

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

(Through virtual mode from Jammu)

**Reserved on:- 08.04.2025
Pronounced on:- 13.05.2025**

Case No:-WP(C) No. 543/2023
CM No. 1309/2023

Ashok Toshkhani, S/o Late Sh. Kashi Nath Toshkhani,Petitioner(s)
R/o Rajbagh Srinagar, at present Sarwal, Jammu.

Through: Mr. G.A. Lone, Advocate with
Mr. Mujeeb Andrabi, Advocate.

Vs.

1. **UT of J&K Th.** Respondent(s)
**Commissioner Secretary to Govt., Revenue,
Relief and Rehabilitation Department, Civil
Secretariat, Srinagar/Jammu;**
2. **District Magistrate, Srinagar;**
3. **Tehsildar South, Srinagar;**
4. **Basanti Toshkhani alias Basanti Saproo,
W/o Surinder Saproo, R/o 14-Tulsi Vihar,
Khanpor, Nagrota, Jammu.**

Through: Mr. Mohsin Qadri, Sr. AAG for R-1 to 3.
Mr. R.A. Jan, Sr. Advocate with
Ms. Humaria Sajad, Advocate for R-4.

Coram: HON'BLE MR. JUSTICE JAVED IQBAL WANI, JUDGE

JUDGMENT

1. The petitioner herein has invoked the extraordinary writ jurisdiction of this Court enshrined in Article 226 of the Constitution of India, seeking quashing of order dated 30.09.2022 passed by the District Magistrate, Srinagar respondent 2 herein bearing Endorsement No. DMS/RD/Misc-446/583 dated 08.12.2022, upon an application filed by the respondent 4 herein for

demarcation and possession of immovable property comprising of land measuring 4.5 Kanals along with the residential house existing thereon situated at Raj Bagh, Srinagar to the extent of her share (*hereinafter referred as “the property”*).

The petitioner is also aggrieved of the consequential order dated 28.02.2023 passed by the Tehsildar South, Srinagar respondent 3 herein, whereby a team of officers has been constituted for the purposes of execution of the impugned order dated 08.12.2022 passed by the respondent 2 herein.

In addition to the challenge thrown to the aforesaid orders, the petitioner has also challenged the *vires* of Section 7(1)(b) of the Jammu & Kashmir Migrant Immovable Property (Preservation, Protection and Restraint on Distress Sales) Act, 1997 (*hereinafter referred to as the, “Migrant Act”*).

2. The challenge thrown by the petitioner herein to the aforesaid orders is, primarily, directed qua the jurisdiction and competence of respondent 2 herein.

3. The respondent 4 herein, namely, Basanti Toshkhani had approached the respondent 2 herein with an application dated 26.04.2022 under and in terms of the Migrant Act, stating therein that she, as also the petitioner herein jointly inherited the property from their mother upon her death, who was owner in part of the land measuring 4.5 Kanals, upon which, three buildings have had been constructed falling under Survey No. 120 situated at Raj Bagh, Srinagar along with one-Smt. Kamta Toshkhani W/o Late Sh. Badri Nath and that upon the death of her mother, she the respondent 4 herein, and her two

brothers being the petitioner herein and one Krishan Toshkhani inherited their deceased mother as their third brother, namely, Brij Krishan Toshkhani had been adopted by their uncle and had also pleaded therein in the said application that in view of her migration from the valley and taking up residence in Jammu, her share in the *property* remained unattended and, as such, encroached upon by the petitioner herein and, accordingly, sought restoration of her share in the *property* in terms of the Migrant Act while maintaining the said application.

4. The respondent 2 after entertaining the said application sought a report from respondent 3 herein, which came to be submitted on 15.07.2022, wherein it had been stated that as per the revenue records, no land or property was recorded in the name of the deceased mother of the respondent 4 herein under Khasra No. 120 in Estate K.P. Bagh, Srinagar and that as per the revenue records, the property was the proprietary land of Mandir Shivji, out of which, 02 Kanals & 12 Marlas along with residential house, stood recorded in the name of one Laxmi Devi W/o Kashi Nath Toshkhani in the tenancy column, who had passed away and no further mutation stands attested thereof and that the property is in possession of the petitioner herein.

5. The petitioner herein being on put to notice by respondent 2 in the said application filed by the respondent 4 herein, appeared and filed reply to the factual aspect of the application, besides raising a preliminary objection *vis-à-vis* the maintainability of the application under the Migrant Act being an alleged dispute, *inter-se*, co-sharers.

6. The respondent 2 herein while relying upon the judgment of this Court passed in case titled as, “*Pushkar Nath Koul Vs. State of J&K and ors.*”, reported in **2008(3) JKJ HC 224**”, dismissed the application of the respondent 4 herein, holding that the Migrant Act is not applicable, where there is only an apprehension and the dispute is, *inter-se*, co-sharers.

7. The respondent 4 herein faced with the dismissal of the said application, filed a supplementary application dated 09.09.2022 before the respondent 2 herein, seeking attestation of inheritance mutation in respect of *the property* in terms of the Hindu Succession (Amendment) Act, 2005 (*hereinafter referred to as the, “Hindu Succession Act”*).

8. Upon issuance of notice in the said supplementary application by the respondent 2 herein, the petitioner herein appeared and filed objections thereto on 02.01.2023, stating therein that *the property* stood bequeathed in his favour by his mother Mahalakshmi Toshkhani by virtue of a registered Will Deed executed in the year 1986 and that the respondent 4 herein had already taken her share in the property of her parents and did not raise any claim for more than two decades thereof and would, as such, seek rejection of the said application for attestation of inheritance mutation filed by the respondent 4 herein.

9. The respondent 2 herein in terms of the order dated 30.09.2022, disposed of the said application and directed the respondent 3 herein to visit the spot of *the property*, demarcate the land in question and put the respondent 4

herein in possession to the extent of her entitled share in the property as per the Hindu Succession Act.

10. The petitioner herein has questioned the legality of the order dated 30.09.2022, primarily, on the ground that the respondent 2 herein had no jurisdiction to pass the same and that no opportunity of being heard was afforded to the petitioner herein to prove his claim, thereby violating the principles of natural justice and that the dispute in question raised by the respondent 4 herein before the respondent 2 herein does not fall within the ambit of the Migrant Act and also that Section 7(1)(b) of the Migrant Act is unreasonable and unjust, which provides for a remedy of appeal against an order passed under the Migrant Act before the Financial Commissioner, Revenue, as such an appeal could be maintained against an order of eviction only first surrendering the possession of the migrant property.

11. **Objections** to the petition have been filed by both official respondents, respondents 1 to 3 herein as well as private respondent respondent 4 herein.

12. In the objections filed by the respondents 1 to 3, passing of the impugned order is being defended and justified on the premise that the same has been passed under the Hindu Succession Act and not under the Migrant Act.

13. The respondent 4 in her objections filed to the petition, has denied the execution of any Will by her deceased mother in favour of the petitioner herein and besides, also supports the legality of the order dated 30.09.2022 passed by the respondent 2 herein on the ground that the same came to be passed

after due consideration of the pleadings as well as her right to claim share in the family property having vested in her under Section 6 of the Hindu Succession Act, in exercise of jurisdiction vested in respondent 2 herein under Chapter X of the Land Revenue Act Svt. 1996 (*hereinafter referred to as the, “Act of 1996”*).

Heard learned counsel for the parties and perused the record.

14. Mr. G.A. Lone, learned counsel appearing for the petitioner, while making his submissions in tune with the case set up in the petition and the grounds urged therein, would also contend that a Revenue Officer including respondent 2 herein although derives its power to order partition of immovable property under Section 105 of the Act of 1996, yet the said power is available and exercisable only in respect of “**land**” as defined under Section 3(2) of the said Act of 1996. On the contrary, Mr. R.A. Jan, learned Senior counsel appearing for the respondent 4 while controverting the submissions of Mr. Lone, would insist that the respondent 2 has validly and legally exercised the power vested in him under and in terms of the provisions of the Hindu Succession Act and consequently passed the order under challenge.

15. Having regard to the respective pleadings of the parties, coupled with the submissions of learned appearing counsels for the parties, the key question to be addressed in the instant petition would be as to “whether the respondent 2 herein had competence and jurisdiction to pass order dated 30.09.2022”.

16. Before proceeding further in the matter, it would be appropriate and imperative to refer to Section 3(2) and Section 105 of the Act of 1996 hereunder:-

“(2) “land” means land which is occupied or has been let for agricultural purposes or for purposes subservient to agriculture or for pasture and includes the sites of buildings and other structures situated in such land and trees standing on such land, as well as areas covered by or fields floating over water, and sites of jandars and gharats but does not include the sites of any building in a town or village abadi or any land appurtenant to such building or sites;

105. Application for partition.- Any joint holder of land or any joint tenant of a tenancy in which a right of occupancy or protected tenancy subsists or any mortgagee with possession of the share of such holder or tenant, may apply to a Revenue Officer for partition of his share in the land or tenancy, as the case may be, if-

(a) at the date of the application the share is recorded under Chapter IV as belonging to him, or

(b) his right to the share has been established by a decree which is still subsisting at that date, or

(c) a written acknowledgement of that right has been executed by all persons interested in the admission or denial thereof.”

As is manifest from the above, Section 105 (supra) empowers a revenue officer for partition of land, which land for the purposes of the application of the Act of 1996 as per the aforesaid definition contained in Section 3(2), means the land used for agriculture or related purpose, including structures and trees thereon while excluding sites of buildings in a town or village abadi or land appurtenant thereto.

17. In the instant case, *the property* indisputably is land and a residential house situated at Raj Bagh, Srinagar, an urban area and, thus, manifestly excluded from the purview of the definition of **“land”** under Section 3(2) of the Act of 1996 and hence outside the competence and jurisdiction of the Revenue Officer under Chapter X of the Act of 1996.

18. As has been noticed in the preceding paras, the respondent 4 herein had submitted a supplementary application before the respondent 2 herein after

the dismissal of the application filed earlier under the Migrant Act, only seeking therein attestation of inheritance mutation and not for demarcation or possession of *the property* and even if, it is assumed that such a relief is implicit and the property qualifies as “land”, yet Section 105 (supra) of the Act of 1996 cannot be read in isolation, as Chapter X provides complete code and mechanism for partition, including procedural safeguards and that upon a valid application filed under Section 105 of the Act of 1996, a revenue officer is bound to notify all the interested parties, consider objections thereof and decide the preliminary issues and if objections warrant rejection of a case, Sections 109 & 110 of the Act of 1996 would apply; otherwise, the revenue officer has to proceed to determine the disputed questions, including title and mode of partition, provided under Section 111-A of the Act of 1996, which, for the sake of brevity and convenience, is also reproduced hereunder:-

“ 111-A. Objection raising question of title.-

- (1) If any objection is made by a recorded co-sharer involving a question of proprietary title which has not been already determined by a Court of competent jurisdiction, the Revenue Officer may either-**
 - (a) decline to grant the application until the question in dispute has been determined by a competent Court, or**
 - (b) require any party to the case to institute within three months a suit in the Civil Court for the determination of such question, or**
 - (c) proceed to enquire into the merits of the objection.**
- (2) When the proceedings have been postponed under clause (b), if such party fails to comply with the requisition, the Revenue Officer shall decide the question against him. If he institutes the suit the Revenue Officer shall deal with the case in accordance with the decision of the Civil Court.**
- (3) If the Revenue Officer decides to enquire into the merits of the objection, he shall follow the procedure laid down in the Code of Civil Procedure for the trial of original suits.”**

As is manifest from the Section 111-A (surpra) of the Act of 1996, if a co-sharer raises a title dispute, the Revenue Officer must either; (i) defer proceedings pending Court adjudication, (ii) direct the party to file a civil suit within three months or, (iii) inquire into the objection following the civil trial procedure provided under the Code of Civil Procedure and if a partition order attains finality, the Revenue Officer is empowered to deliver the possession accordingly.

19. Here, it would be significant to refer to Section 6 of the Hindu Succession Act also being germane and relevant to the controversy in hand. The said Section provides for the devolution of interest in coparcenary property and the proviso to Sub-Section (1) of Section 6, as amended by the Amendment Act of 2005, stipulates that “*nothing contained in Sub-Section shall affect or invalidate any disposition or alienation, including any partition or testamentary disposition of property, that took place before 20.12.2004.*”

20. In the present case, the petitioner herein asserts absolute ownership over the property based on a Will claimed to have been executed by deceased mother in his favour.

21. However, perusal of the impugned order would tend to show that the respondent 2 herein has not even adverted to the aforesaid crucial aspect of the alleged Will and has, in fact, acted in a perfunctory manner, in complete disregard of the pleadings of the parties as well as the law applicable to the case and has, in fact, entirely overlooked the petitioner’s plea qua the said Will and has instead, proceeded to hold that the parties are co-heirs and co-owners of

the property, without addressing or referring to the disputes raised by the petitioner herein, challenging the title of respondent 4 herein over the property.

22. Thus, in view of above, the only inescapable conclusion that could be drawn is that the respondent 2 herein has acted in the matter without any competence and jurisdiction and proceeded to pass the order dated 30.09.2022.

23. With respect to the petitioner's challenge to the Constitutional validity of Section 7(1)(b) of the Migrant Act, such a challenge is untenable in view of various decisions of this Court, including the case titled as, "**Jagar Nath Bhari Vs. State**, reported in **2007 (I) SLJ 63**", wherein it has been, *inter-alia*, held that the requirement of surrendering possession under the said Section under the Migrant Act before filing an appeal is not unreasonable, while observing that the Act stands enacted to ensure the preservation and protection of migrant property, which necessarily entails that the unauthorized occupation of a migrant property by any person cannot be permitted to continue even for the shortest period and that an unauthorized occupant of the migrant property, against whom an eviction order has been passed under the said Act, would otherwise seek to prolong proceedings by filing an appeal, with the intent of continuing in unauthorized possession of the migrant property. Furthermore, since the impugned order has not been passed under the provisions of the Migrant Act, it would be uncalled for to address to the grounds urged by the petitioner in this regard.

24. For what has been observed, considered and analyzed hereinabove, the instant petition **succeeds**, as a consequence whereof, the order dated

30.09.2022 passed by the respondent 2 herein including the consequential order dated 28.02.2023 passed by the respondent 3 herein are quashed. However, parties, however, are free to resort to legal remedy available to them under law in the matter.

25. ***Disposed of***, along with connected application(s).

(Javed Iqbal Wani)
Judge

SRINAGAR
13.05.2025
Ram Krishan

<i>Whether the judgment is speaking?</i>	<i>Yes</i>
<i>Whether the judgment is reportable?</i>	<i>Yes</i>