

(1992) 10 AHC CK 0066

Allahabad High Court

Case No: F.A.F.O. No. 862 of 1992

Chandra Prakash Gupta

APPELLANT

Vs

Noor Mohd.

RESPONDENT

Date of Decision: Oct. 20, 1992

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 39 Rule 1, Order 39 Rule 2, 153

Citation: (1993) 1 AWC 161

Hon'ble Judges: G.S.N. Tripathi, J; G.D. Dube, J

Bench: Division Bench

Advocate: Vipin Saxena, for the Appellant; S.U. Khan, for the Respondent

Final Decision: Allowed

Judgement

G.D. Dube, J.

This appeal has been preferred against the judgment and order of Civil Judge Etah allowing an application of the Plaintiff-Respondent for temporary injunction. By this order Respondent has been permitted to raise wall in between the pillars at his own costs and the Appellant directed to fill in the ditches dug by him towards east of the pillars within four days of the order failing which the Respondent was entitled to get the ditches filled and recover the costs from the Appellant.

2. It appears from the impugned order that two suits 255 of 1992, Chandra Prakash Varma v. Noor Mohammad and 283 of 1992, Noor Mohammad v. Chandra Prakash Varma pending before the court below were consolidated. These two suits were in respect of the same property.

3. It was alleged in suit No. 283 of 1992 that the Respondent has established a type repairing shop in the property in dispute In order to maintain the above shop Brahma Nand Gupta the previous owner had constructed a tin shed Later on Brahma Nand Gupta was trying to evict the Respondent from the site in dispute He filed a suit before the court of Munsif This was decreed. An appeal against this order

was also dismissed. The Respondent filed second appeal before the High Court. In this appeal the operation of the two orders of court below have been stayed. The second appeal is still pending before the High Court. Meanwhile the previous owner Brahma Nand Gupta has transferred the property in dispute along with other properties to the Appellant. The Appellant moved an application u/s 17 of U.P. Act No. 13 of 1972, U.P. Building (Rent, letting and eviction) Regulation Act. The Appellant got a release order from Rent Control and Eviction Officer. Thereafter he got possession over the property lying adjacent to the property in dispute. In the night of 6th July, 1992 the Respondent demolished the eastern wall of the Plaintiff Respondent's tenement. Consequently the property in dispute became unsafe. After demolishing the eastern wall the Respondent was raising wall between the pillars on which his tin rests. The Appellant filed suit No. 255 of 1992 and got a stay order restraining the Respondent from constructing the wall between the pillars. The Respondent urged that the Appellant had no right to demolish the eastern wall. They had dug ditches at the place of wall. Therefore, they have endangered the very construction of the Respondent. On these allegations an application was moved for temporary injunction by the Respondent under Order 39 Rules 1 and 2 of the Code with a prayer that the Defendant Appellant be directed to reconstruct the wall demolished by them.

4. The application for temporary injunction was contested by the Appellant. They alleged that demolished wall was not in the tenancy of the Respondent. The wall was demolished in the night of 5/6th June, 1992. Thereafter the suit was filed on 20th of July 1992. It was further urged that by demolition of the wall the Plaintiff-Respondent does not suffer any irreparable loss and therefore no mandatory injunction can be granted. After hearing both the parties the trial court came to the conclusion that the Respondent has got no right to get the wall constructed which was demolished by the Appellant. However, the trial court permitted the Respondent to raise wall between the pillars so that he may be able to protect his property. This wall was directed to be constructed at the expense of the Respondent which he could not claim from the Appellant. The Appellant was directed to fill the ditches within four days failing which the Respondent was entitled to get the ditches filled and recover the costs from the Appellant. Aggrieved by this order the present appeal has been filed.

5. In other suit 255 of 1992 also an application had been moved for temporary injunction! In the common order passed in the two suits the learned trial court has rejected the application for temporary injunction of the Appellant. It was alleged that the valuation of the suit was less than one lac, hence appeal has been filed against the said order in the court of District Judge Etah.

6. It was argued by the learned Counsel for the Appellant that at the inter locutory stage the lower court should not have granted mandatory injunction. It was urged that the ditch which was directed to be filled does not fall within the tenancy of the

Respondent. This wall was not a subject matter of the suit consequently the lower court could not have granted any relief in respect of these ditches.

7. We had heard the parties with .their consent for final disposal at the very time of admission. Hence we are disposing of this appeal at this very stage of admission.

8. The learned Counsel for Appellant has cited cases in support of his contention that mandatory injunction should be granted only in very rare cases and that too with a intention to secure the property in that very stage at which it existed at the time of institution of the suit. The learned Counsel for the Respondent urged that the first part of the impugned order is not in a mandatory form. It only permits the Respondent to raise wall between the pillars. The second appeal is still pending in the High Court. The ejectment of the Respondent has been stayed. In these circumstances the Respondents are fully entitled to remain on the land and protect their property till they are ejected by process of law.

9. The first case cited by the learned Counsel for Appellant is Zila Parishad Bijnor v. Pashu Shav Chhedan Evam Haddi Chhoora Aydyogik Utpadan Co-operative Society Limited 1990 ALJ 698 In this case the Plaintiff filed suit for permanent injunction against grant of licence-contract to opposite party for collection of carcass, hides and bones of dead animals. The suit was filed on the ground that the Plaintiff-Respondent were entitled to the Theka and the Defendants were wrongly granted Theka for collection of carcass etc of dead animals. While disposing an application for temporary Injunction contemplated by Order 39 of the CPC the trial court had directed the Appellants to grant licence to the Plaintiff-Respondent in this matter the Division Bench of this Court has observed:

We think that the trial court has exceeded its jurisdiction in granting mandatory injunction against the Appellants. The trial court should also consider the provisions of Order 39, Rules 1 and 2, CPC as amended by the State amendment while dealing with the claims of the parties.

10. The court had considered the case of Nandan Pictures Ltd. Vs. Art Pictures Ltd. and Others, wherein a Division Bench of Calcutta High Court had observed:

It is only in very rare cases that a mandatory injunction is granted on an interlocutory application and instances where such an injunction is granted by means of an "ad interim" order pending the decision of the application itself are almost unknown. It would "appear that if a mandatory Injunction is granted at all on an interlocutory application, It is granted only to restore the status quo and not granted to establish a new state of things differing from the state which existed at the date when the suit was instituted.

11. The Division Bench had also relied upon Magnum Films v. Golcha Properties Pvt. Ltd. AIR 1983 Del 392. In this case a single Judge of the Delhi High Court had indicated:

A temporary mandatory injunction can be issued only in case of extreme hardship and compelling circumstances and mostly in those cases when status quo existing on the date of the institution of the suit is to be restored.

12. Prabhu Vs. Doodh Nath and Others, is a case where the matter came before this Court after a full trial by the lower court. The mandatory Injunction was granted in the final order, directing removal of constructions. Appeal filed against the trial court order was dismissed. Then the Defendant came before the High Court. This case is based on different facts and is not applicable to the present matter.

13. The learned Counsel for Appellant has also relied upon State of U.P. v. Prag Ice and Oil Mill. 1983 UP LB EC 565. This case has come up in Second Appeal before the High Court. The question was that whether mandatory injunction could be granted where no such relief was claimed in the plaint! It was held by this Court that no relief for a mandatory injunction for removal of the encroachments could be granted *so moto* in exercise of the judicial discretion of the Court or by permitting an amendment of the plaint at a later stage.

14. No case has been cited on behalf of the Respondent.

15. The above decisions, therefore, show that mandatory Injunction should be granted only in the rarest of the rare cases. The land on which the ditches have been dug do not appear to be in Respondent's tenancy. In such a circumstance no mandatory injunction could be granted against the Appellant even in the exercise of the inherent powers u/s 153 of the Code of Civil Procedure. The learned Civil Judge has directed the Appellant to raise wall at his own expense between the pillars. Admittedly the Respondents have filed a second appeal in this Court. They have obtained a stay order against Brahmanand Gupta. This Brahmanand Gupta had transferred his interest in the property in dispute to the Appellant. In this perspective it would be proper that Respondent seeks direction from this Court in the Second Appeal. He ought not to have rushed to the trial court for getting another injunction by filing a separate suit against the Appellant. By way of transfer of the property in dispute the Appellant had stepped into the shoes of Brahmanand Gupta. Hence the proper course should have been to take such step as advised by his Counsel for obtaining permission of this Court to raise wall between the pillars.

16. No other point was pressed.

17. for the foregoing reasons the appeal is allowed with costs. The order of the court below is set aside. The application for temporary injunction of Respondent is rejected.