

S. No.27
Suppl.List

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

FAO No.37/2024
CM No.8137/2024
CM No.8499/2024
Caveat No.2437/2024

ABDUL AZIZ DAR AND OTHERS

... Petitioner(s)

Through: - Mr. Aswad R.Attar, Advocate.

Vs.

GREEN VALLEY EDUCATION TRUST AND ORS.

...Respondent(s)

Through: - Mr. M.A.Makhdoomi, Advocate
Ms.Shazia, Advocate.

CORAM:

HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

ORDER
02.01.2025

- 1) Caveat stands discharged.
- 2) Through the medium of present miscellaneous appeal the appellants/defendants have challenged order dated 25.09.2024 passed by learned Principal District Judge, Pulwama, whereby in a suit filed by respondent No.1/plaintiff against the appellants and respondent Nos.2 to 7, application under Order 39 Rule 1 and 2 of CPC has been allowed and the appellants have been restrained from causing any sort of interference with respect to the suit land falling under survey No.6508 situated at village Lethpora, Tehsil Pampora, District Pulwama particularly with the pathway measuring 14x788 feet existing on spot.

3) It appears that respondent No.1/plaintiff has filed a suit for mandatory injunction commanding the defendants, including the appellants herein, not to interfere or damage the suit property, more particularly the proprietary road exclusively owned by the plaintiff trust as well as the gate installed at the entrance of suit property. A decree of injunction prohibiting the defendants from interfering or encroaching upon the suit property has also been sought in the said suit.

4) According to the plaintiff/respondent No.1, it has acquired a parcel of land measuring 2 ½ acres situated in village Lethpora Tehsil Pampore District Pulwama bearing Khasra No.6508, which is duly mutated in revenue records in its favour. It has been further pleaded that the plaintiff trust has also acquired the approach road measuring 14 feet x 788 feet, exclusively for access to the educational institution, which is being run by it. It has been submitted that majority of the students enrolled in the B.Ed training programme are non-local, predominantly female students from various regions of India and because of current security situation their safety is of paramount concern to the trust. It has been pleaded that local inhabitants have been trespassing on the college road, consistently obstructing and damaging it, thereby causing significant inconvenience to students, staff and visiting parents of the students. According to the plaintiff, Divisional Commissioner Kashmir and other higher authorities were approached for persistent trespass and unwarranted interference on the

road leading to the College, but no action was taken by them. That the College Management resolved to erect a gate at the main entry of the road as a security measure and despite these efforts some individuals persist in attempting to vandalize the gate and misuse the institution's private property for illicit purposes. It has been contended that the defendants are adamant to dispossess the plaintiff trust from the suit property which has compelled the plaintiff to file the suit.

5) The defendants, including the appellants and private respondents 2 to 7, filed their written statements. In their written statement the appellants pleaded that the land which is in occupation of the plaintiff is actually part of a big chunk of land measuring about 150 kanals which is custodian land. It has been contended that plaintiff trust has encroached upon this land and managed some revenue entries in its favour. It has been further submitted that the pathway upon which the plaintiff is claiming its exclusive rights has been existing since decades and said pathway is sole source of ingress and egress to the residences of appellants/defendants. It has been submitted that the claim of the plaintiff over the said pathway is belied from the fact that as per the sale deed it has purchased only 35 marlas of the land, whereas the suit pathway measures more than 40 marlas. It has been further submitted that subject matter of the sale deed is not the pathway but the same is comprised in a different survey number and even if there is any sale deed, the same is nullity in the eyes of law. It has been further pleaded

that under the garb of security, the plaintiff is trying to deprive the appellants/defendants from using of the common pathway, which they have been using as their only means of ingress and egress to their houses.

6) The appellants/defendants also filed counter claim in which it has been pleaded that in the sale deed related to land measuring 1 kanal and 15 marlas on which plaintiff claims the existence of a pathway, the clause that suit pathway has been sold to the plaintiff, has been mischievously incorporated, so as to create a confusion that the suit pathway has been sold to the plaintiff which is against the position obtaining on spot. It has been reiterated that the suit pathway is the only source of ingress and egress to the houses of the appellants since times immemorial. It has been further contended that the sale deed with regard to suit pathway is direct invasion upon the easementary rights of the appellants/defendants, as such the same is liable to be set aside.

7) The appellants/defendants by way of their counter claim have sought a declaration that the sale deed dated 12.07.2011 executed by Abdul Salam Magrey in favour of plaintiff to the extent of suit pathway be declared as null and void ineffective and inoperative upon the rights of defendants. A decree of permanent injunction has also been sought restraining the plaintiff/respondent No.1 from creating any interference in peaceful enjoyment of the suit pathway by the appellants/defendants.

8) Learned trial Court after analyzing the pleadings of the parties and the documents on record allowed the application of the plaintiff under Order 39 Rule 1 and 2 of CPC vide the impugned order dated 30.05.2024. While doing so the learned trial Court has observed that prima facie the plaintiff has purchased the suit pathway which is his exclusive property and, therefore, its possession over the suit pathway needs to be protected.

9) The appellants have challenged the impugned order passed by the learned trial Court on the grounds that the suit pathway is the only source of ingress and egress to their residential houses and if the plaintiff is allowed to install a gate on this suit pathway, their ingress and egress to their houses would get blocked, thereby prejudicing their easementary rights. It has been further contended that learned trial Court has, by passing the impugned order, defeated the statutory right of easement vested in the appellants under Indian Easements Act of 1882. It has been further contended that before deciding the interim application the learned trial Court should have, in terms of Order 39 Rule 7 of CPC, proceeded to verify the credentials of the claim and the counter claim submitted by the parties.

10) I have heard learned counsel for the parties and perused the record of the case, including the impugned order passed by the learned trial Court.

11) As is evident from the pleadings of the parties, the dispute mainly revolves around the suit pathway leading from the main road to the Education Institution run by the plaintiff/respondent No.1. While plaintiff/respondent No.1 claims that this pathway is its exclusive property as the same has been purchased by it from its owner, namely, Abdul Salam Magrey by virtue of registered sale deed dated 12.07.2011. It is the case of the plaintiff that the defendants/appellants have no right or concern with the same. The appellants/defendants on the other hand claim that they have been using the suit pathway since times immemorial and they have acquired easementary right over the said pathway. It has been further pleaded by the appellants/defendants that the suit pathway is the only means of reaching their residential houses and that there is no other pathway leading to their houses.

12) So far as the ownership of the land which is subject matter of the suit pathway is concerned, the same is not in dispute. It has been clearly pleaded by the plaintiff that the suit pathway has been purchased by it from its erstwhile owner by virtue of registered sale deed. Even the defendants/appellants in their written statement and counter claim have admitted the factum of sale of land forming suit pathway in favour of the plaintiff. The defendants have challenged the said sale deed by way of counter claim on the ground that the same infringes their easementary rights. However, the defendants have failed to produce on record any document or any material to show that

this pathway is being used by them for any length of time. They have also failed to produce on record any material to show that the suit pathway is the only source of ingress and egress to their residential houses.

13) As against this the plaintiff/respondent No.1 has placed on record certificate issued by Tehsildar Pampore dated 31.07.2017 according to which the land bearing survey No.6508 situated at Lethpora Pampore is registered in the name of respondent No.1/plaintiff alongwith approach land of 14x788 feet from National Highway 44 as per revenue records and the sale deed. There is also a covenant in the sale deed in respect of suit pathway which provides that the same has been transferred to the plaintiff way back in the year 2011. The plaintiff/respondent No.1 has also produced certificate issued by Tehsildar Pampore in which it has been recorded that a separate road starting from National Highway 44 Lethpora passing from survey No.6508 recorded as kahchari in estate lethpora is being used by appellants who are residents of Khunbugh Lethpora as their source of ingress and egress. It is also recorded in the said certificate that the aforesaid road is existing on spot and has also been digitized in google satelite map. The respondent No.1 has also produced on record the site map prepared by concerned patwari Halqa Lethpora which shows that a separate road/pathway leads to the residential houses adjacent to the property of respondent No.1/plaintiff trust.

14) In the face of aforesaid overwhelming record to show that the appellants have a separate ingress and egress to their residential houses and that suit pathway is the exclusive property of respondent no.1/plaintiff it can by no stretch of reasoning be stated that the plaintiff has no prima facie case in its favour. The appellants/defendants have miserably failed to substantiate their pleadings with any material that would have persuaded the trial Court to take a different view in the matter.

15) Learned counsel for the appellants has by placing reliance upon the judgment of the Supreme Court in *Joy Auto Works and Others vs. Sumer Builders Private Limited and Another*, (2009) 4 SCC 691 contended that the because there is no other access to the residential houses of the appellants, as such at interim stage their right to access was required to be protected. The ratio laid down in the aforesaid case is not applicable to the present case, as in the said case it was shown by the appellants therein that they had no other access to their properties but in the instant case the appellants have failed to produce any material supporting their assertion in this regard.

16) It was also contended by learned counsel for the appellants that the learned trial Court ought to have, in order to ascertain the actual position on spot, appointed a Commissioner. The contention appears to be without any merit for the reason that appointment of a

Commissioner would have been necessary in case there was any confusion about the actual position obtaining on spot but in the instant case the plaintiff has placed on record documents to show that he was exclusive owner of the suit pathway. Besides this, even the official defendants/respondents have supported this claim of the plaintiff in their written statement filed before the trial Court. Thus, there was hardly any need to appoint a Commissioner. In any case, if at all the appellants/defendants desired to bring to the notice of the Court the facts and the position contrary to what the plaintiff had succeeded in bringing to the notice of the Court, it was open to them to file an application before the trial Court for appointment of a Commissioner. It does not lie in the mouth of the appellants to urge such a contention at this stage, after having failed to file such an application before the trial Court.

17) It is a settled law that discretion exercised by a trial court while passing order under Order 39 Rule 1 and 2 CPC can be interfered with by the appellate court in rare cases where such discretion has been exercised by the trial court in an arbitrary manner or the same is suffering from any perversity. Merely because another view is possible on the basis of material on record does not give jurisdiction to the appellate court to interfere in an order passed by the trial court in exercise of power under Order 39 Rule 1 and 2 of CPC. In the instant

case there is hardly any scope for taking a view other than the one that has been formed by the trial court.

18) For the foregoing reasons, there is no ground to interfere with the impugned order passed by learned trial Court. The appeal lacks merit and is dismissed accordingly.

(SANJAY DHAR)
JUDGE

SRINAGAR
02.01.2025
Sarveeda Nissar

Whether the order is speaking: Yes/No
Whether the order is reportable: Yes/No

