

IN THE COURT OF DIVISIONAL COMMISSIONER, JAMMU
Present Dr. Pawan Kotwal, IAS.

File No.
47/Revision
2014-15

Date of Institution
2-8-2014

Date of Decision.
29.4.2017

Hoshiar Singh
S/o Shri Krishnu (through power of attorney Deep Raj S/o Houshiar Singh)
R/o Kanthal
Tehsil Bani and District Kathua

..... Appellant

Versus.

1. Shri Krishan
S/o Shri Teju
R/o Kanthal
Tehsil Bani and District Kathua.
2. Sub Divisional Magistrate
Bani
3. Assistant Collector 1st Class
Tehsildar Bani

..... Respondents.

IN THE MATTER OF

Appeal against order in file No. SDMB/32 dated 27-02-2013 passed by respondent No. 2 and order No. 488/OQ dated 18-07-2013 passed by respondent No. 3 with a prayer for setting aside the same.

ORDER

A) The appellant submits that :-

1. That the appellant is permanent resident of Jammu & Kashmir and citizen of India thus entitled to the enjoyment of fundamental, legal and statutory rights as enshrined under the Constitution of India as well as that of J&K State and laws made there under.
2. That the appellant is in possession of the land bearing Khasra No. 2092/1 min measuring 01 Kanal 13 Marlas situated at Village Kanthal Tehsil Bani and District Kathua and state land in nature since the time of his forefathers.
3. That the appellant is an illiterate person and his father was also illiterate but the above said land is in his possession and the Patwari concerned have not made the entries of the appellant in the revenue record but this fact was not in the knowledge of the appellant but when the Roshni Act comes into force in state; it was clear cut directions that those persons who is in possession of state land prior to 2004 he has to be treated as the owner of the land and his mutation to be attested accordingly. It is not out of place to mention here that the appellant approached number of times to the concerned authorities regarding the mutation to be attested in his favour as per the provisions of the act but all in vain.
4. That on 18-07-2013 on the application of respondent No. 1 the Assistant Collector Bani passed an order of embedment without following the due procedure prescribed under the Land Revenue Act 1996, as it is clearly evident from the order that the Assistant Collector has not conducted the enquiry himself and believed on the report of the Naib Tehsildar and Patwari. It is to mentionable here that as per the provisions of the act the official has to follow the principle of natural justice and in this case it is evident from the order that no such provisions was ever followed by the respondents.
5. That it is further submitted that the appellant has also developed this land and also had constructed his residence and at present appellant is residing along with his family members in the residential home in that land. Photographs are collectively marked and annexed as **Annexure-A.**

6. That it is clear evident from the order of the respondent that the appellant is in peaceful possession over the above said land since last hundred years back without any interruption from anybody and this fact is also brought into the notice of the appellant by the officer below who has conducted the enquiry, it is not out of place to mention here that the respondent in order to appreciate the facts brought into his notice passed an ejection order without following the due process of law which is illegal, arbitrary and malafied. It is not out of place to mention here that the enquiry conducted by the Naib Tehsildar Bani clearly reflects that the land in question is in possession of the applicant from last more than 100 years and it is explicit that the appellant is owned by way of adverse possession. Copy of the order dated 18-07-13 is marked and annexed as **Annexure- B**.
7. That the appellant on 18-09-2013 filed an appeal against the order of the Assistant Collector Bani before the Sub Divisional Magistrate, Bani for setting aside the same and the appellant court issued notice to the other side and in the meanwhile issue status quo order in respect of the land. Copy of the appeal and order are collectively marked and annexed as **Annexure- C**.
- B) The appeal has been filed on the following grounds :-
- a) That the order of dated 27-12-2013 passed by learned Sub Divisional Magistrate Bani is legally erroneous and without jurisdiction, in terms of Sub Section 4 of Section 18 which is a condition precedent for taking cognizance by the Lok Adalat.
The Sub Section 4 of Section 18 is reproduced as under:-
"18 (4) Lok Adalat shall have jurisdiction to determine and to arrive at a compromise or settlement between the parties to the dispute in respect of:
- Any case pending; or
 - Any matter which is falling within the jurisdiction of and is not brought before, any court for which Lok Adalat is organized.
- b) That there was no dispute as the petition against the order of the Assistant Collector Bani but there was no settlement or compromise by the Lok Adalat and it was mandatory for the Court to follow the procedure prescribed under the Land Revenue Act.
- c) That the cognizance of the case by the Lok Adalat was without jurisdiction being in contravention and violation of the mandate of Section 19 (1) (i) (a) which reads as under:
Section 19 "Cognizance of cases by Lok Adalat.:- Wherein any case referred to in clause (1) of Sub Section (4) of Section 18,-
- (a) the parties thereof agrees; or
 - (b) one of the parties thereof makes an application to the court for referring the case to the Lok Adalat for settlement and if such court prima facie satisfied that there are chance of such settlement; or
 - ii) the court is satisfied that the matter is an appropriate one to be taken cognizance of by the Lok Adalat, the court shall refer the case to the Lok Adalat".
- Since the case has been referred under Section 19 (1) (a) as the order dated 27-12-2013 reveals, it is not covered by Sub Section 4 of Section 18 because the order passed by the Sub Divisional Magistrate Bani, is against the mandate of law as the order was passed without the consent or amicable settlement between the parties.
- d) That the order of reference by the learned Court is not only illegal but without application of mind as the learned Sub Divisional Magistrate, Bani called and listed the file in the Lok Adalat without waiting for next date and on the same day passed an order and dismissed the appeal that too without recording its satisfaction as required under Section 19 (1) (ii) of the Legal Services Authorities Act, 1997 and thus, it is illegal and without application of mind.
- e) That it is only when one party asserts a right and the other repudiates the same that a dispute arises or any question on when parties join issue requiring adjudication by a court that a dispute exists.
- f) That the Lok Adalat while passing the impugned order has assumed the jurisdiction not vested in it under Section 18 of the Legal Services Authorities Act, 1997 as no settlement or compromise was arrived between the parties.

- g) That the Lok Adalat acted without jurisdiction by taking cognizance in violation of the mandate of Section 19 (1) (i) (a) of the Legal Services Authorities Act, 1997 because no order could be passed without the consent of the parties and in this case at hand no settlement or compromise was ever arrived between the parties and dismissal of appeal is against the statutory provisions as laid down under the act.
- h) That the error committed by the Lok Adalat is manifest and apparent on the face of proceedings which are in utter disregard of the provision of law causing grave injustice.
- i) That when the reference is incompetent, without jurisdiction being in violation of Sub Section 4 of Section 18, the order and the decree of the reference court is also without jurisdiction as there was no proper reference before the Lok Adalat hence this appeal.
- C) The case came up for hearing. Power of Attorney Holder for petitioner present. Counsel for respondent present. Petitioner submitted the grounds taken in petition and prayed to set aside both the orders on the ground that the land in dispute has been in possession of petitioner since long and a house has also been constructed in it and the family is residing there.
- D) On the other hand, the Counsel for respondent pleaded to up held the order of court below being the land in dispute as kahcharai.

I have heard the parties. Record examined and law point involved is gone through which is the proviso to Section 133 (2) of Land Record Act & reads as under:

“provided that where on any land mentioned in clause (a) any structure raised, the person encroaching upon the land shall be ejected there from forth-with leaving an area of 10 marlas under and adjacent to the structure in respect of which the owner thereof shall be given a notice in writing affording him an opportunity to:-

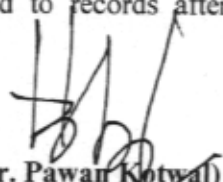
- i) *Dismantle the structure standing on such land and to remove the material from the site; or*
- ii) *Offer suitable equivalent area in exchange from out of his proprietary land or from out of the land which he may acquire or purchase for the purpose in the same village from the date of issue of the notice failing which the Revenue officer aforementioned of the structure and may dismantle the structure and remove or cause to be removed the material from the site and in doing so the Revenue office may use such force, as may be necessary.*

The person so ejected shall be liable under the order of Revenue officer not below the rank of a Collector or officer in charge of the settlement or an assistant collector of the first call subordinate to him to a fine not less than Rs. 500 per day till the contravention on the land mentioned in section 133 is removed in addition to revenue payable on the land for the period of possession reckoned at village revenue rates.

- E) What emerges from the reading of the said proviso is that in case petitioner is found in possession of Kahcharai land, he has to be ejected except for 10 Marlas of land under and adjacent to the structure. Non adherence to the proviso to sub section 2 of Section 133 of Land Revenue Act renders the orders passed by the Revenue authorities as unsustainable and deserves to be set aside.
- F) In view of what has been discussed above the appeal having merit is allowed and the order under challenge is modified to the extent that land measuring $\frac{1}{2}$ Kanal over which the petitioner has possession and has raised construction shall not be evicted provided he offers $\frac{1}{2}$ Kanal of his proprietary land in exchange to one Kanal of Kahcharai land under rule. 1/2

A copy of this order be sent to Deputy Commissioner, Kathua, to issue directions to Tehsildar Bani for attestation of mutation of exchange of $\frac{1}{2}$ Kanal of Kahcharai Land with proprietary land of petitioner. A copy of this order be also sent to Sub Divisional Magistrate Bani and Tehsildar Bani for information.

Stay issued, if any, shall stand vacated. The case file be consigned to records after due completion.


(Dr. Pawan Kothwal) IAS,
Divisional Commissioner,
Jammu

Announced
29.4.17