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Court : Allahabad

Decided On : Feb-02-1993

Reported in : AIR1993All236

Judge : S.R. Singh, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Sections 115 - Order 39, Rule 1 - Order 43, Rule 1; Code of Civil Procedure (CPC) (Amendment) Act, 1978; [Constitution of India](#) - Articles 225 and 226; [Specific Relief Act, 1963](#)

Appeal No. : Civil Misc. Writ Petition No. 35351 of 1992

Appellant : Shri Ram Singh and Another

Respondent : Special Judge, E.C. Act, Additional District Judge, Ballia and Others

Advocate for Def. : S.C. and ;R.K. Chaube, Adv.

Advocate for Pet/Ap. : N.S. Chaudhary, Adv.

Judgement :

ORDER

1. Petition in hand is directed against the judgment and order dt. 5th Aug. 1992 passed by Addl. District Judge, Ballia in Misc. Appeal No. 71/1989 preferred against the judgment and order dt. 1-5-1989 passed by 8th Addl. Munsif, Ballia on the application 6C-2 filed by the plaintiffs under O.39, R. 1, C.P.C. for ad interim injunction in original suit No. 171 of 1988, Sri Ram Singh v. Lala Ram.

2. Petitioners instituted the suit it being suit No, 171 of 1989 for permanent injunction restraining the defendant set No. 1, namely Lal Ram from interfering with the plaintiffs' possession over a part of plot No. 1659/3, area 18.5 decimal and from raising any constructions over the land shown/marked by figures 3, 4, 5 and 6 and also from cutting the trees situate on the said land. The relief of mandatory injunction was also sought directing the defendant set No. 1 to close the door marked by letter 'Ka' and to remove the constructions if any, found on the land shown by figures 3, 4, 5 and 6. An application 6 C-2 supported with an affidavit was also filed by the plaintiffs praying therein to restrain defendant No. 1, by means of an ad-interim injunction, from raising any construction over a part of plot No. 1659/3, area 18.5 decimal shown by figures, 3, 4, 5 and 6. The plaintiffs claimed themselves to be the co-owners along with defendant second set arrayed as party respondents 3 to 7 in the writ petition and alleged that the defendant 1st set namely, Lala Ram, had nothing to do with the land in suit but on sheer muscle power, he was threatening to raise constructions over the land in suit. The application for ad-interim injunction was opposed by defendant Lal Ram by means of the objection attended by an affidavit. He disputed the correctness of the plaint map and filed a map along with his objection according to which the land shown by figures, 1, 2, 3 and 4, was acquired by his father from the father of the plaintiffs for valuable consideration some 30 years ago and it is on the said land that he has got his house shown by figures 1, 5, 11, 14, 13, 12, 10, 9, 8, 7 and 4 in the map filed along with the objection. It was also asserted by Lala Ram (defendant) in his objection that he had all along been using the land marked by figures 14, 2, 3 and 13 as his Sahan land where he had his well situated as also the mango, guava and Tari trees. It was alleged that the plaintiffs had no concern with the suit land and the application 6 C-2 was liable to be rejected.

3. The learned Munsif upon consideration of the facts and circumstances of the case, particularly having regard to the statement made at the bar by the learned counsel appearing for the plaintiffs during the course of arguments, held that the defendant Lala Ram was admittedly in possession over 9 decimal area of the plot in suit. The learned Munsif also placed credence upon extract of Khatauni 1394 Fasli and Amaldaramad made therein of certain orders for recording the name of defendant Lala Ram over 9 decimal area of plot No. 1659. The learned Munsif however, observed that the question as to whether the land admeasuring 9 decimal in possession of the defendant Lala Ram stretched upto eastern wall of his house as alleged by the plaintiffs or upto east of the well as alleged by the defendant Lala Ram. According to the plaintiff, the defendant Lal Ram had no concern with the remaining land beyond the eastern wall of his house and this question, according to the learned Munsif, could be effectively adjudicated upon only at the trial stage after the evidence of both the parties is adduced in the case. The learned Munsif, however, held on appraisal of the report and the map prepared by the Amin that the Palani had been shown towards east of the plaintiffs' house and that the defendant's house had its opening towards east and since the plaintiffs admitted the existence of the door and Palani, they could not be said to have any prima facie case for ad interim injunction in respect of that part of the land in suit but, in respect of the remaining 9 decimal area of plot No. 1659/ 3, the Learned Munsif held a prima facie case made out with balance of convenience leaning in favour of the plaintiffs and accordingly, the learned Munsif directed the parties to maintain status quo.

4. The defendant Lala Ram went up in appeal impugning the aforesaid order passed by the learned Munsif. The learned Addl. District Judge Ballia allowed the appeal, set aside the order passed by the Munsif, rejected the application 6 C and in summation, held as under:

'It is true in extract of Khatauni 1394 fasli plaintiffs are recorded in main column on plot No. 1659/1 area 6.5 decimal and in plot No. 1659/3 area 18.5 decimal and in this Khatauni there is endorsement to record Lala Ram on 1659/3 area 9 decimal. Plaintiff could not challenge these entries in favour of defendants not only this, perusing the plaint, it is apparent that in para 4 plaintiff admitted that the defendant

first set are residents of village Haldi. The father of plaintiff No. 1 on request of father of defendant first set, in lieu of services, permitted to reside in plot No. 1659/3 and from that date defendants had been residing in plot No. 1659/3. Admittedly, defendants are in possession. Plaintiff did not give any date when he permitted defendants to raise construction in plot No. 1659/3 whereas there is specific contention of defendants that they raised constructions sometimes thirty years back. In this way if the documentary evidence are taken together plaintiff is found to have failed in establishing prima facie case in his favour. From spot position as is apparent from map prepared by the Commissioner and documentary evidence on record, Munsif failed to decide the question of balance of convenience and irreparable loss. Balance of convenience and irreparable loss are in favour of defendants and not in favour of plaintiff. As shown above defendants are in possession over the disputed land whereas plaintiffs are not in possession. Defendant cannot be restrained by temporary injunction. Not only this, by ordering both the parties to maintain status quo Munsif Committed mistake as it is no order in the eye of law. Order must be speaking one and capable of being executed. Once application under O.39, R. 1, C.P.C. is preferred, Munsif is obliged to either accept itin toto or reject it. He is not supposed to take other view and pass order against reliefs sought in the application for the purposes.'

5. Having heard the learned counsel for the parties, I am of the view that the impugned order is not sustainable in law. Observations 'Admittedly the defendants are in possession' or 'as shown above, defendants are in possession over the disputed land whereas plaintiffs are not in possession' occurring in the impugned order passed by the learned Addl. District Judge are not traceable or referable to any evidence on record. My attention has not been invited to any a material on the basis of which it could be said that the plaintiffs admitted defendants' possession over the entire land in suit. A perusal of the plaint as well as observations as to the statement made by the plaintiffs' counsel during the course of arguments before the trial court bear it out that the plaintiffs admitted the possession of the defendant Lala Ram only over 9 decimal area of the suit land not in respect of the remaining area. It is not clear as to what impelled the learned Addl. District Judge to make the aforesaid observations as to defendants' possession. It is noteworthy that directions of the learned Munsif as to maintain status quo were given on the

dint of his conclusions that the rights of the parties in respect of 9 decimal area of the suit land could be decided only after the evidence is adduced by both the parties. It is true that the conclusions of the learned Munsif as to existence of a prima facie case and balance of convenience in favour of the plaintiffs in respect of part of the suit land other than 9 decimal area, which was admittedly in possession of the defendant Lala Ram are not preceded by any reason but at the same time, the lower appellate court while rejecting the application for ad interim injunction in toto, has not traversed upon the question in correct perspective. The plaintiff, in order to qualify for ad-interim injunction, must make out a prima facie case all must also demonstrate that balance of convenience leans in his favoure and that in the event of refusal of the relief for ad-interim injunction, he would suffer irreparable loss and injury. Accordingly, if in the opinion of the appellate court, the trial court while directing the parties to maintain status quo failed to address itself to the factors germane to grant of ad interim injunction, the appellate court could have either remanded the matter to the trial court or winnowed the evidence in all its pros and cons itself and recorded a categorical finding on all relevant points, before rejecting the application by himself. As noticed above, the order of the appellate court proceeds on an erroneous assumption trial the defendants' were admittedly in possession over the entire land in suit and the conclusions that the balance of convenience and irreparable loss lean in favour of the defendants and not in favour of the plaintiffs, reached by the learned Addl. District Judge constitute an integral part of his conclusion that the defendants were in possession of the suit-land, which conclusion as noticed above, flows from his erroneous assumption and does not appear to be founded on any material on record.

6. It is well settled that in appeal, unless the statute restricts the power of the appellate court, it has, as a general rule, the same power as are open to the original authority or court from whose decision the appeal is preferred and a court of appeal has no fetters on it to decide all questions of law and fact which crop up in the case by ordinarily, a court of appeal will not tend to interfere with the exercise of discretion by the lower court and substitute for it, its own discretion unless of course, it is found by the court of appeal that the original court misdirected itself on any question of law or it failed to consider the relevant factors governing the exercise of discretion or its discretion is otherwise vitiated by reason

of misconstruction of any statutory provision or on account of misreading of any evidence on record. In an appeal under O.43, R. 1, C.P.C. against an order under O.39, R. 1, C.P.C., the powers of the appellate court are as wide as that of the trial court. Accordingly, if the appellate court chose, after recording a finding that the order under appeal was not speaking one, chose to decide the application for ad interim injunction itself, it ought to have addressed itself to all the relevant factors and record a categorical finding on each of the factors governing grant of interim injunction before rejecting the application in toto. The lower appellate court has failed to do so. Apart from this, the appellate court was also not justified in observing that the order directing both the parties to maintain status quo is not an order in the eye of law and that once an application under O.39, R. 1, C.P.C. is preferred, the Munsif is obliged to either accept it in toto or reject it. No law propping this conclusion of the Addl. District Judge was brought to my notice. There is no such fetter placed upon the power of the court under O.39, R. 1, C.P.C. in granting an ad interim injunction in respect of only a part of land. It is equally well settled that a larger relief includes a smaller one. An application for interim injunction may, in a given case, be only partly allowed. The appellate court was also not right in observing that the order of status quo was no order in the eye of law.

7. In *Dalpat Kumar V Prahallad Singh*, 1991, RD (Suppl) 462, the Supreme Court while explaining the phrases 'prima facie case', 'balance of convenience' and 'irreparable loss', has observed that these expressions 'are not rhetoric phrases of incantation but words of width and elasticity to meet myriad situations presented by man's ingenuity in given facts and circumstances, but always is hedged with sound exercise of judicial discretion to meet the ends of justice'. In the aforesaid case of *Dalpat Kumar*, the Supreme Court has dwelt upon the essential ingredients 'of ad interim injunction under O.39, R. 1, C.P.C. It has been observed by the Supreme Court that 'if on weighing competing possibilities or probabilities of likelihood of injury and if the court considers that pending the suit, the subject matter should be maintained in status quo, an injunction would be issued.'

8. The learned counsel for the respondent, however, urged that a writ petition arising out of proceedings under O. 39, R. 1, C.P.C. is not maintainable. He has

placed reliance upon a Full Bench decision of this Court in 'Ganga Saran v. Civil Judge, 1991 Addl. Civil Journal, 186:(AIR 1991 All 114)'.

9. The Full Bench in the aforesaid case of 'Ganga Saran' was seized of the question as to whether a revision against an appellate order made under O.43, R. 1, C.P.C. in an appeal preferred against an order passed under O. 39, R. 1, C.P.C. was maintainable as held by the Supreme Court in Qamar Uddin v. Rasool Bux, 1990 All WN 308 or such an appellate order was amenable to writ jurisdiction of the High Court under Art. 226 of the Constitution? The Full Bench found that Qamar Uddin's case in so far as it holds the appellate order to be revisable under S. 115, CPC, does not lay down the correct law in that the earlier Supreme Court decisions taking a contrary view in Vishesh Kumar v. Shanti Prasad, AIR 1980 SC 899 : (1980 All LJ 411) and Vishnu Awatar v. Shiv Awatar, 1980 (4) SCC 81 : (AIR 1980 SC 1575), upholding the Full Bench decision of this Court in M/s Jupiter Chit Fund (Pvt. Ltd.) v. Dwarika D. Dagal, AIR 1979 All 218 : (1979 All LJ 685) and laying down the correct law as to maintainability of revision having considered the relevant amendment in S. 115 of the Code of Civil Procedure, brought about by U.P. Amendment Act, 1978, were not brought to the notice of the Supreme Court in Qamar Uddin's case. The Full Bench in 'Ganga Saran's case' answered the first question as to the effect of the Supreme Court judgment in Qamar Uddin's case in the following words.

'For the above reasons it must be held that the decision of Supreme Court in Qamar Uddin's case to the extent it holds that revision against appellate order or revisional order passed by the District Court is maintainable under S. 115, C.P.C. (as amended by U.P. Act 31 of 1978) to the High Court, does not state the law accurately or overrule the decision of the Full Bench of this Court in Jupiter Chit Fund (Pvt. Ltd.) v. Dwarika D. Dagal (supra) particularly when it has specifically been approved by two earlier decisions of the Supreme Court.'

But as regards the second question as to whether the appellate or revisional order passed by a district court is amenable to a writ jurisdiction, the Full Bench in Ganga Saran's case has held as under.

'With respect to the second question to be answered by us, we are not inclined to deal with it elaborately here. Suffice it to say that the view of the Supreme Court in Qamarud-din's case (supra) that ordinarily an interlocutory order passed in civil suit is not amenable to extraordinary jurisdiction of the High Court under Art. 226 of the Constitution, no doubt is based upon recognised principle taken into consideration by the court in refusing the writ. In our opinion, this view of the Supreme Court in Qamaruddin's case is based on assumption that a revision under S. 115, CPC to High Court is maintainable and the party aggrieved can invoke revisional jurisdiction of the High Court. But in a situation where a revision is barred against the appellate or revisional order passed by the district courts and said order suffers from patent error of law and further causes manifest injustice to the party aggrieved can it be said that such an order is not amenable to extraordinary jurisdiction of the High Court under Art. 226 of the Constitution. In our opinion, although every-interlocutory order passed in civil suit is not subject to review under Art. 226 of the Constitution but if it is found from the order impugned that fundamental principle of law has been violated and further that such an order causes substantial injustice to the party aggrieved the view taken by the Supreme Court in Qamaruddin's case (supra) will not preclude such a writ being issued by the High Court under Art. 226 of the Constitution. But only such writ petition under Art. 226 or 227 of the Constitution would be maintainable where writ can be issued within the ambit of the well-established and recognised principles laid down by the Supreme Court as well as by the various High Courts in that regard. The opinion expressed by the Supreme Court in Qamaruddin's case (supra) to the extent that a writ of mandamus cannot be issued to a private individual unless he is under statutory duty to perform a duty is in accord with well established principle regarding writ of certiorari and mandamus and need no reiteration or elaboration at our hand..... Where an aggrieved party approaches High Court under Art. 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 Art. 226 of the Constitution would not be maintainable. Following the decision of the Supreme Court in Qamaruddin's case (supra) this court cannot issue a writ of mandamus to a private party unless;

he is under a statutory duty to perform a public duty.'

From the above passage quoted from Ganga Saran's case (supra) it is evident that so far as maintainability of writ of certiorari against the impugned order is concerned, it is not in doubt. It is also not in doubt that a writ of mandamus against the subordinate courts is maintainable. What is in doubt is whether a writ of mandamus against a private person can be issued if such private person is not under any statutory obligations to perform a public duty for the performance of which a writ of mandamus is normally issued.

10. In *Dwarika Nath v. Income-tax Officer*, AIR 1966 SC 81, the Supreme Court while considering the scope and ambit of powers of High Court under Art. 226 of the Constitution, has made the following observations (at page 84) :

'This Article is couched in comprehensive phraseology and it ex facie confers a wide power on the High Court to reach injustice wherever it is found. The Constitution designedly uses a wide language in describing the nature of power, the purpose for such and the person or authority against whom it can be exercised. It can issue writs in the nature of prerogative writs as understood in England but the scope of those writ petitions also is widened by the use of the expression 'nature' for the said expression does not equate the writ petition that can be issued in India with those in England but only draws an analogy from them. That apart, High Courts can also issue directions, orders or writs other than the prerogative writs. It enables the Court to mould the relief to meet peculiar and complicated requirements of the country any attempt to equate the scope of the power of High Courts under Art. 226 of the Constitution with that of the English Courts to issue prerogative writs is to introduce an unnecessary procedural restrictions grown over the years in a comparatively small country like England with a unitary form of Government to a vast country like India functioning under a federal structure. Such construction defeats the purpose of Article itself.'

The above observations of the Supreme Court in *Dwarika Nath's* case (supra) tend to support the view that a writ in the nature of mandamus may be issued against a private individual in view of the language of wide amplitude of Art. 226 is couched with. It is no doubt true that a writ jurisdiction under Art. 226 of the Constitution is

in the nature of supervisory jurisdiction and not appellate one and that it is not a substitute for the ordinary remedies available under the normal law of the land and the High Court may under Art. 226 decline to interfere if an equally efficacious alternative remedy is available. The remedy for injunction is available under the Civil P.C, and the Specific Relief Act 1963 but this is only a self imposed restriction. There is no absolute bar. It is a question of discretion to be exercised on sound principles of law, justice and equity. Whether to grant or not to grant an ad interim injunction is certainly a matter involving the exercise of judgment and discretion of the subordinate Civil Courts and the High Court may not interfere in the matter but in its supervisory jurisdiction under Art. 226 of the Constitution, the High Court can certainly see whether the orders passed by the Subordinate courts suffer from any error of jurisdiction, patent illegality or perversity etc. and I am also of the opinion that the High Court while exercising its writ jurisdiction against an appellate or revisional order can issue a writ of certiorari/mandamus not only against the subordinate courts but it may also issue any order or direction, not necessarily in the nature of a writ, which it considers necessary to be issued in order to effectuate its certiorari jurisdiction.

11. I am also of the opinion that the High Court while seized of a writ petition under Art. 226 of the Const, can also pass any order including an order in the nature of injunction against a private individual in exercise of its inherent powers. In *M. V. Elisabeth v. Harman Investment and Trading Pvt. Ltd.*, *Hanoekar House Swatontaph, Vasco Digama, Goa* 1992 (2) JT 65, his Lordship (R. M. Sahai, J.) of the Supreme Court in his concurring judgment has observed, that 'Art. 225 of the Constitution preserved jurisdiction including inherent jurisdiction which existed on the date the Constitution came into force and Art. 226 enlarged it by making it not only the custodian of fundamental rights of a citizen but as a repository power to reach its arms to do justice..... The High Courts in India being courts of unlimited jurisdiction, repository of all judicial power under the Constitution except what is excluded, are competent to issue directions for arrest of foreign ship in exercise of statutory jurisdiction or even otherwise to effectuate the exercise of jurisdiction.'

12, Since the order impugned in this writ petition is amenable to certiorari jurisdiction of the High Court, it can safely be said, on the basis of the above

quoted observations of the Supreme Court in M. V. Elisabeth case (supra), that while exercising certiorari jurisdiction, the High Courts may not only demolish the erroneous orders passed by subordinate courts and direct them to perform their judicial duties in accordance with law but it can also issue orders or directions which may be considered necessary to be passed in order to 'effectuate' its certiorari/ mandamus jurisdiction. Such a course is open not only on the strength of Art. 226 of the Constitution, but also on the dint of Art. 225 of the Constitution which makes the High Court a Court of record having inherent jurisdiction in exercise of which jurisdiction, the High Court can, in my opinion, issue an order or direction in the nature of an injunction even against a private individual. Decision of the Supreme Court in Qamar-uddin's case and that of the Full Bench in Ganga Saran's case (supra) do not, in my judgment, create any hindrance in the way of the High Court passing an order in the nature of an injunction in exercise of its inherent jurisdiction if it considers necessary to do so while disposing of the writ petition in order to effectuate its certiorari/mandamus jurisdiction against the subordinate courts or tribunals. The observations to the contrary in Qamaruddin's case (supra) were made in a different context and various aspects of High Court's power as examined in Dwaraka Nath's and Elisabeth's cases (supra) were not considered in Qamaruddin's case nor was the question examined from this angle in Ganga Saran's case.'

13. The conclusions, I have reached above, can also be buttressed on the principle that an authority having power to pass an order is necessarily vested with the power to pass any ancillary orders. An order in the nature of an injunction directing the parties to maintain status quo would tantamount to be an order directing preservation of the subject matter of writ petition and, therefore, ancillary to exercise of writ jurisdiction. Further the view, I am taking is in accord with the principle of interpretation of the fundamental document namely, the Constitution which is regarded as a living organism well equipped to suit the ever changing social, political and economic needs of the people. In this connection, the following observations as quoted in Seervai's Book on [Constitution of India](#) Vol. II, II Edition p. 761 from 'Rochester Corporation V. R. (1858) E. B. & E. 1024, 1033 (Ex. Ch.) per Martin B may usefully be noticed.

'The court will take a liberal view in determining whether or not a writ shall issue.' Instead of being astute to discover reasons for not applying this great constitutional remedy for error and mis-government we think it our duty to be vigilant to apply it in every case to which, by any reasonable construction, it can be made applicable.'

14. The relief of certiorari quashing a manifestly erroneous appellate order and that of mandamus commanding the appellate court to decide the appeal afresh in accordance with law cannot be refused merely because, as urged by the learned counsel appearing for the respondent Lala Ram, the issuance of the writ would in the present case, result in restoration of the status-quo order of the trial court which in substance, urged the learned counsel, amounts to issuing a writ of mandamus against a private individual not obliged or bound by any statutory provision of law to refrain himself from making any interference with the plaintiffs' alleged right, title and interest in the suit property and possession thereof. The restoration of the trial court's order of status quo for the time being' is only consequential and incidental to the main relief of certiorari. It is subject to the order that may be passed by the appellate court in accordance with law. Observations to the contrary made in Qamaruddin and Ganga Saran's cases (supra) are, to my mind, per incuriam in view of the law declared by the Supreme Court in State of U. P. v. M/s. Synthetics and Chemicals Ltd., 1991 (3) JT 268. The submission of the learned counsel if accepted, may render illusory the remedy under Art. 226 of the [Constitution of India](#) which has an ever-expanding horizon having a leaning towards enforcement of the rule of law and securing justice to an aggrieved party by issuing an appropriate order, direction or writ against any person or authority.

15. In view of the above discussion, I am of the opinion that the writ petition cannot be dismissed on the ground of maintainability and since the appeal preferred against Munsif's order has not been decided in correct perspective, the order impugned in this petition suffers from patent error of law and is, therefore, liable to be demolished.

16. Accordingly, the petition succeeds and is allowed. The impugned order D/-5th Aug. 1992 is quashed in so far as it rejects the application 6 C in toto. The

appellate court shall re-admit the appeal to its number and decide the same afresh in accordance with law and in the light of the observations made in the body of this judgment and at the same time, the Munsif may proceed with the trial of the suit and decide it expeditiously. There shall be no order as to the costs.

17. Petition allowed.

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