
(2001) 09 AHC CK 0023

In the Allahabad High Court

Case No : C.M.W.P. No's. 8617 and 8798 of 1992

Awadh Narain

APPELLANT

Vs

IVth Addl. District Judge, Jaunpur and Others

RESPONDENT

Date of Decision : 10-09-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2

Citation : (2001) 4 AWC 2822 : (2002) 1 CivCC 347

Hon'ble Judges : S.K. Singh, J

Bench : Single Bench

Advocate : A.N. Tripathi and A.R. Dwivedi, for the Appellant; G.M. Tripathi and R.S. Misra, for the Respondent

Final Decision : Dismissed

Judgement

S.K. Singh, J.—These are two connected writ petitions. Writ Petition No. 8617 of 1992 has been filed by Awadh Narain in which Shitla Prasad is respondent No. 3. Writ Petition No. 8798 of 1992 has been filed by Shitla Prasad in which Awadh Narain is respondent No. 2. The writ petition filed by Awadh Narain, i.e., Writ Petition No. 8617 of 1992 is the main case and, therefore, that is treated as leading case.

2. The facts of Writ Petition No. 8617 of 1992 appear to be that Shitla Prasad, respondent No. 3 filed a suit. i.e., Original Suit No. 1550 of 1991 for permanent injunction for restraining the present petitioner from interfering in his peaceful possession and also from making any construction over the suit land and from forcibly ousting him. It was stated by the plaintiff that no partition between the parties has taken place by metes and bounds but the defendant by taking forcible possession has encroached the additional land for which he is not entitled. It was pleaded by the plaintiff that by raising of construction, plaintiff will suffer irreparable loss. Along with the plaint he has also filed an application for grant of temporary injunction by which it was prayed that defendant be restrained from raising any construction. A commission was issued who reported

that construction to some height has been raised. The trial court by its order dated 6.1.1992 granted injunction in favour of the plaintiff and restrained the defendant from raising any construction over the land in dispute. Against the order of the trial court, defendant-petitioner filed an appeal which was also dismissed by the order of the Vth Additional District Judge dated. 23.1.1992 which has been impugned in this petition by Awadh Narain.

3. Writ Petition No. 8798 of 1992 has been filed by Shitla Prasad challenging the judgment of the Vth Additional District Judge dated 23.1.1992 by which although the appeal of the Awadh Narain was dismissed but an observation has been made directing the trial court to dispose of the application 27C in the light of fresh report by Commissioner about position of construction. The grievance of the petitioner in this petition is that the appellate court has made observation on the basis of which the trial court may permit the defendant to complete the construction.

4. Learned counsel representing both the parties have been heard.

5. Sri A. N. Tripathi learned counsel who appeared on behalf of the Awadh Narain has submitted that firstly, the land has been already partitioned and parties are in separate possession over their respective portion and, therefore, the petitioner has every right to raise construction which has been illegally stopped by the court below. It has been then submitted that even accepting the parties to be co-sharer, as the construction upto substantial height has been raised and, therefore, grant of injunction is to cause more harm to the petitioner. In this connection, Sri Tripathi, has placed reliance on the decisions in Chhedi Lal and Another Vs. Chhotey Lal, . It has been argued by the learned counsel that equity can be adjusted while effecting the final partition and, therefore, stopping of the completion of the construction is not justified.

6. Learned counsel for the respondent, while refuting petitioner's contention, has submitted that in a suit for permanent injunction, strict status quo is liable to be maintained. It has been further argued that admittedly the parties are co-sharers and the theory of partition as claimed by the other side is disputed and, therefore, the possession of one co-sharer being possession of all, Awadh Narain has no right to raise any construction. It has been further argued that the appellate court while dismissing the appeal has no authority to give direction to the trial court to the effect that after obtaining fresh report from Amin about the latest stage of construction may permit the completion of the construction at the risk of the defendant. Learned counsel has challenged this finding and directions as given by the appellate court in the writ petition filed by Shitla Prasad and has prayed that this direction be quashed.

7. Learned counsel for the respondent in support of his submission has placed reliance on a decision given by this Court in case of Ram Kalap v. IVth Additional District Judge 1989 ACJ 13. The decision referred above has taken note of the judgment given by the Hon''ble Apex Court in Harish Chandra Verma v. Kayasth

Pathshala and Ors. JT 1988 (1) SC 625.

8. It has been held in the aforesaid decision that where the decree for permanent injunction is sought, it would not be appropriate to permit the defendant to raise construction subject to the condition that in the event of decree being against the defendant. the construction shall be pulled down. The observation, as has been made in the decision given in Ram Kalap case (supra), in paras 3 and 4, will be useful to be quoted below :

"3. Should the second question be answered in favour of the petitioner, then the answer to the first question would not arise. The answer to the second question is now available from a judgment of the Supreme Court laying down the principle on what ought to be the appropriate order when one party restrains the other from raising construction over the property in suit. The Supreme Court in the matter of Harish Chandra Verma v. Kayastha Pathashala Trust and Ors. JT 1988 (1) SC 625, held that where a decree for permanent injunction has been sought, it would not be appropriate to permit the defendant to raise construction subject to the condition that in the event of the decree being affirmed, the construction shall be pulled down. The Supreme Court observed, apart from the convenience the parties and equity arising in the facts of the case, a larger principle is involved in the matter. On the face of a decree for permanent injunction, is it appropriate for the appellate court to allow it to be nullified before the appeal is disposed of? We are of the view that the answer has to be in the negative.

4. The Supreme Court set aside the order of the High Court on the ground that requiring the party to raise construction only to pull it down, should the decree for permanent injunction be confirmed, would not be an appropriate order. The principle being that while the matter was being heard, propriety demanded that strict status quo be observed between the parties. Thus, this case can be no exception."

9. In the writ petition filed by Awadh Narain at earlier point in the absence of the respondent No. 3, the petitioner was permitted to complete the construction by the order as was passed by this Court dated May 4, 1992 but on moving application by respondent No. 3 and after hearing both the parties, that order was recalled by this Court on July 30, 1992. Hon''ble Justice A. K. Banerjee, while recalling his order, has taken note of the aforesaid two decisions in 1989 ACJ 13 (supra) and JT 1988 (1) SC 625 and he has observed that permission to raise construction at the risk of party in the suit for permanent injunction was not approved by the Hon''ble Supreme Court.

10. In view of the pleadings and the facts as have come on the record, it is clear that both the parties are co-sharers and it could not be demonstrated that there is any partition by metes and bounds. It is well-settled that the possession of one is possession of all and, therefore, over every inch of land, both the parties have equal right and thus when one co-sharer resists the action of other on raising construction, then the only remedy for the other co-sharer who intends to raise

construction appears to be to get a suit for partition for demarcating their respective rights over the land.

11. Raising of some construction by the petitioner Awadh Narain cannot be given a legal shape and licence to him to complete his construction which has been held to be not permissible. If this action is permitted, then in every suit being filed for injunction, if the defendant somehow or the other is able to raise some construction, either before or after filing of the suit, he will very conveniently pray before the Court that he may be permitted to complete the same as now the equity lay in his favour on account of investment of money and if that prayer for completion of construction is permitted, that will lead to situation of taking of the law in the hand by that party. Otherwise also, final decisions in the suit upto highest forum take indefinite time, even decades and at the last stage on account of the huge construction if it has come out on the scene plays a major role in considering and balancing the equity between the parties. It may cause some prejudice to the plaintiffs interest.

12. In view of this, construction cannot be permitted to be raised even at the risk of the parties so raising. In the present case, as admittedly, both the parties are co-sharer and there is no partition between them by metes and bounds, the courts below were justified in directing the parties to maintain status quo and not to raise any construction during the pendency of the suit.

13. So far the direction as has been given by the appellate court that the trial court will obtain fresh Amin report about the latest position of the spot and will permit the defendant to complete the construction at his own risk is absolutely not justified in view of the discussions made above and, therefore, that part of the judgment is to be quashed. The petitioner Awadh Narain can be said to be entitled to only this discretion that as he has invested some amount in raising that construction, in the event of success in his favour, he will be entitled to complete the same and, therefore, the trial court may be asked to take up the suit with all promptness and to expedite the hearing of the suit.

14. In view of the aforesaid discussions, the writ petition as has been filed by the Awadh Narain being Writ Petition No. 8617 of 1992 fails and It is accordingly dismissed.

15. The Writ Petition No. 8798 of 1992 as filed by Shitla Prasad succeeds and the direction as contained in the Judgment of the appellate court for consideration of the application No. 27C to permit the defendant to complete the construction is hereby quashed. The trial court is directed to expedite the hearing of the suit. The parties are directed to bear their own costs.