

THE HON'BLE SRI JUSTICE U. DURGA PRASAD RAO

Civil Revision Petition No.5957 of 2016

ORDER:

This CRP is filed by the petitioners/plaintiffs aggrieved by the order dated 28.09.2016 in I.A.No.353 of 2014 in O.S.No.120 of 2014 on the file of Principal Junior Civil Judge, Proddatur whereunder the trial Court dismissed the petition filed by the petitioners under Order XXVI Rule 9 CPC seeking appointment of an advocate commissioner to make personal inspection of the brick wall with a foundation of cement beam upto a height of 5 feet with a width of 9 inches and length 184 ½ feet situated near the Nadimpalli street of Proddatur Municipality, Proddatur constructed by the plaintiffs.

2) Petitioners are plaintiffs in O.S.No.120 of 2014 which suit was filed by them against the respondent—Municipality, Proddatur seeking perpetual injunction restraining the defendant from interfering with the peaceful possession and enjoyment of the suit schedule property which is a brick wall with foundation as mentioned supra. Their case is that towards eastern side of the plaintiffs' houses and vacant sites, there was a common passage left by them which runs in North—South direction and joins public rasta on the southern side which is the exclusive property of the plaintiffs and none others have right over it. Previously there was a wall on the eastern side of the passage which was well within the site of the plaintiffs. In course of time, the said wall which was planted with slabs was collapsed. Hence, the plaintiffs by making

contribution of about Rs.1,20,000/- raised permanent wall ABCD (mentioned in the plaint plan). The said wall was raised by the plaintiffs since the adjacent owners on the further eastern side were bent upon knocking away their property. The adjacent owners who constructed residential houses towards further eastern side of the suit schedule wall kept quite till completion of wall shown as ABCD in plaint plan and now they were making hectic efforts through the defendant—Municipality to see some how the said wall was demolished.

Hence the suit.

3) Along with the suit petitioners/plaintiffs filed I.A.No.353 of 2014 for appointment of an advocate commissioner to note down the physical features of the wall. The respondent/Municipality, it appears, reported no counter. The trial Court having observed that suit was filed for permanent injunction and contention of the petitioners was that respondent—Municipality was trying to remove the said wall at the instance of third parties and respondent—Municipality even did not file its written statement and the trial was also commenced and PWs.1 and 2 were examined and in those circumstances there was no need to appoint advocate commissioner and accordingly dismissed the petition.

Hence the CRP.

4) Heard arguments of Sri K.Sita Ram, learned counsel for petitioners. Notice was served on the respondent—Municipality but none appeared on its behalf.

5) The main plank of argument of learned counsel for petitioners is that though respondent—Municipality did not file written statement in the suit, but it participated in the subsequent proceedings and when the plaintiffs' examined PWs.1 and 2, the respondent/defendant cross-examined them. Be that as it may, since the suit was filed by the plaintiffs, the burden is on the plaintiffs to establish that the subject wall was constructed within their property and neither the defendant nor others have any right over the said wall and for establishment of said fact, appointment of an advocate commissioner was very much required as otherwise, mere filing of documentary evidence or photos will not give any picture to the trial Court to decide whether the wall was constructed within the plaintiffs site or not. Therefore, appointment of commissioner is essential, but the trial Court dismissed the petition without noticing the requirement.

6) There is merit in the submission of learned counsel for petitioners. The petitioners being the plaintiffs, the burden of proof will be always on them to establish that plaint schedule wall which they constructed was within their site. For this purpose appointment of commissioner is essential one. Though the respondent/defendant did not file written statement, but the record shows that they have participated in the trial. In my considered view, the trial Court was not right in dismissing the petition.

7) Accordingly, this CRP is allowed and the impugned order dated 28.09.2016 in I.A.No.353 of 2014 in O.S.No.120 of 2014 is set aside and

the trial Court is directed to appointment an advocate commissioner to localize the ABCD wall constructed by the plaintiffs and to note its physical features and file his report. The trial Court shall direct the commissioner to execute the warrant after receiving work memos from both parties and file his report. The entire exercise shall be completed within two months from the date of receipt of copy of this order.

As a sequel, miscellaneous petitions pending, if any, shall stand closed.

Dt. 01.02.2017
Murthy

U. DURGA PRASAD RAO, J

