

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

Reserved on: 29.04.2025

Pronounced on: 06.05.2025

CM(M) No.168/2025

MST ZOONA BEGUM

.. PETITIONER(S)

*Through: - Mr. R. A. Jan, Sr. Advocate, with
Mr. Adil Mushtaq, Advocate.*

Vs.

GHULAM MOHAMMAD SHEIKH & ORS. ...RESPONDENT(S)

*Through: - Mr. Arif Sikandar, Advocate.
Mr. Mir Umer, Advocate.*

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1) The petitioner, through the medium of present petition, has invoked the supervisory jurisdiction of this Court under Article 227 of the Constitution of India for impugning order dated 12.04.2025 passed by the learned Civil Judge/Munsiff, Sogam, Kupwara (hereinafter for short "the trial court"), whereby the application of respondent No.2 seeking permission to raise construction on a portion of the suit property, has been allowed.

2) It appears that the petitioner/plaintiff has filed a suit for declaration, injunction and partition along with the relief of separate possession against the respondents/defendants in respect of land measuring 47 kanals and 01 marla

comprised in various khasra numbers situated at Estate Surigam Lolab, before the learned trial court. In the plaint, the petitioner/plaintiff has alleged that the parties to the suit are the legal heirs of estate holder Ahmad Sheikh and after his death long time back, the parties have become joint owners in respect of the suit property. According to the petitioner/plaintiff, the suit property is unpartitioned and she being the rightful share holder of the suit property is entitled in law to claim her right to separate possession to the extent of her share in the suit property. It has been pleaded that the plaintiff had continuously insisted upon partition of the suit property but she came to know that the defendants in connivance with the revenue agencies have got mutations recorded in a fraudulent manner without the knowledge of the petitioner/plaintiff and that the said mutations stand challenged by her before the competent authority/forum.

3) Respondents No.1 to 3/defendants contested the suit by filing their written statement, in which they admitted that the parties to the suit are descendants of late Shri Ahmad Sheikh. According to the respondents/defendants, the suit property has already been partitioned amongst the parties decades back and that the parties are enjoying the usufructs of their respective shares. It has also been pleaded by the

respondent/defendants that the plaintiff in lieu of her share has received cash from them at the time of partition.

4) It seems that after the filing of the suit, the learned trial court passed an exparte ad-interim order on 29.10.2022. The operative portion of the said order is reproduced as under:

“Considering the above facts and reasons, issue notice to the defendants and in the meanwhile, till next date of hearing, parties are directed to maintain status quo on spot viz possession subject to the rider that the party in possession of the suit property shall not be barred for pursuing the agricultural activities on spot without making any act of waste.

This order is subject to the objections of the other side. The other side, however, shall be at liberty to seek remedy under order 39 rule 4 CPC for modification, vacation or alteration to this order. Plaintiffs/applicants is directed to comply with the procedure prescribed under the provisions to Rule 03 of Order 39 CPC and file service affidavit as envisaged under law.”

5) It is pertinent to mention here that the application of the plaintiff/petitioner under Order 39 Rule 1 & 2 of CPC is still pending and it has not been finally decided as yet and the above quoted exparte ad-interim order is still in operation.

6) It seems that during the pendency of the suit, respondent No.2/defendant filed an application before the trial court seeking permission to raise construction of his residential house over the land measuring 03 kanals and 09

marlas comprised in Khasra No.2079 situated at Surigam Lolab, which is part of the suit property. After inviting objections from the plaintiff/non-applicant and after hearing the parties, the learned trial court passed the impugned order whereby respondent No.2/defendant has been permitted to raise construction of his residential house on the aforesaid portion of land on the ground that respondent No.2/defendant is in exclusive possession of land measuring 03 kanals and 09 marlas, as such, in view of the law laid down in the case of **Mst. Zeba vs. Ghulam Ahmad Zargar & Ors.** (CM(M) No.292/2022 decided on 30.12.2022), respondent No.2/defendant is entitled to raise construction on the said portion of the suit land.

7) The petitioner/plaintiff has challenged the impugned order on the grounds that the same has been passed in blatant transgression of power, authority and jurisdiction vested by law. It has been further contended that the impugned order has been passed in a most mechanical manner as the facts and circumstances have not been properly appreciated by the learned trial court nor the said court has satisfied itself with regard to existence of prima facie case, balance of convenience and irreparable loss. It has been further contended that by allowing the prayer of respondent No.2/defendant, the nature of the suit property

has been allowed to be changed which would result in irreparable loss and injury to the petitioner/plaintiff and she would be non-suited. It has been further contended that the learned trial court despite noticing the legal position on the subject has ignored the same and passed the impugned order which is against the settled position of law, according to which a co-owner cannot change the nature of joint and unpartitioned property.

8) I have heard learned counsel for the parties and perused record of the case.

9) Learned Senior Counsel appearing for the petitioner has vehemently contended that the learned trial court while permitting respondent No.2/defendant to raise construction on joint and unpartitioned property, has allowed the nature of the suit to be changed to the prejudice of the plaintiff/petitioner which is impermissible in law. The learned Senior Counsel has submitted that there has been a consistent view of the Supreme Court and this Court that the status of joint and unpartitioned property needs to be preserved till a suit for partition of property is finally decided. In this regard learned Senior Counsel has relied upon the judgment of the Supreme Court in the case of **Maharwal Khewaji Trust (Regd.), Faridkot vs. Baldev Dass**, (2004) 8 SCC 488.

10) Learned counsel appearing on behalf of respondent No.2 has contended that respondent No.2 was in exclusive possession of a portion of the suit property as the partition had already taken place. He has submitted that in view of the ratio laid down by this Court in the case of **Mst. Zeba vs. Ghulam Ahmad Zargar & Ors.** (supra) a co-owner, who is in exclusive possession of a portion of the joint property, is entitled to raise construction on the said portion of the property. He has further submitted that even otherwise respondent No.2 has filed an undertaking before the learned trial court whereby he has undertaken to pull down the construction of his residential house in the eventuality the plaintiff succeeds in the suit.

11) Before going to the rival contentions raised by learned counsel appearing for their parties, it would be necessary to ascertain as to whether the learned trial court while passing exparte ad-interim order dated 29.10.2022 had put any fetters upon the parties to raise construction on the suit property. A perusal of the exparte interim order dated 29.10.2022 passed by the learned trial court, which is, admittedly, in operation in the same form as on date, would reveal that the parties have been directed to **maintain status quo on spot viz. possession** subject to the rider that party in possession of the suit property shall not be barred

from pursuing the agriculture activities on spot without making any act of waste. So, what has been protected by the interim order dated 29.10.2022 is the possession of the parties over the suit property. The status quo is clearly in respect of possession of the suit property. It has been further clarified that the party shall not be debarred from pursuing their agricultural activities on spot without making any act of waste. There is no restraint on the parties to the suit on raising construction on the portion of property which is in their respective possession. Had it been a case of blanket order of status quo passed by the learned trial court, perhaps the things would have been different but it is a case where the learned trial court has qualified its order of status quo by mentioning the word “possession”, meaning thereby that the status quo has to be maintained by the parties to the suit with regard to possession of the suit property.

12) Thus, by raising construction on the suit property, the status quo as has been directed by the learned trial court does not get infringed in any manner whatsoever. Therefore, in the first place there was no need for respondent No.2 or for any other party to seek permission of the court for raising construction over the portion of the suit property which was in their possession. It seems that by way of abundant caution, respondent No.2 has made an application before the

learned trial court seeking permission to raise construction on the property in question.

13) The concern of the petitioner, that nature of the suit property would get changed in case respondent No.2 is allowed to raise construction of the residential house on a certain portion of the suit property, can be addressed only if she is able to obtain an order of status quo from the learned trial court with regard to construction on the suit property. Until then, neither this Court nor the trial court can come to her rescue. Therefore, determination of the merits of the contentions raised by the learned Senior Counsel appearing for the petitioner in the present proceedings would only be an academic exercise because even if the impugned order is set aside, still then there is no bar to the parties to the suit to raise construction on the portions of the suit property which are in their possession. This is so, because the interim order dated 29.10.2022 does not create any such bar to the parties to the suit.

14) Thus, without going into the merits of the contentions raised by the parties in the present petition, the petition is disposed of in the following terms:

- (I) The petitioner shall be at liberty to approach the learned trial court seeking disposal of her interim application under Order 39 Rule 1 & 2 CPC on its merits.

(II) It shall be open to the petitioner to urge before the learned trial court to enlarge the scope of order of status quo so as to cover the activity regarding construction on the suit property at the time of passing of final order in the application under Order 39 Rule 1 and 2 CPC and if such a prayer is made by the petitioner/plaintiff before the learned trial court, the same shall be considered by the said court in accordance with law after hearing both the parties and without getting influenced by the observations made by the said court in the impugned order dated 12.04.2025.

15) A copy of this order be sent to the learned trial court for information and compliance.

Srinagar,
06.05.2025
"Bhat Altaf-Secy"

Whether the order is reportable:

(Sanjay Dhar)
Judge

Yes/No