

Sr. No. 1
Regular list

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

CM(M) 130/2022

Reserved on : 10.08.2022
Pronounced on: 16.08.2022

Majid Nabi Khan

...Appellant(s)/Petitioner(s)

Through: Mr. R. A. Jan, Sr. Adv. with
Mr. S. Farooq & Mr. Taha Khalil, Advocate

Vs.

**Executive Officer, Municipal Committee,
Bijbehara and ors.**

...Respondent(s)

Through: Mr. Satinder Singh, AAG for 1.
Mr. M. Ashraf Wani, Adv. for 2-10

CORAM:

HON'BLE MR. JUSTICE RAHUL BHARTI, JUDGE

JUDGMENT

1. In this petition, preferred under article 227 of the Constitution of India, an issue broaches as to the limitation of and latitude for an appellate court in an appeal under Order 43 rule 1(r) of the Code of Civil Procedure 1908, (CPC in short), against an order of grant/refusal of a temporary injunction relief by a civil court. To put it more bluntly, issue is whether an appellate court can, in purported exercise of its jurisdiction under Order 43 rule 1(r) CPC, sidestep main cause of a civil suit and the appealable order passed therein, and self-generate a new situation to deal with.

2. As the facts of the present case present such a scenario, so this Court has taken a call to examine the case in exercise of its jurisdictional authority and responsibility under article 227 of the Constitution of India while being fully aware of the eternal enunciation coded in the article 227 of the Constitution of India which is meant to keep the subordinate courts/tribunal within the bounds of their jurisdiction and authority, and consequently to nip the reported extra-judicial transgression on the part of a court/tribunal before it repeats into a tendency.

3. With the aforeset preface, the facts attending the case are set out for undertaking supervisory scrutiny.

4. The petitioner, as being the plaintiff, files a civil suit on 21st April 2022 before the Court of Sub Judge, Anantnag for seeking a decree of declaration and injunction. The petitioner's right to sue related to his purported status as being the President of the Municipal Committee, Bijbehara. The sole defendant named in the suit is Executive Officer, Municipal Executive Committee, Bijbehara, Anantnag, Kashmir, the respondent no. 1 herein.

5. The purported cause of action for the petitioner to file the suit is issuance of a notice no. MC/Bij/G/2022/1033-39 dated 20th April 2022 by the defendant Executive Officer, Municipal Executive Committee Bijbehara, for the purpose of convening a special meeting under rule 27 of the Procedure & Business

Conduct Rules/Byelaws 2021 with respect to a purported resolution for motion of No-confidence alleged to be signed by nine out of sixteen elected Municipality Committee members of the Municipal Committee, Bijbehara. The Municipal Committee, Bijbehara is in last year of its five-year tenure. The petitioner alleged procedural deficiencies and manipulation attending both the resolution and no-confidence moved against him and the communication issued by the sole defendant the Executive Officer, Municipal Executive Committee, Bijbehara.

6. The trial court of Sub Judge, Anantnag, vide its order dated 21st April 2022 came to stay, ad interim, the operation of the said Communication no. MC/Bij/G/2022/1033-39 dated 20th April, 2022 of the defendant Executive Officer, Municipal Executive Committee, Bijbehara read with the resolution bearing No-confidence. It is pertinent to mention here that the elected members of the Municipal Committee Bijbehara who had moved the purported resolution for No-confidence against the petitioner were not named as the defendants in the suit.

7. Said ad interim order of stay dated 21st April, 2022 of the Court of Sub Judge, Anantnag came to be questioned by the respondents 2 to 10, who then were not figuring as defendants in the suit, before this Court in a petition CM(M) 66/2022 under article 227 of the Constitution of India which came to be disposed of vide an

order dated 27th April, 2022 with a direction in terms whereof the respondents 2 to 10, as being the petitioners in said CM(M) 66/2022, were ordered impleaded as defendants 2 to 10 in the suit of the petitioner, along with original sole defendant Executive Officer, Municipal Executive Committee Bijbehara, for enabling the respondents 2 to 10 contest the suit and temporary injunction application of the petitioner.

8. Upon becoming as the defendants 2 to 10, the respondents 2 to 10 came to pose challenge through their joint written statement and objections filed in answer to the suit and the temporary injunction application of the petitioner. The respondents 2 to 10 in their written statement maintained not only preliminary objections to the maintainability of the suit by reference to section 44 of the Municipal Act, 2000 and others as well but also on the merits of the case as well. The respondents 2 to 10 in their written statement stated that it was only upon the failure of the petitioner to act in convening the meeting for fresh election that the original defendant Executive Officer, Municipal Executive Committee Bijbehara, had stepped in, by compulsion of statutory provisions, with his communication challenged in the suit by the petitioner. Thus, the respondents 2 to 10 defended the legality and validity of the exercise attending their resolution for no confidence motion against the petitioner.

9. The learned Sub Judge, Anantnag came to pass

final order dated 26th May 2022 thereby dismissing the temporary injunction application of the petitioner, and also vacating the interim direction of stay of the communication no. MC/Bij/G/2022/1033-39 dated 20th April, 2022 of the defendant no.1 the Executive Officer, Municipal Executive Committee Bijbehara with a further direction to the defendant no. 1 the Executive Officer Municipal Executive Committee, Bijbehara, to exercise the process of No-confidence motion strictly in terms of the provisions of the Municipal Act, 2000 and the Rules thereunder.

10. This Order dated 26th May, 2022 of the learned Sub Judge, Anantnag came to be challenged in an appeal filed on 27th May 2022 by the petitioner before the lower appellate court of the Additional District Judge, Anantnag. It is at this stage of litigation that the actual course of legal proceedings envisaged to be carried out by the appellate court acting under the spell of Order 43 rule 1(r) CPC came to take, or rather taken, to a different course by the court of the Additional District Judge, Anantnag as if the trial court's exercise in hearing and adjudicating the temporary injunction application of the petitioner and disposing it of by labor of an order dated 26th May, 2022 was of no interest and importance to the court of the Additional District Judge, Anantnag as it was willing to charter a new course of its own fancy to be nursed by the purported choice/consent of the respondents 2 to 10 and the petitioner.

11. Before proceeding to dwell upon the course of action so resorted to by the Court of Additional District Judge, Anantnag, it is in the fitness of the situation to mention that being seized of an appeal under Order 43 rule 1(r) CPC it was mandated upon the appellate court of Additional District Judge, Anantnag to hear the same and dispose it on its merits in conformity with the principle of judicial hierarchy and domain of civil courts. The intended outcome of the appeal so filed by the petitioner before the court of Additional District Judge, Anantnag would have been either the order impugned of the Court of Sub Judge, Anantnag getting set aside or confirmed/varied/alterd by an appellate order of the Court of Additional District Judge, Anantnag following the well settled legal principle that an appeal against an order of discretion is an appeal on principle affording very limited scope of examination of order passed under order 39 rule 1 & 2 CPC in granting or refusing an interlocutory injunction relief.

12. While hearing the appeal filed by the petitioner, in terms of the submissions made from the petitioner's as well as the respondents 2 to 10's end about which reference is gatherable from a perusal of an order dated 11th June, 2022 and which exercise if taken to its logical end would have resulted in disposal of the appeal as warranted in law, but instead the Court of Additional District Judge, Anantnag allowed itself a distraction and take a detour. The Additional District Judge, Anantnag

relieves, in fact abandons, the exercise of examining the submissions so made by the parties on the merits of the case in appeal and examining the trial court order, and resorts to become self-imposed supervisory authority of the Municipal Committee, Bijbehara by not only in calling for the official record from the office of the Municipal Committee, Bijbehara but also to make both the petitioner and the respondents 2 to 10 to undertake a fresh process & exercise for resolution/motion of no-confidence. This gets done under the pretext of an application dated 6th June 2022 preferred by the respondents 2 to 10 in the said appeal.

13. In terms of their said application dated 06/06/2022, the respondents 2 to 10 solicited the Additional District Judge, Anantnag to appoint a judicial officer for monitoring the special meeting to be convened for voting on the no confidence motion against the petitioner for ensuring that the legal provisions governing the matter in question are followed and adhered to.

14. To this application of the respondents 2 to 10, by reference to a purported no objection on the part of the counsel representing the petitioner in appeal, the Additional District Judge, Anantnag ventured in the extra-judicial mode, which is reflected from order dated 11th June, 2022 in which after having heard the full dressed submissions of the parties on the merits of the case so as to be in an enabling position to deliver the judgment with

respect to the legality and sustainability of the order impugned, the Additional District Judge, Anantnag instead opts to nominate a Sub Judge, serving as Secretary, District Legal Services Authority (DLAS), Anantnag on fees of Rs. 20,000/- payable by the respondents 2 to 10 to supervise laying of a new No-confidence Motion by the respondents 2 to 10 against the petitioner before the Secretary Municipal Committee Bijbehara and to be taken up for discussion on 20th June 2022. Thus, a serving judicial officer, paid by the litigants, came to be placed in service of the litigants by the Additional District Judge, Anantnag without bothering to mention it on record as to under which provision of the CPC and the Civil Courts Act, 1977 Svt., such a venture was contemplated and carried out by the Additional District Judge, Anantnag and by which authority in and of law a Sub-Judge was commanded to act as supervisor in the internal political matters of a Municipal Committee.

15. The Sub Judge, so appointed as supervisor, came to carry out the diktat so issued to him and submitted his report dated 20th June 2022 to the Additional District Judge, Anantnag. From the perusal of the said report of the Sub Judge, as being the Supervisor, it reflects that said judicial officer not only acted as conductor of the meeting right from reading the purported no confidence motion moved afresh purportedly on the part of the respondents no. 2, 3, 4, 5, 7, 8 & 9 plus one more but also

investigator and on spot judge also. The alleged meeting on 20th June 2022 is said to have been requisitioned vide a notice dated 18th June 2022 issued by the Executive Officer, Municipal Committee, Bijbehara and the purported no-confidence motion against the petitioner is reported to have been carried out by vote of 8 against 6.

16. Borrowing reliance from the said report of the Sub Judge as Supervisor, the Additional District Judge, Anantnag came to conduct fresh hearing of the matter in extenso and to pass a 30-page impugned judgment dated 20/07/2022 bearing a declaration that the petitioner has lost majority in the Municipal Committee Bijbehara and has no right to hold the office of the President, and then passing on a writ like directive to the Executive Officer, Municipal Committee Bijbehara to proceed as per sub rule 6, 7 & 8 of Rule 27 of Jammu & Kashmir Municipality (Procedure and Conduct of Business) Bye Laws 2021. The Additional District Judge, Anantnag parted with the judgment with wordings “**appeal disposed of and be consigned to records after due compilation**”. It is lost to imagination as to what fate the trial court order dated 21st April 2022 and suit of the petitioner was consigned by the Additional District Judge, Anantnag vide his said judgment.

17. Now, caught in this factual backdrop, this Court finds itself pondering as to which role has been served by the Additional District Judge, Anantnag whether as an

amicus curia of the parties to the disputes or a judge of the cause in appeal before him. This Court is no doubt whatsoever that the Additional District Judge, Anantnag personalized the jurisdiction of the court and felt free to abandon the cause in appeal before him so as to be a mend maker for the Municipal Committee, Bijbehara's political state of affairs.

18. Facts speak aloud from the record of the case that the Additional District Judge, Anantnag lost sight of the very jurisdiction, lest that of its bounds, in which the Court of Additional District Judge, Anantnag, was approached in appeal with respect to the matter. Once the trial court of Sub Judge, Anantnag had, by examining the prima facie nature of the petitioner's case, the factor of balance of convenience and irreparable injury, refused temporary injunction relief in favor of the petitioner leaving the Communication no. MC/Bij/G/2022/1033-39 dated 20/04/2022 of the Executive Officer, Municipal Committee, Bijbehara to run its due course to its logical end, then what was meant for and expected of the appellate court of the Additional District Judge, Anantnag to do was simply to adjudge the legality of the said trial court order and pass its judgment thereupon leaving rest of things to proceed on their own course of nature.

19. The learned Counsel for the respondents 2 to 10 has, with all vehemence at his command, tried to impress upon this Court that the end shall justify the means

adopted by the Additional District Judge, Anantnag as the outcome of the indulgence granted by the Additional District Judge, Anantnag has been to pave the way for removal of the petitioner as president of the Municipal Committee Bijbehara and re-election of the new president for the remainder of the duration of the Municipal Committee. The learned Counsel for the respondents 2 to 10 has pressed into service pleas of all hues right from the court serving the democratic restoration of the Municipal Committee, the no-objection of the petitioner's counsel to the measure resorted to by the Additional District Judge, Anantnag resulting in denuding the petitioner any locus to petition this Court under article 227 COI to upset the exercise carried out by judicial intervention, the restricted scope for this Court to intervene under article 227 of the COI in the light of the pronouncement of the judgment in the case of ***Shalini Shyam Shetty vs Rajindra Shanker, 2010 AIR SCW 6387.***

20. The submissions made by the learned counsel for the respondents 2 to 10 lay a very tempting trap but loose the bearings in the face of pointed query of this court as to wherefrom Order 43 rule 1(r) CPC did the Additional District Judge Anantnag draw the jurisdiction to create a new script viz a viz the order of the trial court in appeal.

The learned Counsel for the respondents 2 to 10 has argued that the powers of an appellate court are co-extensive with that of the trial court qua a civil suit as

provided under the scheme of CPC and that being so the course of action adopted by the Additional District Judge, Anantnag can safely be salvaged. For sailing this plea, the learned Counsel refers to section 107 (1) & (2) and 108 CPC read with Order 43 rule 2 CPC which provides that rules of Order 41 shall apply, so far as may be, to appeal from Orders. This Court is taking due notice of said two sections read with Order 43 rule 2 CPC which read as under:

“Section 107: Powers of Appellate Court

(1) Subject to such conditions and limitations as may be prescribed, an Appellate Court shall have power: -

(a) to determine a case finally;

(b) to remand a case;

(c) to frame issues and refer them for trial;

(d) to take additional evidence or to require such evidence to be taken.

(2) Subject as aforesaid, the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein.

Section 108: Procedure in appeals from appellate decrees and orders

The provisions of this part relating to appeals from original decrees shall, so far as may be, apply to appeals: -

(a) from appellate decrees, and

(b) from orders made under this Code or under any special or local law in which a different procedure is not provided.

Order 43(2): Procedure

The rules of Order XLI shall apply, so far as may be, to appeals from orders.”

21 Even if, for sake of saying, said submission of the learned Counsel for the respondents 2 to 10 is accepted as correct, then also same cannot be read to enable an appellate court to possess a power to mutate the very script of the suit before the trial court and in the garb of co-extensive nature of power of an appellate court viz a viz the trial court in relation to a suit create a new fact situation alien to the original lis and carry forward its own perception-based outcome to a given civil suit. That will be nothing but an act of perversion of jurisdiction as has happened in the present case at the hands of the Additional District Judge, Anantnag. Everybody in the matter that is the learned Counsel of both sides, the trial court, the appellate court of Additional District Judge, Anantnag and lastly even this Court are at loss to know & show from the impugned judgment of the Additional District Judge, Anantnag as to what has been done to the trial court's impugned order and labor invested to pass the said order which was taken in appeal, and also the paralysis of the civil suit lying on the file of the civil court to nobody's understanding as to what disposal is left to be given to the suit.

22. In fact, at the best, in case the Additional District Judge, Anantnag found himself arrested with a concern to become the benefactor of the Municipal Committee, Bijbehara for its democratic set up on the asking of the

parties, then the Additional District Judge, Anantnag ought to have re-directed the contesting parties to the trial court for working out their purported consensus to affect the desired outcome, that too, if possible and legally tenable, in the fitness of facts of the case because a civil court is also not meant to be a fishing and phishing forum for litigants to come for pleasure litigation.

23 However, it is a misplaced understanding of the learned Counsel of the respondents 2 to 10 as to the nature of appellate jurisdiction in the matter dealing with an appealable order the basis of passing which is discretion of the trial court. Such species of appeal, as held in para 14 of *Wander Limited vs Antox India Private Limited* (1990 (Supp.1) SCC 727) are acknowledged to be an Appeal on Principle affording an appellate court so much an empowerment to examine only if the discretion has been exercised arbitrarily, or capriciously or perversely by the court below or where the court below has ignored the settled principles of law regulating grant of refusal of interlocutory injunction. Instead of self-confining itself within the said limitation of appellate level examination, the Additional District Judge, Anantnag usurped the occasion to act a political manager for the affairs of the Municipal Committee, Bijbehara and the stake holders thereof. The indulgence, so lend, by the Additional District Judge, Anantnag not only undermined and wasted the work/order of the trial court but also projects and portrays

a common perception that appellate level litigation can be a speculative venture amenable to any end/outcome depending upon the individual disposition & propensity of an appellate judge at a given point of time rather than judicial disposition of the judge and judicial disquisition of the matter.

24. The context in which an appellate court, while hearing an appeal from an appealable order passed in a civil suit, can by reference to section 108 CPC afford itself a position to exercise power envisaged under section 107 CPC is not available in the present case by any stretch of claim, so this court is not getting into examination of that aspect which is only of academic interest viz the present case.

25. In the backdrop of the aforesaid factual and legal evaluation and discussion, the mandate of the Hon'ble Supreme Court of India's judgment in ***Shalini Shyam Shetty case (2010 (8) SCC 329)*** is fully available to this Court and applicable in this case that in order to keep the tribunals and courts subordinate to it, within the bounds of their authority, a High Court has the jurisdiction of superintendence to interfere and in an appropriate cases the power can be exercised *suo motu* as well. When it is recognized for and expected from a High Court to exercise its power of superintendence by standard of high degree of judicial discipline, then surely the court of Additional District Judge, Anantnag in exercise of its limited appellate

jurisdiction against an interlocutory order of refusal of injunction ought to have kept itself to the highest degree of judicial discipline which was to hear the appeal and dispose it of leaving for the parties and the court below to deal with the rest. In fact, this Court is in a state of disbelief that the Additional District Judge, Anantnag made a subordinate judicial officer to get paid with rupees twenty thousand by one of the parties to the dispute and carry out and conduct the No-confidence motion meeting in which the No-confidence motion was laid by the very same respondents from whom the fee of rupees twenty thousand was made payable to the judge so appointed leaving the judge as a privy to matter.

26. This Court finds itself posed with a call through this petition which is either to sanctify the administration of justice by the court of law or to salvage the political administration of a Municipal Committee. Without any iota and moment of hesitation, this Court is taking the first call to sanctify the administration of justice and to sensitize the courts and judges to follow judiciously the judicial discipline and decorum in dealing and deciding the cases within the bounds of their respective defined jurisdiction rather than defining their own jurisdiction to dispose the cases thereupon. Judicial Officers/Judges irrespective of their hierarchical placement must always bear in mind that by being the individuals in the Judicial Institution for the sake of administration of justice, they are not meant to

individualize the Judicial Institution exposing the administration of justice to be bound by the individual's whim and fancy.

27. Thus, this petition is allowed not by the fact that the petitioner has made out a case for the indulgence of this court but because the court has found out a cause in the case through the petition. The impugned order dated 20/07/2022 on file no. 52 titled Majid Nabi Khan vs Executive Officer, Municipal Committee Bijbehara & Ors, and the proceedings related there with and to the passing of the said order, of the Court of Additional District Judge, Anantnag are set at naught by holding the same as null and void *ab initio*. The District Judge, Anantnag is directed to recall the appeal on the file no. 52 of 2022 from the Court of Additional District Judge, Anantnag and to hear and adjudicate it by himself within 30 days from the date of receipt of copy of this judgment. Failure to decide the matter within time given would be condoned only upon show of reasons on record by the Principal District Judge, Anantnag. Further, it is directed that the Principal District Judge, Anantnag shall call upon Mr. Mir Wajahat, the Sub Judge (Secretary DLSA) Anantnag to remit the fee of rupees twenty thousand (Rs.20,000/-) if received from and paid by the respondents 2 to 10 and the same shall then be returned to the respondents 2 to 10 against receipt.

28. A copy of this judgment be sent and notified to the Principal District Judge, Anantnag by the Registrar

Judicial Srinagar of this Court at the earliest. Parties are also at liberty to seek and secure a certified copy of this judgment and place it before the Principal District Judge, Anantnag for notice and action in accordance therewith.

29. Disposed of.

SRINAGAR
16.08.2022
Yasmeen

