

HIGH COURT OF JAMMU AND KASHMIR
AT SRINAGAR

C. Rev. No.02/2018
MP No.01/2018

Date of order:31.03.2018

Mst Fazi

Vs.

Ghulam Mohammad Kumar

Coram:

Hon'ble Mr. Justice Mohammad Yaqoob Mir, Judge

Appearance:

For the Petitioner (s) : Mr. Sheikh Hilal, Adv.
For the Respondent(s) : Mr. Mohammad Sultan, Adv.

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| i) | Whether approved for reporting in Law journals etc.: | Yes |
| ii) | Whether approved for publication in press: | No |

1. Vide order impugned dated 23.12.2017, learned trial court (Munsiff, Chadoora) has dismissed the application filed by the petitioner (defendant No 06) under Order VII Rule 11 CPC for rejection of the plaint.

2. This case has a chequered history both on fact and law, followed by a series of petitions/suits/appeals. The matter has been complicated beyond proportions giving rise to endless litigative process, in the process cause of justice has suffered. In the same background revisional powers of this Court under Section 115 of the Code of Civil Procedure have been invoked.

3. Revisional powers for avoiding protraction in the trial of the suit and other proceeding have been curtailed in view of the proviso to Section 115

CPC. In the same background, learned counsel for the respondent (plaintiff) questioned the maintainability of the revision petition by stating that by the order impugned the suit proceedings have not been terminated.

4. The objection raised is misplaced because Proviso to sub-section (1) of Section 115 CPC envisages that the High Court shall not, under Section 115 CPC, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision would have finally disposed of the suit or other proceedings.

5. The application as was filed by the petitioner (defendant No.6) before the trial court for rejection of the plaint, if would have been allowed, suit proceedings would have terminated, therefore, revision is maintainable.

6. For appreciating the whole controversy in its right perspective so as to avoid failure of justice, it shall be quite advantageous, briefly, to notice the entire background of the litigative process to which parties have resorted to:-

- (I) Noor Kumar, father of the petitioner, was the owner of land measuring 6 kanals 15 marlas covered by survey No.2469/2246/327 and 8 kanals 12 marlas covered by survey No.250 (total 15 kanals 7 marlas) situated at village Wathoora Chadoora.
- (II) 2 kanals of land out of the total land covered by survey No.250 were in possession of respondent Ghulam Mohammad Kumar (Gulla Kumar) as tiller. Regarding these 2 kanals of land, mutation bearing No.1428 under Section 4 of the Agrarian Reforms Act (hereinafter

referred to as the Act) has been attested in favour of Gulla Kumar, in terms whereof, ownership rights of the landlord, Noor Kumar, have been extinguished. Thereafter said Noor Kumar, ex-landlord, and Gulla Kumar, by an agreement in writing executed on 23rd April, 1985 authenticated by the revenue officer (Tehsildar) on 24.06.1985, as permissible under Section 12 of the Act, have settled the matter. Based on said private agreement, mutation under Section 12 of the Act has been attested in the year 1985 declaring Gulla Kumar as owner of said 2 kanals of land.

- (III) After the death of Noora Kumar, mutation of succession bearing No.2018 has been attested on 23.04.1993. While attesting mutation of succession, 2 kanals of land covered by survey No.250 have also been included in the estate of the deceased.
- (IV) Noor Kumar was survived by widow Mst. Azizi, son Mohammad Yousuf Kumar and daughter Mst. Fazi. Estate of the deceased was mutated in favour of son Mohammad Yousuf Kumar and Mst. Azizi (till remarriage or till death) in equal shares except for 5 marlas of land under survey No.250 which have been attested in favour of daughter Mst. Fazi, petitioner herein.
- (V) Mst. Fazi challenged mutation No.2018 dated 23.04.1993 by medium of a revision petition before Divisional Commissioner, Kashmir, in the year 2015, means after a gap of 22 years, wherein both Mohammad Yousuf Kumar (brother of the petitioner) and Ghulam Mohammad Kumar (respondent herein) were arrayed as parties. The Divisional Commissioner, vide his order dated 21.10.2015, accepted the revision

petition and in terms of Section 15 of the Land Revenue Act submitted the case to the Financial Commissioner Revenue with the recommendation for setting aside the mutation No.2018 and to direct the Tehsildar, Chadoora, to attest the mutation afresh after *de novo* enquiry in favour of legal heirs of Noor Kumar in accordance with Muslim Personal Law.

- (VI) Against the order dated 21.10.2015 Mohammad Yousuf Kumar filed writ petition (OWP) No.2235/2015, which is stated to be pending.
- (VII) Financial Commissioner Revenue, in the meanwhile, accepted the recommendation of the Divisional Commissioner vide his order dated 24.05.2017 which has been challenged by Ghulam Mohammad Kumar by medium of OWP No.1052/2017 which is also stated to be pending.
- (VIII) Ghulam Mohammad Kumar apprehending interference with his possession has filed a suit for permanent injunction before the Court of Munsiff, Chadoora, alleging therein that he is the lawful owner in possession of land measuring 2 kanals covered by survey No.250 over which his double storeyed residential house and a cow shed exists. On appearance of the defendants including petitioner herein (defendant No.6 therein), an application under Order VII Rule 11 CPC had been filed which has been rejected.
- (IX) There is another development i.e. Mst. Fazi (petitioner herein) also filed a separate suit titled “Mst. Fazi Vs. Mohammad Yousuf Kumar and another” for declaration, partition and possession, which suit is pending before the Court of Munsiff, Chadoora.

7. The crux of the controversy is twofold_

- (1) issue of inheritance vis-à-vis estate of deceased Noor Kumar which essentially is amongst his legal heirs, in particular Mst. Fazi (daughter), Mohammad Yousuf Kumar (son) and Mst. Azizi (widow);
- (2) issue vis-à-vis 2 kanals of land covered by survey No.250-min situated at village Wathoor;

8. So far as issue No.1 is concerned, mutation of succession bearing No.2018 has been set aside, now Tehsildar after holding enquiry has to attest mutation of succession afresh in favour of legal heirs of deceased in accordance with applicable Muslim Personal Law governing the parties subject to outcome of the two writ petitions (OWP No.2235/2015 and OWP No.1052/2017) as are stated to be pending. It is to be made clear that in respect of land measuring 2 kanals out of total 8 kanals 12 marlas covered by survey No.250, Gulla Kumar has been declared as owner, as referred to hereinabove, under the provisions of the Agrarian Reforms Act, therefore, mutation of succession has to be confined vis-à-vis survey No.250 to the land measuring 6 kanals 12 marlas and the land measuring 6 kanals 15 marlas covered by survey No.2469/2246/327. In short, said 2 kanals of land are not to be included in the estate of the deceased.

9. So far as issue No.2 is concerned, vis-à-vis 2 kanals of land covered by survey No.250-min, mutation under Section 4 of the Act has been attested declaring Gulla Kumar as prospective owner and then in terms of Section 12, based on the agreement executed by Noor Kumar and Gulla Kumar, mutation No.1561 has been attested declaring Gulla Kumar to be the owner of those 2 kanals of land.

10. From the records it appears that Mst. Fazi had filed an appeal before the Deputy Commissioner (Collector), Budgam, against mutation No.1561 which has been dismissed vide order dated 04.07.2017 observing therein that the order has been passed under Section 12 of the Agrarian Reforms Act. Vide SRO 59 of 1997, in District Budgam, Additional Deputy Commissioner has been conferred the jurisdiction to hear the appeals under Agrarian Reforms Act against the orders of Tehsildar/Naib Tehsildar. The appellant Mst. Fazi had been given liberty to agitate the matter before the competent forum. It had been left open for Mst. Fazi to challenge the position of Gulla Kumar as it exists in terms of Section 4 and 12 of the Act.

11. The question which arise for consideration is as to whether remedy chosen by Gulla Kumar against interference with regard to his possession i.e. suit for permanent injunction before the court of learned Munsiff, Chadoora, is available, answer has to be no for the reasons to follow:-

a) It is clear that Gulla Kumar has become owner of land measuring 2 kanals covered by survey No.250-min situated at village Wathoora under Section 4 and 12 of the Act. No doubt, now he is having a residential house and a cow shed existing on the said land but that will not alter the definition of the land. The land under the Act is defined under Section 2(9), same is quoted here-under:

“land” means land which was occupied, or was let, for agricultural purposes or for purposes subservient to agriculture or for pasture in Kharif, 1971 and includes—

(a) structures on such land used for purposes connected with agriculture;

(b) areas covered by, or fields floating over, water;

- (c) forest lands and wooded wastes;
- (d) trees standing on land; and
- (e) but does not include an orchard or site of a building or a structure within municipal area, town area, notified area or village abadi or any land appurtenant to such building or structure.”

b) In the year 1971, which is the crucial date for determining the definition of land, the land measuring 2 kanals was agricultural land. Then position of Gulla Kumar being tenant is also linked with the crucial date of Kharief 1971 as defined under Section 2(17) of the Act, which, for facility of reference, is quoted here-under:

“tiller” means tenant cultivating land personally and shall mean and include a person who was tiller in Kharif, 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 *bona fide* transfer to this effect:

Explanation. — A person who migrated from his place of residence during 1965 due to unavoidable circumstances shall be deemed to be a tiller of the land thus abandoned by him if such land was in occupation of somebody else as *Supar-dar* under orders of a competent authority.”

c) Position of Gulla Kumar being tenant in the year 1971 is established not only by attestation of mutation under Section 4 of the Act bearing No.1428 but also by the private agreement executed by Noor Kumar (now deceased) in the year 1985. There could be little scope for challenging the position which has been admitted by the ex-landlord (now deceased) while executing the private agreement under Section 12 of the Act. Still it shall be open for the aggrieved party i.e. Mst. Fazi to have recourse to permissible remedial measures, if any available, if not already availed.

12. Coming to the important question which is the centre of controversy in this petition is as to whether plaint was to be rejected under Order VII Rule 11 CPC, answer is in affirmative for the reasons to follow:-

1) Admittedly, respondent Gulla Kumar is in possession of land measuring 2 kanals covered by survey No.250-min over which now he has a residential house and a cow shed, having vested in him in terms of Section 4 and 12 of the Act. If he faces any sort of interference, then he has a remedy available under Rule 58 of the Agrarian Reforms Rules. Rule 58, for facility of reference is reproduced here-under:

“58. Special powers of officers-The Officers mentioned in Section 20 of the Act shall have also powers of a Civil Court in respect of the following matters, namely: -

- i) Appointment of next friend and/or guardian of a minor or a person of unsound mind in accordance with the provisions of Rules (1), (2), (3) and (4) of Order XXXII of the Code of Civil Procedure, Samvat 1977; and
- ii) Granting of temporary injunctions in accordance with the provisions of Rules (1), (3), (4) and (5) of Order XXXIX of the Code of Civil Procedure, Samvat 1977.

13. Section 19(3) of the Act provides for disposal of the applications, suits and proceedings by a Collector. Clause (e) of sub-section (3) of Section 19 is quoted here-under:

“all other cases of dispute including those where the party in possession pleads adverse possession against the recorded owner/intermediary.”

The words employed “all other cases of dispute” takes into its sweep the dispute raised by Mst. Fazi vis-à-vis position of Gulla Kumar and as a result thereof has started causing interference, therefore, under Section 19 of the Act read with Rule 58 of Agrarian Reforms Rules, it is open for Gulla Kumar to file appropriate application for protection which may include grant of temporary injunction to be granted by the Collector Agrarian Reforms as permissible in terms of Rule 58 of the Agrarian Reforms Rules.

14. Suit before the court of learned Munsiff, Chadoora, in the context of mutations attested under Section 4 and 12 of the Act is barred in view of Section 25 of the Act, which, reads as under:-

“25. Bar of jurisdiction of Civil Court.—
Notwithstanding anything contained in any law for the time being in force--

(a)no Civil Court shall have jurisdiction to settle, decide or deal with any question or to determine any matter arising under this Act or the rules made thereunder; and

(b)no order of any officer or authority passed under this Act or the rules made thereunder shall be called in question in any Civil Court.”

15. Mutation under Section 4 of the Act bearing No.1428 followed by mutation under Section 12 of the act bearing No.1561, directly or indirectly, cannot be questioned before the Civil Court because Section 25 of the Act clearly envisage that any matter arising under the Act or the rules made thereunder shall not be within the jurisdiction of the Civil Courts to be settled. In addition, it also envisages that no order of any officer or authority passed under the Act or the Rules can be called in question in the Civil Court, therefore, vis-à-vis 2 kanals of land, jurisdiction of the Civil Court is totally barred. The application as filed by Mst. Fazi (defendant No.6) before the Court of learned Munsiff for rejection of the plaint should have been accepted because in the light of Section 25 as referred to above, suit is clearly barred, therefore, Order VII Rule 11(d) CPC applies.

16. It is apparent from the statement in the plaint that the plaintiff (Gulla Kumar) has claimed to be owner in possession which ownership and possession is clearly based on mutation under Section 4 bearing No.1428 and mutation under Section 12 of the Act bearing No.1561. Though same has not been referred to but, in effect, it is these two orders which have made Gulla Kumar as owner, as such, plaint should have been rejected, therefore, order of rejection of application under Order VII Rule 11 CPC, as is impugned, is not sustainable, same is set aside. Plaint (suit) shall stand rejected in terms of Order VII Rule 11 CPC. However, same shall not preclude respondent Gulla Kumar (plaintiff) from having recourse to protection of his possession and other rights by invoking jurisdiction of Agrarian Reforms Authorities, more particularly the Collector under Section 19 of the Act and Rule 58 of Agrarian Reforms Rules. In case interference continues as against his possession and rights, he shall be at liberty to launch

appropriate proceedings i.e. application for injunction under Rule 58 of the Agrarian Reforms Rules.

17. It shall also be appropriate in the interests of justice to mention that 2 kanals of land covered by survey No.250-min for which Gulla Kumar has been conferred ownership in terms of Section 4 and 12 of the Act shall not be open for determination in the suit for declaration, partition and possession filed by Mst. Fazi before the Court of learned Munsiff, Chadoora, regarding 15 kanals and 7 marlas which include said 2 kanals of land. The trial court shall take note of the same because now, in view of findings recorded hereinabove regarding those 2 kanals of land, trial court shall have no jurisdiction to adjudicate. As already mentioned hereinabove, it shall be for Mst. Fazi to take recourse to available remedial measures, if now permissible by law, to challenge the position of Gulla Kumar being owner of those 2 kanals of land in terms of Section 4 and 12 of the Act, if not already availed.

18. Revision petition succeeds, shall stand disposed of as above.

19. Trial court record along with copy of the judgment be sent to the trial court.

(Mohammad Yaqoob Mir)
Judge

Srinagar

31.03.2018

"Bhat Altaf PS"