
(1999) 12 AHC CK 0073
In the Allahabad High Court
Case No : Writ petition No 3185 of 1999

Ahmadi Khanam and Ors.

APPELLANT

Vs

IIIrd Addl. District Judge Gonda & ors

RESPONDENT

Date of Decision : 15-12-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Order 39 Rule 4, Order 43 Rule 1, 151
Constitution of India, 1950 — Article 227

Citation : (1999) 12 AHC CK 0073

Hon'ble Judges : Pradeep Kant, J

Final Decision : Dismissed

Judgement

Pradeep Kant, J.

1. The present writ petition has been filed by the petitioners under Article 226 of the Constitution of India, praying for issuance of a writ in the nature of certiorari for quashing the judgment and order dated 11/11/1999 passed by the learned Illrd Additional District Judge, Gonda, contained in Annexure 3 to the writ petition.

The preliminary objection was raised by the opposite parties that the petition under Article 226 of the Constitution is not maintainable therefore, I have treated this petition under Article 227 of the Constitution.

2. The plaintiffspetitioners had filed a suit with respect to certain properties allegedly inclusive of agricultural and residential properties against defendantsopposite parties 3, 4 and 5 and that suit was instituted on 7th September, 1999. An application under Order 39 read with Rules 1 and 2 of the Code of Civil Procedure was also filedalongwith the plaint on the same day.

3. The learned trial Court was not convinced that any case of urgency has been made out so as to grant any adinterim injunction, therefore, an order for issuance of notices fixing 22/9/1999 as the date of hearing of the application for temporary injunctionwas passed.

4. The plaintiffspetitioners on 8th September, 1999, moved another application for fixing an early date in the case and at the same time also moved an application for amendment of the plaint. The amendment prayed for was to the effect for correcting the plot No. 576 Ka as 873 Ka. On 9th September, 1999, the amendment application was allowed and on the very next day an application for temporary injunction (Second application) under Order 39, Rules 1 and 2 read with Section 151 of the Code of Civil Procedure was also filed.

5. The trial Court on the said application passed an order for maintaining status quo. After passing of the said order on that very day, another application was moved by the plaintiffs petitioners purporting to be under Section 151, CPC of the Code of Civil Procedure indicating therein that the order of status quo is vague and injurious and, therefore, the defendants be restrained from dispossessing the plaintiffspetitioners or interfering in their peaceful possession. A prayer was also made that the order passed earlier on the application under Order XXXIX Rules 1 and 2 read with Section 151, CPC be modified accordingly and the defendants be directed not to disturb the possession of the plaintiffspetitioners. This application was allowed on the same day by the trial Court by means of the order of the same day and the temporary injunction was granted directing the defendants not to interfere in the peaceful possession of the plaintiffs. The first order which was passed on 10th September, 1999 directing the defendants to maintain status quo has been brought on record as Annexure C13 to the counter affidavit. The petitioners have not filed the said order. The order by means of which the earlier order of status quo was modified and substituted by an order of temporary in junction has been brought on record as Annexure1 to the writ petition.

6. The defendants on coming to know about the aforesaid orders moved an application for vacation of exparte interim injunction and also filed an appeal under Order XLIII, Rule 1 (r) before the learned District Judge which came up for hearing before III Additional District Judge, Gonda.

7. The appellate Court while dismissing the appeal with respect to challenge made to the order of maintaining status quo allowed the appeal in part with respect to modification of the order restraining the defendants from interfering the peaceful possession of the plaintiffs.

8. Aggrieved by the order passed by the Appellate Court, the petitionersplaintiffs have approached this Court challenging the same on the ground that the finding recorded by the appellate Court are not borne out from the record and that on the one hand the appellate Court has accepted that the power to grant injunction vests both under Order XXXIX, Rules 1 and 2 as well as under Section 151, CPC but at the same time, has upset the order of temporary injunction passed by the trial Court on the ground that itwas totally without jurisdiction.

9. The learned counsel Sri Adarsh Mehrotra vehemently urged that the finding recorded by the appellate Court that the order (first order) passed on 10th

September, 1999 was an order passed under Section 151, CPC and the second order passed on the same day was totally without jurisdiction, is not in consonance with the record.

10. Learned counsel further submitted that the first order was passed on application under Order XXXIX, Rules 1 and 2, CPC and the second order was passed on the application moved under Section 151, CPC. The subsequent order passed on that very day on the said application was passed by the Court after being convicted that the defendants be restrained specifically from interfering in the plaintiffs' possession which was in the light of the earlier order passed by the trial Court and therefore, no exception can be taken. The learned counsel further urged that in case the first order was treated to be an order passed under Section 151, CPC then an appeal should have been filed. Further in view of the fact that the defendants have already availed the remedy of filing the application under Rule 4 of Order XXXIX, CPC, the appeal against the said order, is therefore, not maintainable.

11. The learned counsel for the respondents submitted that it was a case of fraud where the plaintiff Ahmadi Khanam who has filed a suit is not real Ahmadi Khanam. Further it has been asserted by him that the manner in which the proceedings have taken place and temporary injunction which has been granted, is foreign to the provisions of the Code of Civil Procedure and the procedure adopted by the Courts. Once the notices were ordered to be issued on 7th September, 1999 on the application for temporary injunction and the Court was satisfied that no case for urgency was made out, it was not within the authority of the Court to pass the order on the second application being moved on the next very day on the same ground or within a span of two days and that too, to further modify the order of status quo into a clear order of injunction on that very day. It has also been contended by the learned counsel for the respondents that from 7th September, 1999 and till moving of the second application of temporary injunction on 9th September, 1999 no fact has been brought on record to answer as to what was the subsequent change or urgency or circumstances because of which the second application had to be moved. Once on the application under Section 151, CPC moved by the plaintiffs the Court passed an order for maintaining status quo there was no occasion for the plaintiffs to move another application on that very day for modifying the earlier order of the status quo, to a clear injunction order. It was also not proper to allege that the order of status quo was vague and injurious and was not being implemented, when by that time, the status quo order was not even served upon the defendants. Thus modification of the order of status quo into an adinterim injunction restraining the defendants was totally without jurisdiction and neither there was any occasion nor any reason for any authority for the trial Court to pass such order.

12. The argument of the respondents further is that the first order passed on 10th September, 1999, does not disclose that the trial Court has recorded any reason for passing ex parte order and thus the same is not in consonance with

the provisions of Rule 3, Order 39, CPC. Rule 3, Order 39 specifically provides that the Court (except) where it appears that the object of granting the injunction would be defeated by the delay, before granting an injunction, direct notice of the application for the same to be given to the opposite party, provided that where it is proposed to grant an injunction without giving notice of the application to the opposite party, the Court shall record the reasons for its opinion that the object of granting the injunction would be defeated by delay and require the applicant:

(a) to deliver the opposite party, or to send to him by registered post immediately after the order granting the injunction has been made a copy of the application for injunction together with

(i) a copy of affidavit filed in support of the application;

(ii) a copy of the plaint; and

(iii) copies of documents on which the applicant relies and;

(b) to file, on the day on which such injunction is granted or on the day immediately following that day, an affidavit stating that the copies aforesaid have been so delivered or sent.

It has also been submitted that even if there is some discrepancy in the appellate order in mentioning the provision of Code of Civil Procedure under which the order has been passed by the Trial Court that would not effect the merits of the order and since the order passed by the trial Court cannot be upheld a great injustice would be done if the order passed by the trial Court is restored and the order passed by the appellate Court is set aside.

13. Having heard the learned counsel for the parties I am of the view that the plaintiffspetitioners have failed to justify before this Court the reason for moving the second application for temporary injunction under Order 39, Rules 1 and 2, CPC on 9th September, 1999 when on the such order. first application filed along with the plaint on 7th September, 1999 the trial Court was not satisfied and was convinced that no case for urgency was made out and it passed the order of issuance of notice fixing 2291999. It could also not be established that whether any new circumstance was pleaded by the plaintiffspetitioners for moving the second application. Once the notices were ordered to be issued the plaintiffspetitioners ought to have waited till the date fixed and in any case there was any urgency because of certain development which might have occurred after filing of the suit, they should have been brought on record, as there is nothing as such on record, therefore, there was no occasion for the plaintiffspetitioners to move the second application for temporary injunction on 9th September, 1999 when the suit itself was filed on 771999. Not only this an application for amendment was moved on 8th September, 1999, which is said to be an application of formal nature by the learned counsel for the petitioners. The said application was moved on 9th September, 1999. On 10th September, 1999,

the trial Court first passed an order on the second application moved under Section 151, CPC directing the opposite parties to maintain status quo and there after on that very date modified the order into a clear injunction against the defendants. But while passing this order, it did not record any reason for granting temporary injunction and it ordered for compliance of Rule 3 of Order 39, CPC. The order suffers from noncompliance of the provisions of Rule 3 proviso (b) attached to Rule 3. The order does not record any reasons except a recital, that there appears to be a prima facie case in favour of the plaintiffs and the order is being passed in the interest of justice. The aforesaid provision mandates that the Court shall in all cases, except where it appears that the object of granting the injunction would be defeated by the delay, before granting the injunction, direct notice of the application for the same to be given to opposite parties necessarily which means that in all cases the temporary injunction should be granted as an exception whereas notice has to be issued as a rule, in case the Court is satisfied for issuing the notice. This exception is further fortified and circumscribed by the provisions of Rule 3

14. I find that no such reason has been recorded even in the first order of maintaining status quo passed by the trial Court. So far the question of passing of second order on the same date i.e. 10th September, 1999 is concerned the same has been passed on an application said to have been moved under Section 151, CPC whereas only allegation was that the order is vague and injurious and therefore, the defendants be enjoined by specific order by issuing temporary injunction restraining the defendants from interfering in peaceful possession of the plaintiffs/petitioners. The order passed is contained in Annexure 1 to the writ petition does not indicate as to what were the subsequent circumstances considered by the trial Court while modifying the said order but it specifically says that this is an application for modifying the order and in the interest of justice it is liable to be accepted. I fail to understand that what interest of justice was being carried forward by granting injunction while the petitioners did not plead anything in the application under Section 151, CPC about any circumstances which had compelled them to move an application immediately after passing of the order of status quo by the Court. The term "interest of justice" cannot be stretched to such an extent that it may cause injustice to one of the parties. In case the trial Court was of the view that it requires an immediate injunction the reasons should have been recorded on the basis of pleadings and the averments made in the application. The order does not indicate any such reason.

15. So far the argument that the appeal was not maintainable in view of application for vacation of injunction being moved under Order 39, Rule 4 is concerned the learned counsel for the petitioners placed reliance upon a case reported in 1995 Vol. 26 Allahabad Law Reports 78 in ft: Pt. Rishikesh and another and Smt. Salma Begum. In this case it has been said that the appeal can be filed against an interim order of injunction and when such appeal is filed the appellate Court is required to consider whether the order granting ex parte

injunction was legal and justified.

16. The other case which has been relied upon by the learned counsel for the petitioners reported in *Samar Jet Patel v. Addl. District Judge/Spl. Judge Allahabad*, 1997 Vol. 31 ALR 163, in which the High Court has held as follows:

"The appeal is maintainable under Order 43, CPC. The appeal is also right under Statute. The question in this case which arises for consideration is that in every case if an adinterim order is granted and show cause be issued then the appellate Court need to be cautious and circumspect in admitting the appeal though there is no absolute prohibition in exceptional cases. The intention of the legislature was not to bypass the remedy under Order 39, Rule 4, CPC.

It is now settled principle of law that where the particular procedure has been prescribed by Statute or State that has to be followed unless mala fides or other exceptional circumstances are pleaded. Each case has to be adjudged on its facts and circumstances.

In the facts and circumstances of the case the appeal is maintainable but the learned District Judge should have refrained itself from deciding the case as the injunction could have been varied or discharged or set aside by the lower Court itself and by deciding the application itself the right of appeal is lost."

17. The third case which has been cited by the learned counsel for the petitioner is that reported in *Municipal Corporation of Delhi v. Mis, Adways and another*, AIR 1998 Delhi 1541. In this case in paras 6 and 7 it has been held as follows :

"Para6. It is true as contended by the learned counsel for the respondent Mr. Sharma that the application for the grant of an adinterim injunction is very much subjudice before the learned lower Court as the same has not been disposed of on merits as yet, the impugned order is very much an ex parte order. Hence the same does not fall within the domain of Order 43, Rule 1, CPC. Therefore, it cannot be said by any stretch of imagination that the said order is an appealable order."

"Para7. This brings me to the question as to whether the appellants herein are left without any remedy keeping in view the facts and circumstances of the present case I think this is not so. This Court as per the provisions of Article 227 of the Constitution of India has got the power of superintendence over all the subordinate Courts. It will thus be its first and foremost duty to intervene in the matter and to set aside the orders passed by the Courts below, in case it comes to the conclusion that there is an abuse of the process of the Court and the lower Court has passed an order which is unwarranted, unjustified, illegal and invalid in the given circumstances of a case. In fact I am of the view that the Court would be failing in its duty in case it does not intervene into case such as the present one. To the same effect are the observations of Hon'ble Supreme Court as reported in *Mani Nariman Daruwala and Bharucha v. Phiroz N. Bhatena*, AIR 1991 SC 1494.

18. On the other hand the learned counsel for the respondents has placed reliance in a case reported in in re: Indradeo Singh v. District Judge Gorakhpur, 1994 Vol. 12 Lucknow Civil Decisions page 756, in which it has been held that despite filing of application for vacation of injunction under Order 39 an appeal against the interim order is still maintainable.

19. The authorities cited by the learned counsel for the petitioners do nowhere provide that the appeal against ex.pane injunction is not maintainable or that in case the application for vacation of injunction has been filed the appeal could not be entertained. The only restraint which has been given is that the appellate Court should be cautious in entertaining such appeal but it shall depend upon the facts and circumstances of each case. The High Court in the case of Municipal Corporation of Delhi (supra) has said that though the matter may be subjudice before the trial Court as the application for vacation of injunction has not been disposed of on merits but the moot question is that whether the appellant is left with no other remedy except filing of appeal or not. The Court has said that as per provisions of Article 227 of the Constitution, the Court has got the power of superintendence over the subordinate Courts. It will thus be its first and foremost duty to intervene in the matter and to set aside the orders passed by the Courts below in case it comes to the conclusion that there is an abuse of process of the Court and the lower Court has passed an order which is unjustified, unwarranted, illegal and invalid in the given circumstances of the case.

20. So far the discrepancy pointed out by the learned counsel for the petitioners in the order passed by the appellate Court is concerned it has been stated that the first order dated 10th September, 1999 granting status quo directing the parties not to interfere in the peaceful possession of the petitioners, was an order passed under Section 151, CPC and not under Order 39, Rule 4 of the CPC. The learned counsel for the respondents submitted that this discrepancy in describing the order itself cannot vitiate the effect of the order passed by the trial Court. Further the two orders dated 10th September, 1999 namely the first one by means of which the parties were directed to maintain status quo and the second order by means of which a clear injunction was granted in favour of the plaintiffspetitioners. I am of the view that both the orders were not passed in consonance with the provisions of Rule 3 of Order 39, CPC. No circumstance or reason was indicated by the plaintiffs before the trial Court as to what was the occasion to modify the order under inherent power of Section 151, CPC. It is also to be noticedthat once the plaintiffs have taken recourse of the specific provision of Order 39, Rules 1 and 2 read with Section 151, CPC and the orders having been passed earlier on the first application only for issuance of notice and again on the second application, the orders for maintaining status quo have been passed, then what was the occasion for the plaintiffspetitioners to invoke the jurisdiction of inherent power under Section 151, CPC, for getting the order of their choice as they were not satisfied with the orders passed by the trial Court under Order 39, Rules 1 and 2, CPC.

21. The trial Court was under a bounden duty to deal with the question as to whether circumstance existed and any compelling reason has occasioned after passing of the order on that very day so as to modify the same. The learned counsel for the petitioners/plaintiffs could not satisfy at all on these questions. A simple application under Section 151, CPC was moved in trial Court saying that the order for maintaining status quo is vague and injurious and on that application the said order has been modified directing the opposite parties not to interfere in peaceful possession of the plaintiff's/petitioners. The order passed by the Appellate Court maintains the order of status quo and has only set aside the order granting temporary injunction. The appellate Court has not recorded any finding on the merits of the case and has directed that the trial Court shall consider and decide the controversy in accordance with law. The observation made in the order passed by the Appellate Court are of no value for the trial Court while considering the application under Order 39, Rules 1 and 2, CPC which has to be decided in accordance with law on the merits of the case.

22.1 agree with the submissions made by the respondents' counsel that discrepancy in describing the order impugned by the appellate Court is not fatal for maintaining the order passed by the appellate Court in as much as the appellate Court has already looked into the matter and substantial justice has been done and in case the order passed by the appellate Court is set aside and the order passed by the trial Court granting temporary injunction is maintained or is revived it would not only lead to injustice but would also revive an wholly illegal, unwarranted and unjust order. This cannot be the purpose and spirit of the provisions of the Code of Civil Procedure.

23. In view of the fact that the application under Order 39, Rules 1 and 2, CPC is to be decided by the trial Court, the writ petition has no force and is liable to be dismissed. Any observation made in the judgment regarding conduct of the parties shall not come in way in disposal of the application for temporary injunction pending in the trial Court. The application under Order 39, Rules 1 and 2, CPC shall be decided expeditiously.

24. I would have set aside the order granting status quo also but in view of the fact that the order protects the rights of both the parties and therefore, I refrain myself from interfering in the said order. In these circumstances the parties shall maintain status quo as on 10th September, 1999 and the same shall be subject to final orders passed on the application for temporary injunction.

The writ petition is dismissed. No order as to costs.