

Court No. - 1

Case :- MATTERS UNDER ARTICLE 227 No. - 8666 of 2023

Petitioner :- Vindhyachal Singh

Respondent :- Naresh Mishra And Another

Counsel for Petitioner :- Abhishek Misra

Counsel for Respondent :- Rajan Mishra

Hon'ble Jayant Banerji, J.

1. Heard Sri H.R. Mishra, learned Senior Advocate assisted by Sri Pradeep Kumar Rai, learned counsel for the petitioner and Sri R.K. Ojha, learned Senior Advocate assisted by Sri Rajan Mishra, learned counsel appearing for the defendant-respondents.

2. The counsel for the respondents has stated that no counter affidavit is required to be filed by him in the matter. Accordingly, with consent, the case is taken up for disposal.

3. This petition has been filed seeking the following relief:

"I. to issue a order or direction setting aside the order dated 21.10.2022, so far it permits the defendant respondents to make construction over the land shown by letters D,J,K, L shown in the map attached with the written statement and also refusing the injunction with regard to the land shown by letters C,D,G,H shown in the plaint map and the order of the Additional District & Session Judge, Court No.4, Gorakhpur dated 22.3.2023 so far it relates to the refusal of injunction to the plaintiff petitioner and permitting the defendant respondents to make construction over the land shown by letters D,J, K, L in the map attached with the written statement."

4. It appears that Original Suit No. 1301 of 2022 was filed by the plaintiff-petitioner against the defendants-respondents seeking declaration of easementary right of the plaintiff with regard to an area marked as C,D,G,H in the plaint map situate at the south of the house of the plaintiff. Further relief of permanent injunction was sought for restraining the defendants-respondents from making any construction over the area marked as C,D,G,H in the plaint map and for restraining them from closing window/skylight on the southern wall of the plaintiff marked as C,D in the plaint map. Alongwith the plaint, an application under Order 39 Rule 1 and 2 CPC was filed by the plaintiff-petitioner which was numbered as paper No. 7C for grant of temporary injunction restraining the respondents from interfering in the area marked as C,D,G,H in the plaint map.

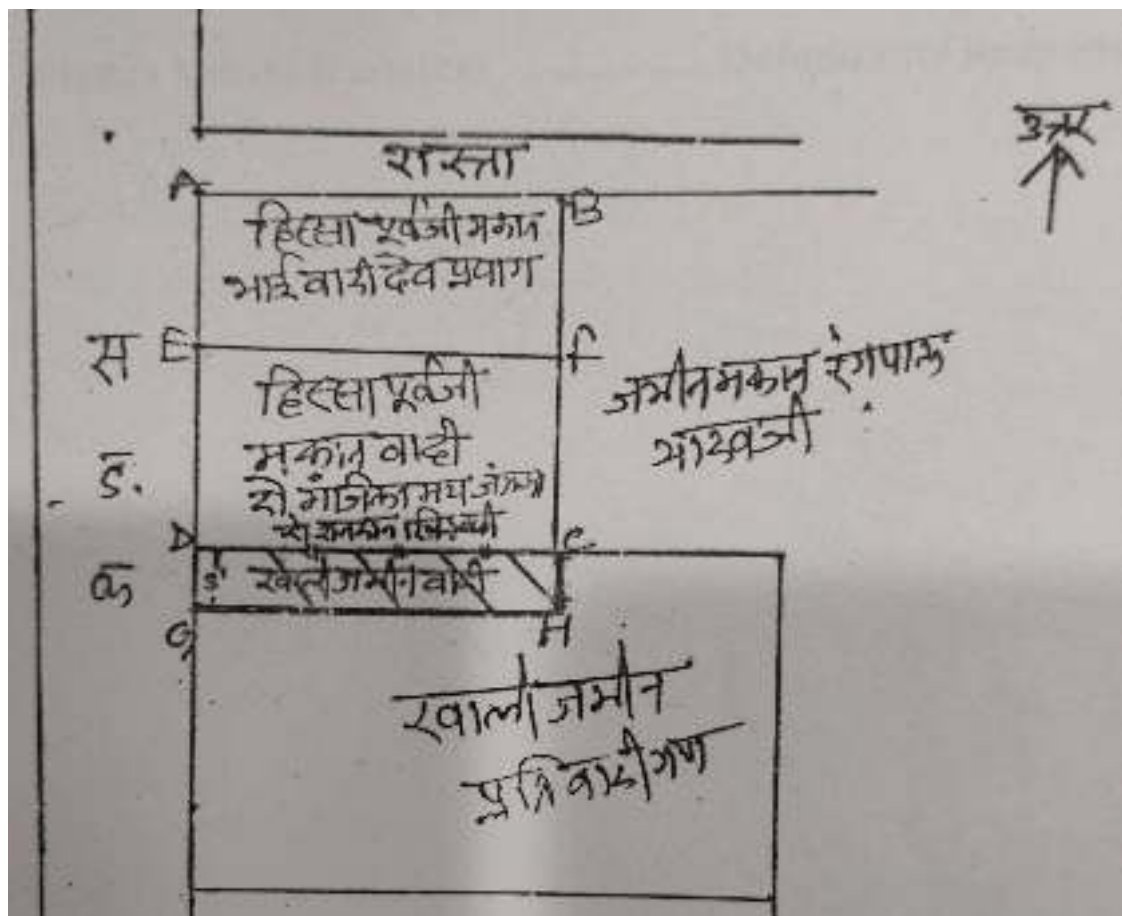
5. In the written statement filed by the defendants-respondents, a counter claim was raised seeking a mandatory injunction directing the plaintiff-petitioner to close the skylight on the wall marked as B,C which appeared both in the plaint map and in the map appended to the written statement.

6. By the impugned order dated 21.10.2022, the trial court while directing the parties to maintain status quo with regard to the skylight made on the wall C,D, further directed that the defendants-respondents would be permitted to make constructions over the area marked as D,J,K,L in the map appended to the written statement. The order was challenged by the plaintiff-petitioner in Misc. Appeal No. 128 of 2022 which was dismissed by an order dated 22.3.2023.

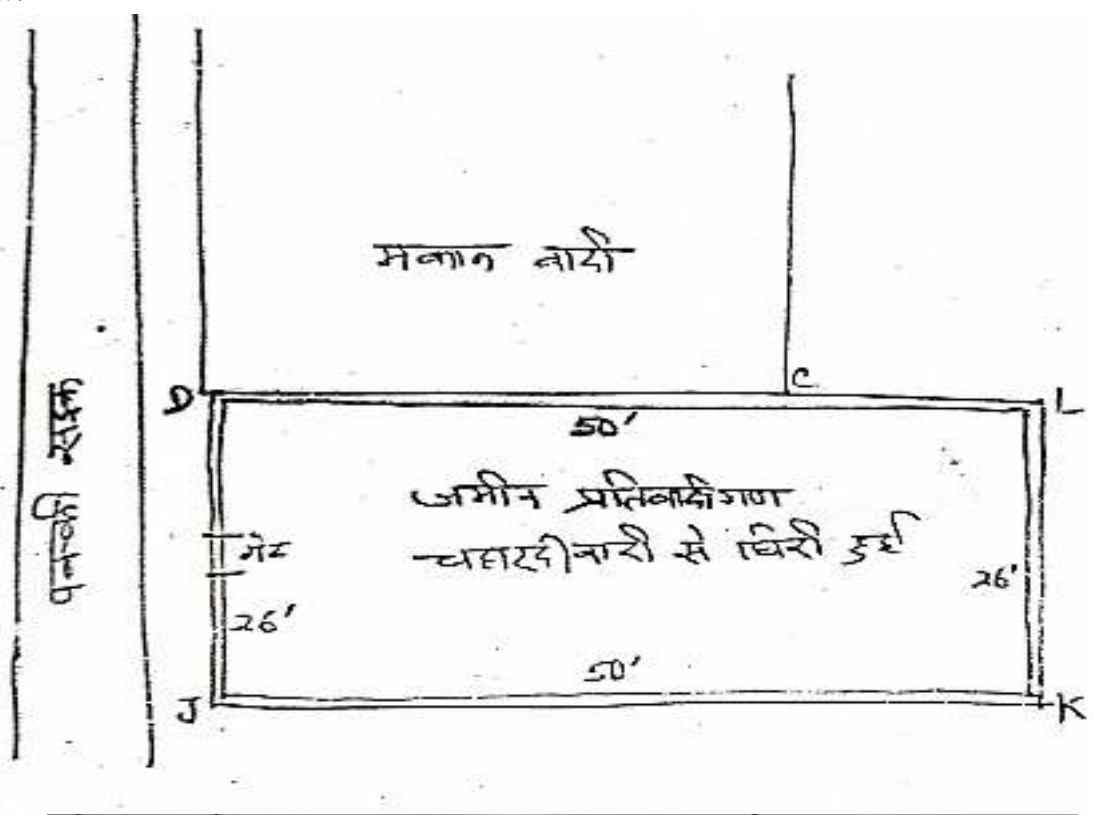
7. The contention of the learned counsel for the petitioner is two fold. Firstly, it is stated that there was no injunction application filed by the defendants-respondents nor was any plea in the written statement with regard to the second part of the order of injunction that granted permission to the defendants to make construction over the area marked as D,J,K,L on the map of the written statement. Secondly, it has been urged that the area regarding which easement has been claimed by the plaintiff and is marked as C,D,G,H in the plain map, actually exists on the area marked as D,J,K, L in the map appended to the written statement. It is stated that the very right of easement regarding which suit has been filed would be frustrated, if the defendants are allowed to make construction over the area marked as C,D,G,H in the plaint map.

8. Sri R.K. Ojha, learned counsel for the respondents has strongly opposed the petition on the ground that if the orders impugned are interfered that would result in negating the right of the defendants in making construction over their own lands which would deprive them of the right of shelter and as such, order impugned ought not to interfere with inasmuch as it recognizes the statutory as well as the constitutional right of the defendants.

9. The plaint map, showing the area marked as C,D,G,H is as under:-



10. The map appended to the written statement, shows area marked as D,J,K,L as below:-



11. From the aforesaid map, it is clear that the area marked as C,D,G,H in the plaint map, prima facie, appears to be existing on the area marked as D,J,K,L in the written statement's map.

12. I have perused the orders impugned. The appellate court has observed that the plaintiff has not been able to file any documentary evidence with regard to the area marked as C,D,G,H. The courts have not considered the aspect of easementary right that is being claimed by the plaintiff-petitioner. The pleadings and evidence regarding a right of easement are different from those of possession and title to any immovable property. Reference may be had to the relevant provisions of the Indian Easement Act, 1882. The contention of the learned counsel for the plaintiff-petitioner appears to be right when he says that in case the defendants are allowed to make construction over the part marked as C,D,G,H on the plaint map, the purpose of filing the suit itself would be frustrated. The courts have committed a substantial error in permitting constructions by the defendants on the area marked DJKL in the map in the written statement, without taking into account the disputed area marked CDGH in the plaint map over which the plaintiff claims easementary right. On perusal of the record, a case for interference is made out.

13. Accordingly, the orders impugned are modified to the extent that the defendant-respondents are restrained from making construction within the three feet wide area shown in the plaint map to the south of the plaintiff's property and marked as C,D,G,H during pendency of the suit.

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

Order Date :- 28.11.2023

sfa/

(Jayant Banerji, J)