

Court of 1st Additional District Judge, Baramulla

CNR No. JKBA020016762022

Date of Institution: 30.12.2022

Date of Order: 17.05.2023

In the Case of:-

Mehraj ud din Angher S/o Haji Gh. Rasool Anghar
R/o Kwajabagh, Baramulla

.....Appellant

V/s

- 1- Satbeer Singh S/o Danwant Singh
Chraligund, Rafiabab A/p Near Masjid Noor
Kwajabagh, Baramulla.
- 2- U T of J&K through Commissioner Secretary,
Local Bodies Srinagar/Jammu/
- 3- Director Local Bodies, Srinagar.
- 4- Executive Officer, Municipal counsel Baramulla.

...Respondents

In the matter of:

Appeal against the order dated **28.12.2022** passed by Id. Special
Mobile Magistrate/Sub-Judge, Baramulla in a suit captioned
Mehraj ud din Angher v. Satbeer Singh & Ors.

Present:- Parties along with their counsel.

Coram: Malik Shabir Ahmad
J.O.Code: JK00122

O R D E R

- 1- The instant appeal is directed against order of learned Special
Mobile Magistrate/Sub-Judge, Baramulla (hereinafter called
learned trial Court), passed in a suit captioned Mehraj ud din
Angher v. Satbeer Singh & Ors. It is averred in the memo of appeal
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that the appellant/Plaintiff is the owner and in possession of piece of land measuring 01 kanal under survey No. 211 min situated at Moza Kwajabagh Baramulla. Upon this piece of land appellant/plaintiff has also his residential house constructed before more than two decades and is residing with his family in same house. That the respondent-1 has purchased some land just adjust to the land of the appellant before some time. Respondent-1 is residing at Charigund Rafi-abad, but has constructed one structure in his land for some commercial activities. That the respondent-1 has left some five to six feet gap from the side of appellant which can be termed as "**fire gape**", Appellant never objected the construction of the respondent-1 as the respondent is constructing on his own land. That as soon the respondent-1 completed first floor of this construction, respondent-1 started on the side of appellant, to lay projection for the external staircase. Appellant approached respondent-1 and requested not to intend any kind of staircase in the gap which has been kept by him as fire gap, as same will not only effect privacy of the appellant but there will remain no fire gap, even respondent-1 installed one door frame also for this staircase. That when the respondent-1 did not concede request of the appellant not to use fire gap for staircase,

appellant approached the Municipal Counsel Baramulla/ respondent-4 against the violation of respondent- 1. Officials of Municipal Counsel Baramulla visited on spot and without any delay removed door frame and also dismantled the projection for staircase. That the respondent-1 was prevented by the Municipal counsel Baramulla for making any kind of construction on spot in the existing fire gap. That after preventing the illegal construction, respondent-1 again started work on spot and has tried to construct column for external staircase. Appellant again resisted this illegal act on spot and again approached Municipal counsel Baramulla/respondent-4 against this brazen violation of the respondent-1 but the respondent-1 has influenced the officials of Municipal Counsel Baramulla and the concerned officials did not bother to listen the genuine grievance of plaintiff. That when the official respondents did not stop illegal construction which was earlier dismantled by them on the pretext of illegal construction, appellant was compelled to file civil suit against the respondents. That it was during the trail that the respondent-1 filed written statement and has filed along with his written statement permission cum site plan issued by the Municipal Counsel Baramulla/respondent no.4. That the permission/ site plan issued

by the Municipal Counsel Baramulla in favour of respondent 1 shows that the respondent No.1 has been given permission for the construction but there is no permission for outer stair case. Besides, in the permission the distance from the side of appellant has been mentioned eight feet. That the Ld. trial Court after hearing the arguments on interim application, appointed court commissioner for spot verification and the commissioner submitted his report and has refuted the claim of the Municipal Counsel Baramulla about distance of eight feet from the side of the appellant but has submitted, average gap from the side of appellant is seven feet. Besides has also mentioned in his report, respondent 1 has already a stair existing inside. That the grievance of the appellant is that the respondent No.1 has no permission from the Municipal Counsel Baramulla for constructing any external stair case from the side of appellants and if the Respondent 1 is allowed to construct external stair from the side of the appellant same will reduce the fire gape and same will be dangerous for the residential house of the appellant and also privacy of the appellant will be effected and same is against the permission of Municipal Counsel. That the Ld. trial Court while deciding the interim application has neither considered

commissioner report nor has taken into consideration there is no permission for external staircase, has passed the order dated 28/12/2022 herein after referred as "impugned order" and same is challenged through the medium of this appeal on the following grounds:

- a. That the impugned order dated 28/12/2022, passed by Ld. Sps Mobile Magistrate/Sub Judge Baramulla is contrary to law and facts and can be sole ground for setting aside same.
- b. For that the Id. trial Court has not applied judicial mind while passing the impugned order, had the Ld. trial Court appreciated the matter in right manner, the bad order in the form of impugned order would have not been followed.
- c. That the Ld. trial Court has based his order against the permission granted for construction.
- d. For that the Ld. Trial Court has also based his order on the basis of report of commissioner but has failed to appreciate the report of commissioner nor has granted any opportunity to appellant to peruse the report, commissioner in his report has no where mentioned the gap is existing eight feet but in the report of the commissioner it is mentioned only seven feet, thereby if any construction is effected even in only two feet, the distance will narrow to only five feet which is against the finding of the Ld. trial Court.
- e. For that the Ld. trial Court while rejecting the application of the appellant has also shielded false facts of Municipal Counsel Baramulla which has mentioned gap of eight feet while as report of commissioner has mentioned only seven feet.
- f. For that the Ld. trial Court has not bothered to summon the official defendants, so that the stand of the official defendants can be ascertained, if the illegal construction was demolished

and there is no permission for external stair case, why they are now not acting against this brazen violation.

g. For that the trial Court cannot pass the order at the wishes of parties, the Ld. Trial Court is under the Mandate of law to follow the principle of natural justice, impugned order is arbitrary without any justification and without any procedure as such needs to be set aside by this Honorable Court.

h. For that the Ld. Trial court has passed the telegraphic and cryptic order without assigning any reason and same has been passed in hot haste.

i. For that the Ld. Trial Court has not given any chance to the appellant to prove his suit and has passed impugned order without any legal force.

j. For that this Honorable Court has jurisdiction to entertain this appeal and adjudicate up on, and the appeal is filed within time.

2- Heard learned counsel for the parties. Learned counsel for the appellant submitted that permission provided by Municipal Council Baramulla to the respondent No.1 for raising construction is a conditional permission where under respondent No.1 has been directed to maintain proper setbacks on all the sides and on the side of appellant, the respondent No.1 has to maintain a fire gap of 8 feet. That the permission of Municipal Council, Baramulla does not authorize respondent No.1 to rise any outer staircase in the fire gap and in this view of matter the impugned order of the learned trial Court has given license for violation to respondent No.1. Learned counsel further submitted that by passing the

impugned order, nothing has been left for the trial of the case. Therefore, the impugned order appears to have been passed without any proper application of judicial mind and needs to be set-aside.

- 3- Per contra leaned counsel for the respondents submitted that the appellant in his plaint has not mentioned how much of the gap he has left towards the house of the respondent No.1 and thereby has not given correct figure in the plaint. Learned counsel further submitted that in the relief clause of the plaint the appellant has prayed for a decree of permanent injunction thereby permanently restraining respondent No.1 from raising any sort of structure adjacent to the land of the appellant without leaving the sufficient fire gap. Learned counsel further submitted that sufficient fire gap shall be deemed and construed as a fire gap of the same width which the appellant has left towards the house of the respondent No.1. So construed, the respondent has left 8 feet of fire gap towards the house of the appellant out of which he can utilize 2 feet for outer staircase and remaining 6 feet is more in width than the fire gap left by the appellant towards the house of the respondent No.1. Learned counsel submitted that appellant has come to the Court of equity and cannot claim more fire gap than he

himself has left towards the house of respondent No.1. Learned counsel further submitted that appellant has suppressed the material facts in the case. There is nothing on record that the appellant has approached the municipal authorities for any violation of permission. That the report of Governor's Grievance Cell shows that the respondent No.1 has not made any violation of the conditions of permission while raising outer staircase in 2 feet, the said fact has been suppressed by the appellant in the plaint as well as in the appeal and therefore, the appellant is not entitled to any equitable relief. With these submissions learned counsel for the respondent prayed that the appeal may be rejected.

4- Heard and considered. The appellant appears to have filed a suit of permanent injunction against the respondents before the Court of learned Sub-Judge, Special Mobile Magistrate, Baramulla with the averments as reproduced hereinabove in the memo of appeal. On the basis of the averments the appellant has prayed for the following reliefs:-

- i) Decree in the form of permanent injunction wherein, defendant No.1 be permanently restrained from raising any sort of structure in the land adjacent to the land of the plaintiff without leaving the sufficient fire gap.
- ii) Further defendant No. 1 be permanently restrained from laying any kind of door, staircase or disposal pipes or project from the side of the plaintiff.

- iii) Further defendant No.1 be permanently restrained from making any septic tank/pit etc from the side of plaintiff.
- iv) Further defendant No.1 be permanently restrained from effecting any kind of construction without approved proposal of R&B Dept. and other departments and without proper permission from Municipal council, Baramulla.
- v) Further defendants be permanently prohibited from violating right to privacy of plaintiff.
- vi) Further defendants 2 to 4 be permanently prohibited from issuing any kind of permission to defendant No.1 which will affect the right to privacy or which will cause damage to the existing fire gap.
- vii) Any other relief which the Court deems fit and proper in the circumstances of the case in favour of plaintiff and against the defendants.
- viii) Cost of the litigation be imposed upon the defendants.

5- Respondent No.1 has contested the suit and submitted his written statement before the trial Court. It is submitted by the respondent No.1 in his written statement that he has obtained proper building permission for construction of his double storied residential house from Municipal Council, Baramulla and while the respondent No.1 was constructing his house properly, the appellant's son, daughter and wife took law into their own hands and damaged the construction of respondent No.1, damaged the boundary wall which bifurcates the two properties and in this regard case FIR No. 173/2022 of Police Station Baramulla under section 447, 427 & 506 IPC stands registered against them. The respondent No.1 has also submitted in his written statement that he has left a gap of 8 feet towards the house of the appellant on spot and same is

evident in the site plan issued by Municipal Council, Baramulla while the appellant has left only 4 feet in which he has constructed stair and Waranda and there is only a gap of hardly 01 feet on the side of respondent No.1. It is further submitted in the written statement that the respondent No.1 made an application in the Governor's Grievance Cell regarding the controversy which was referred to the District Administration Baramulla who after making full dressed investigation reported back and found the complaint of respondent No.1 genuine and resolved the grievance on spot. This fact has been deliberately suppressed by the appellant. It is also submitted in the written statement that the respondent No.1, his sister and mother have land measuring 01 kanal under survey No. 1702/1519/211 over which they have constructed a residential house which is for residential purposes and not for any commercial business. That the sister of respondent No.1 is aged and unmarried and she is residing separately and wants to have a ground floor with separate access and approach and the respondent No.1 has the first floor in the said house and in order to have separate access/approach to the first floor the respondent No.1 has to necessarily raise 2 feet wide staircase made of iron within his own proprietary land and as such the

respondent No. 1 who has left 8 feet gap towards the house of the appellant has to raise 2 feet stair which will be covered by CGI sheets and will be completely blind on the side of plaintiff's house and the appellant has no legal or moral right to oppose the respondent's construction of staircase.

6- Alongside the main suit the appellant had filed an application for interim relief which has been disposed off by the learned trial Court by way of impugned order. It will be profitable to reproduce Para 5, 6 & 7 of the impugned order as under:

(5)- It is evident from the Commissioner report along with the record that the defendant No. 1 has left the fire gap of almost 8 feet towards plaintiff's side. Plaintiff as per record has left less than 6 feet of fire gap towards the defendant's side, as such plaintiff cannot claim right of fire gap more than what he has left towards defendant's side on the basis of principle of equity. Even though if the defendant No.1 constructs his staircase in the said fire gap still a gap of 6 feet has been maintained by defendant No.1 towards plaintiff's side which will be sufficient fire gap towards plaintiff's side. Even though plaintiff in his plaint has stated in Para 4 that there exists 6 feet fire gap left by defendant No.1 towards plaintiff's side which defendant has

already maintained even if defendant No.1 constructs staircase. Thus the grievance of plaintiff that defendant must maintain a fire gap of six feet stands redressed as gap of 6 feet remains even the staircase is constructed. More so, defendant No.1 has undertaken that the staircase will be blind from the side of the plaintiff, as such, the claim of plaintiff that his privacy rights are violated does not hold good as by constructing the staircase in that manner does not violate any privacy right of plaintiff.

(6). Keeping in view these factors there seems to be sufficient fire gap left by defendant No.1 towards plaintiff's side and no privacy rights of plaintiff get violated by way of construction carried by defendant No.1 who has obtained the valid permission from the Municipal authorities.

(7). Thus, keeping in view the discussion as made hereinabove and keeping in mind the facts and circumstances of the case. Plaintiff has failed to make out a prima-facie case, balance of convenience does not tilt in his favour and he suffering any irreparable loss does not arise at all. The application for grant of interim relief is dismissed and order dated 29.09.2022 is vacated.

7. Heard and considered. It is not disputed that the respondent No. 1 is making construction on his own land. It is also not disputed that the respondent 1 has got a proper permission for construction from respondent 3. The terms of the permission inter-alia provide for maintaining proper setbacks on all sides of the construction and on the side of the appellant, the respondent 1 has to maintain a setback of 8 feet. The commissioner report is on the file which shows that the respondent 1 has maintained an average setback of 7 feet from the side of the appellant. In addition to it, there is a boundary wall of 19 inches in width which is common between the appellant and the respondent 1 meaning thereby, the respondent has a gap of almost 8 feet from the side of the appellant. Contrary to it, the commissioner report shows that the appellant has left an average gap of 6 feet, 3 inches towards the side of the respondent 1 in which the appellant has also constructed an open verandah. Ld. Counsel for the respondent 1 during the arguments submitted a communication from respondent 3 to the Deputy Commissioner Baramulla vide No. **MC/Bla/Gen/2022/858 dated 24-09-2022** in which it is stated that the appellant has constructed his house in violation of building permission issued to him under No. **MCB/BP/89 dated 23-07-2007** wherein he was supposed to leave a fire gap of 7.2 feet from the side

of the respondent 1 but has left only 5 feet gap in which too he has constructed a verandah thus leaving only three feet gap at that point.

8. Appellant has come to the court of equity. The legal maxim applicable is that one who seeks equity must first himself do equity. The principle means that to obtain an equitable relief of injunction, the plaintiff must himself be prepared to do equity and must recognize and submit to the right of his adversary. On this principle, the plaintiff cannot claim more gap to be left by the respondent 1 than he himself has left. The argument of Id. Counsel for the appellant that the impugned order has given a license to the respondent 1 to make deviations in the permission does not hold much water in view of the facts and circumstances above described. Therefore, I do not find any illegality or perversity in the impugned order. The appeal is accordingly dismissed and any interim order shall stand vacated. Copy of this order be forwarded to the Id. trial Court for information and file after due compilation be consigned to records.

Announced
17-05-2023

1st Additional District Judge,
Baramulla.