

INTHE HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

CM(M) no. 250/2023 c/w
CCP(S) no. 435/2023

Nazir Ahamd Sheikh

...Appellant(s)/Petitioner(s)

Through: Mr. I. Sofi, Advocate

Vs.

Rayees Ahmad Sheikh and others

...Respondent(s)

Through: Mr. Jehangir Iqbal Ganai, Sr. Advocate with Ms. Mehnaz Rather, Adv.

CORAM:

HON'BLE MR. JUSTICE VINOD CHATTERJI KOUL-JUDGE

ORDER
28.05.2025

1. Through the medium of this petition filed under Article 227 of Constitution of India, petitioner is challenging the order dated 21.09.2023, passed by the court of Principal District Judge, Bandipora (Appellate court) in a File no.06/Miscl Appeal titled *Rayees Ahmad Sheikh and another vs. Nazir Ahmad Sheikh and another*, whereby the order dated 20.05.2023, passed by the court of Munsiff, Bandipora (Trial Court) in an interim application has been set-aside.
2. Heard and considered.
3. The order impugned is being challenged precisely on the ground that the Appellate court entertained the time barred appeal without appreciating the matter and dismissed his interim application. The order passed by the Appellate court is bad in law without any reasons, therefore, it is argued by Mr. Sofi learned appearing counsel for the petitioner that the order

passed by the appellate court is required to be set aside and order of the Trial court restored.

4. A civil suit has been filed by plaintiff, petitioner herein, before the Trial court, stating therein that plaintiffs and defendant entered into agreement/family settlement on 01.03.2001, whereby they settled three issues: one was with respect to walnut trees which were cut down by defendant and other issues were not settled by defendants 1&2 which included common stream which has been blocked by defendants and the concrete wall which was to be constructed by defendants, has not been constructed by them. So, plaintiff's grievance is that defendants have to comply with the terms and conditions of the settlement to the extent of removal of walnut trees, however, so far as the conditions regarding the maintaining the water channel and construction of wall in place of old wall is concerned, same has not been complied with. Thus, the dispute projected by the plaintiff is maintenance of water channel and construction of wall in place of old wall. To enforce settlement, plaintiff has filed a suit before the Trial court, seeking following relief:-

“(a) A decree for specific performance contract duly executed and attested between the parties dated 01.03.2001, be passed in favour of the plaintiff and against the defendants, whereby the defendants be directed/compelled to perform the said contract in its terms and conditions as already agreed by the defendants father.

(b) A decree of perpetual injunction be granted in favour of the plaintiff and against the defendants, whereby the defendants be permanently restrained from alienating or changing the nature of the suit property i.e. subject matter of the contract and from interfering in the peaceful possession of the land under survey no.1000 min measuring 01 Kanal and 15 Marlas situated at Quil, Aloosa, Bandipora”

5. It is clear from the prayer clause that plaintiff is not asking for specific performance of the conditions of the family settlement, but is seeking

injunction with regard to the land measuring 01 Kanal and 15 Marlas comprising of survey No.1000 min.

6. The Trial court, on the first hearing of the case, passed the *ex parte* interim order dated 20.05.2023. For its modification/vacation defendants filed an application but Trial Court did not decide it, so defendants/respondents filed an appeal on 28.08.2023. The Appellate Court by virtue of dated 29.08.2023, asked Trial Court to decide interim application on merits, but the Trial Court did not decide the same.
7. Order 39 CPC relates to temporary injunctions and interlocutory orders. Rule 1 to Order 39 CPC provides that where in any suit it is proved by affidavit or otherwise that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in a execution of a decree or that the defendant threatens or intends to remove or dispose of his property with a view to defrauding his creditors, the court may by order grant a temporary injunction to restrain such act or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property or dispossession of the plaintiff or otherwise causing injury to the plaintiff in relation to any property in dispute in the suit as the court thinks fit, until the disposal of the suit or until further orders.
8. Rule 3A to Order 39 CPC says about the court to dispose of application for injunction within thirty days. It provides that where an application has been granted without giving notice to the opposite party, the court shall make an endeavour to finally dispose of the application within thirty days from the date on which the injunction was granted, and where it is unable so to do, it shall record its reasons for such inability.

9. Rule 4 to Order 39 CPC provides that any order for an injunction may be discharged or varied or set-aside by the court on application made thereto by any party dissatisfied with such order.

10. It is pertinent to mention here that before grant of injunction, the following preconditions must be fulfilled:

- a) Prima facie case;
- b) Irreparable loss;
- c) Balance of convenience; and
- d) Bona fide conduct of the party seeking injunction.

Reference in this regard is made to ***Makers Development Services Private Limited vs. M. Visvesvaraya Industrial Research and Development Center (2012) 1 SCC 735.***

11. In view of the provisions of Order 7 Rule 3 CPC and Order 20 Rule 9 CPC, injunction cannot be granted if the disputed immovable property is not identifiable.

12. Prima facie case is not to be considered with prima facie title which has to be established on evidence at the trial. Prima facie case is a substantial question raised bona fide which needs investigation and a decision on merits. Satisfaction of the court that there is a prima facie case by itself is not sufficient to grant injunction. [See: ***Dalpat Kumar vs. Prahlad Singh, AIR 1993 SC 276***].

13. The principles upon which injunction is granted is well settled. Party to the litigation who seeks an injunction must satisfy the court that there is a serious question to be tried at the hearing of the suit and every probability tilts in his favour for the relief sought for i.e. prima facie case is in his favour. However, at this juncture, it is made clear that prima facie case may not be confused in prima facie success but simply if there is a serious

question to be tried, the test of prima facie case is satisfied and further court interference is necessary without which a right accrued in favour of the party concerned cannot be protected from species of injury which is known as irreparable injury and comparative mischief which is likely to be caused in the absence of the injunction will be greater and not compensable, thus the balance of convenience also tilts in his favour. Broadly, these principles apply where injunction is sought by the party

14. Prima facie case alone is not sufficient for grant of injunction. The court has to further satisfy that non-interference by court would result into irreparable injury to the party seeking relief and that there is no other remedy available to the party except the one to grant injunction and he needs protection from the consequences of the apprehended injury or dispossession. “Irreparable injury” however does not mean that there must be no physical possibility of repairing the injury but means only that the injury must be material one, namely one that cannot be adequately compensated by way of damages or money.

15. The third condition is that the balance of convenience must be in favour of grant of interim injunction. The court while granting or refusing to grant injunction should exercise sound judicial discretion to find the amount of substantial mischief of injury which is likely to be caused to the parties if the injunction is refused and compare it with that what is likely to be caused to the other side if the injunction is granted. If on weighing competing possibilities or probabilities of likelihood of injury, the court considers that pending the suit, the subject matter should be maintained in status quo, an injunction would be issued. [See: ***Maria Margarida Sequeira Fernandes vs. Erasmo Jack De Sequeira***, (2012) 5 SCC 370].

16. Ordinarily, a party seeking interim injunction under Order 39, rules 1 & 2 CPC must have proprietary interest in the subject matter of dispute. [See: Margaret Almeida vs. Bombay Catholic Co-operative Society Limited, (2013) 6 SCC 538].
17. Mr. Sofi, learned advocate appearing for the petitioner has submitted that appeal was not maintainable because it was time barred. The order which was challenged was ordinarily not appealable because it was subject to objections and operational to the next date of hearing which was extended from time to time, because it was not decided, therefore, appeal against the said *ad interim* order was competent and the order had been extended from time to time giving life to such order for next date, therefore, such order would not be hit by any law. The submission of Mr. Sofi is misconceived.
18. What are the consequences of non-disposal of injunction application on merits within 30 days from the date of the *ex parte* *ad interim* injunction is to be seen and looked into by the court granting *ad interim* injunction.
19. When an *ex parte* temporary injunction is granted by a court under Order 39 Rule 3 CPC but it does not dispose of the temporary injunction application on merits within 30 days from the date of grant of the *ex parte* temporary injunction, the aggrieved party shall be entitled to right of the appeal notwithstanding the pendency of the application for grant of the temporary injunction, against the order remaining in force. The appellate court shall, then, be obliged to take note of the omission of the subordinate court in complying with the provisions of Order 39 Rule 3-A CPC. Failure to decide the injunction application or to vacate the *ex parte* temporary injunction shall, for the purpose of the appeal, be deemed to be the final order passed on the application for temporary injunction on the date of

expiry of 30 days mentioned in Rule 3-A. Reference in this regard is made to **A. Venkatasubbiah Naidu vs. S. Chellappan, AIR 2000 SC 3032.**

20. In the present case, when application of defendants/respondents for modification/vacation of the *ex parte* ad interim injunction was not decided, what could have been done by defendants/respondents, obviously they would have availed of the remedy of appeal as was available to them. So, they approached Appellate Court with an appeal, which in view of law laid down by the Supreme Court in **A. Venkatasubbiah Naidu** (supra) was the remedy available to them. Thus, the Appellate Court has rightly set-aside the Trial Court order dated 20.05.2023. While doing so, the Appellate Court has directed defendants/respondents herein not to disturb the position of the old stone wall existed on spot while raising fresh construction on spot. Liberty has also been granted to respondents that in case they intend to raise the construction of fresh wall or raise the height of the existing wall in order to maintain the right of privacy between the parties, they shall be at liberty to raise the said construction of wall.

21. Having regard to above discussion, the instant petition is without any merit and is, accordingly, **dismissed** with connected CM(s). Interim direction, if any, shall stand vacated. Trial court to proceed with the case expeditiously.

(VINOD CHATTERJI KOUL)
JUDGE

SRINAGAR
28.05.2025
"Imtiyaz"

Whether approved for reporting? Yes/No