

THE HON'BLE SRI JUSTICE N.BALAYOGI

CIVIL REVISION PETITION No.6143 of 2017

ORDER:

Though the revision is listed under the caption 'for admission', both the counsel advanced arguments in the main revision itself and therefore, the revision itself is taken up for disposal.

2. This revision under Article 227 of Constitution of India is filed being aggrieved by the orders in I.A.No.1108 of 2017 in O.S.No.138 of 2011 dated 31.10.2017 on the file of Principal Junior Civil Judge, Bobbili contending that allowing of the petition filed under Order 6 Rule 17 r/w Section 151 C.P.C. is contrary to law and the trial Court ought not to have entertained the petition as it was filed at belated stage that too when the suit is coming up for trial. No opportunity was given to the petitioner to file his counter and contest the said I.A.

3. It is further contended that I.A.No.1108 of 2017 was filed by the plaintiffs-respondents 1 to 3 herein on 30.10.2017, notice was served on the counsel for the first defendant-petitioner herein, wherein he endorsed seeking time for counter. The trial Court without giving opportunity for filing counter, on the very next day allowed the I.A.

4. On the other hand, the counsel for the plaintiffs-respondents 1 to 3 herein contended that since the petitioner herein along with other defendants encroached the passage and constructed the building, originally, they filed the suit for permanent injunction and

now, by filing the impugned I.A., sought for amendment of the relief from permanent injunction to mandatory injunction.

5. Now, the point that arises for consideration is 'whether the order of the trial Court is legal and can be sustainable under law?

6. The learned counsel for the petitioner-first defendant contended that the trial Court passed the impugned order without giving opportunity for filing counter and hearing the petitioner and allowed the I.A. on the very next day of filing of the petition. Whereas, the learned counsel for the plaintiffs-respondents 1 to 3 herein contended that notice was given to the petitioner herein, but he failed to file a counter and therefore, the trial Court allowed the petition.

7. A perusal of the record goes to show that the plaintiffs-respondents 1 to 3 herein filed I.A.No.1108 of 2017 in O.S.No.138 of 2011 under Order VI Rule 17 r/w Section 151 C.P.C. seeking amendment of the plaint. A notice was served to the counsel for the petitioner herein on 30.10.2017 and the counsel endorsed the same and prayed time for filing counter. Further the docket proceedings in I.A.No.1108 of 2017 shows that on 30.10.2017 the petition was placed before the officer for consideration and initially, it was endorsed as 'for counter & disposal on 31.10.2017' with initial. But, however, it was struck off. Again, on 31.10.2017, the trial Court endorsed as:

"Respondent called absent. No representation and counter not filed. Treated as no counter."

8. It is also an undisputed fact that in the written statement, the first defendant-petitioner herein stated that he recently constructed

according to his sale deed measurements, due to the reason, the plaintiffs having eyesore and as the plaintiffs 1 & 2 have inconvenience to reach to Jangala veedi, they constructed their house with the encroachment of 3 feet rasta. It is also clear from the order that an Advocate-Commissioner was appointed, who filed a report mentioning that the first defendant occupied some part of schedule mentioned rasta and made constructions towards North of the schedule rasta, which led to filing of the present petition.

9. Admittedly, no opportunity was afforded to the petitioner herein to file his counter and contest the matter. If the impugned order is allowed to stand, much prejudice will cause to him. In such circumstances, I feel it just and proper, in the interest of justice, to remand the matter to the trial Court.

10. Accordingly, the C.R.P. is allowed while setting aside the order dated 31.10.2017 in I.A.No.1108 of 2017 in O.S.No.138 of 2011 on the file of Principal Junior Civil Judge, Bobbili and the matter is remanded to the trial Court with a direction to decide the I.A. afresh after affording opportunity to the petitioner herein to file counter and contest the matter. The petitioner herein is directed to file his counter within 15 days before the trial Court after receipt of the copy of this order by the trial Court and the trial Court shall dispose of the I.A. within a period of one month. No costs.

Consequently, Miscellaneous Petitions pending, if any, shall stand closed.

JUSTICE N.BALAYOGI

23rd January 2018

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