

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 294 OF 2016

SMT. SUCCORINA PEREIRA THR. POA
SHRI, MENINO PEREIRA AND ANR.,

... Petitioners

Versus

SMT. MARIA SAVIA BARRETO AND ANR.,

... Respondents

Shri Preetam Talaulikar, Advocate for the Petitioners.
Shri Arjun F. Naik, Advocate for the Respondents.

Coram:- C. V. BHADANG, J.

Date:- 4th October, 2016

ORAL ORDER :

Heard the learned Counsel for the petitioners and the learned Counsel appearing for the respondents.

2. The challenge in this petition at the instance of the original defendant (appellant before the learned District Judge) is to the order dated 25/01/2016 passed by the learned District Judge at Margao in Misc. Civil Appeal No.26/2015. By the impugned order, the application filed by the petitioners under Order 26 Rule 9 of the Code of Civil Procedure (CPC) for appointment of Commissioner for local investigation has been dismissed.

3. The dispute pertains to a right of access, claimed by respondents/plaintiffs to their property bearing Survey No.54/19. The land belonging to the petitioner bearing Survey No.54/20 is to

the eastern side of the land of the respondents. The respondents are claiming an access to their field bearing Survey No.54/19, which according to the petitioners divides the property bearing Survey No.54/20 into two parts. It appears that in the year 2008, the learned Trial Court had granted injunction in favour of the respondents which has attained finality. In Writ Petition No.392/2013 this Court by judgment and order dated 22/08/2013 had observed that the petitioners may file an application under Order 39 Rule 4 of CPC as the petitioners were claiming that in view of Section 23 of the Easement Act, the petitioners wanted to provide an alternate access to the respondents. In pursuance of the liberty granted, the petitioners filed an application under Order 39 Rule 4 of CPC before the Trial Court on 19/07/2014. It appears that petitioners had also made a prayer before the Trial Court for appointment of Commissioner which was not allowed. Ultimately, the Trial Court has dismissed the application for variation in the order of injunction which order has been challenged by the petitioners in Misc. Civil Appeal No.26/2015. In the said appeal the petitioners again filed application under Order 26 Rule 9 of CPC for appointment of Commissioner which has now been dismissed by the impugned order.

4. It is submitted by the learned Counsel for the petitioners that the petitioners are ready and willing to give an access abutting the southern boundary of the field which has a direct access from the PWD road. It is submitted that this will also save the land of the

petitioners being divided into two halves by the road which the respondents are claiming. It is submitted that although both the parties have produced the reports of their experts before the learned District Judge, it would have been appropriate for the Court to have exercised powers under Order 26 Rule 9 of CPC for appointment of Commissioner, to make local investigation.

5. The learned Counsel for the respondents has supported the impugned order.

6. I have carefully considered the rival circumstances and the submissions made. The perusal of the impugned order shows that the learned District Judge after noticing the fact that both the parties have produced the report of their experts on the record has found that question of Court exercising power under Order 26 Rule 9 of CPC does not arise. At the same time, the learned District Judge has further observed that the question of appointment of Commissioner for local investigation can be decided only after the Court hears both the parties on merits. It can thus be seen, that the learned District Judge has not foreclosed the prayer of the petitioners for appointment of local investigation. All that has been said is that, at this stage, the question of appointment of the Commissioner does not arise. As noticed earlier, the reports of the experts produced by the parties, are available for perusal of the learned District Judge. It is always open to the learned District Judge to appoint a Commissioner for local

investigation, if it is found necessary, after hearing the parties on merits.

7. The impugned order thus does not exhibit any infirmity requiring interference. The petition is without any merit and is accordingly dismissed with no order as to costs.

C. V. BHADANG, J.

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