

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

Reserved on : 13.09.2022
Pronounced on : 15.09.2022

WP(C) No.1241/2022
CM No. 3051/2022

Parvesh Bahri & anr.

...Petitioner(s)

Through:- Mr. G. A. Lone, Advocate with
Mr. Mujeeb Andrabi, Advocate.

V/s

Union Territory of J&K and others

...Respondent(s)

Through:- Mr. Ishfaq Ahmad, Adv. for R-5

Coram: HON'BLE MR. JUSTICE SANJEEV KUMAR, JUDGE

JUDGMENT

1. The petitioners are aggrieved of and have challenged order dated 21.05.2022 passed by the Divisional Commissioner Kashmir at Srinagar, the prescribed authority under the Jammu and Kashmir Migrant Immoveable Property (Preservation, Protection and Restraint on Distress Sales) Act, 1997, on an application/complaint titled Harish Bahri v. Abdul Rehman Mantoo and others. By virtue of the impugned order the Divisional Commissioner has held the respondent No.5 a 'migrant' within the meaning of the term defined under Section 2 (e) of the Jammu and Kashmir Migrant Immoveable Property (Preservation, Protection and Restraint on Distress Sales) Act, 1997 (for short 'the Act' hereafter) and declared the alienation of the properties in Khasra Nos. 273 min, 274 min and 1015 min in contravention of the Act and the Rules framed there under. The Tehsildar

Budgam, who is delegated the powers of Competent Authority under SO 144 dated 31st March, 2022, has been directed to take over the possession of the properties and handover the same to respondent No.5.

2. Briefly stated the facts, as are relevant to the disposal of the short controversy raised in this petition, are; the petitioner No.1 and respondent No.5 are brothers who were having their Pharmaceutical business in Kashmir. The business was started by the two brothers in partnership and a deed of partnership in this regard was also reduced in writing on 04.08.1972. The petitioner and respondent No.5 started another business in partnership under the name of KAYCEE BAHRI & COMPANY with effect from April, 1989 in terms of a partnership deed executed by the two on 18.08.1989. The said business was being conducted from New Delhi as Commission and forwarding agents of Ranbaxy Laboratory, New Delhi. With a view to conduct the business smoothly, both at Delhi and Srinagar and for proper management of the properties, two power of attorneys were executed by and between them, i.e. one by the petitioner No.1 in favour of respondent No.5 dated 02.12.2000 and another by respondent No.5 in favour of petitioner No.1 dated 04.12.2000. On the strength of power of attorney executed by respondent No.5 in favour of petitioner No.1, which also envisaged the appointment of sub-attorney/further attorney by the petitioner No.1, the petitioner No.1 issued a power of attorney in favour of one Mohd Akram Dar R/O Humhama, giving him the power and authority to sell the land which was standing in the name of respondent No.5. On the basis of the power of attorney executed by the petitioner No.1 in his favour, Mohd Akram Dar executed two sale deeds in favour of two different persons for

consideration. The sale deeds so executed were also registered and mutations on the basis thereof were also attested in favour of the Vendees of these deeds. It is alleged by the respondent No.5 in his complaint filed before the Divisional Commissioner Kashmir, Srinagar, that petitioner No.1 misused the power of attorney executed in his favour and unauthorizedly and without seeking prior permission of the prescribed authority, alienated his landed property. The respondent No.5 in his complaint claimed that he was a migrant and, therefore, entitled to the protection of his immovable property under the Act. The Divisional Commissioner entertained the complaint of respondent No.5 and after holding an enquiry and relying upon some reports of the field agencies of the Revenue Department, concluded that respondent No.5, the complainant before him, was a migrant and, therefore, alienation of his properties falling under Khasra Nos. 273 min, 274 min and 1015 min situated at Humhama, Srinagar, were 'distressed sales' and without requisite permission of the competent authority. Holding that the alienations were null and void, the Divisional Commissioner directed the Tehsildar, Budgam to take over the possession of the properties subject matter of impugned sales with a further direction to subsequently handover the same to respondent No.5. It is this order of the Divisional Commissioner dated 21.05.2022 which is called in question in this petition.

3. Having heard learned counsel for the parties and perused the material on record, a short question, which relates to jurisdiction of the Divisional Commissioner to entertain the complaint and pass the impugned order, arises for determination in this petition. For clarity and better appreciation,

the question that has arisen for determination is framed in the following manner:-

“Whether the Divisional Commissioner, the prescribed authority under the Act, is competent to hold an enquiry into alienation of immovable property of a migrant made on or after the commencement of the Act, in contravention of the provisions thereof and declare the alienations null and void with a consequence of reverting such alienated properties to its owner (the migrant).”

4. It is a matter of record that in the wake of spurt of militancy in the Valley in the year 1989-90, the minority community living in the Valley was forced to leave their home and hearth. The properties, in particular the immovable properties, left by them in the Valley remained unattended with nobody to take care of them. Some vested interests and miscreants took the advantage of the situation and many of the houses belonging to the minority community, who were forced to leave the Valley, were burnt and destroyed. The properties were encroached. Taking advantage of the situation, the land brokers also stepped in and persuaded the members of the minority community to sell their properties at throw away prices. This was the scenario from 1990 to 1997. Better late than never, the State woke-up to the plight of these migrants and promulgated the Act, which is aimed at providing for preservation, protection and restraint on distress sale of the immovable property of the migrants. As per the scheme of the Act, the alienation of the immovable property of a migrant by act of parties or a decree or order of a Court or of a Revenue Officer, except with the previous

permission of Revenue and Relief Minister or such officer as may be authorized by him in this behalf is totally forbidden and any alienation made on or after the date of commencement of the Act in contravention to the provisions thereof is declared null and void and the immoveable properties provided to be reverted to its owner. There is clear prohibition that no document purporting to alienate such immoveable property in contravention of the Act shall be admitted to registration.

5. One of the salient features of the Act is that, within 30 days of the commencement of the Act, the District Magistrate is enjoined to take over the possession of the immoveable property belonging to the migrants falling within his territorial jurisdiction and on expiry of said period of 30 days, the District Magistrate shall be deemed to have the custody of such immoveable property. It is thus the duty of the District Magistrate concerned to take all necessary steps for preservation and protection of such property. The Act also provides for eviction of un-authorized occupants of the migrant property and the District Magistrate is the competent authority to evict the un-authorized occupants of the migrant properties. He is authorized to use such force as is necessary for accomplishing this task. The Act also provides an appeal by the aggrieved person against any order passed under the Act before the Financial Commissioner with certain exception. In exercise of powers conferred by Section 14 of the Act, the Government has framed the Jammu and Kashmir Migrant Immoveable Property (Preservation, Protection and Restraint on Distress Sales) Rules, 1997 (for short ‘ the Rules’ hereafter).

6. From entire reading of the Act and the scheme of things it provides, there are essentially three prime authorities to give effect to the provisions of the Act, i.e. ‘**the Prescribed Authority**’, ‘**the Competent Authority**’ and ‘**the Appellate Authority**’. The ‘Prescribed Authority’ is defined in Section 2(g) to mean, the authority competent to grant permission under Section 3. The ‘Competent Authority’ is defined in Section 2(b) to mean the District Magistrate of the area and includes such other officer of the area as the Government may appoint for such area. The ‘Appellate Authority’ is prescribed under Section 7 of the Act and it is the “Financial Commissioner (Revenue)”. The jurisdiction, powers and functions of all the three authorities are clearly delineated in the Act and do not, in any manner, overlap one another. The ‘Prescribed Authority’ i.e. the Divisional Commissioner is the authority competent to grant permission for alienation of the immovable property of a migrant. This is so provided in Section 3 of the Act read with Rule 5 of the Rules. For facility of reference Section 3 of the Act and Rule 5 of the Rules are reproduced herein below:-

“3. Restriction on alienation of immovable property:

Notwithstanding anything to the contrary contained in any other law for the time being in force--

(a) alienation of immovable property of a migrant by act of parties or a decree or order of a court or of a revenue officer except under such conditions as may be prescribed and with previous permission of Revenue and Relief Minister, or such officer as may be authorised by him in this behalf, is forbidden :

Provided that no such permission shall be necessary in case of a mortgage without possession of such immovable property in favour of an institution mentioned in section 4-A of the Jammu and Kashmir Alienation of Land Act, Samvat 1995 and transfer of the said immovable property in favour of Government of Jammu and Kashmir :

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 :

Provided also that the enquiry for the purposes of the grant of permission by the prescribed authority shall be limited to the question of sale being not distress ;

(b) any alienation of immovable property on or after the commencement of this Act, in contravention to the provisions thereof, shall be null and void and immovable property so alienated shall, after such enquiry as may be prescribed, vest in its owner ; and

(underlined by me)

(c) no document purporting to alienate such immovable property in contravention of the provisions of this section shall be admitted to registration.”

Rule 5 of the Rules.

“5. Grant of permission to the alienation of the property:
The Prescribed Authority, after taking into consideration all the facts mentioned in the application and reports made in this behalf as also after making such enquiry as it considers necessary, may grant permission in Form-3 subject to the following conditions; namely:-

- (a) that the alienation shall be in favour of permanent resident of the State;
- (b) that the property which is matter of alienation is owned by intending aliener free from all encumbrances;
- (c) the prevalent market rate in respect of the property to be alienated will be determined by a revenue officer not below the rank of an Assistant Commissioner in consultation with Executive Engineer of the Public Works Department having jurisdiction in the area; and
- (d) the possession of the property shall be handed over to the alienee(s) after it is released by the District Magistrate concerned.”

7. From reading of clause (b) of Section 3 of the Act, it is evident that any alienation of immovable property of a migrant made on or after commencement of the Act in contravention of the provisions thereof, shall be null and void. The immovable property so alienated, **after such enquiry as may be prescribed**, shall vest in its owner. The expression ‘**prescribed**’ used in Sub Section (b) of Section 3 is defined in Section 2(f), which reads thus:-

“(f) “prescribed means prescribed by the rules made under this Act”.

8. Rule 6 of the Rules deals with alienation of the property in contravention of the provisions of the Act, which for facility of reference is also set out below:-

“6. Alienation of the property made in contravention of the provisions of the Act:

- (1) The District Magistrate shall, having jurisdiction in the area in which the property is situated, *suo moto* or on the basis of information he may receive or the request of any migrant that the property belonging to him or other co-sharers has been alienated without obtaining proper permission of the Prescribed Authority hold an enquiry into the matter himself or through a Revenue Officer not below the rank of Tehsildar.
- (2) On receipt of the report as provided in sub-rule (1) above establishing that the sale has been made in contravention of the provisions of the Act, the District Magistrate shall take possession of the property after evicting the person (alinee) from the property and use such force as may be required for the purpose and take all such steps as may be necessary for preservation and protection of such property.”

9. From reading of Section 3 (b) along with Rule 6, it is crystal clear that it is the District Magistrate, having jurisdiction in the area in which the property is situated, who can either *suo moto* or on the basis of information he may receive or on the request of any migrant, hold an enquiry to find out as to whether the property belonging to the migrant has been alienated without obtaining proper permission from the Prescribed Authority. The District Magistrate can entrust this enquiry to a Revenue Officer not below the rank of Tehsildar. It is further clear from sub-rule (2) of Rule 6 that if in the enquiry, conducted by the District Magistrate himself or through an Officer not below the rack of Tehsildar, it is established that the sale of the immoveable property of the migrant has taken place in contravention of the

provisions of the Act, the District Magistrate shall take possession of the property after evicting the alienee from such property. He is also authorized to use such force as may be required for accomplishing taking over of the property.

10. Viewed thus, the plain reading of Section 3 along with Rule 6 makes it abundantly clear that the 'Prescribed Authority' i.e. the Divisional Commissioner is only the authority competent to grant permission for alienation under Section 3 whereas it is the District Magistrate having jurisdiction in the area where the property is situated, who is given authority to hold an enquiry into the alienation allegedly made in contravention of the provisions of the Act and if, in the enquiry, it is established that the alienation has in fact been made in contravention of the provisions of the Act, to take necessary steps to take over the possession of such property after evicting the alienee. Otherwise also, in terms of Section 4 of the Act the District Magistrate of the concerned District is custodian of all the immoveable properties of the migrants in his territorial jurisdiction. It is the District Magistrate who is enjoined to take all necessary steps for preservation and protection of such property. The Divisional Commissioner is only given a limited role under the Act as 'Prescribed Authority' to grant permission under Section 3 of the Act. Rule 3, 4 and 5 lay down the procedure to be followed by the Divisional Commissioner while considering the request of the migrant for permission to alienate his/her property.

11. From the scheme of the Act and the salient provisions thereof discussed above, it is crystal clear that the Divisional Commissioner, who is the prescribed authority to grant permission for alienation of the

immoveable property of a migrant under Section 3 of the Act, lacks jurisdiction to entertain a complaint of a migrant or any other person, alleging the alienation of the immoveable property in contravention of the provisions of the Act. The person aggrieved is required to approach and file an appropriate application or complaint before the District Magistrate who is the authority designated under Rule 6 of the Rules to hold enquiry into the validity or otherwise of alienation of the properties of the migrants. It is the District Magistrate alone who shall, after it is established in the enquiry conducted by him or through Revenue Officer not below the rank of Tehsildar that the alienation of the immoveable property of the migrant has taken place in contravention of the provisions of the Act, take over the possession of the alienated property after evicting the alienee. He shall also take further necessary steps for preservation and protection of such property.

12. Aside what is held above, the maxim “*Expressio Unius Est Exclusio Alterius*” is fully attracted in the case on hand. It means that if a statute provides a thing to be done in a particular manner, then it has to be done in that manner and in no other manner. Hon’ble Supreme Court, while explaining the doctrine in **State of UP v. Singhara Singh, AIR 1964 SC 358**, in paragraph 8 held thus:-

“ 8. The rule adopted in **Taylor v. Taylor** is well recognised and is founded on sound principle. Its result that if a statute has conferred a power to do an act and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing of th act in any other manner than that which has been prescribed. The principle behind the rule is that if this were not so, the statutory provision might as well not have been enacted.....”

13. From the above discussion, what emerges is a clear answer to the question formulated which may be stated as under:-

*“ The Divisional Commissioner is only a “**Prescribed Authority**” empowered to grant permission under Section 3 of the Act while as it is the District Magistrate who is competent and authorized to hold an enquiry into the alienation of immoveable property made in contravention of the provisions of the Act and take over the possession of the alienated property after evicting the alienee from such property, provided in the enquiry it is established that the alienation has taken place in contravention of the provisions of the Act.”*

14. It is, thus, trite that if a statute confers certain power on a particular authority, it is that authority alone and no other authority, howsoever high it may be, shall exercise such power.

15. Viewed thus, I find substance in the argument of Mr. G. A. Lone, learned counsel for the petitioners that the Divisional Commissioner Kashmir usurped the powers of District Magistrate conferred upon him by Section 3 (b) read with Rule 6 and un-authorizedly conducted the enquiry and passed the order impugned. He is correct in his submission that the impugned order is wholly without jurisdiction. I find no merit in the plea of the learned counsel for respondent No.5 that in the face of alternate remedy of appeal available to the petitioners under Section 7 of the Act, the writ petition under Article 226 of the Constitution is not maintainable. This is so because the order impugned passed by the Divisional Commissioner is

wholly without jurisdiction and, therefore, in such a situation the availability of alternate remedy may not be a bar for the exercise of extraordinary writ jurisdiction vested in this Court under Article 226 of the Constitution. (See **Whirlpool Corporation v. Registrar of Trade Marks (1998) 8 SCC 1**).

16. For the foregoing reasons, the writ petition is allowed and order impugned is set aside. It shall, however, be open to the respondent No.5 to approach the competent authority i.e. the District Magistrate concerned with his grievance if the same is still subsisting and he is aggrieved. Needless to say that in case respondent No.5 approaches the competent authority, his application/complaint shall be dealt with strictly as per the provisions of the Act and the Rules framed there under.

(Sanjeev Kumar)
Judge

SRINAGAR

15.09.2022

Anil Raina, Addl. Reg/Secy

Whether the order is reportable : Yes