

HIGH COURT OF AZAD JAMMU & KASHMIR

Writ petition No.797/2019.
Date of institution 14.05.2019.
Date of decision 02.10.2023.

1. Imtiaz Ahmed s/o Saien Khan;
2. Mohammad Ilyas s/o Saien Khan;
3. Abbas Ahmed s/o Saien Khan;
4. Niaz Hussain s/o Saien Khan r/o Kham Drang Gojra, Tehsil & District Muzaffarabad, Azad Kashmir.

Petitioners

VERSUS

1. Custodian Evacuee Property, having its office at Old Secretariat Muzaffarabad;
2. Sheikh Hafeez-ur-Rehman s/o Sheikh Abdul Rehman r/o Kham Drang Gojra, Tehsil & District Muzaffarabad Azad Kashmir.;
3. Sheikh Tahir Qayyum s/o Abdul Qayyum r/o Kham Drang Gojra, presently Mera Tanolian Tehsil & District Muzaffarabad;
4. Revenue Department through Deputy Commissioner Muzaffarabad;
5. Rehabilitation Department through its Standing Counsel Muzaffarabad;
6. Commissioner Rehabilitation, Government of Azad Jammu & Kashmir, Muzaffarabad Azad Kashmir.

Respondents

WRIT PETITION

Before:- Justice Syed Shahid Bahar, J.

PRESENT:

Ch. Shoukat Aziz, Advocate for the Petitioners.
Abdul Rasheed Abbasi, Advocate for Respondent No.2.
Salma Tariq Khan Sadozai, Legal Advisor for Respondents No.1, 4 to 6.

JUDGMENT:

Through this constitutional petition filed under Article 44 of the Azad Jammu & Kashmir Interim Constitution, 1974, the petitioners prayed for cancellation of Proprietary Rights Transfer Order (PRT0) bearing No.14554 dated 18.05.2001 as well as decision of respondent No.1 dated 03.04.2019.

2. The long and the short of the captioned writ petition is that the land comprising survey No.83 measuring 21 kanal 19 marla, survey No.42 measuring 10 marla and survey No.37 measuring 3 marla total land measuring 22 kanal 12 marla was allotted in favour of Alam Deen s/o Imam Deen who was the grandfather of petitioners through allotment chit dated 18.03.1950 and after taking possession of the land, he cultivated the same and till his death he remained the owner and possessor of the land and as per Evacuee Property Act and Rules; On the death of allottee, the land automatically stood transferred to his legal heirs but in the case in hand, the Evacuee authority with mala-fide intention did not transfer the land to the legal heirs and in this regard, an application was also submitted on behalf of legal heirs but only 15 kanal and 18 marlas land was allotted in the name of sons of Alam Deen with the excuse that the other land is in possession of the Armed Forces. It

has been averred that respondent No.2 got 3 kanal land from the father of petitioners who was entitled for allotment of 8 kanal land from survey No.83 and on the statement of petitioners' father, the land measuring 3 kanal was allotted to the name of respondent No.2 through allotment chit No.35/77 dated 06.04.1977 and respondent No.2 from the said land transferred 1 kanal land to his close relative namely Sheikh Tahir Qayyum. It has further been alleged that Rehabilitation Authority after recording the statement of respondent No.2, allotted the land measuring 1 kanal in the name of respondent No.3 on 27.07.1985. Respondent No. 2, who was an officer in Revenue Department, filed declaration for Proprietary Rights Transfer Order (PRTTO) in respect of the land comprising survey No.83 measuring 3 kanal by concealment of the facts and got all the proceedings in his favour by practicing fraud and obtained the land measuring 3 kanal from survey No.83 and the petitioners' father had no knowledge about that forgery and fraud but all this came to his knowledge in year 2015 and then he filed review petition before the Custodian which was objected by the other side and the point of limitation was highlighted but the petitioners by referring the judgment of the Supreme Court submitted

that no limitation shall be counted where true owner was deprived from his land. It has been stated that respondent No.2 categorically mentioned that he challenged the allotment of Sheikh Tahir Qayyum which is also pending before the Hon'ble Court, therefore, it is duty of respondent No.1 to consolidate both the cases and then after detail inquiry, deliver its judgment but non-petitioner No.1 with mala-fide intention through the impugned judgment illegally held that the petitioners have failed to prove the review petition while declaring the review petition as time barred. As per stance of petitioners, the land in question measuring 22 kanal 12 marlas was admittedly allotted in favour of Alam Deen and after his death, the said land should have been transferred to his legal heirs i.e. two sons namely Saïen Khan and Kala Khan but Rehabilitation authority illegally issued new allotment in year 1970 regarding 15 kanal and 18 marlas land and then proprietary rights were also illegally issued in respect of 9 kanal and 15 marla land in favour of deceased sons, which as per contents of petition, is a sordid move of the authority who deprived the land owner from their property illegally, hence, this writ petition for setting aside the whole

proceedings regarding the matter as well as the order of Custodian dated 03.04.2019.

3. Writ petition was admitted for regular hearing and after its admission the respondents were ordered to file written statement, however, on the request of learned counsel for respondents, comments already filed on behalf of respondent No.2 were ordered to be treated as written statement on behalf of all the respondents. The contents of writ petition had totally been negated in the written statement and finally prayed for dismissal of the writ petition with costs.

4. Ch. Shoukat Aziz, learned counsel for petitioners reiterated the grounds taken in the writ petition and submitted that respondents No.2 and 3 mutually transferred the land from each other but now they illegally involved the other Family Members. He further argued that allotment in favour of Sheikh Tahir Qayyum had not come into the petitioners' knowledge because no notice was issued to their father and after getting the knowledge of the same, without any delay review petition was filed before the Custodian but instead of holding thorough inquiry and transferring the land to its real owner, respondent No.1 with the connivance of respondents No.2 and 3 through

impugned decision dismissed the review petition as neither the status of respondent No.2 is of local destitute, nor he falls in the category of refugees. The learned counsel contended that when respondent No.2 surrendered 1 kanal land in favour of respondent No.3 then he was only entitled for 2 kanal land from survey No.83 but he illegally got PRTO about the whole 3 kanal land, hence, all the proceedings clearly show the fraudulent manner and forgery of the respondents with the connivance of the Revenue authority, therefore, the whole proceedings are liable to be quashed. Finally, he prayed that while accepting the writ petition, the impugned decision may be set-at-naught. The learned counsel for petitioner in support of his version referred the following case law;

1. 2016 SCR 451.
2. 1999 SCR 71.
3. Judgement of Hon'ble Supreme Court dated 17.11.2017.

5. Conversely, Mr. Abdul Rasheed Abbasi, learned counsel for respondent No.2 while controverting the arguments advanced by learned counsel for petitioners submitted that the petition in hand is badly hit by the laches as the writ petition has been filed against the PRTO after a long period of 18 years. He further argued that petitioners are also estopped by their conduct regarding their claim in

respect of land measuring 22 kanals 12 marlas as from allotment chit dated 14.05.1970, land measuring 15 kanals 18 marlas comprising 3 survey numbers (37, 42 and 83) situated in Kham Darang, Muzaffarabad was allotted to Kala Khan and Saien Khan and PRTO was issued in favour of legal heirs only to the extent of 9 kanals 15 marlas and they never objected upon said allotment or PRTO, so, they cannot claim any land above from the aforesaid scale. The learned counsel further argued that petitioners have not impleaded the heirs of Kala Khan/one of the allottees and PRTO holders as necessary party, therefore, the writ petition is liable to be dismissed on this sole ground. The claim of petitioners regarding surrender of respondents in favour of respondent No.3 is baseless as apparent from the allotment chit made in favour of respondent No.3, the allotment has not been made on account of any alleged surrender and allotment of respondent No.2 has not been cancelled by any competent authority, he added. The learned counsel finally prayed for dismissal of writ petition. The learned counsel in support of his version referred to and relied upon the following case laws:-

1. 2017 SCR 242
2. 2018 SCR 386
3. 2018 SCR 572
4. 2015 SCR 1156

5. 2004 SCR 391
6. 2004 SCR 459
7. 2008 SCR 256
8. 2002 SCR 150
10. 1995 SCR 259.

6. Pro and contra arguments have been heard at length besides the record has been taken stock of.

7. The petitioners have assailed the decision passed by the learned Custodian dated 13.04.2019 and prayed for multiple relief. It is useful to reproduce the prayer made by the petitioners:-

“It is, therefore, most humbly prayed on behalf of petitioners that by accepting this writ petition an appropriate writ may very kindly be issued while declaring the Proprietary Rights Transfer Order (PRTO) No.14554 dated 18.05.2001 to the extent of 1 kanal was issued against the law, fact and record, as he is entitled only 2 kanals land after surrender 1 kanal in favour of respondent No.3 and the non-petitioner No.1 may also be directed to hold thorough inquiry and then the whole land which was allotted in favour of grandfather of the petitioners in 1950 may also be restored to the extent of other 6 kanals 10 marlas land and declared that the descendant of the Alam Deen were entitled for the whole 22 kanals 12 marlas land and the proceedings of the Alam Deen are initiated for the same allotment which was nowhere been cancelled from his name. Consequently, the decision of the respondent No.1 dated 03.04.2019 may also be vacated.”

8. It is reflecting from the above prayer made by the petitioners that they are seeking a declaration in their favour pertaining to the disputed question of facts requiring detailed probe and evidence. At the outset, declaration pertaining to any proprietary right cannot be given in extraordinary writ jurisdiction conferred under Article 44 of Azad Jammu & Kashmir Interim Constitution 1974, as such like declaratory relief is within jurisdictional ambit of the Civil Court under Section 42 of the Specific Relief Act subject to conditionalities provided over there. Remedy of writ is an extraordinary remedy and equitable relief, having its set protocols and prerequisites, thus, prayer made for declaration is discarded, so, I focus on the last prayer made by the petitioners i.e. for annulment/vacation of decision dated 03.04.2019 passed by respondent No.1.

POINTS FOR DETERMINATION:

1. Whether the claim of the petitioners regarding land in question was triable before the Custodian against the order dated 18.05.2001, after lapse of approximately 14 years, that too, when the petitioners are resident of the same vicinity/locality and particularly having residence the same number khasra i.e. 83 min?
2. Whether the claim of the petitioners pertaining to allotment in such like eventuality when the said land stood allotted to the respondents after a long time despite having knowledge is liable to be

entertained in view of 18 B (II) of the Rehabilitation of Evacuee Property Act 1957?

3. Whether allotments made by the relevant authority in favour of the respondents are void ab initio and could be challenged at any time?
4. Whether findings of fact recorded by the Custodian are liable to be substituted or annulled by issuance of writ of Certiorari?

9. Juxtapose analysis of the pro and contra stance of the parties as they have portrayed before the learned Custodian, oozing from the written arguments offered by them in the Court of Custodian. It is useful to reproduce the comparative version to arrive at right conclusion:-

تحریری بحث سائیں خان (پیشتر)

یہ کہ اراضی نمبرات خسره 83 تعدادی 21 کنال 19 مرلے، 42 تعدادی 10 مرلے، 37 تعدادی 3 مرلے جملہ تعدادی 22 کنال 12 مرلے بحق عالم دین ولد امام دین (والد سائل) مورخہ 18.03.1950 کو الاٹ ہوئی جسکا ریکارڈ مال میں باقاعدہ اندراج موجود ہے۔ عالم دین کے فوت ہو جانے کے بعد سائل اور کالا خان جو کہ عالم دین الاٹی کے شرعی ورثاء ہیں بحق برابر اراضی زیر بحث کے الاٹی چلے آ رہے ہیں۔ عالم دین کے فوت ہو جانے کے بعد قانونی جواز کے سائل (سائیں خان) اور کالا خان پسران عالم دین کے نام جملہ اراضی کے بجائے صرف بحیثیت ورثاء صرف 15 کنال 18 مرلے کی الاٹمنٹ مورخہ 14.05.1970 کو بحق برابر جاری ہوئی جبکہ سائل اور کالا خان نے مورخہ 11.02.1970 کو 22 کنال 12 مرلے کی الاٹمنٹ چٹ جاری کرنے کی استدعا کی حالانکہ بقیہ اراضی کی الاٹمنٹ عالم دین یا اسکے پسران سائیں خان اور کالا خان کے نام سے منسوخ نہ ہوئی تھی۔

تحریری بحث رسپانڈنٹ شیخ حفیظ الرحمان

۱۔ یہ کہ نظر ثانی بالاعرصہ 14 سال بعد بخلاف حکم محررہ 18.05.2001 دائر کی گئی ہے اس ناواجب تاخیر کی کوئی معقول وضاحت نظر ثانی میں درج نہ کی گئی ہے۔ سائل بھی سابق نمبر خسره 83 من کالا الاٹی اور اسی نمبر خسره میں عرصہ دراز سے سکونت پذیر چلا آ رہا ہے جسکو شروع دن سے اراضی زیر قبضہ والاٹ شدہ مسئول نمبر 1 کی نسبت کامل علیت تھی علاوہ ازیں سائل کی علیت میں مسئول نمبر 1 نے ٹیٹلیٹ حقوق ملکیت مجریہ 18.04.2001 بحق خود جاری کروایا لیکن سائل نے کسی بھی مرحلہ پر علیت ہونے کے باوجود عذر اعتراض نہ کیا علاوہ ازیں سائل (سائیں خان) نے قبل ازیں ایک نظر ثانی بخلاف سائل مورخہ 30.05.2016 کو دائر کی جو مورخہ 06.06.2016 کو خارج ہوئی۔ نظر ثانی صریحاً زائد المعیاد ہونے پر قابل اخراج ہے۔ ریفرنس مقدمہ مکھن جان بنام کسٹوڈین، مطبوعہ PLJ 2001 SC AJK 368

Contours of jurisdiction conferred under Article 44 of the Interim Constitution 1974 allow interference in shape of judicial review over the decisions/orders of special tribunal and quasi-judicial forums in a limited manner upon infra criteria;

- (I) If decision of the tribunal is patently illegal or without jurisdiction;
- (II) If decision has been given by deviating the law governing the matter and by brushing aside the prescribed procedure which makes the said decision arbitrary on the very fact of it;
- (III) Where findings are in vacuum and utter disregard of record/evidence.

10. Apart from the supra eventualities, writ is not competent against the decision of tribunal of exclusive jurisdiction over the matter. Custodian is a special tribunal and its findings are supported by the record and reasons are immune from challenging in writ jurisdiction ¹. The finality attributed to the orders mentioned in 18 B (3) of the Act 1957 refers to the other Fora and Courts do not abridge, control or curtail the review powers conferred on the Custodian under section 42 (6) of the Act ². Findings recorded by the Custodian in light of the record cannot be substituted by the High Court for the findings recorded by the special tribunal.

¹. Ch. Mohammad Shoukat Vs. Custodian (2016 MLD 1382).

². Mirza Abdul Aziz Vs. Mohammad Ayub (2013 SCR 827).

11. The question before this Court is now whether writ of Certiorari can be issued by embarking upon the decision of tribunal of exclusive jurisdiction i.e. Custodian, particularly, when findings are supported by record, simple answer is absolutely not. Supreme Court of Pakistan in the case titled “Rahim Shah Vs. Chief Election Commission and others”³, while dealing with the similar proposition held as infra:-

“It may be further observed that although the conditions for grant of Certiorari which obtain in English Courts do not apply to High Court in Pakistan at the same time the Extent of this Constitutional jurisdiction cannot be enlarged to an appeal on facts or questions of law. An appeal is a creation of Statute and if no appeal is provided by the legislature, the determination of a tribunal of exclusive jurisdiction is final. The scope of interference in the High Court is therefore, limited to the inquiry whether the tribunal has in doing the act or undertaking the proceedings acted in accordance with law. If the answer be in the affirmative, the High Court will stay its hands and will not substitute its own findings for the finding recorded by the tribunal.”

Limited arena and grey area is available for interference in extraordinary jurisdiction to overturn the findings of tribunal of exclusive jurisdiction, thus, High Court always

³. PLD 1973 SC 24.

remains slow and cautious while embarking upon the decision of special tribunals as the remedy of writ is not akin to the remedy of appeal (which is creature of statute and equip the appellate Fora with the vast powers to reopen the matter from both factual and legal angles.

(underlining for emphasis)

Another important aspect of the matter which remained unattended by the special tribunal i.e. operation of 18 B (3) of the Pakistan (Administration of Evacuee Property) Act 1957 which reads as under:-

18-B. Notwithstanding anything contained contrary in any other law, for the time being in force and without prejudice to the generality of the powers which already vest in him, the Custodian may cancel any allotment of evacuee property in the following cases;

- a. _____
- b. Where an allottee has, to the satisfaction of the Custodian voluntarily surrendered or abandoned the allotment.
- c. _____
- d. _____
- e. _____

12. Albeit first portion of the above para (18 B (3) of the said law is about voluntarily surrendering but very next portion is alarming which leads to relinquishment and give up on part of the claimant who slept over the matter and spoiling time in deep slumber, afterwards come forward with volta face, thus, under above impression and

exposition of law, inference of abandonment could also be drawn, thus in this sense abandonment expressly or even impliedly blocked the way of claimant in tandem;

(i) The Custodian may himself can cancel and undo the allotment of such allottees who have expressly or impliedly abandoned their rights;

(ii) Abandonment of allotment in view of 18-B (3) can come into play and is to be read against the such like claimants as waiver. The word “Abandon” has been defined in Black’s Law dictionary 11th Edition as infra:-

“Abandon--- To leave (someone) especially when doing so amounts to an abdication of responsibility to relinquish or give up with the intention of never again reclaiming once rights or interest in to desert or go away from permanently, to stop (an activity) because there are too many problems and it is impractical and impossible to continue to cease having (an idea attitude or belief) to give over or surrender to the underwriters the insured’s interest in (the insured property) while claiming payment for the total loss.”

Vis-a-viz the abandoned property has been defined as under in the Black’s law dictionary (supra mentioned).

Abandoned Property- Property that the owner voluntarily surrenders, relinquishes or disclaims, lost property mislaid property.

13. It reveals from above definition that disclaiming a right to property is also abandonment of the property as per law. A person living in the same vicinity where the suit land is situated or rival party has obtained the allotment of the same and made construction over there without any resistance as well as are enjoying the possession and proprietary rights from decade, could not take refuge or rescue himself from the application of 18 B (3), quo abandonment of property as well.

(Underlining is ours)

While dilating upon the identical proposition, the Hon'ble Apex Court of AJ&K in the case titled "Makhan Khan Vs. Custodian & 2 others"⁴, held as under:-

"Discretion exercised by the Custodian by one way or the other is not ordinarily to be disturbed by the Courts even otherwise, the case of the appellants with regard to the absence of their knowledge cannot be accepted in view of that fact that they being residents of the same Village and thus it is improbable that they were ignored of the allotment of the proprietary rights transfer order in favour of the respondents. That too the question of limitation of 30 days for filing review petition before the Custodian has also amicably been resolved in the supra Makhan Khan case. Similarly, the point of limitation has also been resolved in the case titled "Mirza Lal Hussain Vs. Custodian 1992 SCR 214 as well."

⁴. PLJ 2001 SC (AJ&K) 368 @ 374-C

14. It is trite that a party having a right kept mum allowing someone dealing with the property in a manner to infringe and fragile his right and witnessed the entire progress against his rights, he cannot afterward come forward to agitate the matter as doctrine of acquiescence and waiver come into play as barrier. Conduct of the party is much relevant who seek equitable relief under Article 44 of the Interim Constitution 1974, thus, delayed and belated approach of the petitioners is fatal and suffice to decline relief on this solitary score, beside others. The jurisdiction granted by Article 44 of the Interim Constitution is discretionary in nature and relief is always refused if the Court forms the view that it would be unjust to allow the remedy where the conduct of a party which comes to the Court is such that it may amounts to waiver, remedy is also refused, where the party is though perhaps not waiving that remedy yet the other party has been put in a situation of disadvantage in which case it would not be reasonable to unsettle the party. If this conduct is accompanied by lapse of time and delay it assumes greater importance ⁵. Where the Court or the tribunal has jurisdiction and it determined

⁵. Nusrat Fatima Vs. Azad Govt. (PLD 1985 SC (AJ&K) 93) and Haji Mohammad Ashraf Vs. DAM (1995 MLD 1343)

specific question of fact or even of law, unless patent legal defect or material irregularity is pointed out, such determination cannot ordinarily be interfered with by the High Court while exercising jurisdiction under the constitution ⁶.

SQUEEZED ANALYSIS.

15. The petitioners party despite living in the same vicinity particularly in the same number khasra kept mum for a long time and impliedly abandoned the claimed rights or for that matter waived and acquiesced the same, that too the offspring (heirs) of the late Kala Khan (brother of Saïen Khan) have not been arrayed as party in the line of respondents. In first round of litigation brought by the real cousin of the petitioners titled Ch. Shoukat Vs. Custodian continued from 2013 to 2019, the petitioners have failed to join the proceedings and when the case met failure in first round, the petitioners come forward. Dispute between Shafiq and Tahir Qayyum respondents is pending adjudication before the learned Custodian, thus, High Court is not supposed to enter in the realm of disputed question of facts requiring detailed inquiry/evidence. Seemingly, the father of the petitioners himself surrendered or for that

⁶. Chief Executive Vs. M. Fazil (2019 SCMR 919).

matter abandoned the allotment when he did not agitate and raise the matter well within time when less land was allotted and given to them. The case law cited by the learned counsel for petitioners has no relevancy to the proposition involved in the matter and is totally distinguishable.

16. For the above multiple reasons, the constitutional petition in hand is bereft of merit and entails dismissal, thus, the same stands dismissed with no order as to costs.

Muzaffarabad.

02.10.2023 (Saleem)

JUDGE

Note:- Judgment is written and duly signed. The office is directed to intimate the parties or their counsel accordingly.

JUDGE

[TO BE REPORTED]

JUDGE