

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

(Through Virtual Mode)

LPA No.160/2020
CM Nos.6446/2020; 6064/2020

Dated: 31st of December, 2020.

Poonam Mehra & Anr.

..... Appellant(s)

Through: -
*Mr A. H. Naik, Senior Advocate with
Mr Shabir Ahmad Najar, Advocate.*

V/s

Union Territory of JK & Ors.

..... Respondent(s)

Through: -
Mr B. A. Dar, Sr. AAG.

CORAM:

**Hon'ble Mr Justice Ali Mohammad Magrey, Judge.
Hon'ble Mr Justice Vinod Chatterji Koul, Judge.**

(JUDGMENT)

[Per Magrey, J (Oral)]:

CM No.6064/2020:

01. This application is filed on behalf of the applicants/ appellants seeking permission of this Court to place on record the accompanying documents enclosed with the application.

02. On the set of facts and the grounds urged, coupled with submissions made at the Bar, the instant application is *allowed* and the documents annexed with the application are taken on record, of course, subject to all just exceptions.

03. CM *disposed* of as above.

CM No.6446/2020:

04. This application is filed on behalf of the Divisional Commissioner, Kashmir seeking exemption from appearing in person before this Court in pursuance of order of this Court dated 16th of December, 2020.

05. On the set of facts and the grounds urged, coupled with submissions made at the Bar, the instant application is *allowed* and the personal appearance of the Divisional Commissioner, Kashmir before this Court is exempted till further orders.

06. CM *disposed* of as above.

LPA No.160/2020:

07. The appellants-Writ petitioners, who are the daughters of one Late Shri Rajinder Kumar Sahani, through Attorney holder, filed a petition, being WP(C) No. 1090/2020, wherein they claim to be the owners in possession of land measuring 04 Kanals, 05 Marlas and 210 Sfts., comprised under Survey Nos. 1 Min, 5 Min, 6 Min, Khewat No. 139 and Khata No. 350 situate at Gupkar Road, Srinagar. The appellants-Writ petitioners are presently residing outside the Union Territory of Jammu and Kashmir and are registered migrants. The appellants-Writ petitioners submit that they entered into negotiations with the respondent No. 4 for the purpose of sale of the

aforesaid property for consideration of Rs. 13.00 Crores and for that permission of the competent authority is required in terms of the Jammu and Kashmir Migrant Immovable Property (Preservation, Protection and Restraint on Distress Sales) Act, 1997 (hereinafter referred to as “the Act of 1997”). This permission, though sought by the petitioners/ appellants strictly in accordance with the mandate of the Act, remained pending with the Divisional Commissioner, Kashmir, for over more than two years, therefore, the appellants-Writ petitioners filed the Writ petition before the learned Single Judge, claiming declaration for deemed permission. The learned Single Judge, in terms of the impugned judgment dated 26th of November, 2020, after hearing the counsel for the parties, dismissed the Writ petition, however, while dismissing the Writ petition, the learned Single Judge took note of the fact that the application for seeking permission in terms of the Act is pending before the Divisional Commissioner, Kashmir for last more than two years and issued some effective directions for doing the needful in that regard.

08. Mr. A. H. Naik, the learned Senior counsel, representing the Writ petitioners/ appellants, submitted that the impugned judgment passed by the learned Single Judge is not in tune with the mandate of law governing the subject inasmuch as on the one hand, the learned Single Judge dismissed the petition of the petitioners/ appellants, while, on the other, it issued directions with regard to the pending application of the petitioners/ appellants seeking permission for alienation of the property in question. It is contended that the petitioners/ appellants herein have completed all the formalities and the agencies which are concerned with the verification of the property in question

have also clearly reported that for alienation of the properties in question permission can be granted. It is also pleaded that although the revenue record clearly reveals the title of the petitioners/ appellants on the property in question, however, despite that the office of the respondent No.2, without any reason, is again resorting to verifying the case of the petitioners/ appellants. It is urged that in terms of Section 3 of the Act of 1997, the deemed permission should be considered to have been given in favour of the petitioners/ appellants as the respondent No.2 has failed to pass any order within the stipulated period prescribed under the Act of 1997.

09. The Writ petition was resisted by the respondents before the learned Single Judge by stating that from the available records it is borne out that the father of the petitioners/ appellants had one son also, namely, Parneet Kumar, but there is no verification with regard to the share of the said brother of the petitioners/ appellants *qua* his status at the time of his death with regard to the property measuring 14 Marlas falling under Khasra No.1176/3 situated at Sonawar, Srinagar. It was averred that since the title of the petitioners/ appellants was doubtful and unless the interest of any other person in the property of the deceased is properly verified, permission under the Act of 1997 cannot be granted in favour of the petitioners/ appellants for alienation of the property in question.

10. In terms of order dated 16th of December, 2020, this Court directed the Divisional Commissioner, Kashmir, to file his Affidavit in the

matter. The Affidavit stands filed on behalf of the Divisional Commissioner, Kashmir.

11. We have heard the learned counsel for the parties, perused the relevant record made available before us and considered the matter. We have also gone through the contents of the Affidavit so filed by the Divisional Commissioner, Kashmir.

12. At the first blush, what requires to be submitted is that the Legislature, with the object of preserving and protecting the migrant properties and ensuring that a migrant is not forced to sell the property in distress, has made a special legislation known as the Jammu and Kashmir Migrant Immovable Property (Preservation, Protection and Restraint on Distress Sales) Act, 1997. This Act specifically provides that the prescribed authority, i.e., the Divisional Commissioner, must decide an application filed in this behalf before it for grant of permission for alienation of the migrant property within a period of 15 days with a further stipulation that in case the said application is not decided within the aforesaid timeframe, it shall be deemed that the permission has been granted. In the instant case, as would come to limelight from the perusal of the pleadings as well as the relevant record made available before this Court by the respondents, the petitioners/appellants, for the purpose of selling their migrant property in question, seem to have approached the competent authority, i.e., the Divisional Commissioner, Kashmir, under the provisions of the Act of 1997. Thereafter, reports from the concerned quarters were obtained in relation to the

application so submitted by the petitioners/ appellants which were all in favour of the case of the petitioners/ appellants, however, the competent authority/ Divisional Commissioner, Kashmir, instead of disposing of the application within the prescribed period of time, as provided under the Act of 1997, initiated some other independent enquiries which were not even required in accordance with the provisions of the Act of 1997.

13. In the light of the aforesaid position obtaining in the matter, it has become necessary to go through the mandate of second *proviso* to Section 3 of the Act of 1997, wherefrom the scope of deemed permission arises, which reads, thus:

“Provided further that the permission to alienate shall be deemed to have been granted, if an application seeking permission for alienation of such property is not decided by the prescribed authority within fifteen days from the date of receipt of such application.”

From a bare perusal of the above provision of law governing the subject matter of the controversy involved, it becomes crystal clear that permission has to be obtained for alienation of immoveable property. In Websters Dictionary, the expression ‘*alienation*’ has been described as giving up of the control of the title of the property from one person to the other. Besides, this expression ‘*alienation*’ has been defined by Section 2(a) of the Act of 1997 as under:

“Alienation means sale, gift mortgage with possession or exchange but shall not include gift in favour of an heir.”

Alienation, as reflected by the above definition, must be a positive act of transfer of property from the seller to the buyer. Alienation, for the purpose of the Act of 1997, thus means the same factum of transfer. Gifts and sales are recognised as modes of transfer, so in the mortgage with possession or exchange.

14. The intention of Section 3 of the Act of 1997 must be read in such a way so as to accomplish the very object of the Act of 1997 itself. The object has been outlined in the preamble of the Act of 1997 which postulates that the Act provides for Preservation, Protection and Restraint on Distress Sales of the Immovable property of the migrants. Once an application for alienation of the property was made before the competent authority and in the event the permission having been withheld, the same under the proviso will be deemed to exist for the alienation. Besides, the migrants, in the present case, do not complain of distress or of any transgression of their rights. They seem to have no objection. We, in this factual and legal scenario, do not agree with view taken by the learned Single Judge in dismissing the Writ petition filed by the petitioners.

15. In the above background, we find that the learned Single Judge has not taken the requirement of the proviso into consideration while passing the impugned judgment. That being the position, we allow the present appeal and set aside the order dated 26th of November, 2020 passed by the learned Single Judge in WP(C) No. 1090/2020. Consequently, the Writ petition is ***allowed*** and the respondent No.2/ Divisional Commissioner, Kashmir, is

directed to issue permission for alienation with regard to the property in question in tune with the reports/ 'No Objection Certificates' (NOCs) of the concerned agencies in this regard forthwith.

16. Letters Patent Appeal *disposed* of as above, alongwith the connected CM(s).

17. Bench Secretary to forthwith return the records, as produced before this Court, to the respondents through a responsible Officer of the respondent Department to be identified by Mr B. A. Dar, learned Senior Additional Advocate General, against proper receipt. Besides, the Registry shall also return the Writ Court records to the Section concerned with due dispatch.

(Vinod Chatterji Koul)
Judge

(Ali Mohammad Magrey)
Judge

SRINAGAR

December 31st, 2020

"TAHIR"

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| i. | <i>Whether the Judgment is reportable?</i> | <i>Yes/ No.</i> |
| ii. | <i>Whether the Judgment is speaking?</i> | <i>Yes/ No.</i> |