

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 603 OF 2007

- 1] Smt. Maria Pereira,
Major in age, housewife;
- 2] Shri. Neville Pereira,
son of Maria Pereira,
major in age ; and
- 3] Shri. Lyndon Pereira,
son of Maria Pereira, major in age,
All residents of House No. 221,
near M. P. Bar, Fatorda, Margao,
Goa.

... Petitioners.

Versus

Smt. Dolorosa Christina Rodrigues,
(now deceased), represented
through her legal heirs, namely:

- 1 (a) Shri. Dennis Rodrigues,
major of age, unmarried ; and
- 2(b) Shri. Lambert Rodrigues,
major of age, service;
Both represented by their Attorney,
Shri. Minguel Afonso, resident of
Borda, Margao, Goa.

... Respondents.

Mr. Anthony D'silva, Advovate for the petitioners.

None for the respondents.

Coram :- U. V. Bakre, J.

Pronounced on : - 12th February, 2015.

ORAL JUDGMENT :

Heard Mr. D'silva, learned counsel for the petitioners.

2. By this petition, the petitioners have challenged the order dated 24/11/2007 passed by the learned Ad-hoc District Judge – 2, (FTC – II), Margao (Appellate Court), in Regular Civil Appeal No. 48 of 2002.

3. Regular Civil Suit No. 32 of 1992 was filed by the respondents against the petitioners, for injunction. In that suit, it was claimed that Shri. Pedro Francis Fernandes, that is the predecessor in title of the respondents herein had, by sale deed dated 01/06/1939, purchased a property known as Propriedade De Cima Lote D and the said purchased land having shape of irregular polygon was admeasuring 3409 square metres and after purchase by Pedro Francis Fernandes the said plot came to be registered under Land Registration No. 36.756 and it was inscribed in his name under Inscription No. 31199. During the survey under the Goa Land Revenue Code, the said plot was surveyed under chalta no. 2 of P. T. Sheet no. 34 of City survey of Margao. That was the suit property. The petitioners were the defendants in that suit. They had denied the case of the respondents. However, the suit was decreed and the petitioners, their relatives, etc., were permanently restrained from interfering with the suit property. The respondents have filed Regular Civil Appeal No. 48/2002 against the Judgment and decree dated 31/12/2001. In this appeal, the respondents had filed an application dated 10/10/2007, under Order 26 Rule 9 and 10A of C.P.C.

4. In that application under Order 26 Rule 9 of C.P.C., the respondents alleged as follows:- Initially the suit property was surveyed as part of Chalta no. 1 of P. T. Sheet no. 34 of City Survey Margao. The respondents had made an application for resurvey before the Inquiry Officer and by the order dated 02/05/1991 the said application was allowed and the plot purchased by the respondents (i.e. plaintiffs in civil suit no. 32/1992) was resurveyed under Chalta no. 2 of P. T. Sheet no. 34. On 25/02/1992, the respondents filed the said Regular Civil Suit No. 32 of 1992 for injunction against the petitioners. Aggrieved by the said order dated 2/05/1991 of the Inquiry Officer, the petitioners filed first appeal before the Deputy Collector and Sub-Divisional Officer, which came to be registered under case No. LRC/CTS/APPL/78/92. Vide order dated 17/08/1994, the said first appeal was dismissed. The petitioners then filed second appeal against the said order, being Case No. 11-94/LAC/IInd/APL/AC. The Regular Civil Suit No. 32/1992 came to be decreed by Judgment and decree dated 31/12/2001. By order dated 08/03/2002, the second appeal being Case No. 11-94/LAC/IInd/APL/AC came to be allowed. The Additional Collector quashed the order dated 02/05/1991 and remanded the matter back to the Inquiry Officer for fresh hearing on merits after serving notice to the interested parties. Against the said order dated 08/03/2002, the respondents filed another appeal before the Administrative Tribunal and

the said appeal was also dismissed by order dated 13/01/2005. Against the same order dated 08/03/2002, the respondents had also filed a Revision Application No. 15/2/2005-RD, before the Secretary (Revenue), which was also dismissed by order dated 13/02/2007. Against the judgment and decree dated 31/12/2001, passed in Regular Civil Suit No. 32/1992, the petitioners had filed Regular Civil Appeal No. 48 of 2002, during the pendency of the said appeals.

5. In the said First Appeal No. 48 of 2002, the respondents had got a plan prepared by a qualified surveyor namely A. Furtado allegedly locating the plot as per the sale deed and they had filed an application before the learned Appellate Court to produce the same. The said application however was dismissed by the Appellate Court by expressing the willingness to appoint Commissioner to inspect the site. Therefore, the respondents filed the said application dated 10/10/2007 under Order 26 Rule 9 of C.P.C. for appointment of a competent surveyor from the office of Inspector of Survey and Land Records, Margao, as commissioner. The petitioners filed their reply dated 17/10/2007, resisting the said application. The learned Appellate Court by order dated 24/11/2007 allowed the said application and directed that a surveyor from the office of Inspector of Survey and Land Records, Margao shall be appointed as Commissioner to inspect the site and to

verify the location of the plot sold by sale deed dated 01/06/1939. It is against the said order that the present petition has been filed.

6. The petition was admitted by order dated 27/02/2009 after hearing the learned counsel for the both sides. Learned counsel for the respondents had waived service of notice after admission, however nobody is present on behalf of the respondents and therefore the matter was heard in their absence.

7. Mr. D'silva, learned counsel for the petitioners, submitted that the impugned order is causing great prejudice to the petitioners since the appointment of Commissioner amounts to collection of evidence in appeal, in favour of the respondents in order to fill the lacuna. He submitted that no such necessity was found during the pendency and disposal of the Regular Civil Suit No. 32 of 1992. He further submitted that the learned Appellate Court ought to have quashed and set aside the judgment and decree of the trial Court and ought to have remanded the matter to the trial Court for considering the question of appointment of Commissioner and ought to have directed the learned trial Judge to give opportunity to the parties to lead evidence on the report of the Commissioner, if allowed to be appointed. The learned counsel therefore submitted that the impugned order is arbitrary and illegal and is bound

to be quashed and set aside. He relied upon the judgment of this Court in the case of “*Shri. Vishnu Anant Pollshet vs. Shri. Shankar Bhiva Shetgaonkar*” reported in [1998(1) Goa L. T. 77].

8. I have gone through the material on record and I have considered the arguments advanced by the learned counsel for the petitioners.

9. Prior to the filing of application dated 10/10/2007 for appointment of a competent Surveyor as Commissioner, the respondents had filed an application under Order 41 Rule 27 of the Code of Civil Procedure (C. P. C.), before the Appellate Court, for leave to produce a plan prepared by alleged qualified surveyor namely A. Furtado locating the plot as per the sale deed. The said application was dismissed by the Appellate Court. It appears that merely because an observation was made while disposing of the said earlier application showing willingness to appoint a Commissioner to inspect the site, the learned Appellate Court got carried away and has appointed the Commissioner as observed in the earlier application.

10. Order 26 Rule 9 of C.P.C. provides as under ;

Commissions to make local investigation :

In any suit in which the Court deems a local

investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market value of any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court :

Provided that, where the State Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules.

11. It is pertinent to note that during the pendency of the said Regular Civil Suit No. 32/1992, it was not found by the trial Court that local investigation was necessary for the purpose of elucidating the matter in dispute. In the case of **“Shri. Vishnu Anant Pollshet”** (supra), this Court has observed that in an adversarial system, when both the parties are given opportunity of leading evidence and the opportunities are availed of by both the sides, whatever be the material brought before the Court it should form the basis for the decision in a given proceeding. The Court cannot hope for either clarification or better material and therefore, resort to the device of appointing a Commissioner. It has been held that a Commissioner cannot be appointed to collect evidence just before judgment and that the Court has to decide the matter based on the

material already brought by evidence of both the parties. The position in the present matter is that the judgment and decree has been already passed based on the material already brought by evidence of both the parties and in the first appeal, the learned Appellate Court has directly appointed the Commissioner to inspect the site and to report about the exact location of the plot purchased by the predecessor of the respondents namely Pedro Francis Fernandes by sale deed dated 01/06/1939. It should be kept in mind that the matter of resurvey is pending before the Inquiry officer. Certainly the above order is arbitrary and would cause great hardship and prejudice to the petitioners while deciding the appeal filed by them. It should be kept in mind that the respondents have not filed any affidavit-in-reply in the present petition thereby denying the facts as stated in the petition for supporting the impugned order. The petition therefore deserves to be allowed.

12. Hence, the petition is allowed. The impugned order dated 24/11/2007 is quashed and set aside. The parties to appear before the Appellate Court on 13/03/2015.

U. V. BAKRE, J.

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