

COURT OF PRINCIPAL DISTRICT JUDGE, KULGAM

File No. 04/Appeal
CNR No. JKKG020007322022
Date of Institution: 18.11.2022
Date of Order: 09.07.2025

Name of the Appellant:

Abdul Rashid Peer
S/O Wali Mohammad Peer
R/O Chelan Kulgam
Tehsil and District Kulgam.

Through: Mr. Zaffar Wani, Advocate

VERSUS

Name of the Respondents:

1. Abdul Razaq Lone
S/O Mohammad Sultan Lone
2. Abdul Rashid Bhat
3. Shabir Ahmad Bhat
4. Manzoor Ahmad Bhat
Sons of Gh Mohammad Bhat
5. Abdul Ahad Ganie
Son in law Ab Ahad Lone
All Residents of Village Chehlan

Through: Mr. Zahoor-u Din, Advocate

In the Matter of:-

Civil Miscellaneous appeal against order passed by Ld. Sub-Judge Kulgam dated 16.11.2022 in civil suit titled Abdul Rashid Peer Vs Abdul Razaq Lone and ors.

CORAM: Aijaz Ahmed Khan
UID No. JK00085

O R D E R
09.07.2025

1. Civil miscellaneous appeal against the order dated 16-11-2022 passed by Id. Sub Judge Kulgam in case titled Abdul Rashid Peer Vs. Abdul Razaq Lone and others whereby interim application of the appellant came to be dismissed as misconceived has been submitted by Id. Counsel for the appellant.
2. In the memorandum of appeal, it is submitted that Plaintiff/appellant herein instituted the suit for permanent prohibitory injunction against defendants-respondents herein wherein appellant contended that appellant is owner in

possession of land measuring 4 Kanals 5 marls out of which land measuring one Kanal 19 Marlas is fallen under survey no. 137,2 Kanal 5 Marla under survey no. 136, 6 Marlas under survey no. 138 of village Chelan Kulgam upon which appellant has constructed two residential houses one granary, three cowsheds, three shops and separate latrine bathroom based on three separate rooms. The said property is fenced by concreted wall. Some 50 years back appellant out of courtesy allowed neighbours to make irrigation drain (yen) measuring almost a foot in width and depth through suit land for irrigating their kitchen garden from which small amount of water was running through the drain for irrigating their kitchen garden occasionally but with the passage of time, topography changed and people made new construction and those kitchen gardens got vanished and yen became useless.

3. Plaintiff had constructed one residential house in the year 1980 and another in the year 1996 over suit land and is residing there with his family and enjoining possession and ownership without any intervention from any quarter whatsoever.
4. Respondents are bent upon to diminish the said land as sewage drain and has put their bathroom sewage pipes into it which is causing foul smell and causing annoyance to the appellant because of the emitting hazardous gases with which appellant and his family is under immense danger of getting infections. Respondents were requested to abstain from using the said yen as drain but all in vain constraining the appellant to approach the trial court wherein interim ex-parte order dated 18-07-2022 came to be passed whereby parties were directed to maintain status quo on spot.
5. Respondents submitted their written statement resisting the claim of the appellant and submitted that irrigation channel measuring 55 Kanals and 9 Marlas under survey no. 549/164 is flowing from suit land which is recorded as Gair Mumkin Kull and blocked by the appellant with the result property and life of the respondents is in danger. Upon hearing both the sides trial court vacated the order dated 18-07-2022 by virtue of impugned order dated 16-11-2022.
6. Feeling aggrieved of the order impugned, in the memo of appeal, it is submitted that order impugned is devoid of any legal merit being quite unreasoned, erroneous, unjustified, arbitrary as same lacks appreciation of facts and law, therefore deserves to be set aside. Trial court has passed

impugned order in hot-haste without application of judicial mind which is against justice, equity and good conscience, therefore non-sustainable under law.

7. Trial court while deciding interim application has derailed from the basic principles required to be taken into consideration and has passed order impugned which requires to be set aside. While deciding the matter whole pleadings are required to be taken into consideration while as ironically trial court while deciding interim application has taken half of the plaint into consideration and left another half all together. Trial court has concluded wrongly that appellant has remedy under section 91 CPC and 133 of Land Revenue Act and by virtue of order impugned finally disposed of whole suit of the appellant which is against provisions of law.
8. Trial court has lost sight of the written statement while in respondents admitted that 55 Kanals 9 Marlas of irrigation canal along with tributary passes through the suit land of the appellant. Trial court has failed to record reasons while deciding interim application, as such order impugned passed in the above titled case requires interference and may kindly be set aside.
9. Notice came to be issued to the respondents who caused their appearance through their counsel.
10. Trial court record was called for perusal.
11. Heard Id. Counsel for the parties at length. Perused the impugned order, memo of appeal, trial court record and gave my thoughtful consideration to the matter.
12. Id. Counsel for the appellant submitted that some 50 years back appellant allowed some portion of land to be used as yen (drain) for irrigating the kitchen garden but with the passage of time topography changed and people made new construction and those kitchen gardens got vanished and respondents now have put-waste water of their washrooms into the said drain causing smell and danger to the appellant and his family. Trial court without considering the pleadings of the parties have passed impugned order while as no easementary rights have accrued to the respondents, as such, order impugned being perverse, improper and against provisions of law, therefore be set aside.
13. Counsel for the respondents submitted that appellant is trying to misinterpret the facts and has submitted distorted facts before this court as well as trial court regarding that a portion of land measuring one feet breadth one feet

depth has been left by the appellant for irrigating the kitchen garden while as fact of the matter is that a recorded yen is passing alongside the properties of both the parties which has been blocked by the appellant on spot creating great inconvenience not only to the respondents but also to the other villagers which fact has been substantiated by the Revenue Authorities who has submitted their reply which was placed before the trial court. Trial court after considering all the documents placed on file rightly concluded that appellant has no prima facie case and has passed order impugned which does not require any interference.

14.Preventive Relief is granted at the discretion of the court by injunction, Temporary or Perpetual. The Relief of Injunction is an equitable relief and he who seeks equity must do equity. Hence, a party who asks for an injunction must be able to satisfy the court that his dealing of the matter had been fair, honest and free of any fraud or illegality. The Discretion in granting or refusing injunction is to be exercised judicially and not arbitrarily.

15.The order is to the preserve the lis. Interim reliefs are requested from courts so that the subject-matter of the dispute is not destroyed or alienated before the dispute is decided. Court while granting interim relief must be satisfied (i) the existence of a prima facie case; (ii) the balance of convenience; and (iii) the possibility of irreparable loss or prejudice, if the interim relief is not granted.

16.The relief of interlocutory mandatory injunctions are granted generally to preserve or restore the status quo of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining. But since the granting of such an injunction to a party who fails or would fail to establish his right at the trial may cause great injustice or irreparable harm to the party against whom it was granted or alternatively not granting of it to a party who succeeds or would succeed may equally cause great injustice or irreparable harm, courts have evolved certain guidelines. Generally stated these guidelines are:

(1) the plaintiff has a strong case for trial. That is, it shall be of a higher standard than a prima facie case that is normally required for an injunction.

(2) it is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.

(3) the balance of convenience is in favour of the one seeking such relief. Being essentially an equitable relief, the grant or refusal of an interlocutory mandatory injunction shall ultimately rest in the sound judicial discretion of the court to be exercised in the light of the facts and circumstances in each case. This view finds support from the judgement title as **Dorab Cawasji Warden Vs Coomi Sorab Warden & Ors Reported In 1990 AIR 867 SC.**

17. Order 39 Rule 1 CPC defines the cases in which temporary injunction may be granted while as Rule 2 defines injunction to the repetition or continuance of breach and Rule 3 envisage that before granting injunction court has to direct notice to opposite party. Order 39 Rule 3 CPC prohibits grant of injunction without notice to the opposite party. Rule 4 of order 39 CPC provides that an order for the injunction may be discharged, varied or set aside by the court on an application made by any party dissatisfied with such order. In other words, once a temporary injunction application is instituted the court is required to direct notice of the application for grant of injunction to be given to the opposite party. The only exception to the general rule is the case where in the opinion of the court object of granting injunction would be defeated by delay in which case the court may grant an injunction without giving notice to the opposite party. Court has to record reasons for dispensing with the issuance of notice under order 39 rule 3 CPC, unless the reasons recorded, it would be difficult to ascertain as to how and for which circumstances and on what grounds the dispensation of notice in terms of compliance with the order 39 rule 3 CPC has been ordered. Under part III of Specific Relief Act court is empowered to pass any preventive relief, which is a discretionary relief and can be granted in the nature of injunction to prevent the breach complaint of and to compel the performance of the requisite acts.

18. It is also well settled law that right of appeal is a creature of statute. It cannot be conferred or inferred by the courts. The Constitution Bench of the Supreme Court in the matter of **U.P. Awas Evam Vikas Parishad v. Gyan Devi (Dead) by LRs. and others decided on 20th Oct 1994** has held that right to appeal is statutory right and the courts cannot confer or

infer it. It has further been held that what is legislatively not permitted cannot be read by implication, not in respect of right of appeal, as it "is a creature of statute".

19.Hon'ble Supreme Court in case titled as **Arunima Baruah vs Union Of India &Ors decided on 27 April, 2007** held that parties must come with clean hands before the court disclosing all material fact enabling the court to come to just conclusion.

20.Hon'ble Supreme Court in case titled as **Kishore Samrite vs State Of U.P. &Ors decided on 18 October, 2012** held that – “ 34. The person seeking equity must do equity. It is not just the clean hands, but also clean mind, clean heart and clean objective that are the equi-fundamentals of judicious litigation. The legal maxim *jure naturae aequum est neminem cum alterius detrimento et injuria fieri locupletiores*, which means that it is a law of nature that one should not be enriched by the loss or injury to another, is the percept for Courts. Wide jurisdiction of the court should not become a source of abuse of the process of law by the disgruntled litigant. Careful exercise is also necessary to ensure that the litigation is genuine, not motivated by extraneous considerations and imposes an obligation upon the litigant to disclose the true facts and approach the court with clean hands.

35. No litigant can play 'hide and seek' with the courts or adopt 'pick and choose'. True facts ought to be disclosed as the Court knows law, but not facts. One, who does not come with candid facts and clean breast cannot hold a writ of the court with soiled hands. Suppression or concealment of material facts is impermissible to a litigant or even as a technique of advocacy.”

21.While going through the record of the case it was observed that appellant by way of suit for permanent injunction approached the trial court along with the interim application seeking temporary relief to the extent that respondent be restrained from causing any interference with the existing structure over the suit land and passing sewage water through the suit land. In the suit it has been contended by the appellant that some 50 years back appellant out of courtesy allowed the neighbours to make irrigation drain/ yen through the suit land of the appellant for irrigating their kitchen garden which by passage of time and by new construction got vanished and neither the respondents

are using said drain as sewage drain nor has put their bathroom sewage pipes into it causing foul smell. Revenue record placed on file alongside suit by the appellant reveals that appellant is not owner in possession of the land as mentioned in the suit under Khesra no. 136 which is comprising of 2 Kanals 5 Marlas which is owned and possessed by other persons also .Revenue record placed on file reveals that irrigation canal under survey no. 549/164 is not proprietary land of appellant and report from the revenue authorities clearly reveals that the appellant has blocked the said irrigation canal causing great inconvenience to the general public of the area.

22.In the suit appellant has put forth distorted facts that the irrigation canal was left by the appellant from his own land while as said irrigation canal is under survey no. 549/164, only to misinterpret the pleadings and obtained a favor from the trial court but trial court while going through the record has rightly appreciated that the contention of the appellant in the suit that appellant has left one feet land to be used as drain for irrigating the kitchen garden is totally incorrect.

23.Appellant has suppressed the material facts and it is trite law that whoever suppresses the material facts is not entitled to any relief. It appears that under the garb of suit, appellant is trying to encroach upon the recorded drain under survey no. 549/ 164. The said drain is not in the suit property of the appellant but is in survey no 549/164.

24.In view of these circumstances and having regards to what has been stated herein above, I am not persuaded to interfere with the order impugned passed by the trial court as the same is not perverse, illegal nor against any provision of law, as such order dated 16-11-2022 passed in the above titled case by Id. Sub Judge Kulgam does not require any interference, consequent to which appeal stand dismissed along with all connected applications.

25.Let copy of the order be send down along with the record wherein parties shall cause their appearance on 24-07-2025.

26.Appeal is accordingly disposed of and shall go to records after its due compilation.

Announced;
09.07.2025

Pr. District Judge,
Kulgam

“G.R.PA”