

Court No. - 6

RESERVED

Case :- MATTERS UNDER ARTICLE 227 No. - 2946 of 2022

Petitioner :- C/M Anjuman Intezamia Masajid Varanasi

Respondent :- Smt. Rakhi Singh And 8 Others

Counsel for Petitioner :- Syed Ahmed Faizan, Sr. Advocate,
Zaheer Asghar

Counsel for Respondent :- C.S.C.

Hon'ble J.J. Munir,J.

1. The plaintiff-respondents, who are five in number, have instituted regular Civil Suit No.693 of 2021 in the Court of the learned Civil Judge (Sr. Div.), Varanasi for declaration, permanent injunction and mandatory injunction. Through the suit, they have sought to enforce their right to profess, practice and propagate their religion, guaranteed equally to all persons under Article 25 of the Constitution. They have arrayed the defendant-petitioner, besides defendant nos.1, 2, 3 and 5 as party defendants to the suit. The latter defendants are respondent nos.6, 7, 8 and 9 to this petition. The plaintiff-respondents have pleaded violation of their right to *darshan*, *pooja* and performance of all rituals of Maa Shringar Gauri, Lord Ganesh, Lord Hanuman and other visible and invisible deities within the old temple complex, situate at Settlement Plot No.9130, falling in the area of Ward and Police Station Dashashwamedh, District Varanasi.

2. The plaintiff-respondents say that it is the defendant-petitioner who are in continuous violation of their right aforesaid. For the purpose, the plaintiff-respondents have claimed the following material reliefs in the suit:

"a) Decree the suit for declaration declaring that Plaintiffs are entitled to have Darshan, Pooja and perform all the rituals of Maa Srinigar Gauri, Lord Ganesh, Lord Hanuman and other visible and invisible deities within old temple complex situated at settlement Plot No.9130 (Nine

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Thousand One Hundred Thirty) in the area of Ward and P.S. Dashwamedh District Varanasi;

- b) Decree the suit for permanent injunction restraining the Defendants from imposing any restriction, creating any obstacle, hindrance or interference in performance of daily Darshan, Pooja, Aarti, Bhog and observance of rituals by devotees of Goddess Maa Sringar Gauri at Asthan of Lord Adi Visheshwar along with Lord Ganesh, Lord Hanuman, Nandiji and other visible and invisible deities within old temple complex situated at settlement Plot No 9130 (Nine Thousand One Hundred Thirty) in the area of Ward and P.S. Dashwamedh District Varanasi;
- c) Decree the suit for permanent injunction restraining the Defendants from demolishing, damaging, destroying or causing any damage to the images of deities Goddess Maa Sringar Gauri at Asthan of Lord Adi Visheshwar along with Lord Ganesh, Lord Hanuman, Nandiji and other visible and invisible deities within old temple complex situated at settlement Plot No.9130 (Nine Thousand One Hundred Thirty) in the area of Ward and P.S. Dashwamedh District Varanasi;
- d) Decree the suit for mandatory injunction, directing the Government of Uttar Pradesh and District Administration to make every security arrangement and facilitate daily Darshan, Pooja, Aarti, Bhog by devotees of Maa Sringar Gauri along with Lord Ganesh, Lord Hanuman, Nandiji and other images and deities within the precincts of temple complex known as 'Ancient temple' existing at settlement Plot No.9130 (Nine Thousand One Hundred Thirty) within the area of Ward and P.S. Dashwamedh the heart of the city of Varanasi;"

3. Along with the suit, the plaintiff-respondents have also made an application for the grant of a temporary injunction, seeking an *ad interim* injunction in similar terms, but temporary form. Along with the suit, an application for appointment of an Advocate Commissioner to make a local inspection of the property in question was also moved for the purpose of

ascertaining the existence of the images of Deities Maa Shringar Gauri, Lord Ganesha, Lord Hanuman, Nandiji and other Deities, at Settlement Plot No.9130, situate at Ward and Police Station Dashashwamedh, District Varanasi. The aforesaid application was moved invoking the provisions of Section 75 and Order XXVI Rules 9 and 10 read with Section 151 of the Code of Civil Procedure, 1908 (for short, 'the Code').

4. The suit under reference was registered on the file of the learned Civil Judge (Sr. Div.), Varanasi on 18.08.2021 and on that day, three orders were made in the suit by the learned Trial Judge. By an order passed on the suit, he directed it to be registered and issued summonses to the defendants, fixing 17.09.2021 for the filing of a written statement and 24.09.2021 for the framing of issues. By an order passed on the temporary injunction application, the learned Judge issued notice to the defendants, which includes the defendant-petitioner, but declined to grant any *ad interim* injunction. By an order passed on the application for appointment of a Commissioner to undertake a local inspection, he granted the application and directed that a commission be issued to an Advocate Commissioner from the list maintained for the purpose. The plaintiff-respondents were directed to take steps within three days. Post steps being taken, a writ was issued to the Advocate Commissioner concerned, who was directed to make a local inspection and submit a report to the Court before the date fixed.

5. It appears that on the following day i.e. 19.08.2021, a further application bearing paper No.13 ऋ was made on behalf of the plaintiff-respondents with a prayer that the Advocate Commissioner appointed *vide* order dated 18.08.2021, passed

on the application paper No.11 ण, be directed to cause videography of the proceedings of the commission undertaken by him to be done. It was further prayed that police assistance be provided to the Advocate Commissioner to assist him in the discharge of his commission. An objection to the said application was filed on behalf of the petitioner bearing paper No. 30 ण, where it was said that the application for appointment of a Commissioner to make a local inspection was allowed on 18.08.2021, that is to say, on the date that the suit was instituted and now, an application has been made on the following day for provision of police aid to the learned Advocate Commissioner, even before he has been appointed. It was urged that an order for provision of police aid can be made only if the learned Advocate Commissioner, while executing the commission, finds himself obstructed and makes a report in that behalf. The objection also mentions that there is a separate application made on behalf of the defendant-petitioner, seeking recall of the order appointing the Advocate Commissioner *ex parte*. An objection was also raised to the effect that in another suit, on a similar cause of action and the relief, brought under Order I Rule 8 of the Code, being O.S. No.610 of 1991, this Court, in Matters under Article 227 Nos. 3562 of 2021 and 3844 of 2021, has stayed further proceedings of the suit till the next date of listing.

6. A further application bearing paper No. 28 ण was made on behalf of the plaintiff-respondents with a prayer that Mr. Ajay Kumar Mishra, Advocate, standing at Sr. No.13 of the list of Advocate Commissioners, be appointed to discharge the commission. This application was made on 03.12.2021. The basis to move this application set out therein is that of the Commissioners, who were earlier appointed out of the list, that

is to say, Mr. Ajeet Kumar Pushkar, Advocate could not be contacted, despite best efforts by the plaintiff-respondents. Also, after him, Mr. Ajay Pandey, Advocate was nominated, who excused himself from discharging the duty on grounds of ill-health. Thus, it was necessary to appoint an Advocate Commissioner, who would be willing to undertake the commission.

7. By order dated 08.04.2022, the learned Civil Judge (Sr. Div.), Varanasi has allowed the plaintiff-respondents' applications 13ग and 28ग in terms that Mr. Ajay Kumar, Advocate has been appointed the Advocate Commissioner to undertake a local inspection in terms of the order of the Court dated 18.08.2021. It has further been ordered that the Advocate Commissioner would cause videography to be undertaken, covering the proceedings of the commission. It has been further directed that in case the Advocate Commissioner finds it appropriate that in the execution of his commission, he requires police assistance, he would be entitled to it and the police officials concerned would render him necessary assistance. It is this order passed by the learned Civil Judge (Sr. Div.), Varanasi that has made the fourth defendant to the suit to move this Court under Article 227 of the Constitution of India. Apart from the order dated 08.04.2022, the defendant-petitioner has also challenged the order dated 18.08.2021, whereby the plaintiff-respondents' application bearing paper No.11ग seeking appointment of an Advocate Commissioner to make a local inspection was allowed.

8. Still more, the defendant-petitioner has challenged the order dated 05.04.2022, whereby the Trial Judge has posted the defendant-petitioner's application, paper No. 35ग, under

Order VII Rule 11 of the Code to a day after orders were made on applications bearing paper Nos.13 ग and 28 ग, last mentioned.

9. Heard Mr. Mr. S.F.A. Naqvi, learned Senior Advocate assisted by Mr. Zaheer Asghar, learned Counsel for the defendant-petitioner and Mr. M.C. Chaturvedi, learned Additional Advocate General assisted by Mr. Bipin Bihari Pandey, learned Chief Standing Counsel, appearing on behalf of respondent Nos. 6, 7 and 8.

10. The thrust of Mr. Naqvi's submission is that the impugned orders are bad because a commission for local inspection cannot be issued for the purpose of collecting evidence by a party. He submits that the purpose of a commission under Order XXVI Rule 9 of the Code is to elucidate the matters in controversy, where evidence adduced by parties is shrouded in some doubt. It is to place evidence in clear perspective that a commission can be issued, but not to aid a party to collect evidence.

11. Mr. Naqvi further argues that the direction to provide police aid could never have been made unless the learned Advocate Commissioner, during execution of the commission, felt that there was some obstruction to the discharge of the commission by him, which needed to be abated by necessary police aid. It is emphasized that the commission has yet not been executed and no report made. As such, there is no basis whatsoever to the direction granting police aid.

12. The further count on which the learned Senior Advocate appearing for the petitioner objects to the order impugned dated 08.04.2022 is the fact that a particular Advocate Commissioner

has been appointed on the prayer of the plaintiff-respondents, instead of the Court choosing him freely out of the maintained list.

13. The learned Senior Advocate, during the course of his submissions, has drawn the attention of this Court to the very detailed orders passed in Matters under Article 227 Nos. 3562 of 2021 and 3844 of 2021, dated 09.09.2021, where further proceedings of a similar suit, brought in a representative capacity, being O.S. No.610 of 1991, have been stayed.

14. Mr. M.C. Chaturvedi, learned Additional Advocate General assisted by Mr. Bipin Bihari Pandey, learned Chief Standing Counsel has opposed the motion to admit this petition to hearing.

15. The Court has perused the aforesaid orders dated 09.09.2021, besides the other material on records.

16. This Court must say at once that the present petition challenges orders that hardly decide any kind of rights of parties. The reliance placed by the learned Senior Advocate appearing for the defendant-petitioner on the decision of this Court in **Sri Kant v. Mool Chand and others, 2019 (6) AWC 5427** to support his contention that unless evidence is led by parties and there is some confusion about it, no commission for local inspection can be issued, is quite misplaced. In **Sri Kant (supra)**, it has been held:

"15. Apart from above, it is settled law that local inspection or Commission by court is made only in those cases where on the evidence led by the parties, court is not able to arrive at a just conclusion either way or where the court feels that there is some ambiguity in the evidence which can be clarified by making local inspection or Commission. Local inspection or issue of Commission by the court cannot be

claimed as of right by any party. Such inspections are made to appreciate the evidence already on record and court is not expected to visit the site for collecting evidence."

17. The above observation has come in the context of rejection of an application for the issue of a commission for local inspection repeatedly moved by a tenant in a pending rent appeal, where an earlier similar application had been rejected by the Prescribed Authority under Section 21(1)(a) of The Uttar Pradesh Urban Buildings (Regulation of Letting, Rent & Eviction) Act, 1972 (U.P. Act No.13 of 1972) and that order had been upheld by this Court. The principle to which the learned Senior Advocate has drawn the Court's attention and is extracted hereinabove, is not a cast-iron rule to be followed in every case, where a prayer for the issue of a commission for inspection is made. A commission for local inspection can well be issued to collect evidence, which can be taken by its very nature on the spot. Reference in this connection may be made to the decision of the Madras High Court in **In re P. Moosa Kutty, AIR 1953 Mad 717**, where it has been held:

"4. The object of this local investigation is not so much to collect evidence which can be taken in Court **but to obtain evidence which from its very peculiar nature can only be had on the spot** : - 'Amulyakumar v. Anandacharan', AIR 1933 Cal 475 (A). The Court has a discretion to order local investigation or not; it is not bound to order it in all cases; - 'Ram Bricch v. Muhammad Sahib', AIR 1933 Pat 542 (B). In any event, an application under this Rule must be made before the case is closed. The form prescribed for commission for local investigation is set out in form No.9 in Appendix H, Civil P.C. The form states:

....."

(Emphasis by Court)

18. The particular objection that the learned Senior Advocate takes to the course of action adopted by the Trial Court in issuing a commission, even before there was some evidence on record that required elucidation, is best answered in the context of circumstances obtaining in the present case by the following remarks of the Orissa High Court in **K. Raghunath Rao v. Smt. Tumula Jailaxmi, AIR 1988 Orissa 30:**

"9. The aforesaid passage makes it clear that local investigation by a Commissioner can be made in exercise of the power under O.26, R.9, C.P.C. where visit to the spot is necessary. That would be a local investigation requisite or proper. When the report would be necessary to appreciate the evidence on record, a commission can be issued in proper case. Therefore, normally writ is to be issued to a Commissioner for local investigation to appreciate the evidence already recorded. **There may be departures from the normal rule for issue a commission also. For illustration : Where evidence is necessary to know the depth of water in a particular season a Commissioner can be deputed even though evidence has not been recorded. Where it is to be found as to on which plot the disputed land lies, a writ can be issued to any person to relay the same even though no evidence is required if the Court finds that the parties themselves cannot produce evidence to that effect. Since issue a writ to a person for local investigation would depend upon the facts and circumstances of each case; no hard and fast rule can be laid down.** This much can be said that the basic pre-requisite for issue of such a writ is the satisfaction of the Court that a local investigation is requisite or proper. This satisfaction is to be judicial satisfaction based on reason."

(Emphasis by Court)

19. Apparently, the suit claims the existence of the named Deities on the property in dispute and that is a kind of evidence that would fall under the exception to the normal rule for issue of a commission, spoken of in **K. Raghunath Rao**. The existence or non-existence of the Deities on the property in dispute is a matter about which the parties under the

circumstances can hardly produce evidence. Even otherwise, it is evidence which is to be found on the spot where the disputed property exists and can be best gathered therefrom. If the Court has exercised its discretion to issue a commission, so that evidence about the fact in issue can be collected, it cannot be said that the order is beyond jurisdiction of the Court under Order XXVI Rule 9 of the Code. It is not always that a commission is issued to elucidate evidence already on record. There can be cases where it is necessary to secure evidence, which is available on the spot and the parties cannot produce it. The commission issued here clearly falls into that category. Quite apart, the commission does not, in any way, impinge upon the rights of the defendant-petitioner. If anything is said in the report of the learned Advocate Commissioner that the defendant-petitioner or any other defendant to the suit feels is contrary to the spot position, he can always object to the Commissioner's report, which would then be a subject matter for decision by the Court on the basis of evidence on record.

20. The other objection canvassed by the learned Senior Advocate appearing for the defendant-petitioner, that a particular Advocate Commissioner cannot be chosen by the plaintiff, is also not well-founded. A perusal of the impugned order dated 08.04.2022 shows that the learned Trial Judge has taken note of the fact that the two Advocate Commissioners, earlier appointed from the list, had not discharged the commission. It is on that basis that the Trial Judge has remarked that the issue involved is serious, which the Advocate Commissioners are reluctant to enter upon. It is in view of the said facts that the Court has chosen to nominate in its discretion Mr. Ajay Kumar, Advocate to discharge the commission. Mr. Ajay Kumar is apparently an Advocate

available on the list of Advocates, to whom commission could be issued. The mere fact that the said Advocate Commissioner's name has been suggested by the plaintiff-respondents, would not make him a Commissioner of the plaintiffs' choice. It is the Court, that has in its discretion, taken a decision, bearing in mind the history of the previous assignment of the commission and the circumstances obtaining. There is no reason for the petitioner to cry foul about the aforesaid choice. Quite apart, the report submitted by the Advocate Commissioner is only a piece of evidence and open to dispute by the defendant-petitioner like any other. Therefore, by the nomination of a particular Advocate Commissioner, no prejudice *ipso facto* is caused to the petitioner.

21. The third limb of the objection, that has been urged on behalf of the defendant-petitioner, is that the direction to provide police aid could not have been issued unless the Advocate Commissioner reported obstruction by the defendants or from any other quarter. This also is an objection not well-founded, in view of the nature of the order that the learned Trial Judge has passed. It is not that the learned Trial Judge has said that the learned Advocate Commissioner would go to execute his commission with an armed force at his command. The Trial Judge has merely directed that in case the learned Advocate Commissioner finds it appropriate that the police force should assist him in the execution of his commission, necessary aid would be provided to him. This Court, therefore, does not find any force in the aforesaid part of the petitioner's challenge to the impugned order dated 18.04.2022.

22. So far as the objection based on the orders passed by this court in Matters under Article 227 Nos. 3562 of 2021 and

3844 of 2021 on 09.09.2021 is concerned, this Court must remark that the said order was passed in the context of a different suit, may be related to the same property and raising similar issues. The order passed in the said suit is, particularly, of no consequence to the validity of the orders impugned, because the order dated 09.09.2021 came to be passed by this Court in the context of very widely worded directions issued to the Archaeological Survey of India by the learned Trial Judge in O.S. No.610 of 1991, while the judgment involving the controversy appears to have been reserved by this Court on some issue. Here, the orders impugned hardly decide anything and are ones of a very processual kind, that would lead to a report of local inspection made by the Commissioner, together with a videographed record of it. It is hardly an order that may be said to prejudice the defendant-petitioner in a manner that they may be permitted to impugn under Article 227 of the Constitution.

23. The challenge to the order dated 05.04.2022 is also not well-founded, because it is well-known that an application under Order VII Rule 11 of the Code can be considered at any stage of the suit if the grounds disclosed by Order VII Rule 11 to reject a plaint are made out. The issue of a commission prior to orders on a motion under Order VII Rule 11 of the Code is no more than a matter of priority in the discretion of the Trial Court. The learned Trial Judge has not declined to decide the motion under Order VII Rule 11 of the Code, but merely said that the applications bearing paper Nos. 13 ऋ and 28 ऋ would be decided first in order. This is not a matter that this Court can be invited to interfere with, in the exercise of its jurisdiction under Article 227 of the Constitution.

24. Apart from whatever has been said, the jurisdiction of this Court under Article 227 of the Constitution is limited to a supervisory role and can certainly not be the resort to correct every erroneous order. In this regard, reference may be made to the decision of the Supreme Court in **Mohd. Unus v. Mohd. Mustaqim and others, AIR 1984 SC 38**, wherein it has been held:

"7. The supervisory Jurisdiction conferred on the High Courts under Article 227 of the Constitution is limited "to seeing that an inferior Court or Tribunal functions within the limits of its authority," and not to correct an error apparent on the face of the record, much less an error of law. In this case there was, in our opinion, no error of law much less an error apparent on the face of the record. There was no failure on the part of the learned Subordinate Judge to exercise jurisdiction nor did he act in disregard of principles of natural justice. Nor was the procedure adopted by him not in consonance with the procedure established by law. In exercising the supervisory power under Art. 227, the High Court does not act as an Appellate Court or Tribunal. It will not review or reweigh the evidence upon which the determination of the inferior Court or Tribunal purports to be based or to correct errors of law in the decision."

25. To like effect are the observations of the Supreme Court in **Sadhana Lodh vs National Insurance Co. Ltd. and another,(2003) 3 SCC 524**, where it has been held:

"7. The supervisory jurisdiction conferred on the High Courts under Article 227 of the Constitution is confined only to see whether an inferior Court or Tribunal has proceeded within its parameters and not to correct an error apparent on the face of the record, much less of an error of law. In exercising the supervisory power under Article 227 of the Constitution, the High Court does not act as an Appellate Court or the Tribunal. It is also not permissible to a High Court on a petition filed under Article 227 of the Constitution to review or re-weigh the evidence upon which the inferior Court or Tribunal purports to have passed the order or to correct errors of law in the decision."

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26. In the entirety of circumstances obtaining, this Court does not find it to be a case worth interference with any of the orders impugned. This petition **fails** and is **summarily dismissed**.

27. There shall be no order as to costs.

Order Date :- 21.4.2022

Anoop

(J.J. Munir, J.)