

**IN THE HIGH COURT OF JAMMU & KASHMIR AND
LADAKHAT SRINAGAR**

Reserved on: 26.02.2024

Pronounced on: 29.03.2024

WP(C) No.150/2023

LYCEUM PUBLIC SCHOOL **...PETITIONER(S)**

Through: - Mr. Shuja-ul-Haq Tantray, Advocate.

Vs.

UT OF J&K & OTHERS **...RESPONDENT(S)**

*Through: - Mr. Faheem Nisar Shah, GA-for R1 to R4
Mr. Jahangir Iqbal Ganai, Sr. Adv. with
Mr. Vaseem Aslam, Adv.-for R4 to R6.*

CORAM: HON'BLE MR. JUSTICE RAJNESH OSWAL, JUDGE

JUDGMENT

1) The petitioner had earlier approached this Court for quashing of the order dated 15.01.2020 issued by the District Magistrate, Anantnag, in terms of Section 5 of the J&K Migrant Immovable Property (Protection, Preservation and Restraint on Distress Sales) Act, 1997 (hereinafter referred to as "the Migrant Act"), whereby the District Magistrate had directed the petitioner to vacate the migrant property which is subject matter of the present petition, within a period of three months and surrender the same to the District Magistrate, Anantnag, for its further handing over to the respondents No.3 to 5 therein. This Court vide order dated 21.07.2022, dismissed the writ petition bearing CM(M) N.12/2020 and relegated the petitioner to the statutory remedy as provided under Section 7 of the Migrant Act. It was further provided by the Court that in the event any appeal is preferred, the subject

property shall not be delivered to the private respondents therein and the same shall remain in the custody of the District Magistrate. The petitioner filed the statutory appeal before the respondent No.2 but the same was dismissed vide order dated 28.12.2022 as not maintainable on the ground that the petitioner had not surrendered the possession of the property to the District Magistrate.

2) The petitioner has filed the present petition for quashing the order dated 15.01.2020 and also the order dated 28.12.2022 on the ground that while dismissing the appeal, the respondent No.2 has failed to appreciate that while passing order dated 15.01.2020, the District Magistrate, Anantnag, had not rightly appreciated the fact that the petitioner was not an unauthorized occupant of the migrant property but had been in its occupation since 1982, which on time scale is much before eruption of militancy/turmoil in the State of J&K. The District Magistrate, in fact, has taken a view contrary to the judgment passed by a Division Bench of this Court in **Rajeev Verma & Ors. Vs. State & Ors., 2010 (2) JKJ HC 859**. The respondent No.2, while exercising the power of Appellate Authority, was under an obligation to return a finding on the merits of the case but instead of deciding the appeal on merits and rendering the judgment with reference to the factual matrix of the case of the petitioner, the respondent No.2 dismissed the appeal on a ground which was not available to him in view of the direction contained in the order dated 21.07.2022. Besides above, the petitioner has also raised certain factual aspects of the case which may not be

relevant for the purposes of adjudicating the short controversy involved in the present petition.

3) The private respondents have filed the response stating therein that the District Magistrate conducted an enquiry under Migrant Act and after conducting the enquiry, vide order dated 22.11.2018, directed the removal of encroachment made by the petitioner. The said order was impugned by the petitioner through the medium of a writ petition bearing No.33/2019 titled “Lyceum Public School vs. State of J&K and others” for two reasons that the migrant had died and was not represented by any of his legal representatives and that the petitioner was the authorized occupant of the premises. The said writ petition was disposed of by the Court vide order dated 17.01.2019 by providing that these two questions shall be considered and decided by the District Magistrate concerned before proceeding further in the matter. The District Magistrate considered the claim of the petitioner and held that the petitioner was an unauthorized occupant in occupation of immovable property of the migrant without his consent and, accordingly, the District Magistrate vide order dated 15.01.2020 directed the petitioner to vacate the premises/migrant property. The aforesaid order dated 15.01.2020 was assailed by the petitioner through the medium of CM(M) No.12/2020 as mentioned above. It is stated by the private respondents that only an owner under law can create a legal authority and in the instant case, there is absence of written consent from the owner to the occupant to possess the migrant property and in

absence of written consent to occupy the premises, the possession of the petitioner is unauthorized. The petitioner has miserably failed to present any relevant document which could substantiate his claim that he was a legal/authorised tenant and was rightly declared as unauthorized occupant by the District Magistrate.

4) Learned counsel for the respondent has raised a preliminary objection in respect of maintainability of the writ petition, particularly when the petitioner failed to comply with the directions passed by this Court and also the statutory provisions while filing the statutory appeal.

5) Mr. Shuja-ul-Haq, learned counsel for the petitioner submitted that the petitioner was not an authorized occupant of the property being tenant and the respondent No.2 instead of deciding the claim of the petitioner on merits has resorted to shortcut to decide the appeal and, as such, has refused to exercise the jurisdiction vested in him under the Act (supra).

6) Heard and perused the record.

7) In order to appreciate the controversy involved in the present petition in view of the preliminary objection raised by the private respondents, for convenience, Section 7 of the Migrant Act is extracted as under:

“7. Appeal. – (1) Any person aggrieved of an order passed under this Act, may file an appeal before the Financial Commissioner, Revenue:

Provided that no such appeal shall be entertained against–

(a) an interlocutory order;

(b) an order of eviction unless possession of the property is surrendered to the competent authority;

(c) an order of payment of compensation determined under this Act unless the amount of compensation is deposited with the appellate authority.

(2) The period of limitation for filing of an appeal under sub section (1) shall be fifteen days from the date of order appealed against.

8) The perusal of Section 7 (supra), would reveal that surrender of possession of the property, which is the subject matter of appeal, is *sine quo non* for the purpose of entertaining an appeal against an order of eviction. The perusal of order dated 21.07.2022 passed by this Court in CM(M) No.12/2020 reveals that this Court had provided that the possession of the property shall remain in custody of the District Magistrate but shall not be delivered to respondents No.3 to 5 therein. Perusal of the order impugned dated 28.12.2022 reveals that the petitioner did not surrender the possession and the respondent No.2, the Appellate Authority, granted repeated opportunities to the petitioner on the dates mentioned in the order impugned to surrender the possession but the petitioner did not comply the order dated 21.07.2022 passed by this Court and the respondent No.2 taking note of default on the part of the petitioner to surrender the possession of the subject property, dismissed the appeal in limini.

9) Learned counsel for the petitioner tried to impress this Court that this Court had directed that the possession of the subject property shall not be delivered to the private respondents and, in fact, the Court protected the possession of the petitioner. The argument appears to be attractive but deserves to be rejected solely on the ground that it was

provided in the order dated 21.07.2022 that the possession of the subject property shall remain with the District Magistrate concerned. Not only this, the surrender of the possession was a pre-requisite for entertaining any appeal against the order passed under the Migrant Act. It is settled law that once a statute prescribes a mode for doing a particular act in a particular manner in order to obtain any benefit, then that act must be performed in that manner. Once the petitioner did not satisfy the requirement of Section 7 of the Migrant Act for entertaining his appeal thereby surrendering possession of the subject property, the appeal was not maintainable. The petitioner even did not avail the number of opportunities afforded to it for surrendering the possession to the District Magistrate concerned and, in fact, every endeavour was made by the respondent No.2 to ensure the disposal of the appeal on merits but the petitioner by its own action disabled the respondent No.2 to decide the appeal on merits as Section 7 of the Migrant Act has placed an embargo upon the competent authority against entertaining any appeal by the aggrieved person without surrender of possession of the subject property.

10) In view of above, the present petition is found to be misconceived and, accordingly, the same is dismissed.

11) No order as to costs.

(Rajnish Oswal)
Judge

SRINAGAR

29.03.2024

"Bhat Altaf-Secy"

Whether the order is reportable:

Yes/No