HIGH COURT OF JAMMU AND KASHMIR
AT JAMMU

LPAOW no. 4/2010 Date of order: 10.02.2011

Onkar Singh & ors. v. State of J&K & ors.

Coram:

Hon'ble Mr. Justice Dr. Aftab H. Saikia, Chief Justice

Hon'ble Mr. Justice Mansoor Ahmad Mir, Judge

Appearing counsel:

For appellant (s) : Mr. R. S. Pathania, Advocate.

For respondent(s) : Mr. A. G. Sheikh, Advocate for 3 & 4.
Mr. Amrish Kapoor, Advocate for 6.

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i) Whether approved for reporting in Law Journals? **Yes.**

(ii) Whether approved for reporting in Press? **yes.**

Dr. Saikia, CJ:

Heard Mr. R. S. Pathania, learned counsel for the appellants as well as Mr. A. G. Sheikh, learned counsel for respondent Nos. 3 and 4 and Mr. Amrish Kapoor, learned counsel for respondent No. 6.

2. This Letters Patent Appeal witnesses a challenge to the Judgment dated 1.1.2010 passed by the learned Writ Court in OWP No. 507/2007, whereby the learned Single Judge dismissed the writ proceedings initiated by the appellants questioning the legality and sustainability of the order dated 1.6.2007 rendered by the Jammu and Kashmir Special Tribunal, Jammu (for short, "the Tribunal"), claiming, *inter alia*, primarily that they were protected tenants of the land in dispute and respondent No. 6 had no legal rights whatsoever to claim the said land, holding that (a) there was no record/material to establish the status of the appellants as protected tenants; and (b) since the disputed land was deleted from the records of Evacuee Department in the year 1983, the contention of the appellants that land was allotted to them could not be accepted.

3. This case carries a chequered history. The facts of this case traced their roots way back to the time of partition in the year 1947.

4. The *lis* involved herein pertains to a land measuring 14 kanals falling in Survey Nos. 701, 720, 767 and 890 at village Kathil Dhangu Morha Punna Tehsil Ramnagar.

5. Respondent No. 6, Mst. Reshma Bibi D/o Late Shukurdin, is the sole surviving member of the family of late Shukurdin, who had died, along with all his other family members during the holocaust which followed partition of Indian Subcontinent in the year 1947.

6. Respondent No. 6, who was a minor and unmarried at that time, could not cultivate and manage the property left by her late father Shukurdin and the appellants, who were displaced persons from Tehsil Shakargarh, (West Pakistan) and Non State Subjects, took full advantage of the prevailing circumstances and occupied the land left behind by late Shukurdin and started cultivating the same without any valid allotment/contract/lease/engagement and continued to be in the physical possession of the disputed land till date without any legal authority.

7. In the meantime, respondent no. 6 got married to one Shri Kirpal Singh resident of Batala in the district of Gurdaspur and could not get back the possession of the land left by her father Late Shukurdin.

8. However, in the year 1978, inheritance mutation No. 368 of the disputed land was attested in favour of respondent No. 6 on 7.5.1978 and the same had also been

upheld by the learned Deputy Commissioner, Udhampur vide his order dated 12.1.1979 and by the learned Divisional Commissioner, Jammu vide his order dated 20.05.1980 and finally approved by the Division Bench of this High Court vide order dated 12.2.1981.

9. Despite all those legal orders, the respondent No.6 could not get back the possession of the land. On 13.08.1981, respondent No. 6 filed an application for restoration of 14 kanals of land, as described hereinabove, held by the appellants before the District Assistant Custodian, Udhampur, who vide his order dated 14.06.1983 restored the land in favour of respondent No. 6 deleting the same from Evacuee Property.

10. That order was set aside by the Custodian Evacuee Property, Jammu vide order dated 5.12.1983 and the case was remanded to the District Assistant Custodian for fresh enquiry. However, the District Assistant Custodian consigned the file to records in default by his order dated 18.01.1985.

11. On the application of the respondent No. 6, the Custodian called for the record of the case from the court of District Assistant Custodian and simultaneously the appellants filed transfer application before the Custodian

General. The Custodian General decided the application and sent the case back to the Custodian.

12. Thereafter, the Custodian vide his order dated 6.1.1990 upheld the order passed by the District Assistant Custodian on 14.06.1983 with further directions that possession of the property be delivered to respondent No. 6 under Rule 33 of the Jammu and Kashmir State Evacuee's (Administration of Property) Rules, Svt, 2008 framed under the Jammu and Kashmir State Evacuee's (Administration of Property) Act, Svt, 2006.

13. The appellants went on appeal before the Custodian General, who vide order dated 19.3.1991 upheld the order dated 6.1.1990 of the Custodian Evacuee Property, Jammu.

14. The appellants challenged order dated 19.03.1991 passed by the Custodian General before the Tribunal which, while setting aside the order of the Custodian General, remanded the case to the Custodian Evacuee Property vide order dated 26.12.1991 for passing fresh order in the light of the observations contained in the order.

15. The Custodian passed order dated 5.11.1992 in pursuance of order dated 26.12.1991 passed by the Custodian General. Custodian's order dated 5.11.1992 was

challenged by the appellants in the revision petition which was disposed of by the Tribunal vide order dated 17.10.1994, wherein it was specifically reflected that the issue of succession of the land in question in favour of respondent No. 6 was set at rest by upholding mutation No. 368 dated 7.5.1978 attested in favour of respondent No. 6.

16. For ready reference the order dated 17.10.1994 may be quoted as under:-

> "….*I have gone through the contents of the mutation No. 368 dated 7.5.1978 whereby inheritance of Mohd Mansa, Mohd, Hussain and Bashir have been devolved on Resham Bibi. This order was upheld by the Deputy Commissioner, Udhampur and Divisional Commissioner, Jammu in appeals before them. In its finality, the Division Bench of the Hon'ble High Court has by virtue of order dated 12.02.1981 observed as under:-*
>
> > *"…the authorities below have rightly held that the petitioners being merely protected tenants, they have no locus standi to challenge the mutation as regards the ownership of the land in dispute. Accordingly, we see no good ground for interference with their order refusing to interfere with the mutation No. 368 dated 7.5.1978 attested in favour of respondent no. 1 as an heir and successor to the last title holder. The petitioner has no merit in it. It is dismissed accordingly…"*
> >
> > *It becomes amply clear that the Hon'ble High Court has set at rest the issue of*

succession by upholding the mutation No. 368 dated 7.5.1978 attested in favour of Resham Bibi.

As far as the claim of the petitioners is concerned, they are non state subjects, who were allotted land in Punjab being DP's from West Pakistan. They could not produce any allotment order, even made in their favour in respect of land in dispute by any authority.

For the foregoing reasons, I do not find any force in the revision petition, which is accordingly, rejected ……"

17. The order dated 17.10.1994 of the Tribunal was challenged by the appellants before this High Court through the medium of the writ petition and the High Court by its order dated 09.11.2008 passed in OWP No. 779/94, having heard the parties, remanded the case to the Tribunal for disposal in accordance with law with an observation that the decision given in *Chuni Lal v. Custodian General* decided on 15th September 1998 in OWP no. 705/1985, wherein reliance was placed on the decision reported in *Ashwani Kumar v. J&K Special Tribunal* 1988 J&K 65, be also noticed. The relevant portion of the order made be quoted as under:

"*The above aspect of the matter appears us to have been taken note of by the J&K Special Tribunal. In view of this, the case is remanded back* to the Tribunal as it fits *(sick) deemed proper. The petitioner would be at*

> *liberty to raise any other arguments, which be deemed proper. Decision given in "Chuni Lal Vs. Custodian General's, decided on 15th Sept. 1998 i.e. O.W.P. 705/1985, wherein reliance was placed on the decision reported as 'Ashwani Kumar Vs. J&K Special Tribunal', disposed of accordingly. The parties through their counsel are directed to appear before the J&K Special Tribunal on 28th December, 1998. Till the matter is redecided parties to maintain status quo."*

18. The Tribunal, on such remand, by its judgment and order dated 1.6.2007, after hearing learned counsel for the parties and also taking note of the entire facts on record as well as having discussed the related law of Tenancy, explaining the term "Rent", "Landlord" and "Tenancy", came to the finding that the plea of the appellants that they acquired the status of protected tenants, was untenable and, accordingly, the same was rejected, recording further that there never existed any tenancy between the parties to the land in dispute and the appellants were and continue to remain as trespassers and deserved to be dispossessed from the land in dispute forthwith upholding the claim of respondent No. 6. Accordingly, the Tribunal passed the following direction:

> *"In view of the foregoing discussion, I have no alternative except to dismiss the petition, as there never existed any tenancy between the parties to the disputed land and the petitioners were*

> *continued to remain as trespassers and deserve to be disposed from the disputed land forthwith and uphold the claim of Mst. Reshma Bibi (Respondent) to get the possession of the disputed land without any further delay.*
>
> *I, therefore, accept the claim of the respondent (Mst. Reshma Bibi) and direct the Deputy Commissioner Udhampur to disposes the petitioners from the disputed land and put Mst. Reshma Bibi in physical possession under his personal supervision after the expiry of a period of three months from the date of issue of this order. A copy of this order should also be sent to the Deputy Commissioner Udhampur for his information and compliance. This being a classical case of miscarriage and denial of justice and long long harassment of the old, helpless, frail and poor lady who is already sitting in the departure lounge for life) for the last 30 years by the rich, influential and mighty petitioners, accordingly, I impose a cost of Rs. 10,000/- on the petitioners to be paid to Smt. Reshma Bibi. Stay order if any, issued by this Tribunal is also vacated. After due completion the file can be consigned to records."*

19. Being aggrieved by the findings recorded and views expressed by the learned Tribunal by its order dated 01.06.2007, the appellants moved the Writ Court in the instant Writ Petition, OWP No. 507/2007.

20. The Writ Court by its impugned judgment and order dated 1.1.2010, on consideration of extensive arguments of learned counsel for the parties and upon

close perusal of the Tribunal's judgment and order dated 01.06.2007 including the entire records so placed before it, arrived at the findings that the issues raised in the instant writ petition were purely factual in nature and the same were addressed properly and adequately by the authorities below including the Tribunal. The Writ Court observed that so far as the issue of 'protected tenancy' was concerned, the Tribunal discussed the matter in details and found that the appellants failed to produce any revenue entry or Girdawari or mutation under Section 4 of the Agrarian Reforms act, 1976 (for short "the Act"), which declared them as protected tenants/prospective owners and consequently hesitated to declare them as protected tenants.

21. It was further held by the learned Single Judge that the land in question could not be said to be allotted in favour of the appellants as in way back in 1983, the land in question was already deleted from the records of the Evacuee Department.

22. Legality and correctness of the judgment and order dated 1.1.2010 passed by the Writ Court has been questioned before this Writ Appellate Court.

23. Rejecting the findings and observations recorded by the Writ Court, Mr. Pathania, learned counsel, has vehemently contended that the Writ Court committed grave error in law as well as on facts in dismissing the writ petition wherein the appellant categorically agitated the illegality and irregularity committed by Tribunal in its judgment and order dated 01.06.2007 holding that appellants were trespassers and deserved to be dispossessed from the suit land and physical possession of the disputed land to be handed over to respondent No.6, because respondent no.6 had never acquired any right whatsoever over the land due to the fact that the same was in the continuous cultivation and occupation under them since 1948 by acquiring the status of 'protected tenant'. It is further stated that the learned Single Judge also failed to appreciate in its proper letter and spirit the mandate of Tenancy Act amended in 1965 more particularly the Writ Court did not consider the provision of Section 15-A of the Act pertaining to the provision of 'protected tenant' at all. It is also submitted that the Writ Court did not answer the question raised as to whether once a property was not notified as an Evacuees Property in terms of Section 6 of the Evacuees

Property Act, no application under Section 8 of the said Act could be entertained by the Evacuees Property Authority. It is also argued that where there is specific direction given by Division Bench of this Court by its order dated 12.02.1981 to the Tribunal to take note of the decision delivered by this Court in OWP No. 705/1985 titled C*huni Lal v. Custodian General* and *Ashwani kumar v. J&K Tribunal* reported in 1988 KLJ 65, the Tribunal preferred not to follow the said direction of the High Court rather the Tribunal went step ahead declaring that appellants were not protected tenant whereas the Division Bench of this Court clearly accepted the appellants as 'merely protected tenants'. In last leg of his submissions, Mr. Pathania, learned counsel for the appellants has submitted that once the Division Bench of this Court by its order dated 12.2.1981 affirmed that the appellants were "merely protected tenants", the authorities and the courts below are not permitted to consider the same issue, inasmuch as the status of the appellants, as "merely protected tenants", was finally decided by this Court in Division Bench.

24. In support of the impugned judgment and order, Mr. Kapoor, learned counsel for respondent No.6, has

straightway drawn our attention to the findings, observations and discussions recorded by the Tribunal while passing its order on 01.06.2007. According to him, the Tribunal passed a detailed judgment wherein every aspect of facts and law were vividly dealt with and having considered and on scrupulous scrutiny of the entire factual situation, rejected all the contentions and submissions canvassed on behalf of the appellants. The Tribunal in reaching at the conclusion, it is submitted, held that the respondent No.6 admittedly was the sole survivor of her father and was legitimately entitled to the property in question whereas the appellants were never tenants and continued to remain in land in question as trespassers and encroachers till date. The learned counsel has emphasized that the decision of the Tribunal was wholly based on the materials available on record. It is pointed out by the learned counsel for the respondent No. 6, that the entire issues raised before the Writ Court would clearly go to show that the appellants carried a bundle of disputed facts for adjudication before the Writ Court which did not come within the purview of the writ jurisdiction. According to him, the Writ Court by the impugned order rightly and

legitimately accepted the findings arrived at by the Tribunal in its order dated 01.06.2007 and taking similar view that of the Tribunal, dismissed the writ petition. The impugned judgment and order does not, therefore, warrant any interference by the Writ Appellate Court.

25. Due consideration has been given to the in-depth arguments and submissions placed before us by the learned counsel representing the parties. The entire records including various judgments and orders passed by all the authorities on different times pertaining to this issue have been meticulously scrutinized.

26. Having considered the facts and circumstances of the case in its totality, it appears that the basic issue that revolves around is the inheritance of the property in question.

27. It is concurrently held by the authorities and Courts below that the land in question was left by one Shukurdin, father of respondent No. 6, who along with other family members including her brothers were killed during the massacre at the time of partition in 1947 and, at the relevant time, she was minor and, later on, got married to one Kirpal

Singh. During the turmoil, the appellants, who were displaced persons, taking full advantage of the prevailing circumstances, occupied the land left by her father and started cultivating the same without any valid documents as regards allotment or lease whatsoever and continued to be in physical possession and cultivating without any legal authority.

28. Respondent No. 6, however, got inheritance mutation of the land in question being mutation no. 368 dated 7.5.1978 and this was finally upheld by the Division Bench of the High Court by order dated 12.02.1981, which attained finality. Order dated 12.2.1981 would be necessary to read and the same is quoted as under:-

> "*The authorities below have rightly held that the petitioners being merely protected tenants they have no locus standi to challenge the mutation as regards the ownership of the land in dispute accordingly we see no good ground for interfering with their order refusing to interfere with the mutation No. 368 dated 07.05.1978 attested in favour of respondent no. 1 as heir and successor to the last title holder. The petition has no merit in it. It is dismissed accordingly.*"

29. The above order clearly reflects that the ownership to the land in dispute has been vested upon respondent No. 6

being heir/successor of the last title holder and the appellants are being 'merely protected tenants'.

30. In view of the above position, the primary questions to be answered herein is that (i) as to whether the appellants are the protected tenants and (ii) what is the effect of expression "merely protected tenants" and the answer to this question would clinch the whole issue.

31. To become a protected tenant, the person must be a tenant first. The word "tenant" has been defined in the *Jammu and Kashmir Tenancy Act, 1980* (1923 A.D.)(for short "the Tenancy Act"), which reads as under:-

> *"2(5) "tenant" means a person who holds land, under the State, or under another person, and is, or but for a special contract in that behalf would be, liable to pay rent for that land, to the State or to that person; but it does not include –*
>
> *i. an inferior landholder, or*
> *ii. a person to whom a holding has been transferred, or an estate or holding has been let on farm, for the recovery of an arrear of land revenue, or of a sum recoverable as such, or*
> *iii. a mortgagee of the rights of a landholder."*

32. The above definition would go to show that to become a tenant, a person must hold land under an individual or

State with a fixed liability to pay rent for that land under an agreement. At the same time, both 'Rent' and 'Landlord' are also defined in Section 2(2) and Section 2(6) of the Tenancy Act respectively. Sections 2(2)and 2(6) of the Tenancy Act read as under:

> *"2(2) "rent" means what ever is payable to a landlord in money, kind or service by a tenant, on account of the use or occupation of land held by him or on account of the use of water for irrigation.*
>
> *2(6) "Landlord" means a person under whom a tenant holds land, and to whom the tenant is, or but for a special contract would be, liable to pay rent for that land."*

33. The definitions reproduced above would explicitly indicate that there must be tenancy created and existed between the parties so as to become a tenant and landlord and that too, obviously, by paying the rent.

34. Chapter 2-A of the Tenancy Act has exclusively dealt with the 'Protected Tenants' and the same contains in as many as three Sections namely, 15-A, substituted by act XII of 1955, Section 15-B substituted by Act XVI of 1965 and Section 15-C inserted by Act VII of 2005.

35. For determination of the issue in hand, it would be relevant and necessary to read Section 15-A, which provides for 'Protected Tenants" and 15-B which lays down the 'Procedure for declaration of Protected Tenants'. These Sections may be quoted as under:

> "15-A **Protected Tenants**
>
> *(1) All tenants other than occupancy tenants and such fixed terms tenants as hold malairi or vegetable growing land shall be deemed to be protected tenants and recorded as such in respect of such land as is held by them in their cultivating occupation at the time of the commencement of the Jammu and Kashmir Tenancy (Amendment) Act (1965).*
>
> *Provided that the right of protected tenancy of a tenant shall cease when a landlord resumes land for personal cultivation under Section 49 of the Act:*
>
> *Provided further that the right of the protected tenancy of a tenant holding under a lessee or a mortgagee shall also cease on the expiry of the lease or mortgage, as the case may be, if the lesser or the mortgager was in self cultivating occupation of such land immediately before such land was leased or mortgaged and such land including the other land in his personal cultivation does not exceed the size of the holding specified for a landlord in clause (a) of Section 45 of the Act;*
>
> *Provided also that the right of protected tenancy shall not accrue to a tenant admitted by a protected tenant;*

Provided further that a tenant admitted after the coming into force of Act XII of 1955 shall not be entitled to such right in respect of such portion of land as together with what he holds in ownership right or in tenancy right as an occupancy or protected tenant or both does not exceed 2 acres of Abi or 4 acres of Khushki land in Kashmir province including the Districts of Ladakh and Gilgit and 4 acres of Abi or 6 acres of Khushki in Jammu province.

15-B ***Procedure for declaration as Protected Tenant***

(i) Any tenant who is entitled to a right of protected tenancy but is not entered as such may make an application for being declared and entered as a protected tenant within one year of the attestation of the quadrennial Jamabandi of the village in which such land is situate prepared immediately after coming into force of Jammu and Kashmir Tenancy (Amendment) Act 1965.

Provided that where the quadrennial Jamabandi is attested without the note being recorded, or without the entries being read out to the tenants and landlord in the manner prescribed under Section 15-A, the period of one year shall be reckoned form the date the Jamabandi is attested in such manner.

(ii)Notice of every application presented by the tenant under Sub Section (i) shall be given to the landlord and no order shall be made on such application unless the land lord has been given an opportunity to be heard.

(iii) On an application by the landlord or a tenant, a tenant may be declared a protected tenant and recorded as such, if

the land lord has agreed to confer on him the right of protected tenancy."

36. An ordinary reading of the above provisions of law pertaining to 'protected tenants' would amply go to show that the protected tenants are those who are tenants other than occupancy tenants and such fixed term tenants as hold maliari or vegetable growing land shall be deemed to be protected tenants and recorded as such in respect of such land as is held by them in their cultivating occupation at the time of the commencement of the Act since its amendment in 1965.

37. At the same time, Section 15-B provides for 'Procedure for declaration of Protected Tenant' which stipulates that a tenant, who is entitled to a right of protected tenancy but is not entered as such, may make an application for being declared and entered as 'a protected tenant' within one year of the attestation of the quadrennial Jamabandi of the village in which such land is situated prepared immediately after coming into force of the Act as amended in 1965.

38. In the instant case, as has been revealed from careful scrutiny of the records, the appellants at no point of time were protected tenants or got any such declaration as provided under Section 15-A and 15-B respectively. The

record made available does not even make any whisper that there was any entry declaring the appellants as protected tenants in their respective Jamabandi as required under Section 15-B of the Tenancy Act.

39. Only plea which has been continuously and consistently pressed upon in the contentions and submissions canvassed on behalf of the appellants that they are in continuous possession of the disputed land and have been cultivating the same right since 1948 and hence they cannot be dispossessed save and except following the procedure for ejectment provided under the Statute especially when respondent No.6 never proceeded for the resumption of the disputed land under Section 49 of the Tenancy Act, which prescribes for ejectment in case of resumption for personal cultivation, by landlord, does not hold water in the given fact situation.

40. It is surprising that how the question of eviction of the appellants from the land in question by respondent No.6 accepting her to be the landlord, would, in the backdrop of factual premises as narrated above, arise. In the humble opinion of the Court, supported by the concurrent findings of all the competent authorities below including the Division

Bench of this Court, it is pure and simply case of ownership which has been vested upon respondent No.6 by virtue of Mutation 368 dated 7.5.1978 and also land on being deleted as Evacuee Property vide order dated 14.6.1983 by the Assistant Custodian, Udhampur.

41. Having gone through the definition of *tenant, rent, landlord* and *protected tenant*, as quoted above, there is nothing on record to authenticate that the appellants have ever got the status of mere protected tenants.

42. In the case in hand, on consideration of the judgments and orders passed by various authorities, it is seen that the appellants except claiming that they have been cultivating the land in question since 1948, they failed to produce any such document/documents to impress this Court with regard to creation of any tenancy or allotment or revenue entry so as to make them protected tenants. Even in the order dated 12.2.1981 passed by the Division Bench of this Court in Writ Petition No. 629/1981, as quoted above, which has been strongly relied upon by the appellants as to be the final order of declaring them to be protected tenants, *ex-facie*, it is abundantly clear, that High Court only observed to the effect that authorities below had rightly held the appellants being

merely protected tenants had not locus standi to challenge the mutation as regards ownership of the land in dispute. The appellants were simply termed as "merely protected tenants" and not beyond that.

43. Now, the question is what is the scope of word "merely" qualifying the expression "protected tenants". The Dictionary meaning of the word "merely" being 'adverb' is derived from the word "mere", being 'Noun'. The word "mere" when is used as an 'adjective', means that it is used when one wants to emphasise how small or unimportant etc. the matter is. (*Oxford Advanced Learner's Dictionary by A. S. Horn by 6th Edition (2000*).

44. Although the word "mere" is defined in Black's Law Dictionary 7th Edition (1999) (for short "Black's") as "(Law of French) Mother, as in the phrase *en ventre sa mere* ("in its mother's womb")", the same can be well understood and construed by another definition of the phrase "mere right" which means an abstract right in property without possession or even the right of possession (Black's). It is also quoted in Black's that referring to Commentaries on the *Laws of England 197-98 (1766) William Blackstone,* as under:

> *"The mere right of property, the jus propprietatis, without either possession or*

> *even the right of possession. This is frequently spoken of in our books under the name of the mere right, jus merum; and the estate of the owner is in such cases said to be totally devested, and put to a right. A person in this situation may have the true ultimate property of the lands in himself: but by the intervention of certain circum-stances, either by his own negligence, the solemn act of his ancestor, or the determination of a court of justice, the presumptive evidence of that right is strongly in favour of his antagonist; who has thereby obtained the absolute right of possession…..The heir therefore in this case has only a mere right, and must be strictly held to the proof of it, in order to recover the lands." 2 William Blackstone, Commentaries on the Laws of England 197-98 (1766)".*

45. Having regard to the above definitions and also taking into account the use of word "merely" as a prefix in protected tenants, it can be said that in a case of 'merely protected tenants', one must be put to strict proof to claim such right. In other words, "merely" word is used as unimportant and simple. As such, in case of 'mere right', the presumptive evidence of that right is always strongly in favour of his opponent who has thereby obtained the absolute right of possession.

46. Bearing in mind the definition and explanation of the expression 'mere right' and applying the same in the case in hand, it can be safely said that the appellants must be put to strict proof that they can be deemed to be protected tenants.

47. From the perusal of the records , it is seen that the appellants even cannot satisfy any of the conditions so as to bring them within the purview of expression 'merely protected tenants' and not to speak of 'tenants' or 'protected tenants', definitions of which have already been discussed herein above. The expression "merely protected tenants" does not vest any right of tenancy whatsoever within the ambit of Tenancy Act upon the appellants.

48. Be it noted herein that at one stage, during the course of hearing, learned counsel for the appellants has tried to impress upon this Court by submitting that since Division Bench of this Court had already declared the appellants to be "merely protected tenants", any authorities and the Courts below including this Court are not permitted again to sit upon the question of "merely protected tenants", as it is barred by *res judicata*. We do not find any sufficient force in such submissions in view of the judicial authority laid down in this regard. The Supreme Court in a case *Madhvi Amma Bhawani Amma and others v. Kunjikutty Pillai Meenakshi Pillai and others* reported in *AIR 2000 SC 2301*, discussed such issue in paragraph 7, the relevant portion of which is quoted hereunder:

> *".....Thus there should be an issue raised and decided, not merely any finding on any incidental question for reaching such a decision. So if no such issue is raised and if on any other issue, if incidentally any finding is recorded it would not come within the periphery of the principal of res judicata*."

49. The issue of "merely protected tenants", in the case in hand, was never raised directly and decided by the Division Bench of this Court, as claimed, when the Division Bench only made the observation incidentally while affirming the status of respondent No. 6 as heir and successor to the last title holder, which is manifestly evident from the order dated 12.2.1981.

50. In the premises above, it is held that the findings recorded and the views expressed by the learned Single Judge as well as by the Tribunal, cannot be said to be faulty and this Court is in full agreement with the same which stands approved.

51. In the result, this Court holds that this appeal is bereft of merit and the same stands, accordingly, dismissed.

52. However, having considered the facts and circumstances of the case in its entirety and keeping in view the continuing litigations, mostly initiated by the appellants,

dragging the respondent No. 6 all the time, before judicial and quasi-judicial forum, we affirm and endorse the directions given by the Tribunal in its last two paragraphs of the judgment and order dated 1.6.2007, as quoted in paragraph no. 18 of this judgment and the competent authority/authorities is/are directed to cause proper and effective implementation of the same at the earliest possible, in any case, within a period of 90 days from today.

(Mansoor Ahmad Mir)
Judge

(Dr. Aftab H. Saikia)
Chief Justice

Jammu:
February 10, 2011
Tilak, Secy.