
(2000) 09 AHC CK 0113
In the Allahabad High Court
Case No : C.M.W.P. No. 23954 of 2000

Nitya Nand Pandey

APPELLANT

Vs

Additional Chief Judicial Magistrate V/Civil Judge (SD),
Gorakhpur and others

RESPONDENT

Date of Decision : 08-09-2000

Acts Referred:

Allahabad High Court Rules, 1952 — Rule 4
Civil Procedure Code, 1908 (CPC) — Section 24
Constitution of India, 1950 — Article 226

Citation : (2000) 4 AWC 2948

Hon'ble Judges : Shyamal Kumar Sen, C.J;G.P. Mathur, J

Bench : Division Bench

Advocate : A.P. Tewari and S.S. Tripathi, for the Appellant;

Final Decision : Dismissed

Judgement

Shyamal Kumar Sen, C.J.—In the Instant writ petition, the petitioner has prayed for issuance of a writ of mandamus commanding the Additional Chief Judicial Magistrate V/Civil Judge (Senior Division). Gorakhpur to adjudicate and decide Original Suit No. 1990 of 1988, Nitya Wand Pandey v. Sharda Prasad Pandey and others within a specified time.

2. The facts alleged by the writ petitioner is that the petitioner filed a suit for permanent injunction restraining the respondents from cutting down the trees standing over the suit land as well as from raising any construction over the same. A relief for mandatory injunction for removal of boundary wall and door raised over the suit land has also been claimed. The aforesaid suit filed on 9.8.1988 was registered as Original Suit No. 1990 of 1988, Nitya Nand Pandey v. Sharda Prasad Pandey and others in the Court of Munsif, Gorakhpur, now pending in the Court of Additional Chief Judicial Magistrate V/Civil Judge (Senior Division), Gorakhpur.

3. In the said suit, written statement was filed and necessary issues were

settled. The parties also led their evidence in support of their respective claims. It has been alleged by the writ petitioner that the defendants, who are respondent Nos. 2 to 5 in the Instant writ petition, are adopting dilatory tactics by taking adjournments and are trying to prolong the litigation by filing one application or the other very often. The suit was fixed for final hearing on 8.12.1999. In the meantime on 30.11.1999 the respondent made an application for making formal order and on 8.12.1999 the respondents sought for adjournment, which was allowed by the trial court subject to payment of Rs. 20 as costs, fixing 23.12.1999. Thereafter several dates were fixed by the trial court but the respondents did not allow the trial court to proceed with the suit and on one pretext or the other got adjournments. In the circumstances, the writ petitioner has prayed that a writ of mandamus be Issued directing the District Judge to expeditiously dispose of the trial.

4. We are afraid that we are unable to grant any relief in the Instant case, since in our view, it will not be proper to exercise such power in writ jurisdiction under Article 226 of the Constitution of India in respect of a civil suit pending before the district court. The CPC itself provides remedy in such circumstances. In this connection. Section 24 of the CPC may be taken note of :

"24. General power of transfer and withdrawal.--(1) On the application of any of the parties and after notice to the parties and after hearing such of them as desired to be heard, or of its own motion without such notice, the High Court or the district Court may at any stage :

(a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any Court subordinate to it and competent to try or dispose of the same, or

(b) withdraw any suit, appeal or other proceeding pending in any Court subordinate to it, and

(i) Try or dispose of the same ; or

(ii) Transfer the same for trial or disposal to any Court subordinate to it and competent to try or dispose of the same ; or

(iii) Retransfer the same for trial or disposal to the Court from which it was withdrawn.

(2)"

If the petitioner is really aggrieved, he should have applied under the provisions of Section 24 of the Code of Civil Procedure. It is also open to the petitioner to place an application before the District Judge for transfer of the suit. It may also be noted that the Allahabad High Court Rules also provides relief in appropriate circumstances for transfer of a proceeding.

5. Under Chapter VIII, Rule 4 of the Allahabad High Court Rules, the High Court has power under extraordinary original civil jurisdiction to remove any suit being

or failing within the jurisdiction of any Court subject to its superintendence when it shall think proper to do so either on the agreement of the parties to that effect or for the purposes of justice. The said Chapter is set out as follows :

"Extraordinary original civil jurisdiction of the Court.--The Court may remove and try and determine as a Court of extraordinary original jurisdiction any suit being or falling within the jurisdiction of any Court subject to its superintendence when it shall think proper to do so either on the agreement of the parties to that effect or for the purposes of justice, the reasons for so doing being recorded on the proceedings of the Court."

6. In this connection, we may observe that the decision of the Division Bench of this Court in the case of Sidhartha Kumar and others v. Upper Civil Judge, Senior Division, Ghazipur and others 1998 ACJ 154, has not considered the aforesaid provisions of the CPC or of the Rules of our High Court probably because the learned counsel has not referred the said provisions to the learned Judges. When the CPC and Rules provide for the remedy, there is "no reason for interference in the writ petition. The said decision of the aforesaid Division Bench in our view appears to be per incurium.

7. In this connection, we may also take note of the Full Bench decision of this Court in the case of Ganga Saran Vs. Civil Judge, Hapur, Ghaziabad and others, . In the aforesaid decision, it was held inter alia :

"...When an aggrieved party approaches High Court under Article 226 of the Constitution against an order passed in civil suit refusing to Issue injunction to a private individual who is not under statutory duty to perform public duty or vacating an order of injunction, the main relief is for issue of a writ of mandamus to a private individual and such a writ petition under Article 226 of the Constitution would not be maintainable..."

8. All aspects have not been considered by the Division Bench of this Court in the case of Siddhartha Kumar (supra). Being perturbed with the delay in rendering justice to the litigants, the Division Bench in the aforesaid decision laid stress on speedy Justice and held that unnecessary adjournment should not be granted. The said Division Bench also did not consider any of the decisions of the Supreme Court referred to in the Full Bench case of Ganga Saran (supra). In the case of Qamaruddin v. Rasul Baksh 1990 AWC 308, it has been clearly laid down that ordinarily an interlocutory order passed in a civil suit is not amenable to extraordinary jurisdiction of the High Court under Article 226 of the Constitution.

9. In our view, the Division Bench Judgment in the case of Siddhartha Kumar and others (supra), is per incurium since all the aforesaid decisions and the points considered therein have not been considered, probably because the learned counsel did not refer the same. It is unfortunate that the suit of 1980 is kept pending. There is nothing, however, on record to show that the , appropriate remedy against the adjournment orders passed by the trial court was pursued by the plaintiff. Considering all the aspects of the matter, we are inclined to

dismiss the writ petition.

10. We, however, observe that in the event an application is moved for early disposal of the suit before the appropriate forum, appropriate steps should be taken by the Court below and the suit should be disposed of as early as possible without further loss of time.

The writ petition stands dismissed, with the observations noted above.