
(1992) 07 AHC CK 0044
In the Allahabad High Court
Case No : Writ Petition No. 1993 (MS) of 1992

Mumtaz Khan and others

APPELLANT

Vs

1st ADDL.District Judge, Bahraich and others

RESPONDENT

Date of Decision : 22-07-1992

Acts Referred:

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

Citation : (1992) 07 AHC CK 0044

Hon'ble Judges : H.N.Tilhari, J

Final Decision : Disposed Of

Judgement

H.N. Tilhari, J.—This petition is directed against the judgment and order dated 30th May, 1992 passed by Shri S.C. Dikshit, 1st Addl. District Judge, Behraich, in Misc. Civil Appeal No. 38 of 1992, dismissing the petitioner's appeal and directing the parties to appear before the trial court on 18th July, 1992.

2. Brief facts of the case are that the suit was filed by plaintiffoppositeparty, Chand Khan and others for permanent injunction in respect of the property in dispute i.e. plot no. 722 situate at village Bahboliya, District Behraich on the basis of title, claiming to be owner in possession of the said plot. Alongwith plaint of the suit, the plaintiffoppositeparty moved an application for temporary injunction under Order 39 rules 1 & 2 CPC which is paper no. C6 in the record of learned trial court and thereby it was prayed that defendant be restrained, during the pendency of the suit, from constructing the wall, as well as from raising any other construction on the plot in dispute. The learned trial court directed the notice to be issued to the oppositeparties and granted ex parte adinterimtemporary injunction order. It invited objection and feed 22492 for disposal of temporary injunction application on merits. On 731992 the petitioner filed their objections paper No. C 13 along with affidavits. The case was fixed for 2841992 but defendantpetitioner moved an application C16 dated 731992 for modifying the order fixing 2841992 by which 2841992 was fixed and for fixing an early date for disposal of temporary injunction and the objection of the petitioner.

The learned Munsif rejected the application for refixing of the date, as an early date and ordered that the matter will be taken on 28/4/1992 for disposal of defendant/petitioner's objections well as the application for temporary injunction finally.

3. The defendant/petitioner instead of awaiting till 28/4/1992, moved in District Judges Court and filed the Misc. Appeal 38/92, earlier than 24/8/92, in the Court of District Judge on 23/3/92. The learned District Judge dismissed the Misc. Appeal No. 38/92 with the following observation:

?As a matter of fact the application C6 has not been disposed off on merits after hearing the parties by the learned trial court and trial court has already fixed 28/4/92 for disposal, but the defendant appellants preferred this appeal against the order dated 22/2/92. Therefore, it is apparent that the learned Munsif has not decided this application on merits and is still pending disposal before the trial court. Therefore, in my opinion, it would not be just and proper to invoke the jurisdiction of this court in passing the order on application C6 because the party after deciding this application before the trial court will get a right for filing the appeal afresh. Therefore, I do not want to curtail the right of appeal to the aggrieved party. So at this stage I do not find it just and proper to dispose of the application C6 and therefore in my opinion the appeal fails and deserves to be dismissed.?

4. With these observations, the learned Additional District Judge, Behraich has dismissed the appeal.

5. Feeling aggrieved from the order of the learned Additional District Judge, Behraich the petitioners first filed the revision application under Section 115 of the Code of Civil Procedure on 20/7/1992 in this Hon'ble Court which has been dismissed by me on the ground that the revision is not maintainable against the appellate or revisional order, dismissing or allowing the appeal in view of the amendment of Section 115 CPC by U.P. Civil Laws Amendment Act, 1978 and the law laid down by the Full Bench of this Court in Jupiter Chit Fund case reported in (AIR 1979 Allahabad page 218) and the other Full Bench decision reported in (1991 ALJ page 159) i.e. Ganga Saran v. Civil Judge, Hapur. The petitioner has thereafter filed this petition under Article 226 of Constitution of India before me.

6. I have heard Shri S.M. Nasir, learned Counsel for the petitioner at length. Shri Nasir has strongly and to his best contended that the learned Additional District Judge has illegally refused to exercise the jurisdiction vested in law by dismissing the petitioner's appeal without going through the merits of the case, simply on the ground that the petitioner has once filed objection against the application for temporary injunction before the trial court before filing of the "first appeal from the order" against the ex parte order dated 22/2/1992. Shri Nasir has contended that when court passes ex parte injunction order, the remedy by way of appeal is available to the appellant, irrespective of his having approached the trial court itself by filing the objections and, as such, Shri Nasir contends that the appeal

was maintainable and should not have been dismissed without consideration of the matter on merits. Shri Nasir has placed reliance in support of his contention on the Full Bench Decision of the Court in *Zila Parishd v. B.R. Sharma*, (AIR 1970 Allahabad 376) that two remedies have been available to the petitioner. One of appeal against the ex parte order and the other of filing objection against the application for temporary injunction and to have a decision from the trial court and discharge of injunction order as well.

7. Mr. Nasir's contentions are themselves replied by the decision relied by him & the observations of the full bench in the case of *Zila parishad v. B.R. Sharma* AIR 1970 Allahabad 376).

8. There is no doubt that an exparte order granting temporary injunction is appealable. There is no doubt that two alternative remedies are available to a person aggrieved by an ex parte temporary injunction order granted by the trial court. One is that he may file the objection against the application before the trial court and seeking a decision from the trial court and praying for rejection of temporary injunction order and thereafter if he is unsuccessful, he may file an appeal under Order 43 rule 1(r). There is another remedy available by way of alternative remedy to the person aggrieved from ex parte temporary injunction i.e. by directly filing the appeal from the order of ex parte temporary injunction under Order 43 rule 1(r). I do not agree with Mr. Nasir's contention that two remedies can be availed by a person aggrieved by ex parte injunction order simultaneously at one and same time. The process of law as it appears to me is that it is open to a person aggrieved by grant of ex parte temporary injunction order to either approach the court granting ex parte injunction order and to file objections against the injunction application and to seek dismissal and rejection of temporary injunction application and the vacation of exparte temporary injunction order and thereafter to approach the appellate court if the trial court's order goes against him, or in alternative he may directly file the appeal from the ex parte order of temporary injunction itself, but he cannot avail the two remedies simultaneously because if two remedies are taken simultaneously, the result maybe that a person aggrieved by the order of the trial court may be debarred from filing the appeal against the order of temporary injunction granting or rejecting it on merits, on the basis of doctrine of resjudicata. Therefore, I am constrained to hold that if a person is aggrieved from ex parte injunction order, he has to choose either of the two remedies, he cannot avail two remedies simultaneously. The full bench in *Zila Parishad's* (Supra) has been pleased to observe as under:

?The language and the object of Rule (r) of Order 43 and the scheme of Rules 1 to 4 of Order 39 show that an appeal also lies against the ex parte order of injunction. As soon as an interim injunction is issued and the party affected thereby is apprised of it, he has two remedies: (1) he can either get the ex parte injunction order discharged, varied or set aside under Rule 4 of Order 39 and if unsuccessful avail the right of appeal as provided for under Order 43 Rule 1(r),

or (2) Straightway file an appeal under Order 43 rule 1(r) against the injunction order 39 CPC. It is not unusual to provide for alternative remedies. For instance when an ex parte decree is passed against a person he has two remedies either he may go up in appeal against the ex parte decree or he may seek to get the ex parte decree set aside by the same court.?

9. The above quoted observations and the use of expressions 'either' & 'or' in the observations of the Full Bench in the Case of Zila Parishad v. B.R. Sharma clearly lead to the conclusions that two remedies are alternative and that the two cannot be availed simultaneously or at one and the same time. The person aggrieved has to choose either of them, but if he has filed objections as well as filed the appeal and then the Appellate Court does not entertain the appeal and dismisses it on the ground that objections are yet pending, have got to be decided by the trial court, the Appellate Court commits no jurisdictional error or error of law apparent on the face of the record nor does the order of the Court suffers from any irregularity nor has such an order got a tendency of causing any substantial injury or injustice to a person aggrieved, such as is the case of petitioner. The temporary injunction application matter has yet to be finally disposed off. It would have been in the fitness of things for the present petitioner to have awaited for decision of the trial court. I find no force in the Writ Petition as the order of the Appellate Court does not suffer from any error of law & jurisdiction & is liable to be dismissed with the observation that it is expected that the trial court will dispose of temporary injunction as well as the objections filed by the petitioner by a very early date within two months. Subject to these observations the Writ Petition is dismissed as being devoid of force.

(Petition dismissed.)