

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

CM(M) No. 148/2022

CM N. 1088/2023 CM No. 4728/2022 CM No. 4939/2022

Mudasir Nazir

...Petitioner(s)

Through: Mr Aquib Khan, Advocate.

Vs.

University of Kashmir and Others

...Respondent(s)

Through: Mr M. S. Latief, Sr. Advocate with  
Mr Zahid Khan, Advocate.**CORAM:****HON'BLE MR JUSTICE JAVED IQBAL WANI, JUDGE****ORDER**

18.03.2023

1. Through the medium of instant petition filed under Article 227 of the Constitution, the petitioner has thrown challenge to order dated 22.08.2022 (for short 'the impugned order') passed by the court of Principal District Judge, Srinagar, (for short 'the appellate court') in an appeal titled as "*University of Kashmir and Ors. Vs. Mudasir Nazir*".
2. The facts those stem out from the petition would reveal as under: -
  - That the petitioner herein filed a suit for declaration, mandatory and perpetual injunction against the respondents herein accompanied with an application for interim relief before the Court of 3<sup>rd</sup> Additional Munsiff, Srinagar (for short 'the trial court'). The trial court in the application for interim relief accompanied to the suit, initially passed an interim order dated 11.05.2017. The said order came to be made absolute after the defendants/respondents herein had entered their appearance before the trial court and filed written statement/response to the suit as well as the application for interim relief and the application for interim relief supra in terms of order dated 30.10.2019 came to be finally disposed of by the trial court.

- After the disposal of the application for interim relief and making of interim order dated 11.05.2017 absolute, the plaintiff/petitioner herein filed two applications before the trial court one under Order 39 Rule 2-A CPC for initiation of action against the defendants/respondents herein for having violated the absolute interim order dated 30.10.2019 as the defendants/respondents herein have had issued a fresh tender notice in breach of order dated 30.10.2019 and another application for staying the said fresh tender notice having been issued regarding the subject matter of the suit.
- The trial Court upon entertaining both the applications directed on 19.02.2022 the issuance of notice and personal appearance of the defendants/respondents herein in the application filed under Order 39 Rule 2-A CPC and whereas in the application seeking stay of the fresh tender notice issued by the defendants/respondents stayed the same on 19.02.2022 itself.
- The defendants/respondents herein filed a miscellaneous appeal while throwing challenge to the order dated 19.02.2022 in terms whereof the defendants/ respondents herein have had been personally summoned, as also order dated 30.10.2019 in terms whereof the interim application came to be finally disposed of.
- Subsequent to the filing of appeal supra, the defendants/respondents herein filed an application before the appellate court stating therein that the trial court had also passed order dated 19.02.2022 in terms whereof fresh tender notice dated 15.02.2022 had been stayed by the trial court and that the said order dated 19.02.2022 passed in the said application by the trial court be also included in the prayer clause of the appeal on the same ground as are urged in the memo of appeal.
- The appellate court while considering the appeal filed by the defendants/respondents herein passed the impugned order and allowed the appeal setting aside the orders dated 19.02.2022 in terms whereof e-tender notice had been stayed by the trial court as also order dated 19.02.2022 in terms whereof show cause

notice had been issued to the defendants/respondents herein summoning them personally.

- The impugned order is being questioned by the petitioner on the grounds urged in the petition.

**Heard counsel for the parties and perused the record.**

3. Learned counsel for the petitioner while making his submissions would contend that the appellate Court exceeded its jurisdiction while deciding the appeal filed by the defendants/respondents herein and in the process grossly erred. On the contrary the learned appearing counsel for the defendants/respondents herein would contend that the instant petition is not maintainable in view of the parameters laid down by the Apex Court in relation to the exercise of jurisdiction under Article 227 of the Constitution.
4. It is an admitted fact that the application for interim relief accompanying the suit came to be allowed by the trial Court upon its final disposal on 30.10.2019. It is also an admitted fact that the said order came to be challenged by the defendants/respondents herein in the appeal before the appellate Court on 25.02.2022, indisputably beyond the period of limitation prescribed for filing of an appeal against an order appealable under and in terms of Order 43 CPC along with order dated 19.02.2022 passed in the application filed by plaintiff/petitioner herein for initiation of an action against the defendants/respondents herein under Order 39 Rule 2-A CPC and the said order had been challenged well within the prescribed period of limitation in the miscellaneous appeal. It is also not in dispute that the appellate Court had entertained an application during the pendency of the appeal filed by defendants/respondents herein seeking to include in the prayer clause of the appeal challenge to order dated 19.02.2022 passed in the application for staying of fresh tender notice and which tender notice had been stayed by the trial Court.

**Be that as it may**, even if it is assumed that the appellate Court could have entertained the said application and treated the challenge thrown to the order dated 19.02.2022 as sought by the

appellants/respondents herein before the appellate Court in the memo of appeal without seeking a formal amendment of the memo of appeal and without issuing a notice and hearing the other side yet, the fact remains that the appellate Court have had to decide the appeal within the settled parameters being miscellaneous in nature and character as it is settled law that the power exercised by the appellate Court under Section 104 read with Order 43 (1) CPC) are not analogues to the powers exercised by the appellate Court under Section 96 read with Order 41 of the Code. In the matter of injunctions, the powers of the appellate Court are circumscribed and the appellate Court would be loath to interfere with the exercise of discretion and would not normally be justified in interfering with the exercise of lower Courts discretion under appeal solely on the ground that if the appellate Court had considered the matter at the trial stage it may have come to a contrary conclusion. The exercise of discretion by the trial Court in a reasonable and judicious manner would not justify interference with the exercise of powers and jurisdiction, however, where the trial Court exercises its discretion arbitrarily or ignores the relevant facts, then the appellate Court can interfere in the field of discretionary reliefs. This has been the view of this Court in case titled as “**Ashrafa Jeelani (Dr.) Vs. State of J&K**” reported in 1999 KLJ 543”. The Apex court as well in case titled as “**Mysore State Road Transport Corporation Vs. Mirja Khasim Ali Beg and Ors**” reported in AIR 1977 SC 747 has also observed that ....only if the discretion is not exercised by the trial Court in the spirit of the statute or fairly or honestly or according to the rules or reason and justice, the order passed by the lower court can be reversed by the appellate court.

5. Keeping in mind the aforesaid position of law and reverting back to the case in hand the appellate court while testing the validity or otherwise of the impugned orders was required to keep in mind the aforesaid principles and proportions of law inasmuch as another important fundamental basic principle of non-expression of opinion about the merits of the matter as the issue of grant of injunctions usually is at the earliest possible stage. However, record tends to show that the appellate court ironically has not rendered any decision on the

validity or otherwise of order dated 30.10.2019 where under the interim application accompanying the suit had been allowed and finally disposed of by the trial court. The appellate court instead has chosen to determine the validity of orders dated 19.02.2022 passed in two separate applications by the trial court where under in one application proceedings under Order 39 Rule 2-A had been initiated against the defendants/respondents herein and in the other application fresh tender notice had been stayed.

The appellate Court for unknown reasons has chosen not to deal with the primary order of injunction dated 30.10.2019 assuming for the sake of arguments that the appellate court could have proceeded to deal with said order in a time barred appeal without there being any prayer made for condonation of delay yet, perusal of order passed on application under Order 39 Rule 2-A CPC reveals that it had been a mere show cause notice issued to the respondents, whereas, order of stay of tender notice passed in other application on 19.02.2022 had been subject to modification, vacation and alteration. The said orders per se could not have been thrown challenge to by the defendants/respondents herein before the appellate court in the appeal in view of law laid down by the Apex Court in case titled as “**A. Venkata Subbiah Naidu Vs. S. Chellapan and Ors, reported in 2000 SLJ 663**” wherein the Apex Court has ruled that a person aggrieved of an ex parte interim order shall not rush to the appellate or revisional Court against the said orders before seeking vacation, modification or reversal of the said orders before the court having passed the same.

A further perusal of the impugned order would further demonstrate that the appellate Court while adjudicating the miscellaneous appeal has literally held a mini trial and expressed opinions qua the merits of the case which it could not have, as same is forbidden in law.

It is manifest that the appellate Court has grossly erred while passing the impugned order and as such, is not legally sustainable thus, warranting exercise of supervisory jurisdiction enshrined under Article 227 of the Constitution, in that, it is the consistent view of the

Apex court that the exercise powers under Article 227 of the Constitution involves a duty to a High Court to keep the inferior Courts and Tribunals within the bounds of authority and to see that they do the duty in respect of what they are required in a legal manner.

6. For what has been considered, analyzed herein above the petition succeeds and resultantly the impugned order dated 22.08.2022 passed by the appellate Court is set aside and appeal **dismissed**. Consequently the orders impugned in the appeal dated 19.02.2022 passed in both the applications filed by the plaintiff/petitioner herein are restored along with orders passed thereon. The trial court shall proceed in the matter in accordance with law uninfluenced by any observations made hereinabove.

7. Disposed of.

(JAVED IQBAL WANI)  
JUDGE

**SRINAGAR**

18.03.2023

*Ishaq*