

Neutral Citation No. - 2023:AHC:135552

Court No. - 1

Case :- MATTERS UNDER ARTICLE 227 No. - 4984 of 2023

Petitioner :- Shri Krishna Janambhoomi Mukti Nirman Trust

Respondent :- Sahi Masjid Eidgah Management Committee And 8 Others

Counsel for Petitioner :- Suresh Kumar Maurya

Counsel for Respondent :- Punit Kumar Gupta

Hon'ble Jayant Banerji,J.

1. Heard learned counsel for the petitioner and Shri Puneet Kumar Gupta, learned counsel appearing for the defendant-respondent no. 2.

2. This petition has been filed with the following prayer:

"i. Issue a writ, order or direction to set aside the order dated 31.03.2023 passed by Civil Judge, Senior Division, Mathura in Civil Case No. 12/2023 (Shri Krishna Janam Bhoomi and others Vs. Sahi Masjid Eidgah and others).

ii. Issue a writ, order or direction in nature of mandamus directing the respondents to decide the application filed by the plaintiff under Order XXVI Rule 9 before the disposal of Order VII Rule 11 application.

iii. Issue any other suitable writ, order, or direction as this Court may deem fit and proper in the facts and circumstances of the case.

iv. Award the cost of the petition to the plaintiff."

3. At the outset, learned counsel for the petitioner has stated that in a judgment and order dated 26.5.2023 passed by this Court in Transfer Application (Civil) No. 88 of 2023 (Bhagwan Shrikrishna Virajman And 7 Others Vs. U.P. Sunni Central Waqf Board And 3 Others), the Court, while allowing the transfer application, has directed the District Judge to prepare a list of all such cases of similar nature involving the subject matter and touching upon its periphery, expressly or by implication include particulars of such cases and these suits/cases along with record, as above, shall be duly forwarded to this Court within two weeks and the same shall stand transferred to this Court in exercise of suo motu powers.

It is stated that pursuant thereto, among other suits, the Suit No. 12 of 2023 (Shri Krishna Janambhoomi Mukti Nirman Trust and others Vs. Sahi Masjid Eidgah Management Committee and others), that is pending before the court of the Civil Judge (Senior Division), Mathura, has also been transferred to this court and therefore, the present case be connected with that case.

4. It is noted that this petition has been filed under Article 227 of the Constitution of India and the several suits including Suit No. 12 of 2023 have been transferred to this Court and therefore, the Court conducting the trial in the aforesaid suits that have been transferred to this Court would have no jurisdiction to adjudicate on this petition. As such, the request of the learned counsel for the petitioner is refused.

5. By the impugned order dated 31.3.2023, it appears that an application 31 ¶ filed by the defendant no. 1 on the ground that before further proceedings, the application filed under Order 7 Rule 11(d) of the Code of Civil Procedure dated 8.2.2023 be decided first, has been allowed. It is contended by the learned counsel for the petitioner that an application 41 ¶ was filed by the plaintiff-petitioner for rejecting the application of the defendant-respondents and that an independent/competent authority be directed under Order 26 Rule 9 of the CPC for an office survey and to constitute a scientific commission. It is contended that without considering the application 41 ¶ filed by the plaintiff-petitioner, the impugned order has been passed.

6. Shri Puneet Kumar Gupta, learned counsel for the defendant-respondent has opposed the petition.

7. Learned counsel for the petitioner has referred to Annexure-6 of the petition which he states is the application of the plaintiff-petitioners bearing Paper No. 41 ¶. A perusal of the application 41 ¶ that is stated to be filed in opposition to the application 31 ¶ reveals that the reliefs

sought for therein are that (a) the application of the defendant-respondents be rejected, and, (b) in the interest of justice under Order 26 Rule 9 of CPC the Court direct that, through an independent/competent authority, an office for survey and a scientific commission be constituted, which can inform the Court about the correct position.

8. By the impugned order, the trial court has observed as under:

"31.03.2023

पत्रावली प्रार्थनापत्र का०सं०-31 ग पर आदेश हेतु पेश हुयी। उक्त प्रार्थनापत्र पर उभयपक्षों के विद्वान अधिवक्तागण को पूर्व में सुना जा चुका है।

प्रतिवादी सं० 1 की ओर से प्रार्थनापत्र का०सं० 31 ग प्रस्तुत वाद में किसी भी अन्य कार्यवाही को अग्रसारित किये जाने से पूर्व प्रार्थनापत्र अन्तर्गत आदेश 7 नियम 11 (डी) जाब्ता दीवानी दिनांकित 08.02.2023 का निस्तारण सर्वप्रथम किये जाने के आशय से प्रस्तुत किया गया है। प्रतिवादी द्वारा प्रार्थनापत्र के साथ सिविल वाद सं० -950 / 2020 में इस न्यायालय द्वारा पारित आदेश दिनांकित 21.07.2022 की छायाप्रति प्रस्तुत की गयी है।

उपरोक्त प्रार्थनापत्र के विरुद्ध वादी की ओर से आपत्ति का०सं० - 41 ग प्रस्तुत कर प्रतिवादी का प्रार्थनापत्र खारिज किये जाने तथा न्यायहित में एक स्वतंत्र / सक्षम प्राधिकारी के माध्यम से आदेश 26 नियम 9 के तहत कार्यालय सर्वेक्षण, वैज्ञानिक आयोग का गठन करने हेतु आदेश पारित किये जाने की याचना की गयी है।

आदेश हेतु पत्रावली का अवलोकन किया।

पत्रावली के अवलोकन से दर्शित होता है कि प्रार्थनापत्र 31 ग इस आशय का प्रस्तुत किया गया कि उपरोक्त वाद पोषणीय नहीं है , अतः सर्वप्रथम प्रार्थनापत्र अन्तर्गत आदेश 7 नियम 11 सी०पी०सी० पर सुनवाई की जाये। इसके विरुद्ध वादीगण द्वारा अमीन कमीशन हेतु दिये गये प्रार्थनापत्र पर पहले सुनवाई किये जाने हेतु याचना की गयी है। विधि का यह सुस्थापित सिद्धांत है कि जब किसी वाद की पोषणीयता के संबंध में ही पक्षकार द्वारा प्रश्न चिह्न लगाया गया है , तो सर्वप्रथम इसी तथ्य का निर्धारण किया जाना चाहिये कि उक्त वाद पोषणीय है अथवा नहीं, क्योंकि यदि कोई वाद पोषणीय ही नहीं है , तो फिर उसमें अग्रिम किसी भी कार्यवाही की आवश्यकता नहीं है। अतः ऐसी स्थिति में सर्वप्रथम वाद की संधारणीयता के प्रश्न पर ही सुना जाना उचित एवं न्यायसंगत है। अतः पक्षकारों को निर्देशित किया जाता है कि वे अपना पक्ष प्रार्थनापत्र अन्तर्गत आदेश 7 नियम 11 पर नियत दिनांक को रखना सुनिश्चित करें।

पत्रावली वास्ते सुनवाई प्रार्थनापत्र 20 ग अन्तर्गत आदेश 7 नियम 11 दिनांक 14-04-2023 को पेश हो।

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9. Order 26 Rule 9 of the CPC provides for Commissions to make local investigation and it reads as under:

“9. Commissions to make local investigations.- In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any *mesne profits* or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court:

Provided that, where the State Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules.”

10. As such, the purpose of a Commission is to make local investigation for the purpose of elucidating any matter in dispute the Court can direct the Commissioner to make such investigation and to report thereon to Court which report, when proved, would have evidentiary value. The procedure of the Commissioner is provided in Rule 10. Rule 10-A provides for Commission for scientific investigation. The aforesaid provisions of Order 26 provide a mechanism to gather evidence.

11. Order 7 Rule 11 of the CPC provides for rejection of plaint. Apparently, the application 20 7 has been filed under Clause (d) of Rule 11, which provides for rejection of plaint where the suit appears from the statement in the plaint to be barred by any law

12. It is settled law that for the purpose of considering an application under Order 7 Rule 11 of the CPC, only the entire plaint is required to be seen. No other pleading nor any evidence may be considered by the court while adjudicating in respect of an application under Order 7 Rule 11. In the case of **P.V. Guru Raj Reddy v. P. Neeradha Reddy**¹, the Supreme Court has observed as follows:

5. Rejection of the plaint under Order 7 Rule 11 of CPC is a drastic power conferred in the court to terminate a civil action at the threshold. The conditions precedent to the exercise of power under Order 7 Rule 11,

1 (2015) 8 SCC 331 : (2015) 4 SCC (Civ) 100 : 2015 SCC OnLine SC 118 at page 333

therefore, are stringent and have been consistently held to be so by the Court. It is the averments in the plaint that have to be read as a whole to find out whether it discloses a cause of action or whether the suit is barred under any law. At the stage of exercise of power under Order 7 Rule 11, the stand of the defendants in the written statement or in the application for rejection of the plaint is wholly immaterial. It is only if the averments in the plaint ex facie do not disclose a cause of action or on a reading thereof the suit appears to be barred under any law the plaint can be rejected. In all other situations, the claims will have to be adjudicated in the course of the trial.

13. As regards the second prayer made in this petition, it is prerogative of the trial court to proceed in the manner it deems fit unless there is an specific provision that provides for a particular methodology or process to be adopted. The trial court, in the impugned order has observed that where in a suit, its maintainability has been questioned, then that fact has to be determined first. Therefore, hearing on the question of maintainability of the suit is proper and justified.

14. Under the facts and circumstances, I see no such error or illegality in the impugned order dated 31.3.2023 that may merit interference in exercise of jurisdiction under Article 227 of the Constitution of India.

15. Under the circumstances, this petition is **dismissed**.

Order Date :- 10.7.2023

A. V. Singh

(Jayant Banerji, J.)