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**(2010) 05 AHC CK 0254**

**In the Allahabad High Court**

**Case No : Miscellaneous Single No. 3207 of 2010**

Hausila Prasad Tripathi

APPELLANT

Vs

U.P.Avas Evam Vikas Parishad through Housing Commissioner

RESPONDENT

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**Date of Decision : 26-05-2010**

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17

Uttar Pradesh Avas Evam Vikas Parishad Adhiniyam, 1965 — Section 88(2)

**Citation : (2010) 05 AHC CK 0254**

**Hon'ble Judges : Shri Narayan Shukla, J**

**Final Decision : Disposed Of**

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## **Judgement**

Shri Narayan Shukla, J.—Heard Mr. S.K. Mehrotra, learned counsel for the petitioners and Mr. Mahesh Chandra, learned counsel for the opposite party no. 1.

2. Being aggrieved with the order dated 3rd of May, 2010 passed by the District Judge, Lucknow in Civil Revision No. 70/2009, petitioners have filed the present writ petition.

By means of order impugned learned District Judge has set aside the order dated 10th of February, 2009 passed by the Addl. Civil Judge (JD) court no. 39, Lucknow and issued direction to decide issue no. 3 afresh in light of observations made in body of the judgement. By means of order dated 10th of February, 2009 the learned Addl. Civil Judge postponed to decide issue no. 3, which is whether suit is barred by provisions of Section 88(2) of the U.P. Avas Evam Vikas Parishad Act, 1965.?

3. The learned counsel for the petitioners submit that though the petitioners have already served the notice under Section 88(2) of the Act on 18th of September, 1996 before institution of suit and thereafter he instituted the suit on 22nd of November, 1996, but according to him the same was escaped from mentioning in the pleading of the plaint by the learned counsel for the petitioner/plaintiff, who is representing his case, whereas now he has moved an application under Order 6 Rule 17 for amendment of the plaint to bring the notice on record,

which is pending consideration before the Trial Court. In support of his submission he has brought on record the notice as annexure no. 4, which has been received in office of the opposite party no. 1 on 18th of September, 1996. In this back ground he submits that this application moved under Order 6 Rule 17 may be dealt with first and only thereafter the issue no. 3 be taken up for decision by the Trial Court otherwise the purpose of the application for amendment shall be frustrated.

4. Mr. Mahesh Chandra, learned Counsel for the Parishad strongly opposed the submission of learned counsel for the petitioners and submitted that it is highly belated as the defendant filed the written statement in 1998, whereas suit is pending since 1996. The petitioner/plaintiff has come forward to move the application for amendment only in 2010. He further submitted that this notice, which has been proposed to be brought on record by way of amendment is absolutely a manufactured document as if had these been available with the petitioners, it would have been mentioned in the pleadings but it is not so. He further submits that even in this suit it is permitted to the petitioners under Order 23 Rule (3) to withdraw the suit and file afresh by removing defect in the plaint, accordingly he submits that there is no error in the order.

5. Upon perusal of the notice dated 18th of September, 1996 I find that there is endorsement of the officer of the opposite party no. 1, who has received notice, which establishes that the petitioner has served the notice under Section 88(2) of the Act before institution of the suit, but indisputedly it is not a part of the pleading for which the petitioner has moved the application for amendment, therefore, I am of the view unless the fact of notice is permitted to be brought on record through the proposed amendment the same cannot be considered .

6. Under the facts and circumstances of the case, I feel it appropriate to issue direction to the Trial Court to entertain the application under Order 6 Rule 17 before proceeding to decide issue no. 3 so that the issue in question can be decided with the result of the said application.

7. Therefore, I hereby modify the order impugned passed by the District Judge concerned to the extent that the issue no. 3 shall be taken into consideration only after considering the application for amendment and passing an appropriate order thereon accordingly. It is also open to the Trial Court to decide the question whether the notice under Section 88(2) of the Act was required in the matter or not.

8. With the aforesaid observations/directions the writ petition is disposed of finally.