

Jammu & Kashmir High Court

Hindu Bhushan And Others vs Commissioner/Secretary on 26 July, 2022

HIGH COURT OF JAMMU & KASHMIR AND LADAKH  
AT JAMMU

Reserved on : 13.07.2022

Pronounced on : 26.07.2022

WP(C) No. 1679/2021  
CM Nos. 7365/2021, 6554/2021 &  
7516/2021

Hindu Bhushan and others

..... Petitioners

Through: Mr. Vikram Sharma, Sr. Advocate with  
Mr. Sachin Dev Singh, Advocate

Vs

Commissioner/Secretary,  
Horticulture Department and others

..... Respondents

Through: Mr. R. K. Gupta, Sr. Advocate with  
Mr. Uday Baskar, Advocate  
Mr. Vishal Bharti, Dy. AG for R- 1 & 2.

Coram: HON'BLE MR. JUSTICE RAHUL BHARTI, JUDGE

ORDER

CM No. 6554/2021 Through the medium of CM no. 6554/2021, the petitioners have made a prayer that pending disposal of their writ petition WP(C) no. 1679/2021 a stay order with regard to land measuring 32 kanals 12 marlas in

-(2)- CM No. 6554/2021 in WP(C) No. 1679/2021 khasra no. 357 and a common passage land measuring 22 kanals 8 marlas bearing khasra no. 289, be passed. For claiming the aforesaid interim relief the petitioners are alleging that raising of construction at the said site of khasra no. 357 is in violation of Section 3 of Jammu & Kashmir Water Resources (Regulation and Management) Act, 2010 and Section 3 of the Jammu & Kashmir Common Lands (Regulation) Act, 1956 as the construction activity is going to subject the petitioners and the villagers of village Chak Avtara to an

irreparable loss of a water resource and the injury which may not be compensable by any other means in future.

For the purpose of adjudicating this civil miscellaneous application of the petitioners, reference to the facts and circumstances to the needful extent as set up in the writ petition and reply submitted on behalf of respondent no. 2, i.e. Director Horticulture Planning & Marketing Narwal, Jammu as well as the private respondent nos. 9 to 14, is to be first served.

The petitioners have submitted in their writ petition that land comprising khasra no. 357 min measuring 32 kanals 12 marlas in village Chak Avtara, tehsil Bishnah, district Jammu is recorded as Gairmumkin Chapri (Pond) in the Jamabandi records, and, as such as being a water resource khasra no. 357 min cannot be divested and diverted of its nature on any pretext to any other nature and use, much less the use for which the

-(3)- CM No. 6554/2021 in WP(C) No. 1679/2021 respondents, in particular respondent no. 2 read with private respondent nos. 9 to 14, are bent upon to resort to.

With respect to 22.8 kanals of land in khasra no. 289, which is said to serve as road leading to different villages it is pleaded even the said land cannot be taken by the respondent no. 2 and the private respondent nos. 9 to 14 at their disposal on any pretext whatsoever.

Before proceeding further, the learned counsel for the appearing- respondents have made a very categoric statement that from the perspective of their respective position the respondent no. 2 and the private respondent nos. 9 to 14 have nothing to do with 22.8 kanals of land falling in khasra no. 289 in village Chak Avtara, Tehsil Bishnah. That being so, the same shall suffice to take care of the concern of the petitioners qua said 22.8 kanals in khasra no. 289.

This leaves and leads the issue to centre upon land measuring 32 kanals 12 marlas in khasra no. 357 min. It would be in the fitness of facts to register and observe at the outset that as on date the actual physical position obtaining on spot qua khasra no. 357 min in Chak Avtara, tehsil Bishnah is that out of total chunk of 32.12 kanals of khasra no. 357 min, 20.6 kanals stretch of land is being held on acquisition basis by the respondent no. 2 and the rest of 12.7 kanals is reflected in the names of owners.

-(4)-

CM No. 6554/2021 in  
WP(C) No. 1679/2021

On the basis of a land acquisition exercise dating back to the year 2002 by reference to letter no. DDHJ/2002/833-35 dated 23.09.2002 to the Assistant Commissioner Revenue (Collector Land Acquisition) Jammu, a request was registered on behalf of the Directorate of Horticulture (P&M) J&K Government for acquisition of 20 kanals of land under khasra no. 357 in said village Chak Avtara, tehsil Bishnah for the purpose of development of fruit & vegetable mandi which upon

inspection and identification by the officials of the Directorate of Horticulture and Directorate of Agriculture was found suitable.

This request had led to issuance of section 4 notification no.LA/ACR/FVM/Notice/2004 dated 07.02.2004 issued by the Collector Land Acquisition(Assistant Commissioner Revenue), Jammu. The land acquisition process so initiated culminated in passing of a final land acquisition award no.LA/ACR/FVM/D/Award/05 dated 17.06.2005 by the Collector Land Acquisition, Assistant Commissioner (Revenue), Jammu. This land acquisition exercise, going as per the record of the case was never objected to by anyone, be it owners/occupiers/users/village residents of Chak Avtara, tehsil Bishnah on any count much less by reference to the nature of the land comprising khasra no. 357. In fact, the status of entire khasra no. 357 was that of private ownership of the owners as reflected in the Jamabandi record and who are said to have even received the

-(5)- CM No. 6554/2021 in WP(C) No. 1679/2021 compensation for the acquisition of 20 kanals of land out of the total 32.12 kanals of land under khasra no. 357.

Upon the completion of the acquisition of the said 20.6 kanals of land in khasra no. 357, the same came to be held and possessed by the respondent no. 2, i.e., Department of Horticulture Planning and Marketing, Narwal Jammu with its clear demarcation and got the same secured by boundary fencing. Mutation of the acquisition no. 1065 for said 20.6 kanals of khasra no. 357 also stood attested.

The petitioners in their writ petition have adverted to this fact of acquisition by reference to a plea that they came to know about it only when in their complaint made to the office of the Lieutenant Governor, Union Territory of Jammu & Kashmir the disclosure of fact came to take place in the report dated 22.04.2021. The petitioners in a guarded manner have pleaded to exhibit ignorance of said development but still label the said acquisition exercise as being an act of illegal acquisition on the part of respondent no. 2, i.e. Director Horticulture Planning & Marketing, Narwal Jammu.

In the reply-cum-objections filed by the respondent no. 2, i.e., Department of Horticulture Planning and Marketing, Narwal Jammu it has been clearly averred that upon its acquisition the Department came to undertake the physical development of the acquired land which in the course

-(6)- CM No. 6554/2021 in WP(C) No. 1679/2021 of time came to be in the form of coming up of an administrative block functional since 2010, the auction shed of 150 40 size, lavatory block, wide macadamized inlay of roads, a water tank facility in addition to the fencing of the said land, which made the fruit mandi functional at the site from the year 2015 onwards. To this aspect of the physical status of the land so obtaining, the petitioners have not referred or reflected anything in their writ petition or by any rejoinder to dispute the said fact.

The next phase of the development of the said site came to take place when the lessees of 86 numbers of shops earmarked upon the said premises of 20 kanals 6 marlas of land came to take shape. Very fairly it has not been disputed by the learned senior counsel for the petitioners that as on date a good number of shops have already come up at the site leased out and other lease holders

are in line for developing their respective shop sites.

In the light of the factual scenario so obtaining, very vehement and persuasive efforts on the part of the learned senior counsel for the petitioners to say that till the pendency and final disposal of the writ petition, the entire physical situation so obtaining must be put to a reverse state in the light of the fact that the nature of the land in khasra no. 357 is that of a Gairmumkin Chapri, which as per learned senior counsel for the petitioners is to be reckoned as a pond, is a bit far-fetched plea. The learned senior counsel for the petitioners has made very heavy reference and reliance to the provisions

-(7)- CM No. 6554/2021 in WP(C) No. 1679/2021 of the Jammu & Kashmir Water Resources (Regulation and Management) Act, 2010 read with the Jammu & Kashmir Common Lands (Regulation) Act, 1956 to stress the submission that notwithstanding the actual physical position obtaining on spot which may have come into shape by following a procedure of law in the form of land acquisition process dating back to the year 2002 onwards, the provisions of the said two Acts read with judgements of the Hon'ble Supreme Court with respect to the water bodies, its preservation and protection must be given precedence. In this regard, learned senior counsel for the petitioners has cited two Hon'ble Supreme Court of India judgements i.e. 2011(11) SCC 396 "Jagpal Singh and others Vs State of Punjab & others" and 2019(11) JT 504 "Jitendra Singh Vs Ministry of Environment and others."

The judgements cited by the learned senior counsel for the petitioners do make a very persuasive reading but the same cannot lend any assistance to the case of the petitioners as the physical development which came to take place at the site is borne out of a lawful acquisition process which at no point of time was ever questioned and has not been questioned even in this writ petition. The learned counsel for the petitioner has tried to make a case out of a communication dated 13.08.2021 of the Tehsildar Bishnah to plead that even the said Revenue official is referring to said land of khasra no. 357 with a concern for its water resource nature. This communication of Tehsildar Bishnah would have carried some value had the

-(8)- CM No. 6554/2021 in WP(C) No. 1679/2021 said official first checked the entire revenue record with respect to said khasra no.357 and then reconciled his concern vis-a-vis the legal transformation of the land effected.

The principles which govern grant of interim relief in a legal proceeding in a writ petition under Article 226 of the Constitution of India follow the same spirit and sense as the ones contemplated under Order 39 Rule 1 & 2 of the Code of Civil Procedure (CPC). Prima facie case, balance of convenience and irreparable injury are the names of said principles. In addition to the three, the Courts have supplemented sub-principles also like conduct of the party seeking interim relief, the time at which the seeker of interim relief first had notice of the act complained, the element of acquiescence on the part of interim relief seeker.

Considering the situation in its totality, this Court finds itself confronted with a question that in case if the petitioners, as being the vigilant residents of Village Chak Avtara, Tehsil Bishnah or for that

matter other residents of the said village or of an adjoining villages, are so alive and concerned with the nature of said khasra number so as to be kept preserved and maintained for common use as being a water resource then how come all along from the year 2002 onwards till the filing of the writ petition, during the intervening period of which 20.6 kanals out of 34 kanals of land in khasra no. 357, came to undergo a visibly gatherable and

-(9)- CM No. 6554/2021 in WP(C) No. 1679/2021 available physical transformation, did not bother the petitioners to a wink and then all of a sudden to be arrested with an overdrive to seek redressal of the grievance vis-a-vis the purported Gairmumkin Chapri by approaching this Court with the present writ petition and insist for having the physical development on spot frozen through the medium of Civil Miscellaneous petition.

This Court is not tempted to accept the bona fide of the petitioner as such. This Court is refraining from addressing anything on the main merits of the writ petition and has made the needful observations only to the extent required for the purpose of dealing with the CM no. 6554/2021 of the said petition, which is, accordingly, found to be misconceived and hence dismissed.

List the main matter on 22.08.2022.

(Rahul Bharti) Judge Jammu 26.07.2022 Muneesh