

THE HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO

Civil Revision Petition No.1575 of 2018

ORDER :

This Civil Revision Petition is filed under Article 227 of the Constitution of India challenging the order dt.18.04.2017 passed in Interlocutory Application No.177 of 2016 in Interlocutory Application No.37 of 2016 in Original Suit No.33 of 2016 on the file of Principal Junior Civil Judge, at Kothagudem.

2. The petitioners herein are plaintiffs in the above suit.
3. The petitioners filed the said suit against respondent to declare that they have got easementary right over the alleged common drain shown in the suit schedule property for draining out house water from their house, and also sought a perpetual injunction restraining the respondent from interfering with the use of the alleged common drain by them.
4. Written Statement was filed opposing the suit claim.
5. The petitioners filed Interlocutory Application No.37 of 2016 under Order XXVI Rule 9 of Civil Procedure Code, 1908 seeking appointment of an Advocate-Commissioner for local inspection of the suit schedule alleged common drain to ascertain whether there is any other drain connection to the house of petitioners for draining out used water other than the common drain by taking necessary photographs.

6. Counter-affidavit was filed by respondent opposing the said application.

7. By order dt.18.04.2017, the Court below dismissed the said application stating there is no dispute about the existence of the drain and it is for petitioners to prove that it is a common drain, and they have to depend upon their own resources, and cannot seek help of the Court. It also observed that the question whether any other drain is connected to the house of petitioners for draining out the used water from the house of petitioners other than the common drain is a negative fact, and cannot be ascertained by appointing an Advocate-Commissioner.

8. Assailing the same, the present Civil Revision Petition is filed.

9. Heard the counsel for petitioners, and Sri S. Madan Mohan Rao, counsel for respondent.

10. The counsel for petitioners contended that while the existence of the drain may not be in dispute, the existence of other means to drain out used water from the house of petitioners is a fact which is available only on the spot and no amount of oral evidence can establish the said fact, and that was why an Advocate-Commissioner was required to establish whether there is any other access for draining out used water from the house of petitioners.

11. The counsel for respondent supported the order passed by the Court below and stated that if an Advocate-Commissioner is

appointed, it would amount to collection of evidence. He contended that at the time when permission would have been granted to the father of petitioners, the Municipal Authorities would have insisted on the property having a separate drain; and merely because the parties are cousins, the petitioners cannot take advantage of the existence of the drain in the property of respondent and use it for their purposes.

12. I have noted the contentions of both sides.

13. The issue in this suit is whether the drain existing in the property of respondent is a common drain and whether petitioners have an easementary right to drain out their used water through the said common drain.

14. It is not in dispute that parties are related to each other and are cousins.

15. The existence of other means to drain out used water from the house of petitioners is a relevant factor to be taken into account in deciding the above issue.

16. The Court below is not correct in stating that it is a negative factor which cannot be proved by appointing an Advocate-Commissioner.

17. In my opinion, the object of local inspection under Order XXVI Rule 9 of Civil Procedure Code, 1908 is to collect evidence at the instance of the party who relies on the same, and which evidence

cannot be taken in Court, but can be taken only from the peculiar nature on the spot.

18. In the instant case also, an inspection by the Advocate-Commissioner would reveal whether petitioners have access to another drain from which they can drain out their used water and would assist the Court in coming to a proper conclusion in the suit.

19. The Court below, in my opinion, has failed to exercise jurisdiction vested in it by refusing to appoint an Advocate-Commissioner.

20. Accordingly, the Civil Revision Petition is allowed. No order as to costs.

21. As a sequel, miscellaneous petitions pending if any in this Civil Revision Petition, shall stand closed.

JUSTICE M.S.RAMACHANDRA RAO

Date: 12.07.2019

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