

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO.710 of 2018**

Menino Constancio Almeida (Dec)
and two others. .. Petitioners

Vs.

George Vaz .. Respondent

Shri G. Teles, Advocate for the petitioners.

Shri J. Godinho and Shri V. Gaonkar, Advocates for the respondent.

CORAM :- C. V. BHADANG, J.

Date : 20th December, 2018

ORAL ORDER :

Heard the learned Counsel for the parties, for some time. I find that the petition can disposed of on a short count.

2. The petitioners had filed Regular Civil Suit No.113/2008/F before the learned Civil Judge, J. D. at Mapusa for permanent and mandatory injunction. The dispute is *inter alia* about construction of a wall of 1 metre height in the suit property. It appears that after the trial, the suit was dismissed and the petitioners carried the matter in appeal before the learned District Judge in Regular Civil Appeal No.442/2010. That appeal came to be allowed on 05/10/2012 and the matter was remanded back to the learned Trial Court, with a direction to appoint a qualified

Surveyor to ascertain whether there is a wall on the southern side of the property bearing Survey No.377/8, dividing this portion in two parts, i.e. one forming eastern portion and other western portion and also to ascertain on which side the trees are existing. It further appears that after the remand, the Trial Court appointed a Surveyor, who gave his report. After Surveyor was examined before the Trial Court and when the matter was at the stage of hearing arguments, the petitioners filed an application purportedly under Order XXIII, Rules 1 and 2 of the Code of Civil Procedure (Code, for short), for withdrawal of the suit, with permission to file a fresh suit on the ground that the suit is likely to fail on account of a formal defect. It was contended that the plaintiffs were required to seek the relief of declaration that specific portion of the property was owned and possessed by the plaintiffs, which is not claimed.

3. The application was opposed on behalf of the respondent on the ground that there is no formal defect in the suit, as contended. It was contended that the Commissioner, in his report dated 04/09/2017, has clearly stated that there is no wall dividing the Survey No.377/8 to form the eastern portion and western portion at the site. Even so far as the trees are concerned, the Commissioner has already shown the existing trees

in the sketch plan. In short, it was contended that the Commissioner's report having gone adverse to the petitioners, the petitioners are now seeking liberty to withdraw the suit, with permission to file a fresh suit.

4. The learned Trial Court, by order dated 04/06/2018, found that the suit was remanded only for the limited purposes of appointment of Commissioner and therefore, no liberty can be granted to the plaintiffs to institute a fresh suit. Besides, the Trial Court also found that the suit was of the year 2008 and right has accrued in favour of the respondent/ defendant, which cannot be taken away by permitting the petitioners to institute a fresh suit and subject the respondent to another round of litigation. The Trial Court found that the decision in the case of **V. Rajendran and Anr. Vs. Annasamy Pandian**; CDJ 2017 Supreme Court 084, would not apply in the facts and circumstances of the case.

5. Shri Godinho, the learned Counsel for the respondent submitted that the application for withdrawal of the suit may not be maintainable after an order of remand.

6. On hearing the learned Counsel for the parties, I find that the Trial Court has solely gone on the aspect that the suit was

remanded by the Appellate Court for limited purpose. Although that may be one of the relevant considerations, principally, the Trial Court ought to have examined the prayer made by the petitioners on the basis of the requirements of Order XXIII, Rule 3(a) and (b) of the Code. A perusal of the impugned order does not show that the Trial Court has examined the matter to find whether the suit must fail by reason of some formal defect, as claimed by the petitioners or there are sufficient grounds for allowing the petitioners to institute a fresh suit, as prayed. In that view of the matter, it would be appropriate, if the Trial court reconsiders the application in the context of the requirements of Order XXIII, Rule 3 of the Code afresh, after hearing the parties.

7. The petition is, thus, partly allowed. The impugned order is hereby set aside. The application Exh.D-92 is restored to the file of the learned Trial Court, for deciding it afresh, after hearing the parties on its own merits and in accordance with law. Rival contentions of the parties are left open. In the circumstances, there shall be no order as to costs.

C. V. BHADANG, J.

SMA