

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 757 OF 2017**

Maruti Housing Cooperative Society Ltd.
A Housing Co-operative Society
registered under Goa Co-operative
Societies Act, 2001, having its office at
Katem, Baina, Vasco-da-Gama, Goa,
Represented herein through its Chairman,
Shri Tulshidas B. Bhosle,
39 years of age, businessman,
Indian National, having its Office at
Katem Baina, Vasco-Da-Gama.

..... Petitioner

V e r s u s

1. Mr. Agnelo Francisco Da 'Costa,
Son of late Herculanao Da Costa,
Aged 64 years , retired,
Resident of H. No.195,
Opp. Latif Bldg.,
Katem Baina,
Vasco-Da-Gama, Goa.

2. Mr. Anil Maruti Sawant,
Son of Maruti Sawant,
major of age, businessman,
having office at Office No.2,
Karma Paes Avenue,
Near Old Bus Stand,
Vasco-da-Gama, Goa.

..... Respondents

(Registered Addresses)

Shri S.G. Desai, Senior Advocate with Adv. Shirin Naik for the Petitioner.

Shri A. D. Bhobe with Ms. S. Bhobe, Advocates for the Respondents.

CORAM: C. V. BHADANG, J.

Reserved on : 23/3/2018.

Pronounced on : 27/03/2018.

JUDGMENT:

The challenge in this petition, at the instance of the petitioner/defendant no.2, is to the order dated 2/8/2017 passed by the learned trial court in R.C.S. No.17/2017/A thereby refusing to appoint a Commissioner for local inspection.

2. The brief facts are that; the first respondent has filed the aforesaid suit against the second respondent (defendant no.1) and the petitioner for a declaration that the first respondent has a right of access as an easement of 3 meters width through the property under chalta no.262 belonging to the petitioner. The first respondent is also seeking prohibitory injunction against the petitioner restraining it from obstructing the access in any manner. An application for temporary injunction is pending before the trial court. The situation at the location is shown in the sketch annexed to the plaint where there is a public road running north-east to the western side of the land chalta

no.262 belonging to the petitioner. The land bearing chalta no.24 is to the northern side of the land chalta no.262. Admittedly, there is a gate in the southern compound wall of land chalta no.24.

3. According to the petitioner, the first respondent has an access through land chalta no. 272. Incidentally the land chalta no. 272 is abutting the road and towards the western side of the land of the first respondent.

4. The petitioner filed an application for appointment of a Court Commissioner claiming that there is an alternate access available to the first respondent which he is using presently. It was contended that the petitioner has produced substantial evidence to that effect and it is necessary to appoint a Court Commissioner to conduct the site inspection and prepare a detailed report to be submitted before the Court.

5. The application was opposed on behalf of the petitioner. It was contended that the application is filed with an intention to delay the suit and the hearing of the application for temporary injunction. It was contended that on its own saying the petitioner claims to have produced substantial evidence to support their case about availability of the alleged alternate access which is being used by the first respondent and thus it is not necessary to appoint a

Commissioner. It was contended that the petitioner cannot seek assistance of the Court in collecting evidence.

6. The learned trial court has found that the first respondent is claiming that the suit access is the only access and the access on the northern side is only for visiting the neighbours. The trial court has then taken note of the undertaking by the second respondent Mr. Anil Sawant furnished on 21/12/2007 and 29/12/2007 in order to find that Anil Sawant, who is the Proprietor of M/s. Shree Gajraj Construction, had undertaken construction of the building complex in the name and style as Maruti Complex at Katem. The second respondent has given an undertaking that he would keep access to the first respondent and his family members in the property chalta no.262. In such circumstances the learned trial court has found that it is not necessary to appoint a commissioner and has rejected the application by the impugned order.

7. I have heard Shri Desai, the learned Senior Counsel for the petitioner and Shri Bhobe, the learned counsel for the first respondent. None appears for the second respondent.

8. It is submitted by Shri Desai, the learned Senior Counsel for the

petitioner that the trial court failed to consider the request for appointment of a Court Commissioner, in the context of the provisions of Order XXVI Rule 9 of the Code of Civil Procedure 1908 (Code, for short).

9. It is submitted that the Court can appoint such a commissioner, in an appropriate case, for the purpose of 'elucidating any matter in dispute'. It is submitted that the case of the petitioner has all along been that the first respondent has an alternate access through land chalta no.272 as shown in the sketch plan, annexed to the survey report of Mr. Sitakant Kamat, who was appointed by the petitioner. The learned Senior Counsel has referred to letter dated 5/10/2012 written by Bonafacia S.M. D'Costa, wife of the first respondent to the Deputy Collector and yet another letter written by her on 16/10/2012 to the Under Secretary (Department of Public Grievances), Government of Goa, in order to submit that there is an admission on behalf of the first respondent of an alternate access through land chalta no.272. It is submitted that the alleged undertaking by the second respondent, Mr. Anil Sawant was obtained under duress. It is submitted that the land on which the building belonging to the petitioner/Co-operative Society is standing is an integral unit in itself and no access can be permitted through the land of the petitioner, as it would affect the propriety rights of the petitioner as well as would affect the privacy and the security of the residents.

On behalf of the petitioner reliance is placed on the decision of this Court in the case of (i) **Shailendrakumar s/o Mahendrakumar Jain & another Vs. Municipal Council, Tumsar & Others** CDJ Law Journal (ii) **Goa Industrial Development Corporation Vs. M/s. Sadhana Builders Pvt. Ltd. and others** Writ Petition nos.344 & 345 of 2013, in order to submit that in a dispute of the present nature, the Court ought to have appointed a Court Commissioner for local inspection.

10. On the contrary it is submitted by Shri Bhohe, the learned counsel for the first respondent that the first respondent in the plaint itself has made a reference to the access through land chalta no.272 and the petitioner has also produced on record a report by the surveyor which encloses a sketch showing such road. It is thus submitted that it is not necessary to appoint a Court Commissioner for elucidating any matter in dispute within the meaning of Order XXVI Rule 9 of C.P.C.. It is submitted that this is yet another attempt by the petitioner to delay the hearing of the application for temporary injunction.

11. On behalf of the first respondent reliance is placed on the decision of this Court in the case of **Lalitprabha Krishnaji Ajgaokar and others Vs. Yunus Khan and others** (2017) (1) Bom.C.R. 179.

12. I have considered the rival circumstances and the submissions made. The first respondent is seeking a declaration that he has an easementary right of access of 3 metres width from the land chalta no.262 belonging to the petitioner. The second respondent, who is a contractor had constructed the said building and there are two undertakings i.e dated 21/12/2007 and 29/12/2007 by the second respondent to keep an access to the house of the first respondent and his family members between the Buildings “B” and “C” leading to and touching the ODP road. The first respondent is placing reliance on the said undertakings in order to substantiate his case. A perusal of para 31 of the plaint shows that according to the first respondent there is a gate opened a few years back in the compound wall separating the land chalta no.24 and the land chalta no.272. However, according to the first respondent, this gate has not been shown in the survey plan, since it was opened later and the said gate is not used as a motorable access and it cannot be used as a motorable access, because of obstructions like existence of toilet in chalta no.272. Prima facie, it can thus be seen that on his own saying the first respondent has set out in the plaint that there is a gate in the compound wall separating land chalta no.272 and land chalta no.24 belonging to the first respondent. However, according to the first respondent it is not been used and cannot be used as a motorable access. On the other hand, the petitioner

claims that the said access through land chalta no.272 is the alternate access which is being used by the first respondent. The petitioner has also produced the replot of the surveyor along with a sketch which shows the said alternate access through land chalta no.272. The petitioner for the purpose of resisting the suit and the application for temporary injunction is also relying upon the two communications dated 5/10/2012 and 16/10/2012 of Mrs. Bonafacia, who is the wife of the first respondent. The petitioner further claims that it has produced sufficient evidence to support its case namely, the first respondent having an alternate access. The question is whether in such circumstances it would be necessary for the Court to appoint a commissioner, for “elucidating any matter in dispute” . Under Order XXVI Order 9 of C.P.C. it is for the Court to find such a necessity. It is now well settled that a party under the garb of seeking an order for appointment of a Court Commissioner cannot collect evidence and it is primarily for the Court to find that such an appointment is necessary for purpose of elucidating any matter in dispute. In the present case the application for temporary injunction is still pending and therefore it would be neither necessary nor appropriate to examine the rival contentions of the parties so as to prejudice them at the hearing of the application for temporary injunction. The trial court will have to examine the rival contentions in the context of the material produced in order to find out whether a case for grant of temporary injunction is made out

or not. In the given circumstances and particularly in view of the fact that the respondent no.1 has himself pleaded in the plaint about the existence of the gate in the compound wall separating land chalta no. 272 and the land chalta no.24 and has further claimed that the said gate cannot be used as a motorable access and further having regard to the fact that the petitioner has already produced a report of the surveyor enclosing a sketch showing the alternate, access it is not necessary, for the trial court at least at this stage to appoint a commissioner for elucidating any matter in dispute within the meaning of Order XXVI Rule 9 of C.P.C.

13. In the case of **Shailendrakumar (supra)** the petitioner/plaintiff had filed an application for appointment of a Court Commissioner to find out whether the defendants no.2 to 6 had encroached upon the lane owned by the petitioners and had opened doors and Windows and constructed a septic tank in the lane so as to affect the easementary rights of the petitioners. The application was rejected by the trial court by holding that it was necessary for the petitioners to first prove their ownership over the land before seeking appointment of the Commissioner. In the given circumstances, this Court found that the question of ownership could have been gone into at the time of deciding the matter on merits. However, as the aspect about the alleged construction in the land was disputed, it was necessary for the trial court to

have appointed a court commissioner.

Similarly, in the case of **Goa Industrial Development Corporation (supra)** an order appointing a Court Commissioner was subject matter of challenge. This Court in the facts and circumstances of that case found that by appointing such a commissioner it cannot be said that it was appointed to collect evidence. This Court took note of the decision in the case of **ShailendraKumar (supra)** in order to find that in cases of easmentary right the Court can always appoint a commissioner to elucidate the situation at the location. I have already found that the case of **Shailendrakumar** turned on its own facts. At the cost of repetition, it needs to be mentioned that in the present case the respondent no.1 himself has made a reference to a certain access through land chalta no.272 and is relying upon an undertaking by the second respondent acceding the access of 3 metres through the land of the petitioner and on the contrary the petitioner is relying upon the two letters and the report of the surveyor. The question is about appreciation of this evidence and not of elucidating any matter in dispute, at least at this stage. In such circumstances, I do not find that a case for interference is made out. The petition is accordingly dismissed, with no order as to costs.

C. V. BHADANG, J.

Ap/-