
(1992) 09 AHC CK 0041

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 19765 of 1992

Kailash Nath Singh

APPELLANT

Vs

The District Judge, Mirzapur and anothers

RESPONDENT

Date of Decision : 16-09-1992

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 10, Order 39 Rule 4, Order 41 Rule 1, Order 43 Rule 1

Citation : AIR 1993 All 67 : (1993) 1 AWC 3 : (1993) RD 37

Hon'ble Judges : S.R. Misra, J

Bench : Single Bench

Advocate : Sri V. Singh and Sri Sankatha Rai, for the Appellant; S.C. and Sri R.S. Misra, for the Respondent

Judgement

1. The petitioner is aggrieved by an order of the District Judge, Mirzapur dated 21-5-1992, allowing the appeal against the order of the Civil Judge, in the matter of injunction.

2. Petitioner, Kailash Nath Singh filed a suit as suit No. 147 of 1991 (Kailash Nath Singh v. Setu Bandh Rameshwar Pratap Singh) for permanent injunction restraining respondents Nos. 2 and 3 from raising construction and changing the nature of the land in dispute, shown as Ka, Kha, Ga, on the ground that plaintiff is co-tenant and the parties are in joint possession over the disputed land. According to the petitioner the land is ancestral property and parties are descendants from common ancestor Raj Kumar Singh. Plaintiff is coparcener of the joint Hindu Family and disputed land is ancestral property and no partition has taken place. Along with the suit, an application for temporary injunction for restraining the defendant from changing the nature of the disputed land and from raising construction over the land in dispute was filed. On receipt of the notice, defendant filed written statement and objection for the grant of injunction before the trial court. Trial court passed an order of temporary injunction, restraining the defendant from raising construction over the land in dispute.

3. Aggrieved by the order of the learned Civil Judge dated 21-8-1991 defendants filed miscellaneous appeal No. 22 of 1991 before the District Judge, Mirzapur who by his order dated 21-5-1992 allowed the appeal.

3A. During the course of the arguments, the petitioner also moved an amendment application for amendment in paragraphs Nos. 2 and 3 of the plaint and in the application for temporary injunction. The further averment of the petitioner was that respondent Nos. 2 and 3 have admitted in their written statement that the disputed land was ancestral property and they have not denied the pedigree given in the plaint. The ancestral nature of the property was admitted by the respondent No. 2.

4. I have heard Sri Sankatha Rai in support of the writ petition and Sri R. S. Mishra for the contesting respondents. In this writ petition, at the time of admission, counter and rejoinder affidavits have been exchanged and with the consent of the parties the writ petition is finally disposed of at the admission stage in accordance with the High Court Rules.

5. According to the counsel for the petitioner, the District Judge has committed a clear illegality in refusing to consider and allow the amendment to be made in the plaint and rejecting amendment in the injunction application. An affidavit in support of such amendment was also filed.

6. As regards, the amendment in the plaint, the observation of the District Judge is that it is beyond the competence of a miscellaneous court, as the miscellaneous court has only limited jurisdiction to dispose of the injunction application and to find out whether the judgment passed by the trial court in granting the temporary injunction is right or wrong. Before the District Judge, on behalf of the defendant, reliance was placed on the decision reported in Dhunda Singh Vs. Leeladhar and Another, . In that case M.P. High Court has considered all the arguments advanced by the learned counsel for the respondent before the District Judge and according to the defendant the District Judge, while hearing the appeal, preferred under order 43, Rule 1(r) CPC, against the order of grant of an interim injunction passed by the trial court, has no jurisdiction to decide an application for amendment of the plaint on merits. In reply to this contention the counsel for the respondents has urged that the District Judge has rightly refused the prayer of amendment in the injunction application and also rightly observed that while considering a miscellaneous appeal the appellate Court can-not allow and amendment in the plaint. He cannot travel beyond the pleas on the basis of which a trial court has passed an order of injunction, one way or the other. If the miscellaneous court comes to conclusion that the necessary averment for granting an injunction was lacking and even then the trial court has granted injunction, then it should record a clear cut finding to that effect holding that the order of the trial court is bad in law. In any view of the matter, a court hearing miscellaneous appeal is not entitled to allow amendment of the plaint.

7. In the present case, the whole matter is before the appellate court including

the plaintiffs written statement. If in that appeal an amendment is sought the court may dispose it of on merits. But to take a contrary view that while hearing an appeal against the grant or refusal of injunction, appellate court possesses the same power as a court hearing a regular appeal, appears to be doubtful. The appeal before the learned District Judge was under order 43 rule 1 (r) CPC and it was not a regular appeal. The jurisdiction of the appellate court while deciding a miscellaneous appeal of such a character is limited to the extent to examine the validity of an order enumerated in clause (r) of order 43 rule 1, CPC which runs as under:--

"An appeal shall lie, from the following orders under the provisions of S. 104, namely (r) and order under Rule 1, Rule 2, (Rule 2A), Rule 4 or Rule 10 of Order XXXIX."

8. Accordingly the scope of such appeal is limited. The challenge is only regarding the grant of an interim injunction as such, the District Judge was not exercising the power or jurisdiction over the suit. He was ceased to have any jurisdiction for granting a temporary injunction in a suit and the power of amendment will only be with the court where the suit is pending. When a regular appeal is filed after decision by the trial court the appellate court exercises all the powers and the trial court ceases to have any concern with such a suit which has already been decided. Accordingly the District Judge, while hearing as miscellaneous court may not entertain the application for the amendment of the plaint submitted before him by the plaintiff-petitioner and if such an application is made in appeal, the only course which has to be adopted by the District Judge is to direct the plaintiff to file the said amendment application before the trial court for deciding it in accordance with law after disposing of the miscellaneous appeal on merits. The view of the District Judge that he has no jurisdiction to decide the application for amendment of the plaint appears to be correct. Reliance was placed by the petitioner on the provisions of S. 108 read with S. 107 sub-clause (2), Order 43, Rule 2 read with Rule 1 and Order 6 Rule 17, CPC and he contended that the order allowing an amendment of a plaint was exercisable and the District Judge has failed to exercise jurisdiction vested in him in refusing to consider the amendment in the plaint. It was further urged that the appeal was in continuance of the suit and the District Judge hearing a miscellaneous appeal has a right to permit amendment in the plaint while hearing a miscellaneous appeal. It was also contended that unless there is a specific bar restricting a court not to permit amendment, the jurisdiction of allowing or rejecting an amendment will be presumed. In support of this contention, he placed reliance on a Full Bench decision reported in ILR-V, ALD as well as some other cases.

9. The powers of appellate courts are the same as are conferred by this Code to the trial court. By virtue of Order 43, Rule 2, CPC the provisions of Order 41, CPC shall apply to the appeals from orders. In spite of this the scope of the appeal under Order 43, Rule 1(r) is restricted as has already been stated above. The

distinction must be kept in mind regarding the scope of a regular appeal and miscellaneous one. In the case of a regular appeal, the same is continuation of a suit. Power to allow or reject the amendment in the pleadings is always there; but in an appeal of miscellaneous nature, it will be the jurisdiction of appellate court to decide the correctness or otherwise in the matter of interim injunction. As such, the powers of miscellaneous appellate court appears to be quite different than an appellate court as the miscellaneous court has no concern with the suit but it is only an appellate authority to decide the correctness of the grant or refusal of injunction application. Accordingly I hold that the view taken by the District Judge in the present case refusing to permit an amendment in the plaint is absolutely correct. The contention of the learned counsel for the petitioner that unless there is a specific bar restricting a court not to permit an amendment, there will always be a presumption of jurisdiction is not tenable in law. A perusal of Ss. 107 and 108, CPC read with Order 43 Rule 1, CPC reveals that there is implied bar on such an exercise of jurisdiction.

10. There is another aspect of the matter. Assuming that a miscellaneous appellate court has the power to allow amendment. In that case, if the amendment is allowed, in the normal course, the case will have to be remanded to the trial court to consider the matter afresh in the light of the amended pleadings. If the amendment is that of a factual nature where evidence is required, either the appellate court itself will go into the evidence or the case will be sent back to the trial court. In the present case appellate court has done the same thing and, thus, has committed no mistake.

11. So far as the other aspect of the argument, regarding the amendment sought in the application for injunction is concerned, the appellate court has recorded a finding, the relevant portion of which is reproduced below :--

"So far as the prayer for the amendment of the injunction application is concerned, it is not bona fide. The application has been moved to fill in lacuna which has come out during the course of the argument. The Hon. High Court has transferred the appeal to this Court and fixed a date for hearing. The plaintiff respondent No. 1 desires to delay the disposal of appeal only with an intention to delay the construction of the building of the defendant No. 1. In these circumstances I do not find any justification for amendment of the injunction application and to admit the fresh affidavit."

The above view of learned District Judge is correct and does not call for any interference.

12. The counsel for the petitioner has further urged that the trial court having placed reliance on admission that the defendant having admitted the pedigree given in the plaint in which the plaintiff has been shown as coparcener of a joint Hindu Family and there being no denial by the defendant that the disputed land was an ancestral property, the plaintiff has made out a case that the appellate court was not legally justified in allowing the appeal on too technical points, and

at the same time, refusing to permit the amendment so as to rectify that technical mistake. He also urged that the appellate court has failed to record any finding in respect of the balance of convenience and irreparable injury, which is likely to be caused to the petitioner.

13. The reply of Sri Mishra on this point was that the plaintiffs father was alive and the plaintiff having failed to disclose the basis of his title, application for temporary injunction was not maintainable. The disputed land was never joint property of the plaintiff and defendants. The parties had separate houses since before the date of vesting. The disputed land belongs to defendant No. 1 who had his house, baithaka, marhai etc. over the said land. He demolished his kachcha house in last June and wanted to make pakka house over it. According to him, the balance of convenience was in favour of the defendant. The learned Civil Judge has observed that to consider the case of the parties, sufficient evidence would be required to find out which of the two versions is correct, and if by that time, the defendants are not restrained to make construction the plaintiff will suffer irreparable loss, and, on this point the trial court has jumped to a conclusion that plaintiff has made out a prima facie case. In view of this Sri Mishra has contended that there is no finding of prima facie case nor evidence has been considered in granting the injunction.

14. So far as the preliminary point taken by the counsel for the respondents that in view of Full Bench decision of Ganga Saran, reported in 1991 ALJ 159 no mandamus could be issued against a private party as such the writ petition is liable to be dismissed without considering the matter on merits, is concerned without going into the controversy as to whether the writ petition under S. 226 of the Constitution will lie or not, I am of the view that if a wrong order comes before the Court passed by the appellate court and there appears to be no bar in quashing that order at the final stage, aforesaid Full Bench decision will not be applicable. But as I am deciding the writ petition on merits and affirming the order of the District Judge, it is not necessary to dispose of the Preliminary objection regarding the maintainability of the writ petition.

15. The counsel for the respondents has also urged that the petitioner has already constructed his house and is living separately and according to the defendant there is no house and as per pedigree the share of the petitioner is so negligible that hardly he may be entitled to a share to the extent of 5 Square Meters and for that the defendant is prepared to pay adequate compensation.

16. The aforesaid factors pointed out by the learned counsel for the respondents are relevant and should be taken into consideration by the court of fact. This Court under Art. 226 of the Constitution is not required to go into these aspects of the matter and the writ petition is being disposed of on merits in the light of observations made above. It is, however, open for the plaintiff, if he so likes, to get a decision on the amendment from the trial court itself.

17. In view of what has been stated above, the writ petition fails and is

dismissed. Stay order if any is discharged. Parties are directed to bear their own costs.

18. Petition dismissed.