

Nagar Nigam and ors. Vs. Udai Singh and ors.

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Court : Allahabad

Decided On : Sep-30-2002

Reported in : AIR2003All34

Judge : R.K. Agrawal, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 39, Rules 1 and 2;
[Constitution of India](#) - Articles 226 and 227

Appeal No. : C.M.W.P. No. 28293 of 2002

Appellant : Nagar Nigam and ors.

Respondent : Udai Singh and ors.

Advocate for Pet/Ap. : Shri. Manish Goyal

Judgement :

R.K. Agrawal, J.

1. Nagar Nigam, Aligarh through its Mukhya Nagar Adhikari, Mukhya Nagar Adhikari, Nagar Nigam, Aligarh, and Property Officer, Nagar Nigam, Aligarh, the three petitioners, have filed the present writ petition under Article 226 of the [Constitution of India](#), seeking the following reliefs :

(a) to issue a writ, order or direction in the nature of certiorari, calling for the records of the case and quashing the judgment and order dated '1,5.2002 (Annexure-1 to the writ petition) ;

(b) to issue a writ, order or direction in the nature of certiorari, calling for the records of the case and quashing the judgment and order dated 18.4.2001 (Annexure-2 to the writ petition) ;

(c) to issue a writ, order, or direction in the nature of prohibition restraining the respondents from filling up the land with mud or in any way changing the nature of the land.

(d) to issue any other, order, or direction, which this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

(e) to allow this petition with costs.

2. By the order dated 18.4.2001, the learned civil Judge, Aligarh, had allowed the application for grant of temporary injunction and had restrained the defendants-petitioners-herein, from interfering in the peaceful use and occupation of the plaintiffs over the land which is subject-matter of the suit and by the order dated 1.5.2002, passed by the Special Judge, Aligarh, the appeal filed against the order dated 18.4.2001 had been dismissed.

3. Briefly stated facts giving rise to the present petition are that according to the petitioners, 75.2 acres (131 bighas and 12 biawas) of the land was acquired for private drainage system of the city of Aligarh. The notification under Section 4 of the Land Acquisition Act was published on 14.5.1958. The provisions of Section 5A was dispensed with vide notification issued under Section 29(1) of the aforesaid Act. According to the petitioners, the possession of the land was taken over and delivered to them on 18.4.1959 in respect of 114 Bighas 18 Biswas only. The proceeding for the land acquisition was challenged by the tenure holders before this Court, in Civil Misc. Writ Petition No. 1346 of 1959, which was dismissed vide judgment and order dated 27.1.1965.

4. It appears that the award was not made and the State Government exercising its powers under Section 48 of the Land Acquisition Act, released a part of the land in favour of the tenure holders. The area of the land which was released by the State Government was about 95 bighas 14 biswas. The petitioners, vide agreement dated 29.11.1973, released the aforesaid land in favour of the tenure holders. Since then, the tenure holders are in possession of their land mentioned in the agreement dated 29.11.1973. In the agreement dated 29.11.1973, it was provided that the land measuring 95 bighas 14 biswas, is being released in favour of the tenure holders and the remaining acquired land measuring 29 bighas 16 biswas shall be in possession of the petitioners. It was further provided that the tenure holders shall pay a sum of Rs. 2,000 per year for use of water in their fields and they shall not be entitled to claim any compensation in respect of the land, which is being released. Further, the tenure holder shall construct on their own cost drains for taking water to their fields.

5. The plaintiff-respondent Nos. 1 to 5 filed a suit in the Court of Civil Judge, Senior Division, Aligarh on 8.5.2000 seeking a decree of permanent prohibitory injunction in favour of the plaintiffs and against the defendants (petitioners-herein), their agents, servants, officers, officials, friends, labourers, etc. from causing any kind of interference in the peaceful possession, occupation and enjoyment of the plaintiffs over the suit property, details of which had been given at the foot of the plaint, situate in Quasba Kiol (St.). Pargana and Tahsil Kail, district Aligarh, in any manner whatsoever. They also filed an application under Order XXXIX, Rules 1 and 2 read with Section 151 of the Code of Civil Procedure.

6. The suit was filed on the ground that the plaintiffs are owner in possession of the suit property which have been duly shown in the khatauni. They are also paying land revenue to the Government as being owners. The allegation was mainly against the defendant opposite party, namely, Shamshad Ahmad, present respondent No. 6. In order to raise the level of the suit property, the plaintiff had been collecting clay but Shamshad Ahmad did not allow the plaintiffs to fill their plots of land on 4.5.2000 in the morning hours of the day and threatened them from collecting any clay over the suit property in connivance with the defendants 2nd set. Same averments were made in the affidavit filed in support of the

application filed under Order XXXIX, Rules 1 and 2, C.P.C.

7. The petitioners filed their reply to the application along with affidavit denying the ownership and possession of the plaintiff-respondents of the land in question. It was stated that the plaintiff in the garbof their saying that the disputed land is of low level land, wanted to fill up the land of the answering defendant with intention to encroach upon the same. A specific averment was made that the petitioners (defendant second set) acquired 29 bighas 16 biswas land at Gular Road, Aligarh in the year 1958 and same has been in their possession since then and was being used as sullage farm where rainy water of Aligarh city comes through nala at Sarai Rahman and was stored there. It was averred that the plaintiff with dishonest intention wants to encroach the said farm by hook or by crook for which they have no right or authority.

8. The learned civil Judge vide order dated 18.4.2001 has held that the name of the plaintiffs have been entered in the Khatauni in the relevant Fasli year on which there is no dispute. He has further found that the defendants (petitioners) had not been able to show that the land in question was acquired under the provisions of the Land Acquisition Act. He has also found that the defendants have failed to place any material on record, regarding the acquisition of land and it has been released in favour of the tenure holders. Relying upon the entries in the revenue records, the learned civil Judge came to the conclusion that the plaintiffs are the owners in possession of the land in question. He has held that the balance of convenience also lies in their favour and if the plaintiffs are deprived from using their land, they would suffer irreparable Injury and consequently, the learned civil Judge has allowed the application for grant of temporary injunction.

9. Feeling aggrieved thereby, the petitioners preferred an appeal before the District Judge, Aligarh, which was heard and decided by the Special Judge/Additional Judge, Aligarh vide judgment and order dated 1.5.2002. The learned Additional Judge has found that the petitioners are the owners and in possession of only 29 bighas 16 biswas of land and plaintiffs' land had been released. He has further found that in the garb of the ownership of 29 bighas 16 biswasof land, they are trying to interfere in the ownership of the plaintiffs' land

which had already been released. He upheld the order passed by the trial court. Hence this writ petition has been filed.

10. I have heard Shri R. P. Goyal, learned senior counsel, assisted by Shri Manish Goyal learned counsel for the petitioners and Shri Sankatha Rai learned senior counsel assisted by Shri Vinod Kumar Rai, learned counsel for the contesting respondents.

11. With the agreement of learned counsel for the parties, the writ petition is being finally disposed off at the admission stage itself according to the rules of the Court.

12. The learned counsel for the petitioners submitted that the suit is barred for non-joinder of necessary parties as the State Government has not been made a party to the suit. According to him, the fact whether the land was released by the State Government is being disputed by the petitioners and, therefore, in order to maintain the suit, it is necessary for the plaintiffs-respondents to establish their title and ownership over the land in dispute. According to him, the possession was taken by invoking the provisions of Section 29 of the Land Acquisition Act, and the land vested in the State Government. Thus, the plaintiffs-respondents cannot be said to be owners of the land in question. Non-joinder of the necessary party vitiates entire proceedings before the court below and the suit itself is not maintainable under Order 1, Rule 9 of the Code of Civil Procedure. He further submitted that the courts below were not justified at all in granting the temporary injunction restraining the present petitioners from interfering with the possession and use, in as much as the plaintiffs had failed to establish prima facie case in their favour. According to him, the plaintiffs are not owners of the land in question. They have been given possession of the land under agreement dated 29.11.1973. It cannot be construed to confer any title upon the plaintiffs-respondents, since the possession of the land was taken on 18.7.1959 by the State Government by invoking the provisions of Section 29(1) of the Land Acquisition Act, it vested absolutely free from all encumbrances with the State Government. Thereafter it could not have been released even by the State Government in view of the provisions of Section 48 of the Land Acquisition Act and also in view of the decision of Hon'ble Supreme Court in the case of Awadh Bihari Yadav and Ors. v.

State of Bihar and others, 1995 (3) AWC 2011 (SC) (NOC) : AIR 1996 SC 122. He further submitted that once the land has been acquired by the State Government and it had been vested in it, any land which is found surplus and not required for the purposes for which it has been acquired can be disposed off only by way of public auction and not by private negotiation. In support thereof, he relied upon a decision of Hon'ble Supreme Court in the case of State of Kerala and Ors. v. M. Bhaskaran Pillai and Ors., AIR 1997 SC 2703. Thus, he submitted that the agreement dated 29.11.1973, is a void document and no benefit or advantage can be derived by the plaintiffs from it. He further submitted that the documents executed on 29.11.1973 required to be compulsorily registered under Section 29 of the Indian Registration Act, 1908, as it related to immovable property and it being an unregistered document and further having been insufficiently stamped could not be made basis for claiming title by the plaintiff over the land in question. He further submitted that the balance of convenience also does not lie in the favour of the plaintiff for the simple reason that the alleged land is a low lying land on which water during rainy season accumulates and stored for the purpose of proper drainage of the city of Aligarh for the last more than 25 years, even if it is assumed that the alleged land was and is in possession of the plaintiff-respondents, they cannot claim to have suffered any inconvenience so as to justify the grant of temporary injunction. He further submitted that the courts below ought to have considered public inconvenience and right of the persons likely to be affected while granting the injunction. According to him in the present case, it was specifically pleaded that the grant of injunction would create public inconvenience to the residents of Aligarh in case plaintiffs are permitted to fill up the land with mud and raise level of land and in such event, the water collected in the pond will spread into houses of the area.

13. The learned counsel for the petitioner further submitted that the courts below have failed to record any finding on this issue and there is no discussion on the same in the judgment except by way of passing reference. He relied upon a passage in 42 American Jurisprudence 2d, paragraph 39 at page 803 which says that public policy denies an injunction and remits the landowner to the recovery of damages where private property has been put to a public use by a public service corporation or municipality and the public interest has intervened. Under the

principle of balance of conveniences, the Court may, in addition to considering the public convenience, consider the effect of an injunction on the rights of third persons.

14. The learned counsel for the petitioner has also relied upon the decision in the case of U.P. Avas Evam Vikas Parishad v. N.V. Rajgopalan Acharya, 1989 (1) AWC 492 : AIR 1989 All 126, wherein this Court has held that under the principle of balance of convenience, the Court is required to consider the public convenience and if it omits to do so, the order is rendered illegal. He also relied upon the decision of Gauhati High Court in the case of State of Assam v. M/s. M.S. Associates, AIR 1994 Gau 105, wherein it has been held that when a question of granting injunction arises, not only the three ingredients for the grant of injunction should be considered, but in addition to it, the public interest and/or public policy also is to be considered. If injunction is granted affecting the right of the community in general, it will be a dangerous precedent and Court should not easily succumb to such a prayer.

15. He also relied upon the decision of Hon'ble Supreme Court in the case of Raunaq International Limited v. I.V.R. Construction Ltd. and others. 1999 (1) SCC 492, wherein Hon'ble Supreme Court has held that in granting an injunction or stay order against the award of a contract by the Government or a Government agency, the Court has to satisfy itself that the public interest in holding up the project far outweighs the public interest in carrying it out within a reasonable time. Deriving strength by the aforesaid decision, he submitted that both the courts below have completely omitted to consider the question of public inconvenience/ public interest and correspondingly the balance of convenience in favour of the plaintiffs while granting temporary injunction which has vitiated the entire orders.

16. So far as the question of irreparable injury is concerned, he submitted that the courts below have failed to consider the question while granting temporary injunction as to whether the damage which will be caused to the plaintiffs can be compensated in terms of money or not and in case compensation can be valued in terms of money, then no injunction could have been granted. He relied upon Clause (c) of Section 38(3) of the Specific Relief Act, 1963. According to him, the

conditions of the land in question is low lying land, which remained as such since 1958, when the land was acquired on behalf of present petitioners. The nature of the land was not changed by the plaintiff even after it was released in their favour in the year 1973 upto 4.5.2000, as per their averment made in the plaint. Thus, by continuous use of land for agricultural purposes as by utilizing waters from the pond/pokhar for the purpose of irrigation, by their conduct the plaintiffs-respondents have acquiesced to the situation and under such circumstance there was no question of any interference from the petitioners. Only interference is in regard to raising of the level of the land. It was necessary for the reason that public interest will suffer in case water collected in the ponds is not discharged in the field and secondly non-utilization of the water for irrigation purpose, then injury if any can be ascertained in terms of money. According to him, since the land in suit is vested in the State Government the only right which was available to the plaintiff-respondents was right to receive compensation and in terms of agreement dated 29.11.1973. they have already waived their right of compensation. Thus, only right, which remains, was user of the land. He also submitted that the principle governing law of acquisition provides that it is not necessary to retain physical possession of the land and possession may be retained by the owner who may also be permitted to use the land not inconsistent with the use for which the land was acquired. The compensation to be awarded can be set off against the fruits and produce of the land which the owner in possession of the land may retain to himself. In support of this plea, he relied upon paragraphs 145, 406 and 469 of 26 American Jurisprudence 2d. at pages 569, 810 and 855. Thus, he submitted that the case of irreparable injury is also not made out in the facts and circumstances of the present case and the courts below have erred in granting an order of injunction.

17. He further submitted that the agreement dated 29.11.1973, could not have been taken into consideration at all in as much as it was not registered as required by Section 29 of the Indian Registration Act. The said agreement related to transfer of immovable property and was insufficiently stamped and thus, it could not have been received as evidence and could not have formed the basis for grant of the injunction and both the courts below have committed manifest irregularity in granting injunction on the basis of a document, which could not have been

received in evidence at all. He further submitted that the agreement dated 29.11.1973, is also a void agreement, particularly when the same is forbidden by law and if permitted it would defeat the provisions of law. The agreement related to release of land acquired by the State Government when under the provisions of Land Acquisition Act, once possession has been taken over by the State Government it cannot be released under Section 48 of the said Act. Thus, the agreement becomes a void agreement to which no legal sanctity could be attached and no injunction on that basis can be granted. He also stressed on the provisions of Sections 23 and 24 of the Indian Contract Act, which provides that the consideration or object of an agreement is lawful unless it is forbidden by law ; or is of such a nature that, if permitted, it would defeat the provisions of any law and such agreement is void. According to him, since the land could not have been released once possession has already been taken over, the agreement is forbidden by law and, therefore, is void. He further submitted that the Municipal Corporation has been given enough powers under the Municipal Corporation Act as well as under the bye-laws, which have been framed for Aligarh Nagar Nigam and it includes the right to enter, inspect and even interfere in the conduct of any person which will be a cause relating to the working of the Corporation as a body. In this respect he relied upon the provisions of Section 560 of the U.P. Municipal Corporation Act, 1959 and the bye-laws framed thereunder.

18. Shri Sankatha Rai, learned senior counsel for the contesting respondents submitted that it was the specific case of the plaintiff-respondents that they are the owners and in possession of the land in question. The details of the land has been mentioned in the plaint itself and in respect of ownership, the plaintiffs have also filed Khatauni in which their names have been recorded. He further submitted that the petitioners are only claiming the title and possession of the land admeasuring 29 bighas 16 bisuias even though the details have not been given in their affidavit filed in reply to the application for grant of temporary injunction. It is referable to the agreement dated 29.11.1973. He further, submitted that the petitioners cannot rely upon the document which have not been filed before the courts below and in any event they have confined their case only in respect of 29 bighas 16 biswas of land with which the plaintiff-respondents are not concerned at all. He further submitted that under Article 226 of the [Constitution of India](#), this Court should not

exercise its discretionary powers and interfere in orders of the courts below as no illegality or irregularity have been committed by them. He relied upon the Full Bench decision of this Court in the case of Ganga Saran v. Civil Judge, Hapur, Ghaziabad and Ors., 1991 (1) AWC 213 (FB) : AIR 1991 All 114, wherein it has been held that where 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.

19. He also relied upon the decision of the Division Bench of this Court in the case of Smt. Biran Devi v. Sechu Lal and Anr., 2001 (4) AWC 2659 : 2001 ACJ 1417, wherein this Court has followed the decision in the case of Ganga Saran (supra). He also relied upon the decision of Hon'ble Supreme Court in the case of Swetambar Sthanakwasi Jain Samiti and Anr. v. Committee of Management. Sri R.J.L College, Agra and Ors., JT 1996 (3) SC 21, wherein it has been held the High Court will not permit the extraordinary Jurisdiction to be converted into a civil court under ordinary law when a suit is pending between the two parties, the interim and miscellaneous orders passed by the trial court cannot be challenged by way of a writ petition under Article 226 of the Constitution. In the aforesaid case it has been further held that though the jurisdiction of the High Court under Article 226 of the Constitution is not confined to issuing the prerogative writs, there is a consensus of opinion that the High Court will not permit this extraordinary jurisdiction to be converted into a civil court under the ordinary law. When a suit is pending between the two parties the interim and miscellaneous orders passed by the trial court against which the remedy of appeal or revision is available cannot be challenged by way of a writ petition under Article 226 of the [Constitution of India](#). Where the civil court has the jurisdiction to try a suit, the High Court cannot convert itself into an appellate or revisional court and interfere with the interim miscellaneous orders of the civil court. The writ jurisdiction is meant for doing justice between the parties where it cannot be done in any other forum.

20. He also relied upon the decision of Hon'ble Supreme Court in the case of Ouseph Mathai and Ors. v. M. Abdul Khadir, JT 2001 (9) SC 517, wherein it has been held that the wrong decisions cannot be a ground for the exercise of jurisdiction under this Article unless the wrong is referable to grave dereliction of duty and flagrant abuse of power by the subordinate Courts and Tribunals resulting in grave injustice to any party. He further submitted that it is well-settled principle of law that in the writ jurisdiction none of the parties can be allowed to travel beyond the pleadings of the parties in the civil court and the evidence filed on record, and also no argument can be advanced here in the writ petition before the High Court for the first time which were neither raised nor argued before the court below. He relied upon the decision of Hon'ble Supreme Court in the case of Siddhu Venkappa. Devadiga v. Smt. Rangoo S. Devadiga and Ors., AIR 1997 SC 890, wherein it has been held that the decision cannot be based on the ground outside the plea of the parties. He also relied upon the decision of Hon'ble Supreme Court in the case of Smt. Chandrakali Bel and Ors. v. Jagdish Singh Thakur and Ors., 1977 SC 2262, wherein it has been held that where claim has never been made in the defence presented, no amount of evidence can be looked into upon a pleading which has never come forward, if it could not be so even at the trial stage undoubtedly such a new question of fact could not be entertained at an appellate stage. The learned counsel for the respondents submitted that the order dated 18.7.1969 filed as Annexure-4 to the writ petition has never been filed in the court below nor there was any such pleading, thus the petitioner cannot be permitted to refer/rely upon the same in the present proceedings. Moreover such document does not mention plot number. So far as the question of non-joinder of the parties is concerned he submitted that no such plea was ever raised before the courts below. Moreover, on the plaint allegations, the cause of action for the plaintiffs arose only against the defendants and for no other person, therefore, that question cannot be allowed to be raised in the writ petition. Such plea is liable to be rejected. He further submitted that the courts below have rightly found prima facie case, balance of convenience and irreparable loss in favour of the plaintiff respondents and impugned orders do not call for any interference. The agreement dated 29.11.1973 was signed by the Prabhari Adhikari Nagar Palika Parishad, Aligarh and is, therefore, binding upon the parties. No such plea regarding the

document being void or inadmissible for evidence has been taken by either of the parties, and therefore, no such arguments can be advanced herein. He further submitted that the petitioners have no right or title over the land in dispute. According to him, the possession of the land in question was never taken over by the petitioners. Rather 95 bighas 14 biswas of land mentioned in schedule 1 of the agreement had been released in favour of the tenure holders and the petitioners claim title and possession over .357 hectares of land.

21. I have heard the learned counsel for the parties. I find that in the plaint filed by the plaintiff respondents, no relief has been claimed against the State of U.P. The relief which has been claimed is for passing a decree for permanent prohibitory injunction in favour of the plaintiff against the defendants opposite parties, their agent, servant, officers, etc. be restrained from causing interference, as mentioned in the preceding paragraphs. Thus, no relief has been claimed against the State Government.

22. So far as the question of non-joinder of the parties is concerned, the petitioners have not raised this plea in reply filed to the application for grant of temporary injunction. Even in the ground of appeal filed before the District Judge challenging the order dated 18.4.2001 passed by the learned civil Judge granting temporary injunction, no such plea was raised. Thus, the plea of non-joinder of the parties requires investigation of fact, and the petitioners cannot be permitted to raise this plea at this stage for the first time in writ jurisdiction.

23. So far as the question of prima facie case is concerned, I find that the plaintiff respondents have specifically come up with the case that they are owner and in possession of the plot Nos. 6598, 599, 651, 653 and, their names are entered in the relevant Khatauni and they are paying land revenue to the Government as being owners. In the reply filed by the petitioners, though the ownership have been denied as alleged in the plaint, but the petitioners have claimed title and possession on only 29 bighas 16 biswas of land, which they had acquired in the year 1957-58. No details of 29 bighas 16 biswas have been mentioned by them. However, it is referable to the land mentioned in Schedule 2 of the agreement dated 29.11.1973. Both the courts below have found the names of the plaintiff

respondents having been entered in the revenue record, namely, khatauni for the fasli years 1333 and 1405. On the other hand, it has also come to the conclusion that the petitioners have failed to place any evidence and material on record to show that the land in question which the plaintiffs are claiming had ever been acquired by the State Government or possession have been taken by them. Both the courts below were justified in coming to the conclusion that the plaintiff-respondents have prima facie case in their favour. Thus, the findings based on appreciation of evidence and material on record and does not suffer from any illegality. The Court is not inclined to go into the question about the effect of Section 48 of the Land Acquisition Act and Section 29 of the Indian Registration Act or Sections 23 and 24 of the Indian Contract Act as the petitioners have confined ownership and possession over only 29 bighas and 16 biswas of land. This requires investigation of question on facts and both the courts below have found that no evidence and material has been placed by the petitioners to show that the possession of the land in question was ever taken by them.

24. The question still remains that if the plaintiffs have prima facie case in their favour, in the absence of any balance of convenience or irreparable loss being suffered by them, can the Court grant temporary injunction in their favour. It has been stated that the suit property of the plaintiffs is low lying land adjacent to the properties of the others who have higher level land and in order to raise the level of the suit property, the plaintiff had been collecting clay for the same but the defendant 1st set (present respondent No. 6) did not allow the plaintiff as mentioned in the preceding paragraphs. In reply thereof filed by the petitioners, it has been stated that the plaintiffs are not owners and in possession of the land as alleged by them in the plaint. In fact, the plaintiffs in the garb of their saying that disputed land is low lying land have an intention to encroach upon the same. In paragraph 5 of the affidavit, it has been stated that real and true facts are that the answering defendants (petitioners) have 20 bighas 16 biswas land at Gular Road, Aligarh, which was acquired in 1957-58 and the same has been in their possession. Since such land is low level land, hence, it is used for sullage farm (Pokhar) wherein rainy waters of the city comes through nala. It is further stated that the plaintiff have no right or interest of any kind in the above land and they want to fill that sullage farm for which they have no right or authority.

25. The trial court has found that on account of low lying land if water is accumulated there, it does not mean that the plaintiff-respondents can be deprived of their right. In this view of the matter, the trial court has held that the balance of convenience lies in their favour and if they are prohibited from raising the level of the land, they would suffer irreparable loss. The appellate court had also while confirming the said finding, had not given any independent finding regarding balance of convenience and irreparable loss.

26. It may be mentioned here that a specific plea was raised by the petitioners that by filling up the land, the public at large would be adversely affected as the same is being used as sullage farm where the drainage water of the city is coming through nala and stored there. It will create difficulty to the residents of the vicinity. This plea of the petitioners have not at all been considered by the courts below while granting temporary injunction restraining the petitioners.

27. In the case of U.P. Avas Evam Vikash Parishad (supra), this Court has held that the public convenience is required to be considered while considering the question of balance of convenience. The Gauhati High Court in the case of State of Assam v. M.S. Associates (supra) has also held that public interest or public policy is also to be considered while considering the question of granting the injunction. In the case of Raunaq International Limited (supra), the Hon'ble Supreme Court has also held that the Court has to satisfy itself about the public interest while granting Injunction. In para 59 of 42 American Jurisprudence 2d at p 803, it has been stated that the public policy denies an injunction and remits the landowner to the recovery of damages where private property has been put to a public use by a public service corporation or municipality and the public interest has intervened. It has been further stated that under the principle of balance of convenience, the Court may, in addition to considering the public convenience, consider the effect of aninjunction on the rights of third persons.

28. Thus, it is necessary that where the land is being used for some public purpose like sullage farm, collecting rain waters and for the purpose of drainage in the city, the public interest as also the right of third person is to be considered while considering the question of balance of convenience. Both the courts below

have failed to consider the same in the present case. Thus, the order of granting temporary injunction cannot be sustained and is hereby quashed. In this view of the matter, it is not necessary to go into the other question raised by the respective parties.

29. In the case of Ganga Saran (supra), the Full Bench of this Court has held that the writ petition under Articles 226 and 227 of the [Constitution of India](#) is maintainable where fundamental principle of law has been violated and person suffers grave injustice. In para 11 of the decision in the above case, the Full Bench has held as follows :

'Suffice It to say that the view of the Supreme Court in Qamaruddin's case (supra) that ordinarily an Interlocutory order passed In civil suit is not amenable to extra-ordinary jurisdiction of the High Court under Article 226 of the Constitution, no doubt is based upon recognized 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 Section 115, C.P.C. 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 the said order suffers from patent error of law and further causes manifest Injuries to the party aggrieved, can It be said that such an order is not amenable to extra-ordinary jurisdiction of the High Court under Article 226 of theConstitution, in our opinion, although every interlocutory order passed in a civil suit is not subject to review under Article 226 of the Constitution but if it is found from the order impugned that fundamental principle of law has been violated and further 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 Article 226 of the Constitution. But only such writ petition under Article 226 or 227 of the Constitution would be maintainable where writ can be issued within the ambit of the well-established and recognized principles laid down by the Supreme Court as well as by the various High Courts in that regard.'

30. The Full Bench decision was considered by this Court in the case of Smt. Biran Devi (supra) and this Court while holding that in rarest of rare cases a writ petition is maintainable, in para 6 of the judgment has observed as follows :

'6. Following the ratio of law laid down by the Full Bench in Ganga Saran (supra), we hold that in absence of non-performance of any statutory duty, it is not open for this Court to issue a writ of mandamus as opined by the learned single Judge and it is not permissible for this Court either under Article 226 or 227 of the Constitution, to examine the legality or propriety of an order either granting injunction or refusing the same passed by civil court save and except in rarest of rare cases.'

31. In the case of Swetamber Sthanakwasi Jain Samiti and Anr. (supra) the Hon'ble Supreme Court in para 8 of the judgment has held as follows :

Though the jurisdiction of the High Court under Article 226 of the Constitution is not confined to Issuing the prerogative writs, there is a consensus of opinion that the High Court will not permit this extra-ordinary jurisdiction to be converted into a civil court under the ordinary law. When a suit is pending between the two parties, the interim and miscellaneous orders passed by the trial court - against which the remedy of appeal or revision is available-cannot be challenged by way of a writ petition under Article 226 of the [Constitution of India](#). Where the civil court has the jurisdiction to try a suit, the High Court cannot convert itself into a appellate or revisional court and interfere with the interim/ miscellaneous orders of the civil court. The writ jurisdiction is meant for doing justice between the parties where it cannot be done in any other forum.'

32. In the case of Ouseph Mathai and others (supra) the Hon'ble Supreme Court in para 4 of its judgment has held as follows :

'It is not denied that the powers conferred upon the High Court under Articles 226 and 227 of the Constitution are extraordinary and discretionary powers as distinguished from ordinary statutory powers. No doubt Article 227 confers a right of superintendence over all Courts and Tribunals throughout the territories in relation to which it exercises the jurisdiction but no corresponding right is conferred

upon a litigant to Invoke the jurisdiction under the said Article as a matter of right. In fact, powers under this Article cast a duty upon the High Court to keep the inferior Courts and Tribunals within the limits of their authority and that they do not cross the limits, ensuring the performance of duties by such Courts and Tribunals in accordance with law conferring powers within the ambit of the enactments creating such Courts and Tribunals. Only wrong decisions may not be a ground for the exercise of jurisdiction under this Article unless the wrong is referable to grave dereliction of duty and flagrant abuse of power by the subordinate Courts and Tribunals resulting in grave injustice to any party.'

33. From the principles laid down in the aforesaid cases, it is seen that jurisdiction under Articles 226 and 227 of the Constitution can be exercised where the fundamental principle of law has been violated and the party suffers grave injustice. As held hereinbefore, both the courts below have not considered the specific plea raised by the petitioners that the Interest of public at large would be adversely affected in case temporary Injunction is granted in favour of the plaintiffs. It is now well-settled that while considering the question of balance of convenience, the public interest and public convenience have also to be considered and by not considering and passing the order of temporary injunction, the petitioners have suffered grave irreparable injury and both the courts below have also violated the fundamental principles of law. Thus, the present writ petition filed under Article 226 of the [Constitution of India](#) is maintainable.

34. In the view of the foregoing discussions, the writ petition succeeds and is allowed. The impugned order dated 1.5.2002 and 19.4.2001 are hereby quashed. The trial court is directed to reconsider and decide the matter afresh in accordance with law.

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