

**HIGH COURT OF JAMMU AND KASHMIR**  
**AT SRINAGAR**

FAO No.7/2019

Date of decision:27.04.2020

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Gulzar Ahmad Hagroo & anr. Vs. Abdul Rashid Bawan & ors.

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**Coram:**

**HON'BLE MR JUSTICE DHIRAJ SINGH THAKUR, JUDGE**

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**Appearance:**

For the Petitioner(s): Mr. H. U. Salati, Advocate.

For the Respondent(s): Mr. Ishfaq Muzamil Nahvi-for R1 & R2.  
None for R3 to R5.

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i) Whether approved for reporting in Law journals etc.: Yes/No

ii) Whether approved for publication in press: Yes/No

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**1)** This is an appeal under Order 43 Rule 1(r) of the Code of Civil Procedure against the order passed by the Additional District Judge, Srinagar, dated 19<sup>th</sup> of April, 2019, whereby the application for grant of interim injunction filed by the appellants has been dismissed and the interim order dated 16.02.2019, passed by the court below, has been vacated with immediate effect.

**2)** Briefly stated, the material facts are as under:

(I) A civil suit for declaration, injunction and possession was preferred by the appellants herein against the defendants/respondents, wherein it was alleged that the defendants 1 and 2 (respondent No.1 and 2 herein) had illegally encroached upon the land of the plaintiffs and were making illegal and unauthorized construction over the same. It

was alleged that the encroachment had been made by the said defendants on a pathway which was owned and possessed by the plaintiffs. It was further stated that the plaintiffs had obtained due permission from the Municipal authorities to raise construction over the pathway which constituted a part of their parcel of land by erecting a gate, which was being interfered with by the defendants.

- (II) The defendants 1 and 2 took a plea that the pathway which was the subject matter of dispute had been used from times immemorial by the said defendants for purposes of ingress and egress and that in case the plaintiffs were permitted to erect a gate at the beginning of the pathway, it would prevent the access of the defendants to their proprietary land.
- (III) The court below vide order dated 16<sup>th</sup> of February, 2019, allowed the plaintiffs to raise construction of entrance gate and boundary wall subject to the condition that they would obtain a proper permission from the Municipal authorities authorizing them to raise the construction of entrance gate and boundary wall provided the said construction would not affect the easementary rights of the defendants 1 and 2.
- (IV) Upon an application having been filed by the defendants 1 and 2, wherein it was contended that under the garb of the order passed by the court below the plaintiffs were raising construction of a gate at the entrance of the pathway, the court below by virtue of order dated 16<sup>th</sup> of March, 2019, restrained the plaintiffs/non-applicants from raising

any construction or erecting any gate on the pathway which leads to the houses of the applicants/defendants.

(V) It appears that vide order dated 26<sup>th</sup> of March, 2019, the court below appointed a Commissioner to inspect the spot in question and submit a report, which report was, accordingly, submitted. The said report revealed that the pathway in question had been macadamized and that the big gates of defendants 1 and 2 existed on that pathway. An electric transformer has been erected upon two poles. Another electric pole also stood in the said pathway. The report also suggested that the gates of defendant No.1 and 2 which existed on the spot appeared to be very old. The report also revealed that in case the plaintiffs were permitted to erect a gate at the beginning of the pathway, then in that case the right of ingress and egress of the defendants over the pathway in question would be curtailed.

(VI) The court below having considered the effect of the report submitted by the Commissioner and having heard the counsel for the parties at length, in terms of impugned order dated 19.04.2019, dismissed the application seeking grant of injunction filed by the plaintiffs. However, at the same time, the court below recorded the statement made by the counsel for the defendants to the effect that they are willing and ready to submit an undertaking to the effect that in case the plaintiffs succeed in their suit, they will remove the gates and shall not use the pathway for the purposes of ingress and egress but till suit is decided, they may be permitted to use the pathway uninterruptedly

for the purposes of ingress and egress. The court below, accordingly, directed the defendants to submit an undertaking to that that. Notwithstanding the above, liberty was granted to the plaintiffs to erect the gate after leaving the portion of the pathway where the gates of the defendants 1 and 2 exist.

**3)** Counsel for the appellants states that the view expressed by the court below was legally incorrect for the following reasons:

1. That it had failed to appreciate that the plaintiffs had obtained proper permission from the Municipal authorities to erect the gate and, therefore, any direction issued by the court preventing the plaintiffs from erecting such a gate was impermissible in law;
2. That the defendants 1 and 2 had access to their property from the other side and, therefore, the Court could not have returned a finding that their right to ingress and egress would be jeopardized in case the gate was erected on the pathway;
3. That the defendants 1 and 2 had managed to get two cemented poles illegally installed in the middle of the demarcated pathway in collaboration with the officers of the Power Development Department, which, thus, would not create any right in their favour;

**4)** Heard counsel for the parties.

5) The scope of appeal against an order granting or refusing injunction is limited. The appellate court cannot substitute its own opinion over the view expressed by the court below unless the same is found to be perverse in law. The court below while considering the issue in detail has considered the effect of the Commissioner's report which revealed that the pathway leading to the house of the defendant No.1 and 2 had been macadamized and the electric poles and electric transformer installed on the pathway as also the gates erected appeared to be old. The court below has also considered the fact that the defendants 1 and 2 are using the said gates for purpose of ingress and egress over the pathway which right could not be scuttled at this stage as the same would amount to granting a decree in favour of the plaintiffs even before asking the parties to lead evidence. In my opinion, the court below has correctly appreciated the controversy and the order impugned, in those circumstances, cannot be said to be an order which warrants interference in any manner.

6) For the reasons stated above, the appeal is found to be without any merit and is, accordingly, dismissed.

**(Dhiraj Singh Thakur)**  
**Judge**

**Srinagar**  
27.04.2020  
*"Bhat Altaf, PS"*