

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

WP(C) No. 3475/2023 c/w CCP(S) 14/2024

Mohammad Shafi Naikoo

...Petitioner(s)

Through: Mr. M. Ayoub Bhat, Advocate.

Vs.

UT of J&K and Ors.

...Respondent(s)

Through:

CORAM:

HON'BLE MR JUSTICE JAVED IQBAL WANI, JUDGE

ORDER

05.03.2025

(ORAL)

1. Petitioner in the instant petition, filed under Article 226 of the Constitution, has prayed for the following reliefs: -

Writ of Certiorari, thereby quashing the impugned Order dated 03.10.2023 passed by respondent No.2 in File No. 175 of FC-AP titled Mohammad Shafi Naikoo Versus Smt Kamla Devi & Others and appropriate writ order directing the acceptance of the appeal filed by writ petitioner before learned Financial Commissioner and thereby setting aside the order passed by District Magistrate Pulwama dated 15.05.2018 and the application submitted by respondent No.5 Mst. Kamla Devi through Javid Ahmad Lone dated 24.05.2012 be rejected in the interests of justice and the possession of the writ petitioner over the property mentioned in the writ petition be protected in the interest of justice.

2. Facts under the shade and cover of which the aforesaid reliefs have been prayed by the petitioner and as are stated in the petition are that an application under and in terms of the provisions of J&K Migrant Immovable Property (Preservation, Protection and Restraint on Distress Sales), Act 1997 (for short 'the Act of 1997') came to be filed by respondent 5 herein before respondent 4 herein through her attorney seeking eviction of the petitioner herein from the land measuring 11 kanals 3.5 marlas situated at Lalpora, Tehsil Tral,

alleging therein the said application that she the applicant is a migrant and her land has been encroached upon by the petitioner without any right although out of the said land 5 kanals and 8.5 marlas stand sold by her father after obtaining the permission from the Divisional Commissioner in favour of respondents 6 and 7 herein in terms of the sale deed dated 3rd of February, 2012.

3. It is stated that the said application of respondent 5 herein came to be accepted by respondent 4 and in terms of order dated 15th of May 2018 and the Tehsildar accordingly, concerned came to be directed to move on spot and evict the encroacher and handover the possession of alienated land measuring 5 kanals 8.5 marlas to the purchasers/respondents 6 and 7 herein.
4. It is next stated that feeling aggrieved of the said order dated 15th of May 2018, the petitioner herein challenged the same before this Court in OWP No. 956/2018, which petition came to be disposed of on 1st of June 2018, providing a liberty to the petitioner herein to avail the remedy of appeal under the Act of 1997 whereafter and an appeal bearing LPA No.80/2019 is stated to have been preferred by the petitioner herein against the order dated 1st of June 2018, which LPA came to be dismissed by the Division Bench, upholding the liberty of availing of an appeal under the Act by the petitioner herein.
5. It is further stated that pursuant to the said liberty granted to the petitioner, an appeal came to be filed against the order of District Magistrate/respondent 4, dated 15th of May 2018, before respondent 2, which appeal came to be dismissed on 28th of May 2019, aggrieved whereof the petitioner filed writ petition being OWP No.1922/2019 before this Court, which writ petition as well, came to be dismissed on 4th of July 2019, whereafter the petitioner herein challenged the said order of dismissal in LPA No.199/2019, which LPA as well came to be dismissed on 17th of December 2021, whereafter the petitioner herein preferred a SLP against the said order dated 17th of December 2021, which SLP, however, came to be disposed of on 29th of July 2022, upon the statement made by counsel for the petitioner herein that the petitioner be permitted to prefer an appeal under Section 7 of

the Act of 1997 after making necessary compliance of pre-condition as contemplated and that if the petitioner makes necessary compliance of the provisions of Section 7 of the Act of 1997 within a period of 6 weeks from today, appeal of the petitioner be registered and decided by the appellate authority on its own merits in accordance with law.

6. It is being further stated that pursuant to the order of the Apex Court dated 29th of July 2022, supra the petitioner herein surrendered the possession of the land as per Section 7 of the Act of 1997, and thereafter preferred an appeal before the respondent 2 under Section 7 of the Act of 1997, which however, came to be dismissed in terms of order dated 3rd of October 2023 i.e. the order under challenge in the instant petition.

7. The petitioner herein has maintained the instant petition on the following grounds: -

(a) That as submitted hereinabove the relevant documents agreement to sell executed by Janki Nath and Ors dated 27.03.1998 annexed herewith as Annexure-IV. Application submitted by Dharkinath Bhat, Vedlal, Shadilal, Kamla Devi, respondent No.5 addressed to District Magistrate Bulwama admitting that the property in question along with the other property has been sold to the petitioner through his father and consideration amount has been received in full and possession handed over accordingly and the same is annexed herewith as Annexure-V. Affidavits sworn by Kamla Devi respondent No.5 and other co-sharers dated 28.06.1998 are attached herewith as Annexure-VI. Application as per Rule 3 on prescribed format ie. Form No.1 signed by above said persons including Kamla Devi Respondent No.5 is attached herewith as Annexure-VII and it will be in place to mention that as per the above said application form the learned Divisional Commissioner prescribed authority for grant of permission to alienate has been requested that the property in question has been sold by Kamla Devi etc and consideration amount in full accepted to the tune of Rs. 3,83,200/-

(b) That it is as such, submitted that the above said documents categorically demonstrate that the claim of the petitioner is bonafide and the possession of the petitioner is also legal and it will be in the interests of justice to save the writ petitioner from the U-Turn of respondent No.5 now.

(c) That the above said documents were already known to non official respondents and despite this they in order to put harm to the interests of writ petitioner after a long gap of more than two decades managed some documents at the back of the petitioner and the above said documents were managed and manipulated and have got the permission for sale by concealment of the above vital facts.

(d) That the impugned order judgment is illegal because the above sale deed dated 03.02.2012 allegedly executed by Javid Ahmad Attorney Holder of Kamla Devi in favour of Ghulam Nabi Zaboo and Rashid Mahmood has been challenged through the medium of a civil suit before the civil court and in this behalf it will be appropriate to mention that the civil court at Tral in the above said suit has passed orders while deciding the issue with regard to jurisdiction etc and the said issue is reproduced herein below which was framed by the civil court:

"Whether the suit of the plaintiff is hit by the provisions of Jammu & Kashmir immovable Property (preservation, Protection & Restraint on Distress Sale), Act 1977 and civil court lacks the jurisdiction to adjudicate upon the matter.

And this issue was decided and it was held that civil court has a jurisdiction. This fact also has been ignored and on the score also impugned judgment deserves to be set-aside. Furthermore the learned trial court has passed order of status qua and in violation of the order of the status qua the learned District Magistrate Pulwama has passed eviction order. This also is ignored by the learned Financial Commissioner. As such the writ petitioner keeps himself at the mercy of this Hon'ble Court.

(e) That the above said suit was transferred to Court of District Judge Pulwama and the learned District judge has rejected the plaint by virtue of order dated 07.03.2022 while exercising powers under Order 7 Rule 11 of CPC. That the petitioner herein has filed an appeal against the order of the learned District Judge above mentioned and Hon'ble High Court has been pleased to dismiss the appeal by virtue of order dated 17.08.2022. That in this behalf the writ petitioner has requested the counsel at Delhi to examine the matter and file appropriate proceedings before Hon'ble Supreme Court. Copy of the civil court dated 23.09.2015 is enclosed as Annexure-VIII.

(f) That the impugned judgment is illegal and deserves to be quashed as the learned District Magistrate has assumed the authority which does not vest with him even then has passed the order and the learned Financial Commissioner has unfortunately not considered the submission made in this behalf. That the application in the form 1 as per rule 3 was submitted to the Divisional Commissioner concerned and as per the law the same was not considered within stipulated period as such, it will be deemed that permission is granted, this fact has not been considered in the impugned judgment rendering the same as illegal.

(g) That the petitioner is a bonafide purchaser and is in possession also as a bonafide purchaser as the land in question is sold to the appellant through his father after payment of due consideration amount and the appellant is in possession of the property as bonafide purchaser and in this behalf, the respondents Kamla Devi, Ghulam Nabi Zaboo and others, approached the local residents of Tral who are commonly known as Traders federation, Tral, on 09.01.2011. The said local residents including President Traders Federation, namely Mohammad Abbas Kushoo heard

the parties and respectable person of the locality namely Ali Mohammad Naik, Ex. MLA and Ex. Minister was also approached by the Traders Federation in this behalf and it came to fore that the property in question and other properties situated at Kahlail known as Banjwani, have been sold in presence of above said Ali Mohammad Naik and the whole consideration amount was paid by the appellant and his father and it was categorically recorded that Ghulam Nabi Zaboo & others, were told that the property has already been sold to the appellant. It will be in place to mention that son of Mst Kamla Devi, namely, Sh Badri Nath, has also made a complaint before Darul Fatawa Wal Qaza managed by Darul Uloom Noor-ul-Islam, Tral, by virtue of their decision dated 15.05.2012 has categorically stated that Ghulam Nabi Zaboo & Anr, did not cooperate with the said Darul Fatawa Qaza and in this behalf have shown cold shoulder and accordingly, the Board rejected the complaint out rightly. The above said facts were brought to the notice of District Magistrate but unfortunately, same have not be considered at all. 5 as such, the impugned order deserves to be set-aside.

(h) That it is also submitted that the agreement to sell has been executed by Jankinath Bhat as Karta of the family because they have to perform the marriage of daughter in order meet the expenses of the said marriage the land in question was duly sold as such, the order of District Magistrate as well as Financial Commissioner deserves to be set-aside in the interests of justice.

(i) That this Hon'ble Court may be pleased to see that as is alleged by the respondents that they have executed a sale deed as per the provisions of the Act above mentioned. As such, it is humbly requested that after the execution of the Sale Deed the status of the property in question is changed and by change of status of the property it does not remain now migrant property. As such, the proceedings for eviction of the petitioner are misconceived and are without any authority of law and the issue between the parties is squarely to be decided by authority /court under General Civil Law

8. **Reply** to the petition has been filed by respondents 3 to 5, wherein the instant petition is being opposed on the premise that the petitioner herein in terms of order dated 15th of May 2018 passed by respondent 4 stands declared as an “unauthorized occupant” of migrant property, and that an appeal against such a declaration stands filed by the petitioner herein twice before the appellate authority under the Act of 1997 without any success.
9. It is being further stated in the reply that the petitioner herein is guilty of process of abuse of Court and law, in that, the petitioner herein initially filed a civil suit qua the land in question before the Court of Munsiff at Tral and upon his failure to get any desired relief from the

said court, the petitioner filed OWP No.1659/2012 before this Court which eventually came to be dismissed on 19th of December 2017.

10. It is next stated that the order under challenge in the instant petition dated 3rd of October 2023 has been passed by respondent 2 after hearing the parties at length upholding the eviction order passed by respondent 4 dated 15th of May 2018 validly and legally.

Heard counsel for the parties and perused the record.

11. Perusal of the record reveals that the petitioner herein while opposing the application filed by respondent 5 herein before respondent 4 for removal of encroachment of the land in question, pleaded that he-the petitioner herein is in possession of the land in question having been sold to him by father of respondent 5 herein, being Karta of the family and an agreement to sell in this regard had been executed and sale consideration also paid for the sale of the said land in full, inasmuch as possession as well of the land delivered to the petitioner herein.

It had also been pleaded by the petitioner herein in the reply filed before respondent 4 in opposition to the application of respondent 5 herein that even an application for a grant of requisite sale permission had been submitted before respondent 3 under the Act of 1997, in order to complete the transaction of sale and that, as such, the petitioner herein is not an authorized occupant of the land, but has been in possession thereof with the consent of the owners and had also planted various walnut trees there on the said land in the year 1989-1999, besides having spent lakhs of rupees upon the improvement and development of the land.

12. Perusal of the agreement to sell relied upon by the petitioner herein in support of the case set up before respondent 4 and available on the file reveals that same has been executed on 27th of March 1998 providing therein that sellers namely Janki Nath Bhat and Dwarika Nath Bhat have agreed to sell the land in question to the petitioner herein for a consideration of Rs.1,53,000/- out of which Rs.40,000/- had been received and the balance amount of Rs.1,13,000/- would be paid at the

time of obtaining of the permission of sale whereupon the purchasers would be entitled to obtain the possession of land.

13. It is significant to mention here that the Act of 1997 came into being on 2nd of June 1997 and under Section 3 alienation of immovable property of migrant has been forbidden except under such conditions as may be prescribed with the previous permission of the Revenue and Relief Minister or such officer as may be authorised by him in this behalf. Sections 4 of the Act, being relevant to the controversy are extracted and reproduced hereunder: -

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 any one save with the express consent of the migrant in writing.

Under Section 4, supra District Magistrate has been authorised to take over the possession of the immovable property of a migrant within 30 days from the commencement of the Act, falling within his territorial jurisdiction and after the expiry of said period of 30 days, the District Magistrate is deemed to have the custody of such immovable property imposing further duty upon the District Magistrate to take all such steps as may be necessary for preservation and protection of such property while proviso appended to Section 4(2) provides that the possession of the migrant property shall not be handed over to anyone except with the express consent of the migrant in writing.

14. Keeping in mind the aforesaid position of law and having regard to the case set up by the petitioner herein, admittedly the petitioner herein claims to have taken over the possession of the land in question pursuant to the agreement to sell dated 27th of March 1998 i.e. much after coming into being of the Act of 1997 and under Section 4, supra

of the Act, the petitioner herein could not have taken over the possession of the land in question except with the express consent of the migrant in writing to be handed over by the District Magistrate, alone thus, in this view of the matter, the petitioner herein cannot but said to be an unauthorized occupant of the land in question as defined under Section 2(i) which for the sake of brevity is referred as under: -

2(i). Unless the context otherwise requires,- “unauthorized occupant” means any person who has encroached upon or taken possession of any immovable property of a migrant without his written consent and authority of law.

15. Assuming for the sake of arguments that the petitioner herein had taken over the possession of the property in question with the consent of the migrant, those referred in the agreement to sell however, the agreement to sell relied upon by the petitioner does not suggest so inasmuch as the possession of the land has not been taken over by the petitioner herein under the authority of law, meaning thereby with the permission of the District Magistrate as is provided in Section 2(i) supra.

Even otherwise, also the possession of the petitioner over the land in question cannot said to be legal or authorized merely on the basis of the filing of an application for seeking permission from the competent authority under the Act for the alienation of the land in question, in that, the delivery or taking over the possession of an immovable property is subject to the obtaining of permission of sale under Section 3 of the Act and with the consent in writing of the migrant and the permission of the District Magistrate.

Besides, the aforesaid position obtaining in the matter, the petitioner herein cannot claim any right to be in possession of land in question, otherwise as well in view and in presence of the provisions of Sections 54 and 138 of the J&K Transfer of Property Act, SVT, 1977. A reference whereby to Section 54 as also Section 138(3) hereunder also becomes imperative: -

54. "Sale" defined.—

"Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

Sale how made.— Such transfer, in the case of tangible immoveable property or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

Contract for sale.—A contract for the sale of immoveable property is a contract that a sale of such property shall take place on terms settled between the parties but no such contract shall be valid, unless it is in writing, and signed by the parties.

It does not, of itself, create any interest in or charge on such property.

138. Transfer of immovable property after due registration

- (1) No transfer of immovable property, except in a case governed by any special law to the contrary, shall be valid unless and until it is in writing registered and the registration thereof has been completed in accordance with sub-section (3) of section 61 of the Registration Act, 1977.
- (2) No Court shall entertain a suit for pre-emption in respect of transfer of any such immovable property unless the transfer complies with the provision of sub-section (1).
- (3) No person shall take possession of, or commence to build or build on, any land in the Province of Kashmir which has been transferred or has been contracted to be transferred to him unless and until such transfer becomes valid under the provision of sub-section (1).

16. Viewed thus, for what has been observed, considered and analyzed herein above, the instant petition is found without any merit and is accordingly **dismissed**.

CCP(S) 14/2024

In view of dismissal of the writ petition as above, contempt notices issued are recalled and proceedings closed.

(JAVED IQBAL WANI)
JUDGE

SRINAGAR

05.03.2025

Ishaq

Whether the order is speaking? Yes
Whether approved for reporting ? Yes