

HIGH COURT OF JAMMU AND KASHMIR
AT JAMMU

OWP No.1027/1988

Date of Decision: 15.03.2012

Karnail Singh Vs J&K Special Tribunal and ors.

Coram:

Mr. Justice J.P.Singh.

Appearing Counsel:

For the Petitioner(s) : Mr. S.A.Salaria, Sr. Advocate with
Mr. Tahir Umar Salaria, Advocate.

For the Respondent(s) : Mr. D.R.Khajuria, Advocate for R-4.

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| i) | Whether approved for reporting
in Press/Media | : | Optional |
| ii) | Whether to be reported
in Digest | : | Yes |
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The petitioner-Karnail Singh and respondent No.4-Mst. Savitri are in litigation for the last more than 35 years over land measuring 8 kanals comprised in Khasra No. 331 min situated in Village Panjore of Tehsil, Jammu. The facts leading to the litigation may be stated thus:-

One Jagan Nath son of Pt. Phangi Ram of village Panjore needed Rs.1000/- (Rupees One thousand) to pay the Arrears of Land Revenue of his land. Therefore receiving Rs.1000/- as advance from Inder Singh son of Kirpa Ram and Karnail Singh son of Budhi Singh, he delivered the possession of his land measuring 40 kanals and 8 marlas comprised in Khewat No.1 Khata No.75 Khasra No.331, Khewat No.3 khata No.55 khasra No.341, and Khewat No.10 khata No.86 khasra No.343 min situated at village Panjore, to them on “*Mustajri*” for a period of 20 years executing an Agreement titled “*Mustajri-Nama*” on 9 Sawan, 2010 which was registered with Sub-Registrar, Jammu on 12th of Sawan, 2010. The Endorsement of registration on the Agreement

records Jagan Nath to have admitted receipt of Rs.500/- before the execution of the Agreement whereas Rs.500/- is stated paid to him in presence of the Sub-Registrar. The terms and conditions as recorded in “*Mustajri-Nama*” are as follows:

- (i) 20 years’ period of ‘*Mustajri*’ would commence from the beginning of Kharif Crop 2010.
- (ii) During the period of ‘*Mustajri*’, the beneficiaries in possession of the land would pay Land Revenue and water tax to the Government and deliver Receipts obtained thereof to the owner.
- (iii) The beneficiaries would be entitled to appropriate entire income of the land during the currency of ‘*Mustajri*’.
- (iv) The owner shall alone be responsible in case he loses his right to possess the land.
- (v) The owner shall not be entitled to dispossess the beneficiaries from the land during the period of ‘*Mustajri*’.
- (vi) After the period of ‘*Mustajri*’, the entire ‘*Mustajri*’ amount of Rs.1000/- shall be deemed to have extinguished entitling the owner to the possession of land without payment of any amount.
- (vii) After the ‘*Mustajri*’ period, the beneficiaries would not be entitled to claim any sort of compensation from the owner.
- (viii) The beneficiaries shall not be entitled to give the land on Contract or give possession thereof to any stranger.
- (ix) The beneficiaries shall not be entitled to use the land for any other purpose except cultivation.
- (x) The trees existing at present and grown in future on the land shall be the property of the owner but the beneficiaries may prune the trees and enjoy their usufruct.
- (xi) If the beneficiaries had built any house in the land for their residence they shall have the right to lift the material after the expiry of the ‘*Mustajri*’ period. In case the material was not so lifted within three months, the material would stand forfeited in favour of the owner.

The owner of the land appears to have sold part of the land to respondent No.4 vide Sale Deed dated 12.10.1964 registered on 12.10.1964. She, therefore, acquired all those rights in the land purchased by her that Jagan Nath possessed therein.

The period indicated in “*Mustajri-Nama*” for the

beneficiaries to retain possession of the land expired in the year 1973. The petitioner and the legal representatives of Inder Singh, who died meanwhile, did not, however, hand over the possession of the land to the owners.

The dispute between the petitioner and respondent No.4 pertains only to 8 kanals of land because there appears to have been some compromise between the owners and those in possession of rest of the land.

Respondent No.4 filed a Suit in the Court of City Judge, Jammu seeking possession of 8 kanals of land which was in possession of the petitioner. The petitioner contested her Suit questioning the jurisdiction of the Civil Courts to entertain it which was stated hit by the provisions of the Jammu and Kashmir Agrarian Reforms Act.

Taking the view that the relationship between the parties was that of a landlord and tenant and the Agreement between them evidenced a Fixed Term Tenancy, the trial Court of learned City Judge, Jammu returned the respondent's Plaintiff for its presentation to proper Forum holding that the Civil Courts had no jurisdiction to entertain and determine the Suit.

The findings of the Civil Court were questioned by the respondent before the appellate Court of learned District Judge, Jammu, who appears to have modified the trial Court's order, in that, rather than directing return of Plaintiff, the Suit as such was referred to the Collector Agrarian Reforms, Jammu to determine the dispute between the parties.

Examining the terms and conditions of the document in terms whereof the possession of the land was delivered to the petitioner, the learned Collector came to the conclusion that there was no relationship of landlord and tenant between the parties and the Agreement between them was a Mortgage

that needed redemption in terms of the provisions of Section 10 of the Agrarian Reforms Act. It was observed that in case the respondent had not to be treated as mortgagee he could only be treated as a trespasser after Kharif 1973. He accordingly ordered restoration of 8 kanals of land to the respondent directing the petitioner to pay her Rs.500/- as cost of the benefits derived from the land during litigation.

The Collector's order was appealed against by the petitioner before the Commissioner under the Agrarian Reforms Act, 1976. The learned Joint Financial Commissioner too negatived the petitioner's plea dismissing his Appeal against the Collector's Order. The petitioner remained unsuccessful before the Jammu and Kashmir Special Tribunal too where his Revision against the Commissioner's order failed. The Tribunal, however, modified the Collector's order and raised the amount of money payable by the petitioner to the respondent from Rs.500/- to Rs.800/-.

The orders passed by the Authorities under the Jammu and Kashmir Agrarian Reforms Act were questioned by the petitioner by his Writ Petition OWP No. 1027/88. A learned Single Judge of this Court upheld the petitioner's plea holding the transaction between the parties a Lease and not Mortgage as held by the Authorities under the Agrarian Reforms Act. The view taken by the learned Single Judge was upset by a Division Bench of the Court remanding the matter to the Writ Court for consideration afresh.

While remanding the Writ Petition, it was observed by the Division Bench that the Writ Court had neither discussed nor returned findings on issues, which for facility of reference, are reproduced hereunder:

- “i) Whether concurrent finding(s) recorded by all the three Courts can be disturbed by Writ Court?
- ii) Whether writ court or civil court is within its jurisdiction

and competence to decide the issue relating to landlord and tenant while keeping in view the provisions of Act and The Jammu and Kashmir Tenancy Act, 1980(1923 A.D.)?

- iii) What was the intention and in what background the document was executed by the executant-Jagan Nath?
- iv) Whether the amount which was already received by Jagan Nath-executant from respondent was a debt?
- v) Whether dictionary meaning of the word '*Mustajri*' can turn the whole deed into a lease deed without having regard to the intention of the parties as well as to the concurrent findings recorded by the trial court, appellate court and Revisional court?"

This is how the matter is now before the Court for its determination afresh.

With the above prelude on facts, I proceed to determine the issues demonstrated at the Bar by the learned counsel for the parties.

Although the name by which a document may be called, may not, of itself, be determinative of the relationship that the parties intended to create with execution thereof and the terms and conditions of the document, coupled with attending circumstances, may be germane to determine their *inter se* relationship, yet, before dwelling on the subject, it is considered appropriate to understand the meaning of word "*Mustajri*" which the document in question is described as, in view of the submissions made by the petitioner's learned counsel who would term the Agreement between the parties as '*Lease*' and those of the respondents' learned counsel, who would call it a '*Mortgage*'.

In Jamia Feroz-Ul-Lagaat Urdu (new edition) published by Asif Book Depot, 422 Matia Mahal Jamia Masjid, Delhi-6, the word '*Mustajri*' is defined as Thekedaari-Jaradaari, meaning thereby a Contract/License.

In some texts, '*Mustajri*' is explained by authors as Hypothecation of land with possession, say, for a long period of twenty years or so.

The Punjab Government too appears to have recognized ‘*Mustajri*’ as Mortgage as it so appears from Punjab Government’s Letter No.29-Rev dated March 08, 1915 whereby its Revenue Department issued instructions to the concerned revenue officers to affect Mutations of lands covered by *Mustajri*-Mortgages.

The meaning of the word ‘*Mustajri*’ does not, however, appear to be any longer *res integra*, in that, even the Hon’ble Supreme Court of India has in some cases treated ‘*Mustajri*’ as Mortgage. It would be advantageous to refer to *Thakur Singh versus Ram Baran Singh and others*, reported as 1972 SCC (2) 740, where referring to Ijara Bonds and Mustajir, it was indicated as follows:-

“The relevant terms of the Ijara Bond (Mortgage Board) in favour of Ram Baran Singh were these: “It is desired that the said Mustajir should enter into possession and occupation of the Ijara Property, himself cultivate the land, appropriate the produce thereof in lieu of interest on peshgi money, I the executant or my heirs and representatives neither have nor shall have any claim for excess produce and mesne profits etc. against the said Mustajir or to his heirs and representatives.....”

Broadly stated these terms indicate three features. First, the mortgagee shall have possession and occupation of the mortgaged property and appropriate the produce thereof in lieu of interest on the mortgage money and the mortgagor had no claim to any excess produce or mesne profits against the mortgage. Secondly, the mortgagee was to pay to the mortgagor the amounts mentioned in each ijara bond the annual reserve rent or haq-ajri. Thirdly, the mortgagor was liable for payment of the Government revenue or cess.”

Be that as it may, the nomenclature of a document, being not determinative of the intention of the parties in understanding their relationship, the relationship of the parties sought to be created by ‘*Mustajri-Nama*’ in question needs to be determined with reference to the terms and conditions of the document and the circumstances attending thereto.

In construing whether a document creates a Mortgage

or not, the test is to ascertain the jural relationship created by it and the intention of the parties, and not merely the name by which the document is called. The document may be described as a Mortgage but may not be actually so, if its effects were otherwise, And the document may be called by a different name yet will be a mortgage, if the essentials of mortgage are satisfied. If the words of the documents are clear, effect is to be given to them and any extraneous inquiry into what the parties intended, may not be warranted. The title of the document may be relevant only, if the document was otherwise ambiguous.

In the background of the above settled legal position, the terms and conditions of the document in question need to be examined.

From the terms and conditions of the document, it appears that Jagan Nath was in arrears of Land Revenue payable for his land and he wanted to discharge this liability to save his landed property. He, therefore, received Rs.1000/- from Inder Singh and Karnail Singh to clear his existing liability to the Government. He accordingly agreed to permit Inder Singh and Karnail Singh to use his land and enjoy its usufruct but only for a period of 20 years whereafter the advance of Rs.1000/-, i.e., the Ijara money, received by him in the shape of a debt, would stand extinguished.

There being no ambiguity in the terms and conditions of the document, the intention of the parties can well be found on appreciation thereof.

To consider as to whether the transaction between the parties was that of a Lease, as submitted by the petitioner's learned counsel or a mortgage as contended by the learned counsel appearing for the respondent, regard needs to be had to the provisions of Sections 58 and 105 of the Transfer of Property Act, 1977 (1920 A.D).

In terms of the provisions of Section 58 of the Act, a mortgage is the **transfer of an interest** in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan and existing or future debt or the performance of an engagement which may give rise to a pecuniary liability. Section 58 (d) defines Usufructuary mortgage as mortgage where the mortgagor delivers possession of the mortgaged property to the mortgagee and authorizes him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property or in part of such rents and profits and to appropriate the same in lieu of interest **or any payment of the mortgage-money** or partly in lieu of interest or partly any payment of the mortgage-money.

In terms of the provisions of Section 105 of the Act, a lease of immovable property **is a transfer of a right** to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of the price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.

Analysis of the two Sections, one defining the **Mortgage** and the other **Lease** reveals that in case of Mortgage there is the **transfer of an interest** in specific immovable property *inter alia* for the purpose of securing the payment of money advanced or to be advanced by way of loan, whereas in case of lease, *as against transfer of interest, it is the transfer of a right to enjoy* such property which the lessor transfers on to the lessee for its enjoyment in consideration of a price paid or promised or of money, a share of crops, service or any other thing of value.

To fall within the definition of a lease, intention of the parties creating it, must therefore, be to **transfer right** in the property for its enjoyment to the lessee for a consideration to be paid by the lessee to the lessor to enjoy the leased property. However, if the intention of the parties is to secure the money advanced or to be advanced by way of loan then it is the **Interest** in land that is transferred and **not the Right** as such to enjoy the property. It needs to be understood that in case of a Usufructuary mortgage, the debt sought to be secured may stand extinguished after the time fixed by the parties for the mortgagor to enjoy the property, expires.

The terms and conditions of the document in question do not demonstrate, in any manner whatsoever, respondent's predecessor's intention to transfer any right in the land to the petitioner to use the land as such in exercise of **such right**. What appears to have been intended by the terms and conditions of the document is the transfer of an interest in the land for a period of twenty years, by which time, the amount advanced, i.e., 'Peshgi', by the petitioner and his partner to the predecessor-in-interest of the respondent to facilitate the respondent's predecessor to clear his existing liability of paying land revenue to the Government, would stand extinguished. The '*Mustajri*' amount advanced by the petitioner to the respondent's predecessor-in-interest is intended by the parties to be deemed to have been received back after the petitioner had enjoyed the land in question and its usufruct for a period of twenty years and no more.

The view taken by the Authorities under the Jammu and Kashmir Agrarian Reforms, Act that the relationship between the parties was not that of a landlord and tenant, therefore, sounds well merited.

Petitioner's learned counsel's plea that the learned District Judge had upheld the City Judge's order dismissing

the respondent's Suit, and in this view of the matter, the findings of the Civil Court that the relationship between the parties was that of a landlord and tenant, having attained finality, the Authorities under the Jammu and Kashmir Agrarian Reforms Act would have no jurisdiction to upset the findings of the Civil Court, is found without merit, in that the finding recorded by the trial Court is not found to have been affirmed by the Appellate Court because in the absence of the original records of the learned District Judge, which despite search conducted by the Registry, could not be retrieved from the records and there being no certified copy thereof with any of the parties or on records, one has to get cue from the orders of the authorities under the Jammu and Kashmir Agrarian Reforms Act as to the nature of the order passed by learned District Judge, who pursuant to the judgment of the Appellate Court had proceeded to determine the case afresh because the dispute between the parties regarding their relationship pertained to agricultural land. This apart, the petitioner having not questioned the jurisdiction of the Authorities under the Agrarian Reforms Act to deal with the dispute is even otherwise estopped to question the jurisdiction of the Authorities under the Agrarian Reforms Act to determine the dispute between the parties, at this belated stage.

Even otherwise, in view of the provisions of Section 19(4) of the Jammu and Kashmir Agrarian Reforms Act, any application, suit or proceeding of the kind mentioned in Sub-section (3) of Section 19, pending at the commencement of the Act, before a Revenue Officer or any Civil Court had to be transferred to the Collector having jurisdiction in the place in which the land was situated. The dispute between the parties as to whether or not the transaction between them was that of a lease or mortgage and whether petitioner was liable

to be evicted therefrom, therefore, needed its adjudication by the Collector in terms of the provisions of Section 19 (3) (e) of the Agrarian Reforms Act and it was for this reason that the learned District Judge had transferred the whole case to the Collector in terms of Section 19(4) of the Act to which the parties appear to have acquiesced.

The findings recorded by the three Forums under the Jammu and Kashmir Agrarian Reforms Act that the relationship between the parties was that of a mortgagor and mortgagee and the Deed of '*Mustajri*' was usufructuary mortgage, does not suffer from any error of law. The Authorities under the Agrarian Reforms Act have adjudicated the dispute between the parties pertaining to the Agricultural land exercising jurisdiction vested in them so to do under Section 19 of the Agrarian Reforms Act and the finding of the learned City Judge, which even otherwise had not been affirmed by the learned District Judge, was, therefore, no bar for the Authorities under the Act to determine the dispute because the jurisdiction of the Civil Courts to deal with the matter stood specifically ousted. The Authorities under the Jammu and Kashmir Agrarian Reforms Act which alone were competent to determine the dispute between the parties rather than the Civil Court have properly appreciated the terms of the '*Mustajri-Nama*' and their unanimous finding that '*Mustajri Nama*' did not create any tenancy and it was a usufructuary mortgage because the amount of Rs.1,000/- advanced by the petitioner and his partner, was a debt which had to extinguish after a period of twenty years in lieu of the benefits derived by the petitioner and his partner from the user of the land in the way it had been suggested to be so used by the owner of the land, calls for no interference under Extra Ordinary Writ Jurisdiction of the Court additionally because no miscarriage of justice is

found to have been caused to the petitioner.

For all what has been said above, the petitioner's Writ Petition is found without merit, hence dismissed.

(J.P. SINGH)
JUDGE

JAMMU
15.03.2012.
Tilak, Secy