

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

Writ Petition No.35081 of 2012

ORDER:

This writ petition under Article 226 of the Constitution of India is filed seeking the following relief/s:

'....to issue an appropriate Writ, order or directions mostly one which is in the nature of a Writ of mandamus, declaring the Proceedings ROC No.2393/2011-G2, dated 8-9-2012 of the 1st respondent as illegal, irregular, arbitrary, unreasonable, and unsustainable and set aside the same directing the respondents to implement the proceedings ROC No.2393/2011-G2, dated 9-3-2012 for removal of the unauthorized walls constructed by the Respondents 2 to 4 in Aravinda Asramam Road, YMR Colony, Proddatur Town, YSR District and pass such other order....'

[Reproduced verbatim]

2. I have heard the submissions of the learned counsel for the writ petitioners, the learned Standing Counsel appearing for the 1st respondent and the learned Senior Counsel appearing for the unofficial respondents.

3. The relevant material averments in the writ petition, in brief, are as follows:

The petitioner and his wife are the lawful owners of the buildings bearing door nos.3/559-1 and 3/559-2 situated behind the Arvind Ashramam Street of YMR Colony, Proddatur Town of Kadapa District. In the said buildings, two educational institutions viz., Sri Chaitanya High School and Sri Veda Vyasa Public School are being run. On the Western side of the school buildings, there is a passage running from South to North for ingress and egress of the residents of the locality and also the students of the said educational institutions. The width of the said passage is 13 feet and the same was affirmed by the vendors of the petitioner and others about 30 years

back. The said passage is being used as a rasta/way for ingress and egress of the residents of the locality and the students of the educational institutions. The unofficial respondents 2 to 4 after obtaining rectification deed dated 18.08.2009 in respect of the land in Sy.no.307/2A and having thus got rectified the recitals in the original sale deed dated 27.11.1997 in their favour had tried to encroach upon the said rasta highhandedly. The petitioner had successfully resisted the said attempt of the respondents 2 to 4. The petitioner is the President of Sri Veda Vyasa Educational Institutions. The petitioner is also functioning as the Vice President of Aravinda Nagar Residents Welfare Society formed for the well keeping of the amenities of the colony and the welfare of the residents. The said respondents had filed a suit in OS.No.250 of 2009 against the petitioner on the file of the Court of the learned Senior Civil Judge, Proddatur for declaration of title and a perpetual injunction and for removal of the constructions made in the suit property and for recovery of vacant possession of the same. The property involved in that suit was described in the schedule of the plaint as a property of an extent of 1030 Square feet on the Western side of the school building. The public rasta is obviously the subject property in the above said suit. According to the said plaint averments, the said property is located in Sy.no.307/2A and the 2nd 3rd and 4th respondents herein are respectively owners of 2 ½, 5 and 5 ½ cents each under their respective documents. It is alleged in the said plaint that this petitioner had attempted to encroach into the land by opening a wicket gate in the compound wall on the Western side and by constructing a pial and that the property is the private property of the said respondents and that there is no public rasta. This petitioner having filed a written statement and a plan is contesting the said suit. No interlocutory order of injunction was granted in that suit in favour of the respondents 2 to 4. However, they had constructed the wall upto 5 feet height across the passage/rasta with the help of the local police and with political influence and the support of rowdy elements and by not listening to the objections raised by the petitioner. The construction of the said wall is causing obstruction and preventing the ingress and egress to the school building.

3. The respondents 5 to 9 are the legal representatives of the deceased 2nd respondent. The case of the respondents 2 to 4 as could be culled out from the material record, in brief, is this:

The said respondents are the absolute owners of the land in an extent of Ac.0.20 cents forming part of Sy.no.307/2A of Proaddatur Municipality of Kadapa District. They are residing away from their said subject site and are often visiting their property as a matter of caution. On the Eastern side of their said site, there is the school building. They have got surveyed their land through a licenced surveyor and on that they came to know that the petitioner, who is their neighbor, had encroached into their property. The petitioner had made constructions by making encroachment and by paying a deaf ear to their explorations. Therefore, they were constrained to file OS.No.250 of 2009 for declaration of title, recovery of possession and mandatory injunction for removal of illegal constructions insofar as the portion of their property that was encroached. The plaint schedule in the said suit is shown as 1030 Square feet excluding the remaining site of the respondents 2 to 4 herein. The petitioner herein, having sensed that he has no case to show that he had not encroached upon the land of the respondents 2 to 4, had resorted to making complaints to the municipality alleging that the respondents 2 to 4 are attempting to make construction of a compound wall without permission of the 1st respondent municipality and that the proposed compound wall is being constructed encroaching the rasta and blocking the ingress and egress. The subject property where the wall was proposed to be constructed and the property covered by the civil suit filed by the respondents 2 to 4 and the remaining property is the property of the respondents 2 to 4. There is no public rasta. The compound wall was constructed within the limits of the property of the respondents 2 to 4 and in their land and, therefore, the alleged blockage of rasta and the petitioner suffering any loss does not arise. The notice given to the respondents was withdrawn by the 1st respondent after considering the facts and the position of law and as the matter is pending before a competent civil Court. The Tahasildar concerned had earlier inspected and clarified that there was no rasta. The contention that the wall

was constructed in the middle of a public rasta and it is preventing the passage of traffic is false. No permission is required for the construction of the subject wall. Since the civil suit is filed, the issue involved has to be decided by a civil Court and not the municipality. The writ petitioner has to approach the civil Court.

4. On a reading of the case of the writ petitioner and the defence of the unofficial respondents, stated supra, it is clear that the dispute is about a wall constructed by the respondents 2 to 4 and the said wall allegedly blocking an alleged passage and the withdrawal of the proceedings initiated by the Municipality in regard to the said wall against the respondents 2 to 4. The writ petitioner claims that the wall is constructed in a public rasta and it is preventing the ingress and egress to the school building of the writ petitioner. On the other hand, the unofficial respondents 2 to 4 submit that there is no public rasta and that the wall was constructed within the limits of their property and in their land and that the petitioner himself had made constructions by making encroachment into their property and by paying a deaf ear to their explorations and that, therefore, they had already filed OS.No.250 of 2009 for declaration of title in respect of the subject matter of that civil suit and for recovery of possession and mandatory injunction for removal of illegal constructions made in the property of the unofficial respondents and that, therefore, the civil Court is having sesin over the matter and that the municipality had rightly withdrawn the proceedings initiated against them.

5. In this backdrop of respective cases and the crux of the dispute involved in the */is*, it is necessary to examine the chronology of events, which are relevant and which are as follows.

Feeling aggrieved of the wall that was constructed by the respondents 2 to 4, the writ petitioner had earlier filed W.P.No.30328 of 2011 against the police concerned and had lodged a complaint on 01.11.2011 with the 1st respondent requesting to take appropriate action immediately for removal of such unauthorized structure raised in the middle of the public rasta. On

14.11.2011, the Commissioner of the 1st respondent municipality had issued three separate provisional orders to the respondents 2 to 4 as per the provision of Section 228(1) of the Andhra Pradesh Municipalities Act ('the Act', for brevity) informing them by the said orders that they have not taken permission for construction of compound wall and that the said construction is illegal and that the respondents 2 to 4 are required to stop the constructions immediately and remove the constructions, which are already made against the building rules, and not to make any constructions of any structures without applying for permission from the municipality. In the said orders, it was also stated that failing compliance, action would be taken against them as per the provisions of the said Act. Subsequently, as there are no replies submitted by the respondents 2 to 4 to the said provisional orders issued by the municipality, the municipality had issued confirmation notices dated 24.11.2011 to the respondents 2 to 4 confirming the provisional notices issued under Section 228(3) and the said respondents were demanded to remove the structure within seven days on receipt of the said notices. It was also stated in the said notices that on their failure to do so, action would be initiated by filing cases against them in the appropriate court under Section 340 of the Act and that the constructions, which were illegally made, will be removed by the department at the cost of the respondents and that the costs for removal of the constructions would be recovered from the respondents 2 to 4 and that the municipality will not be responsible for any loss caused while removing the said illegal constructions. Subsequently, as there was no further action from the municipality, the petitioner had sought information in the matter from the municipality under the Right to Information Act. On that the Public Information Officer, Proddatur municipality issued an endorsement dated 19.12.2011 stating *inter alia* that pursuant to the oral complaint dated 26.10.2011 of the petitioner, the Town Planning Supervisor had inspected the site and had found that the respondents 2 to 4 had raised the wall in the open site at Sri Chaitanya school and Sri Veda Vyasa school, YMR colony without obtaining permission from the municipality and hence, the work was stopped on 26.10.2011 itself and that subsequently provisional notices have been issued on 14.11.2011 asking for removal of the unauthorized constructions

immediately and further stating that on their failure to do so action will be taken as per the provisions of the Act and that as there was no response from the above individuals the municipality had further issued confirmation notices on 24.11.2011 informing that under Section 340 of the Act charge sheets will be filed in the local court and that the unauthorized constructions will be removed departmentally. Having thus secured the information and being aggrieved as the municipality had failed to take further action in the matter, the petitioner had got issued a legal notice dated 30.12.2011 to the 1st respondent municipality to take immediate further action. On the failure of the 1st respondent to take appropriate action, the petitioner had filed WP.No.1911 of 2012 on 24.01.2012 in this Court seeking to declare the inaction of the 1st respondent municipality as illegal, improper and arbitrary. The said writ petition was disposed of by an order dated 27.01.2012. The operative portion of the said order reads as follows:

'In that view of the matter, without going into the merits of the case, this writ petition is disposed of directing the 1st respondent to take further action, in accordance with law, by giving due notice to the petitioner as well as to the unofficial respondents, within a period of four weeks, from the date of receipt of a copy of this order.'

Referring to the above said orders of this Court, the 1st respondent municipality had issued notice dated 09.03.2012 to the respondents 2 to 4 directing them to remove the compound wall within seven days from the date of the receipt of the notice and also stating that otherwise the municipality will take action as per law. In the said notice dated 09.03.2012 the municipality had *inter alia* informed the respondents 2 to 4 that inspite of a direction to remove the unauthorizedly constructed wall, the respondents 2 to 4 have not come forward either to take permission from the municipality or to remove the unauthorizedly constructed wall. On 30.03.2012 the municipality had also addressed a letter to the Station House Officer, III Town Police Station, Proddatur to provide sufficient police bandobast in order to maintain law and order at the time of the removal of the unauthorized compound wall raised by the respondents 2 to 4. On receiving the notices dated 09.03.2012 issued by

the 1st respondent municipality, the respondents 2 to 4 had filed W.P.No.10010 of 2012 in this Court against the municipality and the petitioner herein, assailing the said notice dated 09.03.2012 and for setting aside the said proceedings alleging *inter alia* that the 1st respondent municipality is trying to demolish the wall without considering the representation and notice dated 31.03.2012. This Court by orders dated 11.04.2012 had disposed of the said writ petition *inter alia* holding as follows:

'In the result, the Writ Petition is disposed of. However, the 1st respondent is directed to pass appropriate orders in compliance of the impugned notice dated 9.3.2012, which was issued not only to the petitioners, but also to the 2nd respondent herein after considering the representation dated 18.3.2012; legal notice dated 31.3.2012 issued on behalf of the petitioners and also after hearing the petitioners as well as the 2nd respondent. Till such time, the 1st respondent shall not demolish the compound wall of the petition schedule property, if it is existing as on today.'

Feeling aggrieved of the orders of this Court in the said writ petition, the petitioner herein had filed a writ appeal in WA.No.987 of 2012 and a Division Bench of this Court, by orders dated 14.08.2012 while dismissing the said writ appeal had held that there is no flaw committed by the Hon'ble Single Judge in passing the orders. In the given facts and circumstances, the Division Bench of this Court directed the authorities to decide the question as directed by the Single Judge within a period of four weeks from the date of orders in the writ appeal. Enclosing the copy of the order of this Court in the writ appeal, the petitioner herein had submitted a representation on 23.08.2012 to the 1st respondent municipality to take immediate action. The 1st respondent municipality by proceedings in Roc.2393/11-G2 dated 08.09.2012 passed an order withdrawing the notices issued in Roc.2393 of 2011-G2, dated 09.03.2012 and 30.03.2012 on the ground that the civil suit is pending. Questioning the said order, this present writ petition is filed by the writ petitioner.

6. In support of this writ petition, the further case of the writ petitioner is this: 'The pendency of the suit cannot be a ruse for withdrawal of the proceedings dated 09.03.2012 and 30.03.2012 by the 1st respondent. The final order *vide* proceedings dated 09.03.2012, when once passed, is final

and it must be implemented, if necessary, by taking police protection for demolition. The 1st respondent has no power under facts and in law to withdraw, by the impugned proceedings, the final orders. The 1st respondent has no power of review either. Therefore, the impugned proceedings, which are passed on the ground that a civil suit is pending and without jurisdiction, are unsustainable.’ As already noted, the respondents 2 to 4 are supporting the proceedings impugned in the writ petition and the 1st respondent is also contending that the proceedings impugned are valid and brook no interference.

7. I have given earnest consideration to the facts, the contentions and the chronology of events, which lead the municipality to withdraw the earlier notice by the proceedings, which are impugned. The narration of the facts in the impugned order/proceedings would show that one of the grounds for dropping the action is that the municipality will not take any action as the construction of the compound wall alone of a height of less than two meters does not require any construction permission. However, on this aspect, the learned counsel for the petitioner would contend as under: ‘The exception carved out in the definition under Section 2(3) of the Act has no application to the facts of the case as the said definition deals with a boundary wall alone not exceeding a certain height. However, the wall in question is a building as the explanation to section 209 of the Act lays down that the building in that sub-section of that section shall include a wall or a fence of whatever height bounding or abutting on any public street and as the wall in question was constructed on a public rasta preventing passage of traffic. Therefore, the wall in question cannot be called as a boundary wall alone around a building or an open site.’ ***Per contra***, the learned senior counsel for the unofficial respondents would submit that the contention of the writ petitioners is not well founded and that the 1st respondent was right in holding that the wall in question that was constructed at the fringe of the property of the respondents 2 to 4 is a boundary wall and that the said wall, which is of a height less than two (02) meters, required no permission from the municipality.

8. Now, it is necessary to refer to the relevant definitions under the Municipalities Act.

‘2(3) ‘building’ means any structure constructed of any material for any purpose, and includes a house, out-house, shop, stable, latrine, shed, hut, wall (other than a boundary wall not exceeding two metres in height), or any part of such building.’

The definition of the building excludes from its purview boundary wall not exceeding two meters in height.

Section 209 deals with application to construct or reconstruct buildings. The said provision of law reads as under:

‘209. Application to construct or reconstruct buildings: - (1) If any person intends to construct or reconstruct a building other than a hut, he shall send to the Commissioner –

(a) an application in writing for the approval of the site, together with a site plan of the land, and

(b) an application in writing for permission to execute,

the work together with ground-plan, elevations and sections of the building, and a specification of the work.

(c) a copy of the title deed of the land duly attested by a Gazetted Officer of the Government together with an urban land ceiling clearance certificate or as the case may be, an affidavit referred to in section 184.

Explanation: ‘Building’ in this sub-section shall include a wall or fence of whatever height bounding or abutting on any public street.

(2) Every document furnished under sub-section (1) shall contain such particulars and be prepared in such manner as may be required under rules or bye-laws.’

The explanation appended to this provision makes it clear that ‘building’ as defined in the sub-section (1) includes a ‘wall or fence of whatever height bounding or abutting any public street’. It is not the case of the either of the parties herein that the wall in question was bounding or abutting on any public street. On the other hand, the specific case of the writ petitioner is that it is constructed over and across the public Rasta, which fact is being

disputed by the unofficial respondents 2 to 4. A reading of the order impugned would show that it is a detailed and reasoned order. In the said orders, while adverting to the pendency of the civil suit filed by the unofficial respondents against the petitioner, a conclusion was arrived that no action is required in the matter in view of the pendency of the said civil suit as 'the construction of the compound wall alone of a height of less than two meters does not require the permission under the building Rules laid down in A.P. Municipalities Act, 1965.' It was also further noted in the said orders as follows: **'As such, it is ascertained that the Compound Wall alone under reference raised is below the height of less than 2 Mts., as such it does not include any Public Rastha as per street survey record, the representations/petitions of Sri B. Narasimha Reddy, are not considerable in view of pendency of OS.No.250/2009 in the Hon'ble Local Court, Proddatur. Therefore, the action initiated by this respondent Municipality in the impugned notices Roc.No.2393/2011 – G2, Dt.09.03.2012, and 30.03.2012 shall be deemed to have been dropped'**. [Reproduced verbatim]. Thus, in the impugned order dated 08.09.2012 a finding was also recorded that the subject place where the wall in question was constructed does not include a public rasta as per the street survey record. The writ petitioner on the one hand contends that the wall in question is constructed blocking a public rasta. On the other, the unofficial respondents contend that the wall was constructed well within the limits of their property and in their land. Therefore, whether there was a public rasta in existence or not is a disputed question of fact. Since the writ petitioner is contending that the wall was constructed blocking a public rasta and preventing ingress and egress, the said contention being a question of fact, the burden squarely rests upon the writ petitioner to *prima facie* establish the said fact. In the first place, it is apt to note that the unofficial respondents complain against the petitioner that the petitioner had made constructions of his building by encroaching into their property. They had already filed a civil suit in regard to that property in dispute for declaration of title and recovery of possession and other appropriate reliefs and the writ petitioner is resisting the said suit. Hence, the questions raised in the writ petition appear to be serious

disputed questions of fact. Be that as it may, no documents of title relating to the school buildings of the writ petitioner are produced to *prima facie* show the existence of any public path way in question abutting to their school buildings, though it is averred in the writ petition that the width of the said passage is 13 feet and the same was affirmed by the vendors of the petitioner and others about 30 years back. No public record like a certified copy of a street survey record from the municipality or the approved lay out, if any, of the locality is also filed to establish the existence of the path way in question. The material papers filed by the unofficial respondents on a perusal would show that the Mandal Surveyor, Proddatur had inspected the property involved in the *lis* on 06.11.2011, as per the orders of the Tahasildar, Proddatur and the Commissioner, Proddatur Municipality and had submitted a report to both of them. The copy of the said report discloses that the Veda Vyas High School is situate in Sy.no.302/1 of Proddatur and the neighboring survey nos.307/2 and 307/1 to 4 are in existence after sub division and that in the same there was no sub division whatsoever for the purpose of rasta and that the land is a patta land as per RSR and that it is for the municipality to examine whether any lay out was approved by the municipality for finding out whether there was any rasta before taking appropriate action in the matter. Therefore, by placing reliance on this report, the learned senior counsel for the unofficial respondents would submit that as per the revenue record and municipal record, there is no road or rasta and, therefore, there was no separate sub division in that regard for the purpose of rasta or road. He would also submit that admittedly, there is no approved lay out showing the subject property or any part thereof as a road or rasta. Thus, from the aforesaid reasoned discussions, it is manifest that the writ petitioner could not *prima facie* show the existence of a rasta as being claimed and that there is a serious dispute in regard to the encroachment of the property of the unofficial respondents by the petitioner and the same is the subject matter of a civil suit. In the concluding portion of the impugned orders, the learned Commissioner, Proddatur Municipality, had noted as follows: **'In the above circumstances, the suit is pending before the Senior Civil Judge, Praddatur for title declaration which is mandatory for taking further**

action. Therefore, the action initiated by this respondent Municipality in the impugned notices Roc.No.2393/2011 – G2, Dt.09.03.2012, and 30.03.2012 is withdrawn in view of pendency of declaration of title over petition schedule property in the Hon'ble Senior Civil Judge Court, Praddatur in OS.No.250/2009.' [Reproduced verbatim]. In the facts and circumstances of the case coupled with the reasoned findings supra, the finding recorded in the impugned proceedings cannot be faulted. Hence, the contention of the writ petitioner that the pendency of the suit cannot be a ruse for withdrawal of the proceedings dated 09.03.2012 and 30.03.2012 by the 1st respondent cannot be countenanced as in the facts and circumstances of the case neither a *prima facie* case was made out in regard to existence of a rasta nor was a case made out for deciding in this writ proceeding a disputed fact over which a competent civil Court is having sesin over the matter.

9. Dealing now with the next contention that the 1st respondent has no power under facts and in law to withdraw the final orders and that the 1st respondent has no power of review either and that, therefore, the impugned proceedings, which are passed by exercising a power which is not vested and without jurisdiction, are unsustainable, it is necessary to restate that this Court in the writ orders dated 11.04.2012 in WP.No.10010 of 2012 had directed the 1st respondent to pass appropriate orders in compliance with the impugned notice dated 09.03.2012 only after considering the representation dated 18.03.2012, legal notice dated 31.03.2012 and also after hearing the petitioners as well as the 2nd respondent therein and that till such time the 1st respondent shall not demolish the compound wall of the petition schedule property, if it is in existence as on that day. The said orders were confirmed in W.A.No.987 of 2012. Therefore, the 1st respondent is bound to follow the writ orders of this Court and he had accordingly followed the same and passed the orders, which are impugned. As a sequel, it must be held that the 1st respondent is well within his powers in passing the orders dated 08.09.2012 withdrawing the notice dated 30.03.2012 on the ground that the civil suit is pending and on the further observation that the wall in question

being a compound wall alone of a height of less than two meters does not require any construction permission. Therefore, the writ petitioner cannot be heard to say that such orders are passed without any power or jurisdiction.

10. Having regard to all the reasons, this Court finds that the proceedings in Roc.No.2393/11/G2, dt.8.9.2012 of the 1st respondent brook no interference and no directions as sought for in the writ petition need be granted. Accordingly, this Court finds that there is no merit in the writ petition and that the writ petition is liable to be dismissed.

11. In the result, the Writ Petition is dismissed leaving it open to the Municipality to proceed in the matter, if necessary and if warranted, in strict accordance with the procedure established by law subject to the final result of the pending civil suit between the petitioner and the unofficial respondents.

Miscellaneous petitions, pending if any, in the writ petition shall stand closed.

M. SEETHARAMA MURTI, J

20th January, 2016
Vjl