

Babu Ram Vs. Tehsildar and ors.

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Court : Jammu and Kashmir

Decided On : Apr-23-2004

Reported in : 2004(2)JKJ246

Judge : Permod Kohli, J.

Acts : Tenancy Act, Svt. 1980 - Sections 42(3) and 46; ;Jammu and Kashmir Agrarian Reforms Act, 1976 - Sections 2(17), 4 and 4(1)

Appeal No. : OWP No. 534/2001

Appellant : Babu Ram

Respondent : Tehsildar and ors.

Advocate for Def. : S.K. Anand, Adv.

Advocate for Pet/Ap. : U.K. Jalali, Sr. Adv.

Disposition : Petition dismissed

Judgement :

Permod Kohli, J.

1. Petitioner who was owner of the land measuring 51 Kanals 3 Marlas comprised in Khasra Nos. 696, 699, 970-72, 982-96, 988-89 situated in Village Bamal, Tehsil R.S. Pura, initiated proceedings for eviction of respondents No. 2 to 4 under

Section 46 of the Jammu and Kashmir Tenancy Act vide his application dated 7-11-1960 before the Collector, Jammu on the grounds that respondent No. 2, who entered as a protected tenant surrendered his protected tenancy rights by an oral notice and entered into fresh agreement for the cultivation of land as a tenant at will alongwith respondents No. 3 & 4. This application was resisted by the respondents on the plea that respondent No. 2 being 'Karta' of the Joint Hindu Family comprised of respondents No. 3 & 4 as its co-parceners, have been in cultivating possession of the land as protected tenants. They also denied the factum of surrender of protected tenancy rights and the execution of the fresh agreement for cultivation of the land as tenants at will. The Assistant Commissioner, who entertained the application granted the relief to the petitioner vide his judgment dated 16-3-1965 and arrived at the finding that there has been relinquishment of tenancy rights by oral notice as contemplated by Section 41 of the Tenancy Act. According to this judgment a corresponding entry was made by the Patwari of the factum of surrender of tenancy rights and entry of the fresh agreement in 'Roznamcha Wakayati'. Aggrieved of the afore-said order respondents No. 2 to 4 preferred an appeal before the Collector, Jammu who treated the application filed by the petitioner as a suit for resumption of the land and declared the appeal having been abated vide its order dated 13-12-1965. Respondents there-after made an application to the Collector in March, 1966 requesting him to review his earlier order dated 13-12-1965. However, the review application was dismissed on 26-4-1966 on the representation of the respondents, who decided not to pursue the same. Petitioner herein approached the Collector vide his application dated 24-12-1965 for execution of the decree passed in his favour by the Assistant Commissioner which had been earlier transferred to him by the Collector. The Assistant Commissioner vide his order dated 17-5-1966 filed the proceedings in view of the order of the Collector declaring the appeal to have abated.

2. The matter again came to Assistant Commissioner. He again made a reference to the Collector seeking leave to review his predecessor's order dated 13-12-1965. The Collector in turn sought permission of the Divisional Commissioner for review of his predecessor's order. This reference was contested by the parties and the Divisional Commissioner finally refused to grant permission sought by the

Collector vide order dated 17-5-1966. Petitioner also filed an appeal against order dated 17-5-1966 refusing to execute the decree for ejectment of respondents 2 to 4. This appeal was also dismissed on 9-6-1967. This order was again challenged in appeal before the Divisional Commissioner, who treated the same as revision and made a report to the Financial Commissioner vide his order dated 23-12-1967 requesting setting aside of the order of the Collector dated 13-12-1965. The Divisional Commissioner also requested that the order passed by the Assistant Commissioner on 17-5-1966 refusing to execute the decree may also be vacated. The Financial Commissioner dismissed the application of the petitioner for ejectment of respondents No. 2 to 4 vide his order dated 26-2-1969. He also set aside the entire proceedings. The Financial Commissioner observed as under: --

'The Assistant Commissioner had by deciding the original application ignored the fact that relinquishment Of cultivation by an occupancy or protected tenant, even though it can be made orally, cannot be given effect to, except after an order is obtained from the competent Revenue Officer on a regular mutation entered for this purposes. As no mutation of 'Tark-I-Kasht' had been entered, the status of Baldev Raj as a protected tenant persists, notwithstanding entries to the contrary made by the Patwari on his own in Roznamcha Waqiyati or in Khasra Girdawari.

X XX X X Baldev Raj has been entered as a protected tenant in the Khasra Girdawari in 1958 and in earlier years. That status could only be changed on the basis of a mutation order.'

3. This order of the Financial Commissioner became subject matter of challenge in writ petition (WP No. 263/69) before this Court on various legal questions. I need not deal with the same, in these proceedings keeping in view the limited scope of the petition. The writ Court however, dismissed the said writ petition vide order dated 20-11-1969 and appeal was preferred before the Letters Patent Bench being LPA No. 10/1970/ Division Bench however, referred the matter to the Full bench, keeping in view the important questions involved. The Full Bench on consideration of the issue passed the following order on 9-12-1970:

'The learned Financial Commissioner was therefore, not right in observing that since the relinquishment of Kasht was not followed by a regular mutation it could

not be given effect to the impugned order of the Financial Commissioner appears to be based on an erroneous assumption of law, the same has to be quashed. Accordingly, I would allow the appeal, set aside the order dated November 20, 1969 of Hon'ble Bhat J dismissing the writ petition, quash the order dated Feb 26, 1967 of the Financial Commissioner and remit the case to the latter with the direction that he should rehear the reference made to him by the Revenue Commissioner and pass fresh orders according to law or by quashing the order dated Dec 13, 1967 passed by the Collector in appeal preferred by the respondent, direct him to rehear the same and pass fresh order according to law. The latter course being in consonance with the requirement of justice will, in my opinion be preferable.'

4. After the remand, the matter remained pending and in the meanwhile Jammu and Kashmir Agrarian Reforms Act 1972 came into being, which was replaced by the Jammu and Kashmir Agrarian Reforms Act 1976. It appears that the proceedings were initiated under the provisions of the Agrarian Reforms Act and mutation under-section 4 thereof came to be attested on 9-9-1981 by the Naib Tehsildar concerned. This was followed by another mutation No. 280 dated 24-3-1984 under Section 12 of the J&K; Agrarian Reforms Act. Under this mutation a reference was made to an agreement executed between the petitioner and respondents No. 2 to 4 whereby the petitioner is stated to have surrendered his right in consideration of levy amount of Rs. 11,005.75. Petitioner herein approached this Court through the medium of the present petition challenging the action of the Revenue Authorities inter-alia on the grounds;

(i) that no agreement under Section 12 was ever executed by him and the mutation under Section 4 as also the subsequent mutations under Sections 8 & 12 have been attested in his absence;

(ii) It is further alleged that respondent No. 2 sub-let the land to his brother Tej Ram by surrendering his tenancy under the Joint Hindu Family and whereas no relationship of landlord and tenant could be established between respondent No. 2 Baldev Raj and Tej Ram, his brother under the Agrarian reforms Act, the creation of sub-tenancy being prohibited under law.

It is further stated that by virtue of the Full Bench judgment a decree for ejectment of respondents No. 2 to 4 already stood passed and in view of the said decree respondents No. 2 to 4 were liable to be ejected and no proceedings under the provisions of the Agrarian Reforms Act are warranted and in view of the afore-said judgment the petitioner is deemed to be in possession in Kharief 1971, respondent having already surrendered their tenancy rights in his favour;

5. The State and the private respondents have filed their separate replies claiming that the writ petition filed by the petitioner is mis-conceived and is based upon concealment of facts. It is further contended that on account of application of J&K; Agrarian Reforms Act, respondents No. 2 to 4 who were entered as tenants and were in cultivating possession of the land were entitled to the benefit of the provisions of the Agrarian Reforms Act, they having become the prospective owners are entitled to hold the property. It is also stated that the petitioner voluntarily entered into an agreement with respondents No. 2 to 4 in terms of Section 12 of the Agrarian reforms Act and received the consideration of Rs. 11,000.75 which culminated in attestation of mutation under Section 12 on 24-3-1984. The provisions of the Tenancy Act already stood repealed by the Agrarian reforms Act, hence no benefit flows from the judgment. According to the respondents, no further proceedings could be or have been initiated on the basis of the Full Bench judgment.

6. I have heard the learned counsel for the parties and perused the record on the file.

7. It is true that the proceedings initiated by the petitioner for the eviction of respondents No. 2 to 4 under Section 46 of the J&K; Tenancy Act 1980 culminated into passing of the judgment dated 9-12-1970 passed by the Full Bench, whereby order passed by the Financial Commissioner has been quashed. Full Bench, however, remanded the case to the Financial Commissioner with the direction that he should re-hear the reference made by the Revenue Commissioner and pass fresh order according to law or by quashing order dated 13-12-1967 passed by the Collector in appeal preferred by the respondents direct him to re-hear the same and pass fresh order according to law. Full Bench further observed that the

second course suggested by it should be preferred i.e. 'by quashing the order dated 13-12-1967 passed by the Collector in appeal preferred by the respondent, directing him to rehear the same. By this direction, the order passed by the Assistant Commissioner for eviction of respondents No. 2 to 4 on the application of the petitioner under Section 46 of the Tenancy Act stands revived. It is on the strength of this order that the petitioner claims that there is a decree for eviction, which was or is required to be executed. It is however, admitted case of the parties that on remand neither the Financial Commissioner nor the Collector has passed any fresh order after hearing the parties. None of the parties have explained the circumstances for not passing or initiating the proceedings pursuant to the direction of the Hon'ble Full Bench issued vide its judgment dated 9-12-1970. It is the case of the respondents that after coming into operation of the Jammu & Kashmir Agrarian Reforms Act, the proceedings were required to be initiated under the new Act which has the over-riding effect. According to the respondents because of the application of Agrarian Reforms Act and the respondents being tenant on the crucial date of Kharief 1971 mutation under Section 4 was passed extinguishing the rights of the petitioner and finally on the basis of mutual agreement mutation under Section 12 was passed vide mutation No. 280 dated 24-3-1984. Petitioner having received the consideration of Rs. 11,000.75 is not entitled to challenge the same after 17 years.

8. Petitioner had initiated proceedings under Section 46 of the Tenancy Act claiming the surrender of the protected tenancy rights by respondents No. 2 to 4 under Section 41 of the same Act. Sections 41 and 46 of the Tenancy Act 1980 read as under:

41 'Relinquishment by any other tenant:- (1) Any other tenant may relinquish his tenancy by giving orally or in writing to his landlord or to his landlord's agent, on or before the date fixed by Appendix B of this Act, notice of his intention to relinquish the tenancy after the harvesting of the current crop.

(2) The tenant may, instead of, or in addition to, giving the notice in the manner mentioned in Sub-section (1) apply to [a Revenue Officer] on or before the date aforesaid to cause the notice to be served on the landlord, and the Revenue

Officer, on receiving the cost of service from the tenant, shall cause the notice to be served as soon as may be.

(3) If the tenant does not give notice in the manner prescribed in this section, he shall be liable to pay the rent of his tenancy for any part of the ensuing agricultural year during which the tenancy is not let by the landlord to some other person, or is not cultivated by the landlord himself.'

46. Ejectment of tenant at will [(1)] Notwithstanding anything contained in Sub-section (1) of Section 44, a tenant other than an occupancy, protected or fixed term tenant may be ejected at the time specified in Appendix B of this Act.]

(2) (i) Where a tenant at will contends that he is a protected tenant but has erroneously been recorded not as such, the Revenue Officer shall enquire into it and, if he is satisfied that the tenant is a protected tenant, declare him to be so.

(ii) A declaration made under Clause (i) shall be deemed to be declaration under Section 15-B'

9. From the reading of afore-said sections, it is clear that if a protected tenant surrenders his protected tenancy rights by notice and enters into mutual agreement he is to be treated as tenant at will. Proceedings for eviction under Section 46 of the Act can be initiated for eviction of tenant at will. This position is clearly established by reference to Full Bench judgment dated 9-12-1970. The case was remanded to the Financial Commissioner/Collector to re-hear the same. Admittedly, without any order having been passed by the authorities on remand, the Agrarian reforms Act intervened. Under Section 4 (i) of the said Act, all rights, title and interest in land of any person, not cultivating it personally in Kharief, 1971, is deemed to have extinguished and vested in the State, free from all encumbrances with effect from 1-1-1976. For application of Section 4, it is necessary that a person should be a tiller as defined under Section 2 (17) of the Act, which defines the tiller as under:

'tiller' means tenant cultivating land personally and shall mean and include a person who was tiller in Kharief, 1971 or his legal heirs or his transferee in the

case of any valid transfer of land made between 1st September, 1971 and 1st May, 1973, subject to the competent Revenue Officer being satisfied about the existence of a bonafide transfer to this effect'

10. It is admitted position that even when respondents No. 2 to 4 arc established to have surrendered their protected tenancy rights in favour of the petitioner by oral notice under Section 41 of the Tenancy Act, their status is reduced to that of a tenant at Will. Respondents 2 to 4 continued to be tenants at Will in Kharief 1971. An entry in this regard is existing in the Khasra Girdawari from Kharief 1969 to Kharief 1972, as is evident from Annexure R-8 to the reply of private respondents. The claim of the private respondents is further that the petitioner entered into an agreement under Section 12 of the Agrarian reforms Act and received the consideration amount. This agreement is also attested by the Tehsildar and signed by the petitioner and respondents No. 2 to 4 on 22-3-1984. Learned counsel for the petitioner Mr. U.K. Jalali, Senior Advocate has brought my attention to the provisions of Section 12 and contended that he never applied for resumption and unless a land owner seeks resumption under Section 7, provisions of Section 12 cannot be invoked. He has further stated that no such agreement was ever executed by him and the agreement is not valid. Even if this agreement is ignored and mutation attested under Section 12 is held not to effect the rights of the petitioner, the question still arises whether the intervention of the Jammu & Kashmir Agrarian Reforms Act deprives the petitioner of the benefit of the judgment of Court and whether respondents No. 2 to 4 are entitled to the benefit and retain the land as prospective owners under the Agrarian reforms Act. With a view to examine this question some of the relevant provisions of the J&K; Agrarian reforms Act are relevant. Sections 28, 32, 35 & 42 of the Act are quoted hereinbelow:

'28. Rights and liabilities of prospective owner -- (1) Notwithstanding anything contained in any law --

(a) a prospective owner of land eligible by or under this Act to acquire ownership rights in land under his personal cultivation shall continue to have all rights and be subject to all liabilities (including the payment to the State of the rent which was

payable by him to the ex-landlord before the commencement of the Jammu and Kashmir Agrarian Reforms Act, 1972) as a tenant under the Jammu and Kashmir Tenancy Act, 1980, until he is vested with ownership rights in such land:

Provided that he shall be governed by the rules of succession applicable to occupancy tenants until he becomes owner of such land;

(b) no prospective owner of land shall, (save as otherwise provided in the proviso to Clause (a) or in this clause) transfer his rights in such land by sale, gift, exchange, mortgage, will or by any other means whatsoever, and any transfer of such rights made after the first day of May, 1973 shall be null and void and such rights shall vest in the State and such prospective owner and his transferee shall, after being given an opportunity of being heard be dispossessed of such land by a Revenue Officer.

Provided that a prospective owner shall have the right to transfer land in the form of simple mortgage subject to the provisions of the Alienation of Land Act, for securing loan to liquidate the amount of levy payable by him under this Act, and

(c) No document purporting to effect transfer by a prospective owner of his rights in land shall be admitted to registration.

32. Act to over-ride other laws- The provisions of this Act and the rules made and instructions issued there-under shall have effect notwithstanding anything contained in any other law or any custom or usage or in any contract, express or implied or in any instrument inconsistent with the provisions of this Act.

35. Transfer to defeat provisions of this law- Where, on or after the first day of September, 1971 any land has been transferred by act of parties or in compliance with a decree or order of a Court or a Revenue Officer or by the operation of any other Act, and the transfer does not fall within the purview of Section 31 but has the effect of defeating the provisions of this Act, the land so transferred shall be deemed to have been retained by the person who held such land immediately before such transfer for purpose of calculating the area retainable under this Act by him, anything to the contrary contained in this Act notwithstanding.

42. Inapplicability (1) With effect from the commencement of this Act, the provisions of--

- (a) The Jammu and Kashmir Tenancy Act, Samvat 1980;
- (b) The Jammu and Kashmir Alienation of Land Act, Samvat 1995;
- (c) The Jammu and Kashmir Land Revenue Act, Samvat 1996
- (d) The Jammu and Kashmir Big Landed Estates Abolition Act, Samvat 2007;
- (e) The Jammu and Kashmir Consolidation of Holdings Act, 1962 and
- (f) The Jammu and Kashmir tenancy (Stay of Ejectment Proceedings) Act, 1996;

And the rules, standing orders, orders and instructions issued thereunder shall, so far as they are inconsistent with the provisions of this Act and the rules framed and instructions issued there-under, cease to apply to the land to which this Act applies.

(2) All applications, suits and proceedings, pending before the Revenue Officer, Civil or revenue Court, any authority acting under the Jammu and Kashmir Consolidation of Holdings Act, 1962 or the Government on the date the commencement of this Act under any of the provisions of the Acts mentioned in Sub-section (1) shall so far as these are inconsistent with the provisions of this Act, abate.

(3) Notwithstanding anything contained in Sub-section (1) nothing contained in this Act shall be deemed to effect the previous operation of the Acts mentioned in Sub-section (1) or anything done or any action or proceeding taken there-after which thing, action or proceedings has finally concluded under any of said Acts prior to the commencement of this Act.'

11. Section 28 maintains the position of a prospective owner as defined under the Act and subject him to all rights and liabilities, which were enjoined upon him prior to coming into operation of this Act till he is vested with the ownership rights under law. Section 32 gives over-riding effect to the provisions of the Agrarian reforms

Act over all other laws, customs, usage, contract, instrument etc. Similarly Section 35 prohibits transfer of any right in the land after 1-9-1971 whether by act of parties or in compliance with a decree or order of a court or a Revenue officer or by the operation of any other Act, and even if any such transfer has taken place, it shall be deemed to be in-operative. Similarly by the operation of Section 42, all laws specified therein are deemed to be in-operative to the extent they are inconsistent to this Act. Not only this Sub-section (2) of Section 42 makes all proceedings of any Court Revenue or Civil etc to abate to the extent of inconsistency with this Act. Sub-section 3 of Section 42, however, saves the action or proceeding finally concluded prior to the commencement of this Act. As a matter of fact the provisions of this Act were made applicable on 1-9-1971 by various provisions of the Act. After 9-12-70 the judgment of the High Court dated 9-12-1970, the case was never decided by any competent authority to whom the matter was remanded and therefore, the proceedings had not been concluded and the question of implementation of any such judgment or decree or order does not arise. Therefore, the same is not saved under Section 42(3) of the Act. Otherwise also by virtue of Section 35, if any decree stands executed after 1-9-1971 the legal position is that the person who was in possession prior to execution of decree or order shall be deemed to be in possession. Therefore, keeping in view the various provisions of the Agrarian reforms Act, referred to above, petitioner cannot be said to have acquired any right under the judgment of the Full Bench dated 9-12-1970 as no benefit came to be conferred upon the petitioner prior to 1-9-1971. The sole ground on which the present petition is based is the judgment of the Full bench which does not confer any benefit upon the petitioner under law. Therefore, the petitioner was/is not entitled to execute judgment or decree as no such decree has attained finality before the crucial date i.e. 1-9-1971.

12. The only question that remains whether respondents No. 2 to 4 are entitled to the benefit of Agrarian reforms Act. They were admittedly tenants at will even if surrender of protected tenancy rights under Section 41 is established. They do fall within the definition of 'tiller' as defined under the Agrarian reforms Act. They were in possession in Kharief 1971 and by virtue of Section 4 & 8 they are deemed to be prospective owners. Petitioners have nowhere denied receipt of consideration of Rs. 11,000.75 for which a separate receipt is also executed. In the re-joinder

filed by the petitioner also, the receipt of a consideration has not been denied, though there is a specific mention of the same in the reply of the private respondents.

13. Last contention of Mr. Jalali that the decree passed by the Assistant Commissioner having been up-held by the Full Bench of the High Court has to be executed. I am unable to appreciate this contention. Istly the decree passed by the Assistant Commissioner was subject matter of appeal before the Collector/Financial Commissioner. The Full bench of the High Court only decided a proposition of law and held that the protected tenancy can be surrendered by oral notice. However, the proceedings under Section 46 of the Act initiated by the petitioner for eviction of respondents No. 2 to 4 were subject matter of appeal and that is why the Full Bench had remanded the case to the appellate-forum for deciding the same under law. No such decision ever came. Therefore, there is no final adjudication up-holding the eviction of private respondents, the petitioner is not entitled to any benefit thereof. Respondents being tenants at will and in cultivating possession of the land in Kharief 1971 are entitled to the benefit of the provisions of the Agrarian reforms Act. This writ petition fails and is accordingly dismissed.