. Today, when the instant petition was taken up it has been urged by learned counsel for the parties that the aforesaid order passed by this Court continues to be in vogue and no fruitful purpose would be served to keep the petition alive as it will not serve the interest of any of the parties, and accordingly a prayer has been made jointly that a direction be issued to the concerned Deputy Commissioner to proceed strictly in accordance with the aforesaid Act and take a decision in this regard after hearing both the parties and other stakeholders vis-à-vis the property in question, the details of which find mention in the preceding paragraphs.

26. Prayer of the parties seems to be tenable and convincing in the peculiar facts and circumstances of the case.

27. With the consent of learned counsel for the parties, the present petition is taken up for final disposal. Accordingly, the Deputy Commissioner is directed to decide the issue expeditiously, who shall take a decision strictly in tune with the aforesaid Act after providing an opportunity of being heard to all the stakeholders, which includes the petitioners and private respondents.

28. Let the decision in this regard be taken by the concerned Deputy Commissioner within six weeks from today by notifying the date in advance to all the stakeholders for proceeding ahead in the matter.

29. Till the aforesaid decision is taken, the *status quo* as it exists today shall be maintained and the continuance of the same shall be subject to the decision which is likely to be taken by the Deputy Commissioner. As a necessary corollary, the impugned communications/orders are quashed/set aside.

30. Needless to say, that the Deputy Commissioner Baramulla shall take a decision in the matter strictly in accordance with the provisions of the aforementioned Act.

31. ***Disposed of*** in terms of the above.

(WASIM SADIQ NARGAL)
JUDGE

SRINAGAR:
26-05-2025
Mubashir