

Zainab Abdullah and ors. Vs. State of J. and K. and ors.

Zainab Abdullah and ors. Vs. State of J. and K. and ors.

SooperKanoon Citation : sooperkanoon.com/899599

Court : Jammu and Kashmir

Decided On : Oct-22-1998

Reported in : AIR1999J& K103

Judge : N.A. Kakru, J.

Acts : Jammu and Kashmir Constitution - Article 103

Appeal No. : O.W.P. No. 1316 of 1997

Appellant : Zainab Abdullah and ors.

Respondent : State of J. and K. and ors.

Advocate for Def. : G.J. Tantray and; G.J. Bala, Adv.

Advocate for Pet/Ap. : G.A. Lone, Adv.

Disposition : Petition dismissed

Judgement :

ORDER

N.A. Kakru, J.

1. Through the medium of this writ petition, building permission accorded vide order No. 24 of 1997 dated 17-5-1997 issued by respondent No. 2 is impugned on the ground that the provisions of J & K Municipal Act have ceased to operate in

view of the mandate of Section 54 of J & K Development Act 1970. The permission is also challenged because proposed construction is going to deprive the petitioner of his easementary rights.

2. In order to appreciate the controversy, a narrative of rival contentions is called for. The petitioners are aggrieved of building permission issued under Order No. 24 of 1997 dt. 17-7-1997 on two-fold grounds, one that the permission accorded contravenes the provision of Development Act, another that the construction being erected on the strength of impugned order has the effect of interrupting the easementary rights of the petitioners. The respondent No. 6 has chosen to adopt the averments made by her in CMP No. 146/1998 as her objections in terms of order of the Court dated 11-5-1998 which is accompanied by a copy of writ petition bearing No. 1045/97 which has been filed by one Mohammad Abdullah Sofi s/o Mohamad Shaban Sofi R/o Maharaj Bazar, Sarai Bal, Srinagar, respondent No. 7 (herein), a copy of an order passed on 30-7-1997 in the said writ petition, two copies of complaints filed by Shri Abdul Majid Sofi S/o respondent No. 7 (herein) and a photo copy of one more document. In the objections it is submitted by the respondent No. 6 that the petitioners (herein) are the daughters of respondent No. 7 (herein) and sisters of respondents 8 & 9 (herein). It is further contended that respondent No. 7 had filed a writ petition bearing No. 1045/97 challenging the permission impugned agitating the same rights which have been taken in this petition. The said writ petition stands disposed of by virtue of order dated. 1-9-1998. This fact is not disputed by L.C. for the petitioner and as a matter of fact, he has relied on the judgment and has produced a photocopy of the same. It being so, there is no dispute that the writ petition No. 1045/97 which has been filed by father of the petitioners (herein) stands adjudicated upon. It is also contended by respondent No. 6 in his reply that similar reliefs have been prayed for in respect of the property which was the subject matter of the earlier writ petition as well and prior to that, a suit was filed before the District Judge, Srinagar, which came to be transferred to the Ist. Additional Munsif, Srinagar and is subjudice, in which an interim relief was granted by the trial Court but was subsequently vacated and the order vacating interim relief was on appeal maintained by the Additional District Judge Srinagar, yet another suit came to be filed, praying same relief in respect of the same property. It is submitted that since interim direction was vacated in the

suit, therefore, respondent No. 7 chose to file a writ petition bearing No. 1045/97 but the Court having declined interim relief by order dated 30-7-1997, the petitioners chose to file this writ petition and by share suppression they are said to have got an interim order. The petitioners have filed objections to the application of respondent No. 6 and have disputed the knowledge of institution of the suits as also of the writ petition No. 1045/97, however, they have not disputed the fact that the permission impugned through this writ petition was impugned through the writ petition No. 1045/97 besides suits. The respondent No. 7 has specifically contended in the writ petition No. 1045/97 that he is the proprietor of the house, in respect of which, rights of easement are claimed and this averment of respondent No. 7 has been specifically mentioned by respondent No. 6 in his application (treated as objections to the writ petition), but the petitioners herein have not disputed this fact.

3. What emerges from the pleadings of the parties is that the permission granted is challenged through suits and was also subject matter of a writ petition, which was filed by respondent No. 7 bearing writ petition No. 1045/97 and the said writ petition stands disposed of but the suits are pending in respect of the same matter.

4. The facts of the case make it manifestly clear that respondent No. 7, who is the father of petitioners herein and of respondents 8 & 9 herein are bent upon to frustrate the proposed construction aimed at by respondent No. 6 and to achieve this object, respondent No. 6 has been forced to litigation. Since the interim direction was vacated in the suit, therefore, another suit was filed, likewise writ petition No. 1045/97. It is relevant to notice here that respondent No. 7 had prayed for an interim direction in the writ petition No. 1045/97, but the Court did not only decline the direction, but impliedly declared the writ petition in respect of easementary rights not maintainable and the relevant portion of the order dated 30-7-1997 passed by a co-ordinate bench of this Court is reproduced hereunder :

'.....In this view of the matter, it is not possible to pass any orders at interim stage. LC for the petitioner complains that the construction of private respondent No. 6 was affecting petitioners easementary rights and that this respondent was required to be restrained from proceeding with the construction..... and also

because petitioner can agitate this matter in an appropriate remedy to enforce his easementary rights if any.'

5. No doubt, petitioners have disputed knowledge about the institution of the suit and writ petition, which stand appears far from imagination, because the building permission which has aggrieved the private respondents and the petitioners is impugned through suits and through the writ petitions and the averments made in the writ petitions and in the suits make it clear that the right claimed is for one and the same property and the petitioners in these petitions and suits claim themselves to be residents of one and the same house, therefore, denial of knowledge on the part of petitioners about the pendency of writ petition and suits is devoid of reason and the only conclusion available is that the petitioners are fully in know of pendency of suits, institution of writ petition No. 1045/97 as also its disposal and these facts have been deliberately suppressed by them in this writ petition which depicts that they have not come to the Court with clean hands.

6. There is no dispute that the writ petition No. 1045/97 stands disposed of and the copy of the petition has been produced by L.C. for the petitioners who was pointedly asked to explain as to why his writ petition be not dismissed for suppression, his reply was that the petitioners are not liable to punishment for the fault of a scribe of the writ petition No. 1045/97 and submits that he has a right to seek protection of his rights even if he is an occupier only and need not prove his title to the property and on this contention, he has also attempted to escape the fallout of doctrine of resjudicata.

7. I have gone through the reliefs and averments prayed for through the earlier writ petition and suits. The property in the previous writ petition as also in this writ petition besides the suits is same and a specific averment has been made by respondent No. 7, who is father of the petitioners and respondents 8 & 9 (herein) that the property belongs to him and this fact has not been refuted by the respondents in their objections, filed to the application of respondent No. 6 therefore, it can be safely observed that the petitioners and respondents 8 & 9 derive their title through their father, respondent No. 7, that apart, the right claimed by the respondent No. 7 is not only for himself, but for the benefit of his heirs,

dependants and all those who reside in the house and what is more important is that the building permission, issued under No. 24 of 1997 dated 17-5-1997, stands adjudicated upon and no further adjudication is possible in respect of such permission. Mr. G. A. Lone, LC for the petitioners, while arguing, submitted that resjudicata is a technical rule and can't debar the petitioners from seeking enforcement of their fundamental rights. I find an answer to his argument in Daryao v. State of U.P. reported in AIR 1961 SC 1457 at 1462, which reads as under :

'.....Now rule of resjudicata as indicated in Section 11 of the Code of Civil Procedure has no doubt some technical aspects, for instance, the rule of constructive resjudicata may be said to be technical, but the basis on which the said rule rests, is founded on considerations of public policy. It is in the interest of public at large that a finality should attach to the binding decisions pronounced by the Court of competent jurisdiction and it is also in the public interest that individuals should not be vexed twice over with the same kind of litigation. If these two principles form the foundation of the general rule of res judicata they can't be treated as irrelevant or inadmissible even in dealing with the fundamental rights in the petitions filed under article 32.....'

8. Considering the averments made in the complaints and the previous writ petition, I am fully convinced that the permission impugned through this petition has been challenged through the suits and was also subject matter of the writ petition No. 1045/1997 which has been admittedly disposed of by order dated 1 -9-1998 and the judgments pressed into service by Mr. Lone have not only been relied at by the Court but the relief granted in writ petition No. 1045/97 owes its origin to the mandate of the judicial pronouncements reflected in the said judgment and the relief granted takes full care of grievance of the petitioners, they have in respect of the permission impugned, moreso, considering the relief: allowed, it is amply clear that the relief granted is not available to the petitioner of writ petition No. 1045/1997 only but is available to the petitioners also because they are also aggrieved of the same permission which has been dealt with by the Court in writ petition No. 1045/1997 and there is no need to file any other writ against the same permission in view of the decision dt. 1-9-1998. Moreover, there cannot be any

dispute that the order passed by the Court in writ petition No. 1045/97 is by a competent Court of jurisdiction, obviously the plea of res judicata is well founded on the general principle of res judicata which principle applies to the writ petitions under Art. 226 as well and has to occupy the field so that a finality is attached to the decisions pronounced by the Courts of competent jurisdiction and the said doctrine applies to the case in hand on the strength of judgment passed by the writ Court in writ petition No. 1045/97. In this backdrop I am of the opinion that the decision passed in writ petition No. 1045/97 creates a bar of res judicata on this writ petition.

9. Now coming to the relief sought on the basis of easementary rights which right is vehemently disputed by the respondent No, 6, thus , disputed questions of fact have arisen. Well there may be a case where writ petition can be entertained although question of fact falls for determination, of course, depending upon the circum-stances of each case, but where writ petition raises such questions of fact which require oral evidence as is true of case in hand in such circumstances Court is justified to refuse indulgence through its writ jurisdiction and this view has virtually prevailed on the Court at the very outset when it declined to entertain the plea of easement projected in the writ petition No. 1045/97. That apart suits are already pending involving the property in respect of which easementary rights are claimed and the petitioners if they have any cause can seek their impleadment in the pending suits and if they seek such impleadment, their plea shall be considered by the Court on its merits. They shall also be free to file a suit if so advised and if a cause of action in accordance with law is available to them.

10. For the aforementioned reasons this writ petition is dismissed along with the CMPs. and the interim direction if any shall stand vacated. However, no order as to costs.