

**IN THE HIGH COURT OF JAMMU & KASHMIR AND
LADAKH AT SRINAGAR**

Reserved on: 28.05.2025
Pronounced on: 06.06.2025

CM(M) No.129/2024

MOHAMMAD AFZAL MALIK **...PETITIONER(S)**

Through: - Mr. G. A. Lone, Advocate.

Vs.

MOHAMMAD AKRAM WANI & ORS. **...RESPONDENT(S)**

Through: - Mr. Jahangir Iqbal Ganai, Sr. Advocate, with
Ms. Mehnaz Rather, Advocate.

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1) The petitioner, through the medium of present petition, has challenged order dated 22nd April, 2024, passed by the learned Principal District Judge, Kulgam (hereinafter referred to as "the Appellate Court), whereby the appeal as against order dated 16.03.2024 passed by the learned Munsiff, Kulgam (hereinafter referred to as "the trial court") dismissing the application of the petitioner under Order 39 Rule 1 and 2 of the CPC, has been dismissed. Challenge has also been thrown to order dated 16.03.2024 passed by the trial court.

2) It appears that the petitioner (plaintiff) filed a suit seeking a permanent prohibitory injunction against the

respondents (defendants) before the learned trial court. It was pleaded by the plaintiff that he is owner in possession of land measuring 15 marlas falling under Khasra No.161 situated at Village Munchwa Tehsil Yaripora. It was further pleaded that the plaintiff has planted apple trees over the suit land about 20 years back but some portion of the suit land towards Yamrach-Munchwa pathway is lying vacant. On this basis, it has been pleaded by the plaintiff that he is in occupation and possession of the suit land as its owner. To support his contention, the petitioner has placed on record copy of the Misli Haqiyat for the year 2019-20.

3) It has been pleaded by the plaintiff that the defendants have started illegal, unjustified and unwarranted interference into the plaintiff's possession over the suit land and that they are trying to dispossess him from the portion of the suit land which is situated towards Yamrach-Munchwa pathway. Accordingly, the plaintiff has sought a decree of permanent prohibitory injunction against the defendants restraining them from causing any sort of interference with the suit land, with a further injunction for restraining the defendants from forcibly dispossessing the plaintiff from the suit land.

4) The defendants have filed their written statement, in which they have admitted ownership of the plaintiff over the

suit land but have claimed that on 15th March, 2002, land measuring 25 marlas out of the suit land has been exchanged by plaintiff with defendant No.1 and in lieu of said land, defendant No.1 has given 26 marlas of land falling in Survey No.143 situated at Munchwa. According to the defendants, the exchanged land was originally belonging to Mst. Taja. It has been pleaded that pursuant to the exchange, defendant No.1 has delivered possession of the exchanged land to the plaintiff whereas the defendants have taken over possession of 25 marlas of the suit land and besides this, the plaintiff has sold additional two marlas of land from the suit land to defendant No.1.

5) It is being claimed by the defendants that they in peaceful possession of 27 marlas of land out of the suit land situated towards Yamrach-Munchwa pathway. It has been further contended by the defendants that they have nothing to do with the other portion of the suit land and that they are not interfering in the plaintiff's possession over the other portion of the suit land. It is being claimed by the defendants that the plaintiff is in not possession of the land situated towards Yamrach-Munchwa pathway. It has been further contended that defendant No.1 has enclosed 27 marlas of land, which is in his possession, by boundary wall on all sides and has constructed a cemented cell 2½ feet

below the earth/ground and 2½ feet above the earth/ground on all sides. It has been contended that tin sheets have been erected on the said cemented cell as boundary wall of the land in question and the height of the boundary wall from the ground is 10 feet on all sides whereas on the southern side its height is 12 feet. According to the defendants, they have constructed this boundary wall 15 years back and that defendant No.1 has started construction of residential house on this land. It has been claimed that the defendants have constructed base of the plinth and have dumped building material on spot. It has also been claimed that if defendant No.1 is not allowed to raise construction on the land in question, it will cause an irreparable loss to him.

6) The learned trial court before deciding application for grant of interim injunction, ordered appointment of Commissioner in terms of order dated 29.04.2023. Two persons, namely, Smt. Saima Advocate and Tehsildar, Yaripora, were appointed as Commissioners. The said order came to be challenged before this Court by way of a petition bearing CM(M) No.89/2023 but the petition was dismissed by this Court on 15.05.2023. Thereafter the two Commissioners went on spot and filed their repots before the learned trial court.

7) The learned trial court, after considering the rival submissions of the parties and after analyzing the pleadings filed by the parties as well as the report of the Commissioner, passed the impugned order dated 16.03.2024, whereby the application of the plaintiff for grant of interim injunction has been dismissed. The learned trial court while declining the relief in favour of the plaintiff has given a prima facie finding that the plaintiff is not in possession of 27 marlas of land, which, according to the learned trial court, appears to be in possession of the defendants. Thus, according to the learned trial court there is no prima facie case in favour of the plaintiff and, as such, he is not entitled to grant of interim injunction.

8) The aforesaid order of the learned trial court came to be challenged by the plaintiff by way of an appeal before the Appellate Court and the said Court vide impugned order dated 22.04.2024 upheld the order of the learned trial court and refused to interfere in the said order.

9) The petitioner has challenged the impugned orders passed by the learned trial court and the learned Appellate Court by contending that the courts below have failed to exercise the jurisdiction vested in them which has resulted in manifest injustice and irreparable injury to the petitioner. It has been contended that the courts below have

exercised their jurisdiction in an illegal manner as a rank trespasser has been encouraged and allowed to effect construction on plaintiff's land. It has been contended that the courts below have ignored the Record of Rights, to which presumption of correctness is attached and have instead placed reliance upon the report of the Commissioner and the document relating to exchange which is inadmissible in evidence. It has been further contended that the orders of the trial court and the Appellate Court are based upon report of the Commissioners which is impermissible in law because it was not open to the Commissioners to give a finding on the factum of possession of the suit land. It has been further contended that in terms of Section 138 of the J&K Transfer of Property Act, the defendants do not have any right to possess the land in question nor have they any right to raise construction thereon because their claim is based upon an unregistered piece of paper which has been styled as an exchange deed between the plaintiff and defendant No.1

10) I have heard learned counsel for the parties and perused record of the case including the trial court record.

11) Before proceeding to determine the merits of the grounds raised by the petitioner, it would be appropriate to understand the scope of power of this Court under Article

227 of the Constitution of India. Learned Senior Counsels appearing for the parties have more or less relied upon the same judgments rendered by the Supreme Court over a period of time wherein the legal position as regards the scope of power of the High Court under Article 227 has been analyzed and discussed. It would be apt to refer to some of these judgments.

12) In **Waryam Singh And Another vs Amarnath And Another, AIR 1954 SC 215**, a Constitution Bench of the Supreme Court has, while discussing the contours of power of superintendence conferred by Article 227 of the Constitution, held that the said power has to be exercised most sparingly only in appropriate cases in order to keep the subordinate courts within the bounds of their authority and not for correcting mere errors.

13) Again, in **Estralla Rubber vs Dass Estate (P) Ltd. 2001 (8) SCC 97**, the Supreme Court has, while discussing the scope and ambit of power under Article 227 of the Constitution of India, held as under:

6. The scope and ambit of exercise of power and jurisdiction by a High Court under Article 227 of the Constitution of India is examined and explained in a number of decisions of this Court. The exercise of power under this article involves a duty on the High Court to keep inferior courts and tribunals within the bounds of their authority and to see that they do the duty expected or required of them in a legal

manner. The High Court is not vested with any unlimited prerogative to correct all kinds of hardship or wrong decisions made within the limits of the jurisdiction of the subordinate courts or tribunals. Exercise of this power and interfering with the orders of the courts or tribunals is restricted to cases of serious dereliction of duty and flagrant violation of fundamental principles of law or justice, where if the High Court does not interfere, a grave injustice remains uncorrected. It is also well settled that the High Court while acting under this article cannot exercise its power as an appellate court or substitute its own judgment in place of that of the subordinate court to correct an error, which is not apparent on the face of the record. The High Court can set aside or ignore the findings of facts of an inferior court or tribunal, if there is no evidence at all to justify or the finding is so perverse, that no reasonable person can possibly come to such a conclusion, which the court or tribunal has come to.

14) In **Garment Craft vs Prakash Chand Goel**, (2022) 4 SCC 181, the Supreme Court, after noticing its earlier decisions on the issue, observed as under:

15. Having heard the counsel for the parties, we are clearly of the view that the impugned order is contrary to law and cannot be sustained for several reasons, but primarily for deviation from the limited jurisdiction exercised by the High Court under Article 227 of the Constitution of India. The High Court exercising supervisory jurisdiction does not act as a court of first appeal to reappreciate, reweigh the evidence or facts upon which the determination under challenge is based. Supervisory jurisdiction is not to correct every error of fact or even a legal flaw when the final finding is justified or can be supported. The High Court is not to substitute its own decision on facts and conclusion, for that of the inferior court or tribunal. The jurisdiction exercised is in the nature of correctional jurisdiction to set right grave dereliction of

duty or flagrant abuse, violation of fundamental principles of law or justice. The power under Article 227 is exercised sparingly in appropriate cases, like when there is no evidence at all to justify, or the finding is so perverse that no reasonable person can possibly come to such a conclusion that the court or tribunal has come to. It is axiomatic that such discretionary relief must be exercised to ensure there is no miscarriage of justice.

15) Recently the Supreme Court in the case of **M/S Puri Investment vs. Young Friends and Co. & others**, 2022 LiveLaw (SC) 279, has, while considering the scope of power under Article 227 of the Constitution of India spelt out three situations when a finding on facts and questions of law can be termed as perverse. The Court held that a finding of fact or question of law would be perverse if it is erroneous on account of non-consideration of material evidence, if the conclusions are contrary to the evidence or if the conclusions are based on inferences that are impermissible in law.

16) With the aforesaid legal position in mind, let us now advert to the facts of the present case. As per case of the plaintiff, he is owner in possession of suit land measuring 05 kanals 15 marlas in Khasra No.161 situated at Village Munchwa Tehsil Yaripora. It is pleaded that the plaintiff has grown apple trees over the suit land but has left some portion of the land towards Yamrach-Munchwa pathway

vacant, meaning thereby no fruit trees have been grown by the plaintiff on the said portion of the land. The claim of the defendants is that this vacant portion of the land, which is situated towards Yamrach-Munchwa Pathway has been acquired by defendant No.1 by virtue of exchange document executed between plaintiff and defendant No.1 and that in lieu of this portion of land, the plaintiff has taken possession of 26 marlas of land situated in some other Khasra number belonging to one Mst. Taja. The defendants claim that they are in possession of 27 marlas of land which is part of 05 kanal and 15 of suit land and they have raised fencing around it by constructing concrete cell on which tin sheets have been erected upto the height of 10/12 feet. It is also the case of the defendants that they have constructed plinth of their house.

17) There is no dispute to the fact that as per Record of Rights, whole suit land exists in the name of the plaintiff. There can also be no dispute to the legal position that the document of exchange, on which the defendants have placed reliance, is nothing but a piece of paper having no validity in the eyes of law, inasmuch as it is not even written on a stamp paper nor is it registered in accordance with law. Learned counsel for the petitioner is right in his submission that the said document does not confer any

right upon the defendants to either possess a portion of the suit land or raise construction thereon in view of the provisions contained in Section 138 of the J&K Transfer of Property Act read with the provisions contained in Section 49 of the Registration Act.

18) The issue, however, in the suit filed by the plaintiff is somewhat different. The plaintiff seeks an order of injunction against the defendants to protect his dispossession from the suit land. The defendants claim that out of the suit land, they are in possession of 27 marlas located towards Yamrach-Munchwa pathway and plaintiff admits that portion of the suit land towards the said pathway is vacant and there are no apple trees grown by him on that portion of the land. As already stated, the defendants claim that they have raised fencing and the construction of plinth on the said portion of the land. The two Commissioners appointed by the trial court while exercising his powers under Order 39 Rule 7 CPC have rendered their reports. Both of them have confirmed that the existence of fencing around the portion of land situated towards Yamrach-Munchwa pathway. Both of them have confirmed the position that construction of plinth has been made on spot. It is not the case of the plaintiff that it is he who has fenced the portion of the suit land or that it is he

who has raised construction of the plinth on spot. The existence of these physical features on spot when read with the claim of the defendants as projected by them in their pleadings, prima facie goes on to show that it is the defendants who have raised the fencing on the said portion of the suit land and it is they who have constructed plinth on spot.

19) It is true that it was not open to the Commissioners to record any finding with regard to possession of the suit land and it is also correct that it was not open to the Commissioners to record the statements of the witnesses to ascertain as to which of the party is in possession of the suit land. However, the two Commissioners were well within their jurisdiction to submit a report as regards the physical features existing on spot. To that extent, their reports cannot be ignored, at least for the purpose of understanding and co-relating the pleadings of the parties for the limited purpose of deciding the application under Order 39 Rule 1 and 2 of the CPC.

20) When the aforesaid aspects of the matter relating to existence of physical features on the land in question, which have been reported by the two Commissioners are co-related with the stand of the defendants are read in conjunction with the report of the Patwari concerned dated

07.07.2022 as well as even the report of the police dated 05.11.2022 rendered at the time of implementation of order of status quo passed by the learned trial court, it prima facie shows that it is the defendants who are in possession of the portion of the suit land which is situated towards Yamrach-Munchwa pathway. In report dated 07.07.2022 of the Patwari concerned and report dated 05.11.2022 of the police, it is clearly stated that the defendants are in possession of the said portion of the suit land and that the defendants have fenced the said portion of land and have also constructed plinth of a house. Even the copy of Khasra Girdawari for Rabi 2022 in respect of the suit land, which is on record, does not reflect the possession of the plaintiff over the suit land. In fact, it does not reflect the possession of the defendants over the suit land. When all these documents are read together in conjunction with the pleadings of the parties, prima facie, it does appear that it is the defendants who are in possession of portion of the suit land situated towards Yamrach-Munchwa pathway. Therefore, the tentative findings reached by the learned trial court, as upheld by the Appellate Court, as regards the possession cannot be termed either contrary to the material on record or based on inferences that are impermissible in

law. These findings can also not be termed as erroneous on account of non-consideration of material evidence.

21) Had it been a case where the defendants would have approached the court for grant of interim injunction against the plaintiff for protection of their dispossession, the situation may have been different as in such an eventuality, the defendants, who, it appear, have no title to any portion of the suit land, could not have defended their possession over the suit land against its real owner but it is a case where the real owner is seeking injunction against his dispossession without prima facie showing that he is in possession of the said land. The proper course for the plaintiff may have been to file a suit for possession or mandatory injunction against the defendants who, it appears, are in possession of a portion of the suit land. In the form in which the suit has been filed by the plaintiff against the defendants, I am afraid neither the trial court or the Appellate Court nor this Court can come to the rescue of the plaintiff as proof of possession is *sine qua non* for grant of a permanent prohibitory injunction against dispossession.

22) For the foregoing reasons I do not find any ground to interfere in the impugned order passed by the learned trial

court, as upheld by the learned Appellate Court. The petition lacks merit and is dismissed accordingly.

23) No order as to costs.

24) A copy of this judgment be sent to the learned trial court for information.

(Sanjay Dhar)
Judge

Srinagar,
06.06.2025
“Bhat Altaf”

Whether the judgment is reportable: YES