

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

**WP(C) No. 3379/2019
CM Nos. 531/2021, 532/2021 & 6812/2019**

*Reserved on: 06.04.2023
Pronounced on: 07.06.2023*

Noor Illahi Fakhtoo ...Petitioner(s)

Through: - Mr. A. Haqani, Sr. Advocate with
Mr. Asif, Advocate.

Vs.

UT of J&K and ors. ...Respondent(s)

Through: - Mr. Mohsin Qadri, Sr. AAG with
Ms. Maha Majeed, Adv. for R-1-4.
Mr. Salih Pirzada, Adv. for R-5.

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

JUDGMENT

1. The petitioner in the instant petition has sought the following reliefs:-

- “(i) A writ, order or direction including one in the nature of Certiorari, quashing impugned orders;**
- (iii) A writ, order or direction including one in the nature of Mandamus recalling the judgment and order dated 28.04.2017 passed by the Hon'ble Court in OWP No. 1232/2009, MP No. 1599/2009 and Contempt (OWP) No. 152/2013, MP No. 53 of 2014;**
- (iii) A writ, order or direction including one in the nature of Prohibition commanding upon the respondents to forebear from giving any effect to the orders impugned;**
- (iv) A writ, order or direction including one in the nature of Mandamus commanding upon the respondents not to cause any interference into the title of the petitioner or in his peaceful and valid occupation of the land under his possession;**

- (v) **Any other writ, order or direction which the Hon'ble Court may deem fit and proper in the facts and circumstances of the case may also be passed in favour of the petitioner and against the respondents."**

2. The facts those stem out from the instant petition reveal that the petitioner claims to be the owner in lawful actual physical possession of a plot of land measuring 17 Marlas situated at Hyderpora, Srinagar within Municipal limits covered under Survey No. 764, Khewat No. 104 alongwith a double storey residential house thereon fully bounded by concrete wall.

It is being stated that the said landed property was purchased by the petitioner from its erstwhile owner-respondent 6 herein through his lawful attorney-respondent 7 herein for lawful consideration vide Sale Deed dated 20.09.1996 duly registered and fully supported by the relevant revenue records. A mutation No. 3787 dated 02.11.2006 is also stated to have got attested by the petitioner in respect of the plot in question.

It is being further stated that under the latest settlement held by the State, the said plot of land came to be classified as 'Aabadi-Deh' under revised Survey No. 379.

It is being next stated that over the plot of land in question, the petitioner constructed the double storey residential house after obtaining building permission from the competent authority bearing No. 109 of 2004 dated 01.05.2004 and the petitioner is putting up alongwith his family therein uninterruptedly and peacefully.

It is being next stated that the respondent 5 herein claiming to be the owner of the land measuring 19 Marlas covered under Survey No. 524-min, Khewat No. 138 situated at Hyderpora (Peerbagh), Airport Road, Srinagar, had preferred a writ petition before the Jammu Wing of this Court being OWP No. 1232/2009, alleging therein that his said landed property has been unauthorizedly occupied/encroached upon, which writ petition had been disposed of on 28.04.2017, directing the competent authority (Deputy Commissioner, Srinagar) to take action under Section 5 of the J&K Migrant Immovable Property (Preservation, Protection and Restraint on Distress Sales) Act, 1997 (*hereinafter referred to as the "Act of 1997"*) to remove the unauthorized occupation from the land in question.

It is being further stated that the respondent 5 in the said writ petition did neither implead the petitioner herein as a party respondent nor made any claim in respect of the plot of land purchased by the petitioner and also did not allege therein the petitioner to be an unauthorized occupant of his plot of land.

It is being further stated that in compliance to order passed in the said OWP No. 1232/2009 (*supra*), the respondents issued order No. DCS/ARA/278-81/18 dated 12.01.2018, whereby a team of officers came to be constituted for a detailed demarcation of the land bearing Survey No. 524 and that the said committee filed some demarcation report, revealing, *inter-alia*, therein that the petitioner is in possession of 15 Marlas of land of respondent 5 herein.

It is being next stated that the said order concluded that the land claimed by the respondent 5 was illegally occupied by the petitioner and consequently, the respondent 3 herein is stated to have exercised power under Section 5 of the Act of 1997, directing respondent 4 to take over the possession of the land in question in terms of order dated 12.01.2018, which order is stated to have never served upon the petitioner or else conveyed to him.

It is being further stated that the petitioner is a bonafide purchaser of the land measuring 17 Marlas covered under Survey No. 764 and has never been an unauthorized occupant or encroacher of the land claimed by respondent 5 herein and, as such, respondents 3 and 4 had no power to extend their jurisdiction over the land owned by the petitioner. It is being also stated that while conducting an inquiry into the matter, inasmuch as, affecting demarcation of the land of the petitioner, the respondents did not associate the petitioner therein the said inquiry or demarcation exercise, but instead the petitioner came to know about the order dated 12.01.2018 pursuant to impugned order/notice dated 05.11.2019.

3. The petitioner while maintaining the instant petition, has thrown challenge to order dated 12.01.2018, the consequential order/notice dated 05.11.2019 and has as well sought recalling of the judgment/order dated 28.04.2017 passed in OWP No. 1232/2009 filed by respondent 5.

4. The petitioner has challenged the said impugned orders, as also the order dated 28.04.2017 (supra) on the following grounds:-

- (i) The order dated 28.04.2017 is liable to be recalled by the Hon'ble Court, having been obtained by respondent No. 5 by fraud and by deliberate and wilful indulgence of suppression and concealment of the relevant facts and by not impleading the petitioner herein as a party respondent to the writ proceedings. As may be noticed from the perusal of the said order, the case set up by the respondent No. 5 before the Hon'ble Court was not at all in respect of demarcation of the land allegedly held by him. On the contrary, the case put up by the respondent No. 5 before the Hon'ble Court related to alleged encroachment and unauthorized occupation of his land. It is submitted that in the said context, it was mandatorily incumbent upon respondent No. 5 to inform the Hon'ble Court of the details of the encroachment/occupation and the person(s) having allegedly unauthorizedly occupied or encroached upon the land and to implead such person(s) as a party in the writ petition. As may be noticed, the respondent No. 5 did not at all implead any alleged occupant muchless the petitioner as party respondent in the writ petition and yet, obtained the order to the prejudice of the petitioner by fraud and unilaterally. In terms of the well settled rules and principles of law, the judgment and order passed, as such, by this Hon'ble Court deserves to be recalled;
- (ii) The order impugned dated 12.01.2018 has been passed by the respondent No. 3 without conducting any enquiry into the allegations made by respondent No. 5. It is submitted that under law, while exercising the power under Section 5, the respondent No. 3 acting as a designated person has to exercise quasi-judicial function by conducting an enquiry, culminating into his subjective satisfaction. It is stated that while exercising the said power/function, respondent No. 3 was and is required to associate the petitioner into the enquiry, as was mandated by law to be conducted by him. As stated above, respondent No. 3 on the contrary did not hold any enquiry into the question as to whether the land under the possession and ownership of the petitioner was in fact the land of respondent No. 5. He as well did not conduct any enquiry as to whether the petitioner was an unauthorized occupant/encroacher of the land. The order passed by the respondent No. 3 being contrary to the mandate of the statute is obviously a nullity in the eye of law and also in flagrant violation of the mandate of fairness enshrined by Article 14 of the Constitution, more particularly, so when the order impugned is likely to visit upon the petitioner with grave and serious consequences;

- (iii) The order impugned is again bad in the eye of law inasmuch as the same is based on the alleged report of a sub-committee constituted by the respondents. Assuming though denying that the land claimed by the respondent No. 5 was in fact unauthorizedly occupied, yet, it was incumbent upon respondent No. 3 to hold the enquiry himself into the matter. Interestingly, the so-called enquiry held by the respondents has not even been held by the committee as was constituted by respondent No. 3 but by a sub-committee, without any locus or legal authority vested in them;
- (iv) The orders impugned are also illegal being seriously hit by the principle of estoppels. As has been stated hereinabove, the petitioner is a bonafide purchaser of the land under his possession having purchased the same in terms of sale deed dated 20.09.1996 after having obtained the relevant revenue records from the respondent- revenue department, demarcating the land in question (under the occupation of the petitioner) being under Survey No. 764 qua the copy of Aqsi-shajra dated 28.07.1996. It is stated that in terms of the said revenue records, the petitioner was held out an unequivocal declaration that the land purchased by him and under his occupation was admittedly under Survey No. 764. It is stated that under law, it is not at all permissible for the respondents to resile from the said firm declaration and put the land under his possession as being under Survey No. 524, that too, on the basis of a sham and unilateral exercise;
- (v) The order impugned is also bad in the eye of law inasmuch as the same has been passed by the respondents in a manner, which is not countenanced by law. The respondents have exercised the power not vested in them;
- (vi) The order impugned is also illegal in that the same is infested with grave and serious errors of non-application of mind. The respondents have acted in a mechanical manner according to their own whims and caprice;
- (vii) The order impugned is not at all bonafide but has been passed by the respondents in colourable exercise of their power to accommodate respondent No. 5 for extraneous and collateral consideration;
- (viii) The orders impugned have been issued without any lawful justification and are infested with fatal error of legal malice;
- (ix) The orders impugned have been issued by the respondents in utter violation of the well established rules and principles of law, natural justice, equity and good conscience and fair play. The petitioner has been condemned unheard.”

5. **The official respondents have filed two sets of reply to the petition.** In the said replies filed, the said respondents have stated that as per pre-settlement record of revenue estate, Hyderpora, Srinagar, respondent 5 purchased land measuring 19 Marlas under Survey No. 524 (old) in terms of the instrument of sale from Jay Kishori W/o Pandith Brij Nath having been duly attested vide Mutation No. 2914. It is being next stated that upon conclusion of the settlement operation of the revenue estate, Hyderpora, the said Survey No. 524 got re-numbered into Survey Nos. 377, 377/1 and 378 and recorded as “*Aabadi Deh*”.

It is being next stated that upon receiving representation from respondent 5, a demarcation team was constituted by the Deputy Commissioner, Srinagar vide order dated 18.03.2017, as respondent 5 had alleged illegal encroachment of the said land and upon effecting demarcation by the said team and receiving a report therefrom, order dated 12.08.2018 for taking over the possession of the land of respondent 5 came to be issued by respondent 3 in the name of respondent 4 for taking its custody under Section 5 of the Act of 1997, whereupon the respondent 4 issued order/notice dated 05.11.2019.

It is being further stated that upon spot verification by the team constituted by the respondent-Deputy Commissioner, Srinagar, it was found that the petitioner has illegally occupied migrant property measuring 15 Marlas, whereas 02 Marlas of land were found to have been encroached by the Masjid Shareef and 02 Marlas were found to be under thoroughfare. It is being further stated that on the basis of

the said report and after examining the facts, as also the revenue records, the order under challenge dated 12.01.2018 came to be issued by the respondent-Deputy Commissioner, Srinagar. It is being further stated that upon effecting demarcation, the petitioner was found to be in illegal possession of the land of respondent 5 being a migrant, necessitating, thus, initiation of action under Section 5 of the Act of 1997 in terms of the Court order dated 24.04.2017.

6. **In the reply filed by the respondent 5**, it is being, *inter-alia*, averred that the petition is not maintainable and that the dispute raised by the petitioner in the petition is about the identity of the land being a private in nature, as such, is incapable of being resolved under Article 226 of the Constitution of India and that in compliance to order dated 28.04.2017 passed in OWP No. 1232/2009 filed by the respondent 5, the petitioner cannot question the same through the medium of the petition under reply.

It is being next stated in the objections that 19 Marlas of land came to be purchased by the respondent 5 in the year 1987 and had been in his continuous personal possession till his migration in the year 1990, which did not impair his right of title over the land in question.

It is being further stated that the respondent 5 is the owner of the land in question having purchased the same in the year 1987 under registered Sale Deed and upon coming of into operation of the Act of 1997, the custody of the land in question stands vested into

the respondent-Deputy Commissioner, who under the Act, is under an obligation to preserve the said land of 19 Marlas and that upon demarcation effected, 15 Marlas of land out of 19 Marlas belonging to respondent 5 were found to be in illegal occupation of the petitioner.

It is being further stated that the Sale Deed exhibited by the petitioner cannot obliterate the identity of the land having been duly demarcated and that the petitioner cannot enforce any right qua the said land illegally occupied by him belonging to respondent 5.

It is being further stated that the demarcation conducted by the official respondents was found to be in conformity with the record and that there has been no counter evidence available that the petitioner discrediting either the revenue record or the demarcation effected by the official respondents.

It is being further stated that the official respondents have acted in compliance to the order passed by this Court in OWP No. 1232/2009 read with Contempt (OWP) No. 152/2013 and that the compliance of a Court order by the official respondents is being questioned in the instant petition, which is not legally permissible.

Heard learned counsel for the parties and perused the record.

7. Having regard to the case set up by the parties in their respective pleadings, following issues would emerge for consideration of this Court:-

- (i) Whether the order dated 28.04.2017 passed in OWP No. 1232/2009 filed by the respondent 5, directing the respondent-Deputy Commissioner, Srinagar to take action under the Act of 1997 is illegal having been obtained by fraud while not impleading the petitioner herein as a party respondent to the petition;
- (ii) Whether the action of the respondent-Deputy Commissioner, Srinagar in constituting a sub-committee of revenue officers for demarcation of the land in question is illegal, as the District Magistrate being a designated statutory authority could not have delegated his statutory functions provided under the Act of 1997;
- (iii) Whether the impugned order dated 12.01.2018 passed by the Deputy Commissioner, Srinagar under Section 5 of the Act of 1997 is violative of principles of natural justice;

8. Insofar as the Issue (i) is concerned, it is an admitted fact that the respondent 5 filed OWP No. 1232/2009 before the Jammu Wing of this Court, alleging therein that his proprietary land measuring 19 Marlas covered under Survey No. 524 situated at Hyderpora, Srinagar had been encroached upon and, as such, had prayed for removal of said encroachment. It is not in dispute that the petitioner herein was not impleaded as a party respondent in the said petition. The allegation of fraud levelled by the petitioner in the instant petition against the respondent 5 herein for having filed writ petition (supra) without impleading the petitioner herein as a party respondent to the petition cannot, *per-se*, said to be constituting a fraud in absence of any fact and circumstance, *prima-facie*, establishing any deliberate attempt of deception or fraud by the respondent 5 herein while maintaining the said petition. The allegation, *ex-facie*, is bald and not legally entertainable, in that, the respondent 5 herein can neither said to have by misrepresentation

or concealment of facts obtained the judgment/order dated 28.04.2017 passed in OWP No. 1232/2009 nor acquired his own landed property by playing fraud with the Court or else by taking unfair advantage of the petitioner herein. A reference in this regard to the judgment of the Apex Court passed in case titled as “*Yashoda Vs. Sukhwinder Singh and ors.*”, reported in *AIR 2022 SC 4623*” would be relevant herein, wherein at para-23, following has been laid down:-

“23.....

5.....
 6.....A fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another’s loss. It is a cheating intended to get an advantage.....”

Thus, in view of above, the contention of the petitioner urged in this behalf is not sustainable in law.

9. Insofar as Issue (ii) is concerned, Section 6 of the Act of 1997 is complete answer to the same, in that, the competent authority under the Act of 1997 being a District Magistrate/Deputy Commissioner has been empowered to take or cause to be taken necessary steps for implementation of the provisions of the Act and in this regard to make or cause to be made any survey including measurements or else do any other act, which may be necessary for carrying out the purpose of the Act. It is an admitted fact that the respondent-Deputy Commissioner, Srinagar has not delegated his quasi-judicial function while issuing impugned order dated 12.01.2018, but has only got demarcation done through the field staff, which indisputably is not forbidden in terms of Section 6 (supra) of

the Act of 1997. Thus, the contention of the petitioner in regard to above Issue is not legally tenable.

10. Insofar as Issue (iii) is concerned, it would be appropriate and advantageous in the first place to refer to the ambit and scope of the **principles of natural justice** laid down and devised by the Apex Court from time to time in series of judgments.

The Apex Court in case titled as, "**Canara Bank and ors. Vs. Debasis Das and ors.**, reported in 2003 (4) SCC 557" has held that "*principles of natural justice are those rules which have been laid down by the Courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi-judicial and administrative authority while making an order affecting those rights and that these rules are intended to prevent such authority from doing injustice.*"

It is also pertinent to note here that the concept of principles of natural justice have undergone great deal of change and that the Apex Court in case titled as, "**Viveka Nand Sethi vs. Chairman, J&K Bank Limited and ors.**, reported in 2005 (5) SCC 337" has held that "*principles of natural justice, its trite, is no unruly horse, and when the facts are admitted, an inquiry would be an empty formality and even the principle of estoppels would apply and that the principles of natural justice are required to be complied with having regard to the fact situation obtaining therein and that it cannot be put*

in straightjacket formula and also it cannot be applied in vacuum without reference to the relevant facts and circumstances of the case.”

It is also significant to note here that in relation to the principles of natural justice, “**Doctrine of Useless Formality Theory**” has also got evolved, which would provide that there may be cases, where a relief can be refused to a party, where the Court thinks that the case of the party is not one of “real substance” or that there is no substantial possibility of his success or that the result will not be different even if the principles of natural justices are followed. Even in a given case covered by the aforesaid Useless Formality Theory, **Post-Decisional Hearing** has also got evolved, providing that a Post-Decisional Hearing can obliterate the procedural deficiency of pre-decisional hearing, as has been held by the Apex Court in case titled as, “*Charan Lal Sahu etc. etc. vs. Union of India and ors.*,” reported in *1990 (1) SCC 613.*”

Reverting back to the Issue (iii), much emphasis has been laid down by the petitioner on non-adherence of the principles of natural justice by the official respondents while effecting demarcation of the land in question and consequently issuing the impugned orders. Admittedly, the petitioner herein claims to be the owner in lawful possession of the land measuring 17 Marlas covered under Survey No. 764, whereas respondent 5 claims to be the owner in possession of the land measuring 19 Marlas covered under Survey No. 524 min, out of which 15 Marlas were found to have been under the illegal occupation of the petitioner after conducting of demarcation by the

official respondents. The petitioner, however, has not shown anything either in the petition or from the material annexed therewith that the result of such demarcation would have been different, had he been associated in the said process. Be that as it may, this Court refrains from expressing any opinion as to the merits of the claim lodged to the petitioner qua the land in question as also by the respondent 5 herein, as merits are not for this Court to be decided, but for the designated authority under the Act of 1997 to consider.

11. Having regard to the aforesaid position, inasmuch as, the facts and circumstances of the case, this Court is of the considered opinion that in the instant case, Post-Decisional Hearing can obliterate the procedural deficiency of Pre-Decisional Hearing to be afforded to the petitioner by the respondent 3.

12. For what has been observed, considered and analyzed hereinabove, the instant petition is *disposed of* with a direction to the respondent 3-Deputy Commissioner, Srinagar to provide adequate opportunity of hearing to the petitioner herein as “Post-Decisional Hearing” in the matter and the petitioner shall be at liberty to avail such hearing either in person or through his counsel and also shall be free to produce all/any documents/material in support of his case. The said hearing be provided to the petitioner by the respondent 3 upon issuing a notice and such hearing be concluded and a decision thereof be taken within a period of four weeks from the date a copy of this order is produced by either of the parties before the respondent 3-Deputy Commissioner, Srinagar.

Till the conclusion of the aforesaid hearing, the operation of impugned order dated 12.01.2018 read with order/notice dated 05.11.2019 shall remain in abeyance.

13. It is made clear that nothing hereinabove shall be construed to be an expression of any opinion qua the claim of the petitioner herein or respondent 5 herein qua the subject matter land.

14. *Disposed of*, alongwith connected applications.

(Javed Iqbal Wani)
Judge

JAMMU
07.06.2023
"Ram Krishan"

