

**HIGH COURT OF JAMMU AND KASHMIR AT
JAMMU**

OWP no. 686/2007
CMP no. 1010/2007

Date of Decision: 29.06-2009

Ram Saroop and ors. vs. *Basant Ram*

CORAM:

MR. JUSTICE J. P. SINGH, JUDGE.

Appearing counsel:

For the Petitioner (s) : Mr. S.S. Lehar, Sr. Advocate with
Mr. Meharban Singh, Advocate.

For the Respondent(s) : Mr. B.L. Kalgotra, Advocate.

i) Whether approved for reporting
in Press/Journal/Media : **Yes**

ii)	Whether to be reported in Digest/Journal	:	Yes
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Petitioners have invoked this Court's jurisdiction under Section 104 of the Constitution of Jammu and Kashmir for setting aside Sub-Judge, Samba's order of July 31, 2007, holding Basant Ram-respondent in possession of land measuring 7 kanal 4 marlas comprised in khasra no.63, 19 kanal 16 marlas in khasra no.42, 10 kanal 3 marlas in Khasra no.43 and 2 kanal 13 marlas in Khasra no.61 situated at village Palli Tehsil Samba, while answering the reference made to him by the Executive Magistrate 1st Class, Tehsildar, Samba, who was unable to record a positive finding as to which one of the parties was in possession of the land in question in terms of the provisions

of Section 145 of the Code of Criminal Procedure on the basis of the Affidavits, documents and material which the parties had produced before him.

Petitioners' learned counsel submits that the learned Sub-Judge has committed an error of law, apparent on the face of records, in omitting to consider the Affidavits which the parties had produced before the learned Magistrate, and in such view of the matter, his order of July 31, 2007 was illegal being in violation of the provisions of Section 146 (1) (a) of the Code of Criminal Procedure which mandates the Civil Court to consider while deciding the reference that evidence too which the parties had produced before the Magistrate before reference of the case to the Civil Court,.

Respondent's counsel, on the other hand, submitted that the well reasoned order of the Subordinate Judge may not warrant interference by the court in exercise of the power of superintence when the petitioner, despite having been provided opportunity, had failed to lead any evidence to substantiate his claim to possession.

I have considered the submissions of learned counsel for the parties and gone through the records.

Perusal of learned Sub-Judge's order reveals that in recording his finding that the respondent was in possession of the land in question, he has considered not only the respondent's evidence but also the other material on records, i.e., the revenue records, the judgments delivered by the

Revenue Forums, as also by Division Bench of this Court. It is only after analyzing the available material on records, i.e., the revenue records, the orders passed during the currency of the proceedings under Section 145 of the Code of Criminal Procedure before the Executive Magistrate, the orders passed by the Divisional Commissioner, Joint Commissioner and a Division Bench of this Court that the learned Sub-Judge has held the respondent to be in possession of the land in question.

Although, the Civil Court, proceeding on a reference made under Section 145 Cr. P. C., is, in law, required, to consider the effect of such evidence which the parties may have produced before the reference of proceedings to the Civil Court, yet I am of the view that non consideration of the Affidavits of the parties which they had produced when the Executive Magistrate, Tehsildar, Samba, was in seizin of the case, has not materially effected the findings recorded by the learned Sub Judge, in that, the Affidavit evidence of the parties cannot have precedence over the oral evidence produced before the Civil Court where both the parties enjoy liberty to question the veracity of such evidence by cross-examining the witnesses produced by the parties in this behalf.

That apart, looking to the nature of the evidence which the petitioners' had projected in their Affidavits, some of which are stereo type and the others not verified as required

by law, I do not find any miscarriage of justice to have happened in the case because of the omission of learned Sub Judge to refer and consider the Affidavit evidence of the petitioners. This is so because the Affidavit evidence, is of general nature and runs contrary to the evidence which the respondent has brought on records allowing opportunity to the petitioners to cross-examine his witnesses, produced before the Civil Court, and additionally because the oral evidence produced by the respondent is stated by the learned Judge to have been supported by the judgments and other material available on the records.

In view of the above discussion, I do not find any case to have been made out by the petitioners for invoking jurisdiction under Section 104 of the Constitution of Jammu and Kashmir which is required to be exercised most sparingly and only in appropriate cases to keep the Subordinate courts within the bound of authority and not for correcting mere errors of fact. Jurisdiction under Section 104 of the Constitution cannot be invoked to correct errors of fact which only a superior court may do in exercise of its statutory powers as court of Appeal. The High Court cannot, in exercise of jurisdiction under Section 104 of the Constitution convert itself into a court of Appeal.

Although the findings of the Civil Court given on reference under Section 146 Cr. P.C. are not open to Appeal, Review or Revision yet I am not inclined to exercise

jurisdiction under Section 104 of the Constitution because the final orders passed under Section 146 of the Code of Criminal Procedure remain always subject to any subsequent decision of a civil court of competent jurisdiction.

For that what has been said above, I do not find any justification to interfere with the order passed by learned Sub Judge, Samba.

This petition, therefore, fails and is, accordingly, dismissed.

(J. P. Singh)
Judge

JAMMU
29.06.2009
Tilak, Secy.

HIGH COURT OF JAMMU AND KASHMIR AT JAMMU

OWP No. 818/2005

C.M.P Nos. 1028/2007, 1119/2005 & 288/2006

Date of Decision:16.05.2008

Makhan Lal Bhat. Vs. State of J&K & Ors.

Coram:

MR. JUSTICE J. P. SINGH, JUDGE.

Appearing Counsel:

For Petitioner(s) : Mr. P. N. Bhat, Advocate.

For Respondents : Mr. A. H. Qazi, AAG for 1 to 4.
Mr. virender Bhat, Advocate for
5 to 8.

Petitioner has filed this writ petition seeking issuance of a writ of mandamus to respondent nos. 2 & 3, i.e., Deputy Commissioner, Baramulla and Tehsildar, Patan to hand over the possession of land to him which falls into his share out of the land measuring 21 kanals 6 marlas comprised in Khasra nos. 2532/A (new) 6 kanal 11 marlas, 2532/B-2 kanals 11 marlas, 2707 (old) 2042 (New)-9 marlas, 2705 (old), 20458 (new)- 9 marlas, 5385 (old) 2965 (New)-11 marlas, 2048/B (new)-1 kanal 2 marlas, 5806 (old) 4573 (New)-1 kanal 2 marlas, 2793 (old) 2566 (new)-15 marlas, 2794 (old) 2567 (new) -1 marla, 2795 (old) 2570 (new)-15 marlas and 2048/A-6 kanals 4 marlas situated at village Buran, Tehsil Patan, District Baramulla Kashmir.

Objections filed by Deputy Commissioner, Baramulla indicate that the land which had fallen to the share of the petitioner has been

protected and preserved by Tehsildar, Patan, who was ready and willing to hand over the possession thereof to the petitioner as and when he approached him in this behalf.

In view of the objections filed by Deputy Commissioner, Baramulla, this petition may not survive for further consideration. It is, accordingly, disposed of with a direction to Tehsildar, Patan to hand over the possession of the land which falls to the share of the petitioner out of 21 kanals 6 marlas as and when the petitioner or his authorized agent approaches him in this behalf. While handing over the possession of the land of the petitioner, Tehsildar, Patan shall ensure that land measuring 2 kanals 18 marlas which is in possession of Mohd Yousuf Khan, Mohd Rafiq Khan, Mohd Sultan Khan sons of Late Gulzar Ahmed Khan and Ab. Hamid Khan S/o Gh. Mohd Khan was not interfered with in any manner whatsoever.

(J. P. Singh)
Judge

Jammu
16.05.2008.
Tilak, PS