



HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU

WP(C) No.1794/2022

Reserved on: 19.02.2026

Pronounced on: 11.03.2026

Uploaded on: 12 .03.2026

Rehmatullah Naik, Age 60 years
S/o Sh. Haji Mohd. Shafi Naik,
R/o village Chapnari, Gundlaqkote,
Tehsil Banihal, District Ramban.

...Petitioners(s)

Through:-

Mr. Koshal Parihar, Advocate.

Versus

1. U.T of J&K through Chief Secretary, Govt. of J&K,
Civil Secretariat, Srinagar/Jammu,
2. District Magistrate, Ramban.
3. Tehsildar Banihal.
4. Sham Singh S/o Goga Singh
5. Renu Devi W/o Lt. Krishan Singh
6. Ravinder Singh S/o Lt. Krishan Singh
No.4 to 6 residents of Village Chapnari, Gundlakote,
Tehsil Banihal, District Ramban.

...Respondent(s)

Through:- Ms. Priyanka Bhat, Advocate vice
Ms. Monika Kohli, S. AAG for R-1-3
Mr. Swarn Kishore Singh, Advocate
for R-4 to 6

Coram: HON'BLE MR. JUSTICE SANJEEV KUMAR, JUDGE
HON'BLE MR. JUSTICE SANJAY PARIHAR, JUDGE

JUDGMENT

Sanjeev Kumar "J"

1. In this petition, filed by the petitioner under Article 226 of the
Constitution of India, the petitioner prays for declaring proviso



(b) of Section 7 of the Jammu and Kashmir Migrant Immovable Property (Preservation, Protection and Restraint on Distress Sales) Act, 1997 [“the Act of 1997”] as unconstitutional being violative of Article 14, 19 and 21 of the Constitution of India. The petitioner also prays for a writ of certiorari quashing order dated 25.08.2022 passed by the District Magistrate, Ramban, on an application filed by respondent Nos. 4 to 6 (private respondents) under Section 5 of the Act of 1997 titled *Sham Singh and others v. Rehmatullah Naik*.

2. Learned counsel appearing for the respondents have taken a preliminary objections to the maintainability of this petition to challenge order of the District Magistrate, Ramban on the ground that in the face of alternative and equally efficacious remedy of appeal provided under Section 7 of the Act of 1997, writ petition under Article 226 may not be maintainable.
3. Learned counsel for the petitioner does not seriously dispute the proposition that ordinarily writ would not lie to throw challenge to an order for which a statutory appeal is provided under a particular Act of legislation. However, it is argued by Mr. Koshal Parihar, learned counsel appearing for the petitioner that the remedy of appeal provided under Section 7 of the Act of 1997, which makes the condition of surrendering of possession of the property a condition precedent for entertaining appeal is



totally unconstitutional and renders the remedy cumbersome and unworkable.

4. Having heard learned counsel for the parties and perused the material on record, we are of the opinion that Section 7 of the Act of 1997, in particular, proviso (b) thereof cannot be held to be *ultra vires* the Constitution.
5. Right of appeal is a statutory right and not a vested or fundamental right, therefore, the legislature, which provides such statutory right of appeal, is well within its competence to impose reasonable conditions for availing such right. Care, however, is required to be taken that such conditions are not arbitrary, excessive or confiscatory. Any condition attached to the right of appeal, which practically defeats the right of appeal may be struck down as unreasonable and hit by Article 14 of the Constitution of India. In that view of the matter, it can very well be said that the legislature is competent to impose surrender of possession as a condition precedent for entertaining an appeal. However, such condition needs to be tested on the touch stone of reasonableness and if it renders the appeal illusory or oppressive, it may be struck down. Otherwise, such remedy, with reasonable conditions, is to be treated as an efficacious and alternative remedy barring filing of writ petition under Article 226 of the Constitution of India as a matter of course.



6. Before we proceed further, it would be apt to set out Section 7 of the Act of 1997 herein below, which reads thus:-

“7. Appeal. —(1) Any person aggrieved of an order passed under this Act, may file an appeal before the Financial Commissioner, Revenue :

Provided that no such appeal shall be entertained against—
(a) an interlocutory order;

(b) an order of eviction unless possession of the property is surrendered to the competent authority ;

(c) an order of payment of compensation determined under this Act unless the amount of compensation is deposited with the appellate authority.

(2) The period of limitation for filing of an appeal under sub-section (1) shall be fifteen days from the date of order appealed against.”

7. From a reading of Section 7 reproduced herein above, it is evident that the right of appeal given to a person aggrieved of an order passed under the Act is subject to certain conditions like, an interlocutory order would not be appealable; where the order impugned is an order of eviction, unless possession of the property is surrendered to the competent authority; and where the order impugned is an order of payment of compensation, unless the amount of compensation is deposited with the appellate authority.

8. Before us, condition (b), which requires surrendering of possession of the property from where the aggrieved person is directed to be evicted, is sine qua non for availing the remedy of appeal under Section 7 of the Act of 1997. With a view to



determine as to whether this condition of surrendering possession is arbitrary, harsh, excessive or confiscatory, we need to understand the aims and objects of the Act of 1997. As is evident from reading of statement of objects and reasons, an urgent need was felt to take requisite steps for preservation and protection of immovable properties left behind by the persons, owing to their migration from Kashmir Valley in the year 1989, and thereafter also to put a halt on distress sale of immovable properties by the migrants.

9. Incidence of unlawful encroachments on the migrant properties, left unattended on account of migration coupled with the instances of distress sales by the migrants, was the immediate provocation for bringing the legislation i.e. the Act of 1997. It was enacted with an aim to preserve and protect the immovable properties left behind by the migrants and also to put a restraint on distress sales of such properties. Section 4 of the Act of 1997, which provides for custody of immovable properties, reads as under:-

“4. Custody of Immovable property.

(1) Within 30 days from the commencement of this Act, the District Magistrate shall take over the possession of immovable property, belonging to Migrants, falling within his territorial jurisdiction and shall, on the expiry of said period of 30 days, be deemed to have the custody of such immovable property.

(2) The District Magistrate shall take all such steps as may be necessary for preservation and protection of such property
:



Provided that possession of such property shall not be handed over to one save with the express consent of the migrant in writing.”

10. It is, thus, evident that in terms of Section 4 of the Act of 1997, District Magistrate of the District concerned was put under a statutory obligation to take over the possession of immovable properties belonging to the migrants within thirty days from the commencement of the Act i.e. 2nd June, 1997. The Section further provides that on expiry of thirty days from the commencement of the Act, all immovable properties belonging to the migrants shall be deemed to be in the custody of District Magistrate concerned. From a reading of Section 4 of the Act of 1997 in its entirety, it clearly comes out that the Section recognizes both, actual custody and the deemed custody. Although, it is a statutory obligation of the District Magistrate to take over the possession of immovable properties belonging to migrants falling within his territorial jurisdiction within a period of thirty days, yet the Section also speaks of deemed custody of such immovable properties on expiry of thirty days of the commencement of the Act of 1997.
11. It seems that the legislature was well aware and fully realized that it may not be possible for the District Magistrate to take over the possession of entire immovable properties belonging to the migrants falling within the District, as such, provision was made with regard to the deemed custody of the District



Magistrate concerned of such immovable properties. The Section essentially recognizes custody, where physical possession is taken over by the District Magistrate and also deemed custody where the possession of the property was not to be taken over by the District Magistrate but shall be deemed to be in his custody by fiction of law.

12. Section 5, of course, provides for eviction of unauthorized occupants and for doing so the competent authority is authorized to use such force as may be necessary for taking possession of such property. Obviously, taking over of possession of such property by the competent authority cannot be construed to include symbolic possession. The order passed by the competent authority under Section 5 directing eviction of unauthorized occupant is challengeable by way of an appeal before the Financial Commissioner, Revenue under Section 7 of the Act of 1997, which we have reproduced herein above.
13. As discussed above, appeal against an order of eviction shall be entertained by the Financial Commissioner, Revenue only if the possession of the property is surrendered to the competent authority. What is apparently required under Section 7 is surrender of physical possession by the adjudged unauthorized occupant to the competent authority and the requirement of Section 7 would not be met by surrendering symbolic possession.



14. Adjudged unauthorized occupant, who has been ordered to be evicted, is entitled to claim before the Appellate Authority that he is not an unauthorized occupant or that he was not provided an adequate opportunity of being heard by the competent authority to prove his claim. May be such aggrieved person has a good case to plead before the appellate Court but his appeal will not be entertained or considered by the appellate authority until he surrenders the possession of the property as provided in the impugned proviso. Take an example of a house from where the aggrieved person has been directed to be evicted by the competent authority, the only remedy he has is to file an appeal under section 7 of the Act of 1997. Such appeal, however, shall not be entertained by the appellate authority unless he surrenders possession of the house to the competent authority. We could understand, if there is a provision for surrendering of possession in favour of the migrant.
15. The property with regard to which the eviction order has been passed is required to be surrendered to the competent authority so that the same is preserved and protected by the competent authority during pendency of the appeal. In other words, the subject property shall remain in the custody of the competent authority, to be disposed of, as per the directions that may be issued by the appellate authority. When such custody of the competent authority is seen with the obligation of the aggrieved



person availing the remedy of appeal to surrender, it would necessarily follow that the surrender of possession of the subject property could be symbolic as well and such property shall be deemed to be in the custody of the competent authority during pendency of the appeal, to be dealt with as per the direction of the appellate authority.

16. The concept of deemed custody of the competent authority would necessarily encompass the concept of surrender of symbolic possession to the competent authority. In these circumstances, it would be meeting the requirement of Section 7 of the Act of 1997, if aggrieved person surrenders symbolic possession of the subject property and it remains in the deemed custody of the competent authority. We are saying so, as reading the proviso to mean '*surrendering of physical possession of the subject property*' would render the remedy of appeal harsh, arbitrary and totally unworkable, more particularly, when such property is a house in which the aggrieved person is living with or without family. Unless, it is conclusively determined that he is unauthorized occupant, depriving him of the shelter would be rendering him incapacitated to avail the remedy of appeal.
17. It may not be equally true in cases of landed properties, yet we cannot lose sight of the fact that surrendering of possession to the District Magistrate and thereafter District Magistrate/Competent Authority placing it on the spurdari of some stranger



would waste the property and would not serve any purpose. Instead of placing the surrendered property on the spurdari of a stranger, it would be worthwhile if the subject property remains with the aggrieved person, who shall be bound in law to surrender its physical possession, if appeal filed under Section 7 of the Act of 1997 goes against him.

18. It is beyond pale of any discussion that possession in law includes actual, constructive and symbolic possession. It, however, depends upon the nature of legislation and the purpose and object sought to be achieved by a particular provision in the legislation. Language of the statute, object of legislation and nature of right involved are some of the factors, which would determine whether the possession spoken of in a particular statute is only actual physical possession or would also include constructive and symbolic possession.
19. We have adverted to the aims and objects of the Act of 1997 and the language used in Sections 4 and 7 and are of the opinion that for the purposes of availing the right of appeal under Section 7, it would be sufficient if the aggrieved person surrenders symbolic possession and the subject property is deemed to be in the custody of the competent authority during pendency of the appeal.



20. We have done nothing more than reading down “*surrender of possession of the property to the competent authority*” to mean not only actual surrender of possession but also constructive and symbolic possession. Such interpretation shall also save the provision from the vice of arbitrariness as also from rendering the remedy of appeal meaningless and nugatory.
21. This issue has already been dealt with by a Division Bench of this Court in a judgment dated 19.12.2023 passed in LPA No.243/2023 (*Shabir Ahmad Rufai and another v. UT of J&K and others*) where taking over of the subject property by way of symbolic possession has been recognized as the compliance of the condition precedent for availing the remedy of appeal under Section 7 of the Act of 1997.
22. For the foregoing reasons, we do not find any substance in the submission of learned counsel for the petitioner that proviso (b) of Section 7 of the Act of 1997 is *ultra vires* the Constitution. We, however, are in agreement with the learned counsel for the petitioner that the proviso (b), if construed to mean and include only surrendering of actual possession, would be hit by Article 14 of the Constitution of India, as it would render the remedy of appeal nugatory, meaningless, totally unworkable and would be suffering from the vice of arbitrariness.



23. Having regard to the facts and circumstances of the case and for the discussion we have made above, we have resorted to the doctrine of reading down and held that surrendering of possession as stipulated in proviso (b) of Section 7 of the Act of 1997 shall mean and include constructive/symbolic possession and by doing so the provision is saved of being condemned as arbitrary rendering the remedy of appeal ineffective, inefficient and unworkable.
24. The expression ‘surrender of possession’ as used in proviso (b) of Section 7 of the Act of 1997, if construed constrictively would definitely infringe upon the right of the aggrieved party to file appeal against an order of eviction passed by the competent authority against him, as such, we are left with no option but to read the expression “unless possession of the property is surrendered to the competent authority” to mean and include surrendering of constructive/symbolic possession. The competent authority shall be *de jure* possession where is person ordered to be evicted will continue to have defacto possession of property in dispute till his appeal is decided.
25. Needless to say that reading down is a judicial interpretative tool used to limit or restrict or sometime broaden the scope of a statutory provision making it constitutional and workable without invalidating the entire law. The reading down is applied by the Courts to harmonize the legislation with constitutional



mandates preserving the validity of law wherever possible. This is exactly what we have attempted to do in this case.

26. In the premises and with the observations made above, we do not find this petition maintainable before us in the face of availability of alternate and equally efficacious remedy of appeal available to the petitioner under Section 7 of the Act, 1997. This petition is, accordingly, dismissed relegating the petitioner to the remedy of appeal under Section 7 of the Act of 1997. Needless to say that in case the petitioner avails the remedy of appeal, as aforesaid, within a period of four weeks from today, the time spent in this litigation shall be eschewed from the period of limitation provided for such appeal. There shall be an order of status quo with respect to the subject property for a period of four weeks.

(Sanjay Parihar)
Judge

(Sanjeev Kumar)
Judge

JAMMU
11.03.2026
Vinod

Whether the order is speaking : Yes
Whether the order is reportable: Yes