

Court No. - 1

Case :- MATTERS UNDER ARTICLE 227 No. - 6801 of 2022

Petitioner :- Captation Shri Prem Singh

Respondent :- Shri Ghurelal And Another

Counsel for Petitioner :- Swapnil Kumar,Deesh
Mohan,Sudhanshu Kumar

Counsel for Respondent :- Hitesh Pachori

Hon'ble Jayant Banerji,J.

1. Pursuant to the order dated 29.8.2022, the office has reported that notices were issued by registered post with acknowledgment due to the respondent nos. 1 and 2 and a vakalatnama on behalf of the respondent nos. 1 and 2 has been filed by Shri Hitesh Pachori, Advocate.

2. A mention was made for this matter to be taken up for out of turn, which mention was accepted, and the learned counsel for the petitioner has served notice on the office of Shri Hitesh Pachori. Accordingly, the notice as served is taken on record.

3. Heard learned counsel for the petitioner. Despite notice to the other side, no one has turned up on behalf of the respondents.

4. This petition has been filed seeking to set aside the order dated 25.07.2022 in Civil Appeal No. 160 of 2018 (Captain Prem Singh vs. Shri Ghure Lal and another) passed by the court of Additional District Judge, Court No. 4, Agra, whereby the amendment application filed by the petitioner has been rejected.

5. The contention of the learned counsel for the petitioner is that a suit for mandatory injunction was filed by the plaintiff-petitioner for a direction to the dependents for removing the encroachment on the drain and to repair the part of the house of the plaintiff that was shown on the plaint map as A,B,F, E or to construct the same. It is stated that the suit came to be dismissed against which an appeal was filed bearing Civil Appeal No. 160 of 2018. In the appeal, an application paper no. 14C was filed seeking to incorporate certain amendments in the plaint on the basis that certain developments had occurred which were of recent origin. By the impugned order dated 25.07.2022, the application 14C was rejected. It is contended that the appellate court has misdirected

itself in observing that the suit is of permanent injunction and that additionally, the relief is being sought for mandatory injunction which would amount to changing the nature of the suit. Learned counsel has drawn the attention of the court to the relief claimed in the plaint which is of mandatory injunction to state that the premise of the impugned order is incorrect. Learned counsel has strenuously and fairly argued that though some part of the amendments sought could overlap with the averments made in the plaint, however, permanent injunction was sought inasmuch as certain anti-social persons had attempted to intrude into the property of the plaintiff on 27.11.2021. It is further stated that amendments in the relief clause were three fold and each has to be dealt with by the court concerned separately without generalizing on the amendments sought in the application.

6. It is noted that neither has the counsel for the respondent appeared despite notice nor is any counter affidavit on record.

7. A perusal of the impugned order dated 25.7.2022 reflects that with regard to the relief sought to be incorporated for mandatory injunction for removing the girder placed on wall marked HA on the plaint map, the court has observed that it corresponds to paragraph 2 of the plaint for which no relief was sought earlier. Therefore rejecting this amendment cannot be said to be erroneous.

8. However, as far as the aspect of attempted forcible possession by the defendant, the appellate court has observed as follows:

"जहाँ तक विवादित जगह पर प्रतिवादीगण के द्वारा कब्जा करने का संबंध है, तो उभय पक्ष के अभिवचनों से यह स्पष्ट होता है कि उभय पक्षों के मध्य विवादित जगह के स्वामित्व के संबंध में कोई विवाद नहीं है। अपीलार्थी द्वारा नया वादकारण दर्शित करते हुए उक्त अनुतोष चाहा गया है।"

In my opinion, such observation actually addresses the merits of the amendment rather than the amendment itself. As far as this amendment seeking addition of relief clause 2 ब is concerned, the appellate court requires to look into the matter afresh.

9. As far as the question of damages is concerned, the observation of the appellate court is justified for rejecting the amendment sought given the fact that relevant pleadings were raised in the plaint itself and after the suit was dismissed and at the appellate stage, the plaintiff cannot additionally raise such a claim as it

would be hit by the proviso to Order 6 Rule 17 CPC.

10. In view of the aforesaid, the order dated 25.7.2022 only to the extent it relates to consideration of incorporation of amendment 2 ँ in the relief clause and its related amendments are concerned, is set aside and the appellate court is required to consider only that aspect afresh.

11. This petition is, accordingly, **disposed of**.

Order Date :- 14.12.2023

A. V. Singh

(Jayant Banerji, J.)