

(1998) 04 AHC CK 0045
In the Allahabad High Court
Case No : C.M.W.P. No. 10672 of 1998

Jagdish Prasad Sharma

APPELLANT

Vs

IIIrd Additional District Judge, Etah and others

RESPONDENT

Date of Decision : 13-04-1998

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11
Constitution of India, 1950 — Article 227
Uttar Pradesh Avas Evam Vikas Parishad Adhiniyam, 1965 — Section 88
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Uttar Pradesh Avas Evam Vikas Parishad Adhiniyam, 1965 — Section 88
Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11
Constitution of India, 1950 — Article 227
Uttar Pradesh Avas Evam Vikas Parishad Adhiniyam, 1965 — Section 88

Citation : (1998) 2 AWC 1497

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

Bench : Single Bench

Advocate : S. Alim Shah, for the Appellant;

Judgement

D. K. Seth, J.—A suit for specific performance was filed against U. P. Avas Vikas Parishad, in connection with the said suit, an application for injunction was also filed praying for restraining the defendants from cancelling the allotment. The trial court by order dated 22.5.1995 granted temporary injunction, against which an appeal being Misc. Appeal No. 33 of 1995 was filed. By an order dated 9.2.1998, the said appeal was allowed and the order dated 22.5.1995 was set aside, in the said order, the appellate court had directed return of the plaint on the ground that the suit was not maintainable in view of Section 88 of U. P. Avas Vikas Adhiniyam. 1965, in terms of Order Vii, Rule 11, clause (d), it is against this order Sri Alim Shah, learned counsel for the petitioner has moved this writ petition.

2. On leave being prayed for, he is permitted to convert this petition into one under Article 227 of the Constitution in the course of today.

3. According to Sri Shah, the appellate court cannot pass order under Order vii Rule 11 while deciding Misc. appeal against the order of injunction, inasmuch as his Jurisdiction is confined only with regard to the orders passed by the trial court, granting injunction. The entire suit was not before the appellate court in Misc. appeal. Therefore, according to him, direction for the return of plaint is wholly without jurisdiction.

4. He relied on the decision in the case of Kailashnath. Singh v. District Judge. Mirzapur 1993 AWC 3, in support of his contention. A perusal of the said judgment shows that the jurisdiction of the appellate court in Misc. appeal is confined to the order challenged before it. The whole suit is not before the appellate court while deciding Misc. appeal Therefore, it cannot travel beyond the ambit and scope of the appeal itself.

5. Sri Ghanshyam Awasthi, learned counsel for the respondent No. 2 on the other hand, contends that since no suit is maintainable without notice u/s 88 after giving sixty days time, therefore, the plaint was rightly directed to be returned since it was barred by Section 88 of the Act. Therefore, there is no infirmity in the order.

6. After having heard learned counsel for the parties, it appears that by reason of Section 88 of the said Act, no suit can be instituted against defendant No. 2 until expiry of two months from the date of service of notice on the defendant No. 2. The said provision does not contemplate any relaxation, and, as such, the same appears to be mandatory. Therefore, admittedly, no suit is maintainable without such notice. In that view of the matter, the findings of the lower appellate court appears to be correct in respect of setting aside of order for injunction. Inasmuch as if the suit appears to be barred by law, in that event no injunction can be granted in such a suit, since jurisdiction of the appellate court was confined only to injunction. It cannot take itself a decision in respect of the whole suit. Now it is for the trial court to decide as to whether on the basis of finding that the suit is not maintainable by the lower appellate court, whether plaint is to be returned or not after arriving at appropriate finding as to whether the suit is maintainable on the basis of statement made in the plaint.

7. In that view of the matter, so far as the order by which direction to return the plaint was granted in the order dated 9.2.1998 is concerned, is hereby set aside. In the facts and circumstances of the case, i am not inclined to interfere with the other part of the order. It would be open to the parties to raise question of maintainability of the suit in view of Section 88 of the said Act, if such a contention is raised the trial court shall decide the same in accordance with law without being influenced by the findings of the lower court, which is tentative for the purpose of grant of injunction only or any of the observations made in this order, as early as possible, preferably within a period of one month from the date of production of certified copy of this order before the trial court.

8. With these observations, the writ petition is disposed of. There will be,

however, no order as to costs.