

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU**

Case:- **CR No. 44/2016**

1. Veena GurtooAppellant(s)/Petitioner(s)
(wrongly named as Beena in plaint)
Age 62 years,
W/o Late Sh. Vinay Kumar Gurtoo.
2. Greesham Gurtoo, Age 41 years.
S/o Late Sh. Vinay Kumar Gurtoo,
Both residents of 128, Lower Laxmi Nagar
Sarwal, Jammu.

Through: Mr. Sumir Pandita, Advocate
Mr. Imran Ahmed Rather, Advocate.

Vs

Rajesh Kumar Gupta Respondent(s)
S/o Om Parkash Gupta
R/o 127 Lower Laxmi Nagar, Sarwal, Jammu.

Through: Mr. Siddhant Gupta, Advocate.

Coram: HON'BLE MR. JUSTICE JAVED IQBAL WANI, JUDGE

ORDER
(04.04.2024)
सत्यमेव जयते

1. The instant revision petition has been filed by the petitioners against order dated 29.09.2016 (for short '**the impugned order**') passed by learned City Judge, Jammu (for short '**the trial court**') in case titled as "**Rajesh Gupta Vs. Veena Gurtoo and another**".

2. Facts giving rise to filing of the instant petition reveal that the plaintiff/respondent herein filed a civil suit for permanent prohibitory injunction along with an application for interim relief against the defendants/petitioners herein stating therein that he is owner in possession of House No. 127 situated at Lower Laxmi Nagar, Sarwal, Jammu having been purchased by him vide sale deed dated 09.03.2007 and that the boundary wall of the said house which is six

feet in height separates the same from the house of the defendants/petitioners herein and that the said boundary wall as also the pillars of the main gate abutting the said boundary wall, due to heavy rains, got damaged requiring immediate repairs and in order to make necessary repairs in the said wall, he started making necessary repairs in the said wall to which the defendants/petitioners herein objected to and caused hurdles compelling the plaintiff/respondent herein to file the suit which after persuasion of the defendants/petitioners herein did not yield any results for not effecting repairs in the wall.

3. The trial Court, upon entertaining the suit on 22.09.2010, passed the interim order in the application for interim relief accompanying the suit restraining the defendants/petitioners herein from interfering in any manner in the repair of the boundary wall and the pillar of the main gate of the house of the plaintiff/respondent herein. It was further clarified that the plaintiff/respondent herein shall raise the construction in his own land i.e. well within the suit property and that too only on the foundation of the boundary wall which already existed on spot and upto the same height of which it existed earlier. The said order, however, was subject to objections from other side and notice was directed to be served upon the defendants/petitioners herein by the plaintiff/respondent herein in terms of the provisions of Rule 3 of the Order 39 CPC and the case came to be fixed for further proceedings on 29.09.2010.

4. The defendants/petitioners herein in response to the summons issued by the trial court appeared and received the copies of the plaint as also the application for interim relief and sought time to file written statement as also

objections to the suit by the next date. The case then came to be posted for further proceedings on 12.10.2010. Till 12.10.2010, defendants/petitioners did not file any response and instead the application came to be filed by the plaintiff/respondent. It is stated that before the next date fixed in the case, the plaintiff/respondent herein filed an application on 05.10.2010 seeking permission of the court to withdraw the suit which application came to be allowed and the suit came to be permitted to be withdrawn.

5. It is being next stated that the defendants/petitioners appeared before the trial court on 12.10.2010 i.e. the actual date fixed in the case before the trial court and came to know on the said date that the suit, in fact, stands withdrawn by the plaintiff/respondent herein on 05.10.2010.

6. It is being next stated in the petition that in the meanwhile, the plaintiff/respondent herein have had besides effecting repairs in the boundary wall and pillar of the gate also raised the height of subject matter i.e. boundary wall which compelled the defendants/petitioners herein to report the matter to the police which actually could not do anything because of the restraint order in the matter except booking the parties under sections 107/117 RPC, after conducting an enquiry there on the spot.

7. It is being further stated in the application that the plaintiff/respondent herein with a design withdrew the suit before the case fixed in the case and after raising the construction in question that too in defiance of the orders passed by the trial court which necessitated filing of the application before the trial court by the defendants/petitioners herein after they came to know the withdraw of the suit by the plaintiff/respondent herein, with the following prayers:

“It is therefore prayed that in exercise of powers under section 151 CPC the plaintiff be directed to restore the height of the wall to 6 feet as it existed on 22.09.2010, prior to the passing of order and demolish the additional brick lines laid from 6 feet to 10 feet at his own peril and cost;

And in case of his failure to do so the restoration be got done and implemented through some other agency at the risk and cost of the plaintiff;

Or any other relief or order which this Hon’ble Court deems fit and proper in nature and circumstance of the case be passed in favour of the defendants and against plaintiff including review of the order dated 05.10.2010.”

8. It is being stated that the trial court upon considering the said application invited objections from the plaintiff/respondent herein and passed the impugned order whereunder the application came to be dismissed.

9. The defendants/petitioners herein have question the impugned order on the multiple grounds in the petition.

Heard learned counsel for the parties and perused the record.

10. It is an admitted fact that the suit for permanent prohibitory injunction came to be instituted by the plaintiff/respondent herein alleging therein that his immovable property, being a residential house, is separated from the property/residential house of the defendants/petitioners herein by a boundary wall which boundary wall along with pillars of the gate got damaged due to heavy rains necessitating repairs and while undertaking repairs of the said wall and the pillars, the defendants/petitioners herein obstructed and objected the same necessitating the filing of the suit.

11. It is also not in dispute that the trial court upon entertaining the suit passed an *ex parte* interim order on 22.09.2010 though allowed the plaintiff/respondent herein to execute the repairs in the wall as also the pillars, but bound down the plaintiff/respondent herein not to raise the height of the said boundary wall which exists earlier.

12. It is also an admitted fact that after passing the said interim order on 22.09.2010, the trial court fixed the case for further proceedings on 29.09.2010 whereafter fixed the same on 12.10.2010. Defendants/petitioners herein entered their appearance through their counsel and received the copies of the plaint as also the application for interim relief for filing the written statement/objections thereto.

13. It is also not in dispute that before the date fixed in the case being 12.10.2010, the plaintiff/respondent herein filed an application for withdrawal of the suit and the trial court on the very same day allowed the same and permitted the plaintiff/respondent herein to withdraw the suit.

14. It is also not being denied by the plaintiff/respondent herein that the repairs/construction came to be effected/undertaken by him after obtaining the order passed by the trial court and that the same was objected and opposed by the defendants/petitioners herein which resulted into initiation of the proceedings under section 107/117 CrPC by the concerned Police Station.

15. Perusal of the record tends to show that the defendants/petitioners herein essentially before the trial court have had sought restitution of the suit as also restoration of status quo *qua* the subject matter of the suit.

16. Before proceeded further to deal with the validity or otherwise of the impugned order, it would be pertinent and significant to refer to section 144 of the Code of Civil Procedure, which provides for an application for restitution which expression 'restitution' has not been defined in the Code but by a claim dictionary meaning would mean an act or instance of restoring the theme to its proper owner or to its original suiter. The Apex Court while considering the said

expression in case titled as Zaffar Iqbal Vs. Board of Revenue reported in 1984 SCC 505 held that the word 'restitution' in its etymological sense meaning restoring to a party on the modification, regulation or reversal of the decree what has been lost to him in execution of the decree or direct consequence of the decree.

17. It has also been settled that the provisions of section 144 CPC are not confined only to the matters in execution of decrees and orders which are final but also are applicable to interlocutory orders and in final disposal of the suit.

18. The provisions of section 144 CPC have been held to be based on a well known maxim "**Actus Curiae Neminem Gravabit**" i.e. the act of the Court shall harm no one, suggesting that one of the first and highest duties of all the courts is to take that the act of the court does not give injury to the suiter. Thus, imposing an obligation on a party who had received a benefit of an order to restore to the other party for what that party has lost and it has been held that it is the duty of the court to enforce this communication. This Court in case titled as "Subash Chander Vs. Bodh Raj reported in AIR 1969 J&K 8 has, in the context of the powers and provisions of the section 144, held that a wrong should not be perpetuated by keeping it alive and respecting it as the doctrine of restitution is based on equitable principles as has been held by the Apex Court in case titled as Kavita Tarehan Vs. Bans Raj Products Ltd. reported in 1994 (5) SCC 380.

19. As has been noticed in the preceding paras, the defendants/petitioners herein though have had invoked the provisions of section 151 of the Code of Civil Procedure in the application wherein the impugned order has been passed,

yet it can safely be said that under the provisions of section 151, the defendants/petitioners have had sought in essence the restitution of the proceedings/suit before the trial court.

20. Here it is pertinent and significant to note that even the powers vested in Court under section 151 being judicial in nature or declaratory as well and though does not confer inherent powers in the court but declares that such powers have been vested in the court of civil jurisdiction providing further that no provision of the court should be taken or deemed to limit or otherwise effect these inherent powers vested in the court by virtue of its duty to do full and complete justice between the parties before it.

21. Even under the provisions of section 151, a court is vested with a power exercisable under section 144 for recalling of an order passed by it in case, the order *inter alia* has been obtained by playing a fraud or collusion has been used to obtain such an order. The Apex Court in case titled as “**Lajwanti Vs. Union of India**” reported in 2000 (10) SCC 581 even held that where the name of the appellants’ advocate was not shown in the cause list on the relevant date and the matter was decided on merits in his absence, the court should recall the order. Even reopening of the matter/case by a court has been held to be permissible in exercise of powers under section 151.

22. Having regard to the aforesaid principles and position of law and coming back to the case in hand, risking repetition, the plaintiff/respondent herein sought withdrawal of the suit on 05.10.2010 and the same came to be permitted by the trial court before the date which was fixed in the case being 12.10.2010. The defendants/petitioners herein indisputably have had not been

issued a notice or afforded an opportunity to the respondent to the said application filed by the plaintiff/respondent herein seeking withdrawal of the suit.

23. The contention of the defendants/petitioners herein has not been denied by the plaintiff/respondent herein that the height of the wall in question was not raised after obtaining interim order dated 22.09.2010 from the trial court.

24. Thus, in this view of the admitted factual position obtaining in the matter, it cannot but be said that the plaintiff/respondent herein under the cover of the interim order of the trial court dated 22.09.2010 raised the height of the boundary wall which is subject matter in dispute beyond 6 feet and after completing the same with a design by playing mischief withdrew the suit before the trial court that too within a week before the date which was fixed in the suit and the trial court ironically permitted the withdrawal of the suit overlooking the fact that the defendants/petitioners have had entered appearance in the suit.

25. With the aforesaid undisputed facts and circumstances obtaining in the matter, the trial court ought to have considered the application filed by the defendants/petitioners wherein the impugned order has been passed having regard to the said facts and circumstances, however, the trial court miserably failed to advert to the said facts and circumstances and misdirected itself while considering the application and in the process proceeded to pass the impugned order, which *per se* is not only grossly misconceived, misdirected but also patently perverse. Thus, necessitating exercise of supervisory jurisdiction of this

court, more so, in view of the fact that the passing of the impugned order has resulted in substantial miscarriage of justice to the defendants/petitioners herein.

26. Viewed thus, what has been observed, considered and analyzed hereinabove, the instant revision petition is treated as a petition under Article 227 of the Constitution of India warranting exercise of supervisory jurisdiction of this Court having regard to the facts and circumstances of the case rendering the impugned order is legally unsustainable.

27. Accordingly, the petition is allowed and the impugned order is set aside. The application filed by the defendants/petitioners is allowed, however, insofar as the prayer made in the application for directing restoration of status-quo ante is concerned, the trial court is directed to consider the said prayer afresh after affording an opportunity of hearing to the parties.

28. The trial court shall proceed in the matter as expeditiously as possible. The parties shall appear before the trial court on 29.04.2024.

(JAVED IQBAL WANI)
JUDGE

JAMMU
04.04.2024
Shivalee

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