

(1998) 09 AHC CK 0077

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 10321 of 1998

Abdul Qadeer and Ors.

APPELLANT

Vs

Xlth Additional District and Sessions Judge, Moradabad & Ors.

RESPONDENT

Date of Decision : 04-09-1998

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Citation : (1998) 09 AHC CK 0077

Hon'ble Judges : D.K.Seth, J

Final Decision : Dismissed

Judgement

D. K. Seth, J.—Against the order dated 2121998 passed in Misc. Appeal No. 53 of 1996 by the Additional District Judge, Moradabad, the present writ petition has been filed.

2. Mr. V M. Zaidi, learned Counsel for the petitioner submits that the order passed by the appellate court is perverse and cannot be sustained since it had overlooked the materials placed before it. Secondly, he contends that by virtue of interim order, final relief has been granted which could not be granted at the initial stage.

3. Mr, M.C. Gupta, learned Counsel for the respondents, on the other hand took a preliminary objection that in view of decision in the case of Ganga Saran v. Civil Judge, Hapur, A.I.R. 1991 Allahabad 114, this writ petition is not maintainable.

4. Relying on paragraph 11 of the said decision, Mr. Zaidi contended that since he is not claiming any relief against any private individual but has challenged the order passed by the judicial officer, the, c fore, the writ of certiorari is very much maintainable.

5. Admittedly, the suit is one for injunction between two private individuals. Both of them have no statutory obligations against each other. In the case of Ganga Saran it has been laid down that in case of refusal to grant injunction or refusal to vacate injunction is is fact a grant of mandamus, therefore, order passed in

such a suit, would not be amenable to writ jurisdiction. The distinction that was sought to be made by Mr. Zaidi is that even if such writ is not available against private individual, but writ of certiorari is very much available since he had challenged the order passed by judicial officer which is to be quashed by a writ of certiorari.

6. Such a distinction, however, in my view appears to be misconceived. The dispute is between two private individual. The relief that has been sought is also between two private individuals. In no way the relief would affect the judicial officer. The judicial officer is not a party to the proceedings. There is no lies in between the parties and the judiciary. Then again, writ lies against the State as defined in Article 12 which does not include within its definition the judiciary.

7. At .this stage Mr. Zaidi prayed for leave to amend the writ petition so as to convert it into one under Article 227. Mr. Gupta has not opposed the said prayer. Accordingly, leave is granted. Mr. Zaidi may amend the cause title in course of today.

8. Now on merits of the case as contended by Mr. Zaidi it appears that the question is a question of fact as to whether there has been prima facie case or not for the purpose of grant of interim order. Admittedly, the facts are that the plaintiff had initiated proceedings for eviction against the petitioner which was decreed, and then appeal and ultimately second appeal is still pending. Mr. Gupta contends that the eviction suit confined to a portion of the property, of which the petitioner was a tenant. However, Mr. Zaidi disputes the same and contends that whole of the suit property involved in the case was subjectmatter from which eviction was sought for. But copy of the plaint of eviction suit is not being produced and the Court is unable to determine the same. However, Mr. Gupta points out from the order of the Additional District Judge in the appeal that the said decree in the eviction suit has been perused by the appellate court and had been scanned and it was found that only a part of the property was the subjectmatter in the eviction suit and the suit property involved in the present suit was not within the ambit of the said suit. This finding is being disputed by Mr. Zaidi. Such disputed question cannot be gone into in exercise of the power under Article 227 which only scrutinize the decision making process and not merits of the decision it self Admittedly, the court had jurisdiction to decide the issue and it decided the same whether rightly or wrongly this Court cannot interfere unless there is any infirmity in the decision making process. However, Mr. Zaidi points out that the decision making process has been vitiated by nonconsideration of the material placed before the court particularly in misreading those very documents which were relied upon by the court itself. But, it appears that eviction of the petitioner was sought for in respect of a part of the property. But subsequently the petitioner has filed suit No. 484 of 1991 against the plaintiffopposite party. The plaint of the said suit is annexure2 to the writ petition. In the said plaint, it was contended that the petitioner is a tenant in respect of whole of the property and on the basis of such statement he had

prayed injunction restraining the respondent from interfering with his possession and preventing from making any construction on the eastern side of the property mentioned therein. Curiously enough he had not included any prayer for declaration that the whole property is within his tenancy though eviction suit was in respect of a part of it. Without such a prayer, he had simply prayed for .injunction. It is admitted by Mr. Zaidi that no injunction has been granted in the said suit No. 484 of 1991 and the same is still pending . It was open to the petitioner to obtain injunction in the said suit which would be binding on the plaintiff in respect whereof he had been ascertaining his own rights. In the present order, it appears that the appellate court had gone through various records and come to the conclusion that the suit property involved was not subjectmatter of the eviction suit. It has also discussed various other materials and then came to a finding of fact with which it is very difficult to find any difficult to find any perversity.

9. So far as the question that by virtue of interim order, final relief is granted, is concerned, the said contention cannot be sustained on the ground that in that event no injunction can be granted either byway of interim or temporary in a suit for injunction where only relief for injunction is prayed. The question depends on the facts and circumstances of each case provided prima facie case is made out. If the petitioner has not been able to establish even prima facie that he has any iota of evidence to show that he is tenant in respect of the whole of property, the court was not prevented from granting such orders if situation so warrants. Then again, the petitioner himself had filed the suit for injunction restraining the respondent from interfering with his possession in respect of whole of the property where he was unable to obtain injunction though the suit is still pending. This presupposes that he has not been able to show prima facie case in his own suit.

10. In the facts and circumstances of the case, I am, therefore, not inclined to interfere with the order impugned particularly when both the courts below have held against the petitioner which assumes concurrent finding of fact for the purpose of deciding the question of grant of interim order only. However, it may be observed that the findings given or the observations made in the present order or those in the order passed by the trial court or lower appellate court are all tentative for the purpose of grant of temporary injunction and shall in no way influence the trial decision in the suit.

11. It is desired and expected that the suit would be decided as early as possible preferably within a period of six months from the date a copy of this order is produced before the court below. The court below will decide the case independent of any observation made either in the order of trial Court or that of lower appellate court or this order.

12. With the above observations, this writ petition is dismissed.

13. Let a copy of this order be issued to the learned Counsel for parties on

payment of usual charges within seven days.