

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 18 OF 2018

ANTONIO MENDES.,

... Petitioner

Versus

ANNE FERNANDES AND ANR.,

... Respondents

Smt. A. Agni, Senior Advocate with Ms. H. Modi, Advocates for the petitioner.

Coram:- C. V. BHADANG, J.

Date:- 8th January 2018

P.C.

Heard Smt. Agni, the learned Senior Counsel for the petitioner, for some time. Perused record.

2. The petitioner, who is the defendant before the Trial Court, is challenging the order dated 07/12/2017, passed by the learned Trial Court, dismissing the objection raised by the petitioner to the report of the Commissioner (Exh.93).

3. It appears that the respondents has filed a suit for removal of encroachment to the extent of 20 square metres and for demolition of the compound wall erected by the petitioner. The suit was decreed by the Trial Court. In appeal, the Appellate Court, while partly allowing the appeal, set aside the judgment and decree of the Trial Court and the matter was remanded back to the Trial Court with a direction to appoint a qualified officer of the Survey Department to take the measurements of the

properties bearing Chalta Nos.134, 145 and 146, after taking into consideration the sale deeds dated 31/05/1932 and 31/12/1932 and other relevant documents, if any and to ascertain if there is any encroachment in the property of the respondents/ plaintiffs, by taking into consideration the said sale deeds and other relevant documents. The said judgment and order has been confirmed by this Court in Second Appeal.

4. After the remand, the learned Trial Court appointed the Director of Settlements and Land Records as Commissioner, who conducted the exercise and submitted his report dated 31/08/2017. That report was objected to on behalf of the petitioner inter alia on the ground that the Commissioner has not conducted the exercise in compliance with the direction of the Appellate Court, which has been confirmed by this Court.

5. The learned Trial Court, after hearing the parties, has dismissed the said objection, which brings the petitioner to this Court.

6. The only contention raised on behalf of the petitioner is that the Commissioner has not conducted the exercise as directed by the Appellate Court. It is submitted that the Commissioner was required to ascertain and fix the boundaries as per the two sale deeds, which has not been done.

7. A bare perusal of the report, prima facie, at this stage, shows that the Commissioner has referred to both the sale deeds and has found that the physical measurements taken at location,

do not tally with the measurements recorded in both the sale deeds. Thus, prima facie, at this stage, it cannot be accepted that the exercise was not conducted in accordance with the direction. Be that as it may, the impugned order shows that the petitioner is yet to cross-examine the Commissioner. In the cross-examination of the Commissioner by the petitioner, the petitioner would get an opportunity to bring all the material on record, including the aspect whether the exercise was conducted in accordance with the direction of the Appellate Court or not. The Commissioner will also get an opportunity to explain the same and thereafter, the Trial Court can decide the issue. Thus, no case for interference is made out at this stage as the impugned order does not result into any manifest injustice to the petitioner. (See RADHEY SHYAM AND ANOTHER VS. CHHABI NATH AND OTHERS, 2015(5) SCC 423.).

8. In such circumstances, I decline to entertain the petition, which is accordingly, dismissed. Needless to mention that the rival contentions of the parties are left open, to be decided by the Trial Court, after cross-examination of the Court Commissioner.

C. V. BHADANG, J.

SMA