

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO.987/2017**

1. Shri Nazario Sebastiao Pinto,
Son of late Shri Jose Camilo Pinto,
Major of age, business and his wife;
 2. Smt. Betsy Pinto,
Major of age, Panch at Varca Village,
through duly constituted Attorney
Shri Nazario S. Pinto,
Both residing at H.No.320,
Gunnea-vaddo, Varca,
Salcete Goa.
- Petitioners

V/s

1. Shri Bhaskar Pandharinath Naik,
Son of late Shri Pandharinath Naik,
Major of age, bachelor.
2. Smt. Mirabai Pandharinath Naik (deceased)
Widow of late Shri Pandharinath Naik,
Major of age, housewife
Both residing at H.No.365,
Reprovaddo, Varca, Salcete Goa.
- 2(a) Mrs. Sailee Bhaskar Naik,
W/o. Bhaskar Naik, major in age,
married, R/o Varca, Salcete, Goa.
3. Shri Ramnath Sadashiv Naik,
Son of late Shri Sadashiv Naik,
Aged 70 years, landlord and
his wife (deceased)
- 3(a) Mr. Sadashiv Ramnath Naik,
Son of late Ramnath Sadashiv Naik,
Major of age, married and his wife,
- 3(b) Mrs. Amita Sadashiv Naik,
Wife of Sadashiv Ramnath Naik,

Major of age, both resident of 3rd Floor,
Alta Monte Co-operative Society,
Margao, Goa 403 601.

3(c) Mr. Sandeep Ramnath Naik,
Son of late Ramnath Sadashiv Naik,
Major of age, married and his wife.

3(d) Mrs. Anita Sandeep Naik,
wife of Sandeep Naik,
Major of age, Both resident of 2nd Floor,
Laxmi Resident Near Mother care Hospital,
Borda, Margao, Goa.

4. Smt. Sunanda Ramnath Naik,
Daughter of late Shri Anandrao
Babu Camotin Redkar,
Aged about 64 years, housewife
Both resident at G/7,
Alta-Monte Co-operative Housing
Society Ltd. Behind Grace
Nursing Home, Margao, Goa.

.... Respondents

Shri Valmiki Menezes, Advocate for the Petitioners.

Shri Sahish Mahambrey, Advocate for the Respondents.

Coram:- NUTAN D. SARDESSAI, J.

Reserved on : 25th June, 2018

Pronounced on: 4th July, 2018

JUDGMENT :

Rule. Heard forthwith with the consent of the learned
Counsel appearing for the parties. Learned Counsel appearing
for the respondents waives service.

2. The petitioners seek to challenge the orders dated 12/10/2017 and 27/10/2017 passed by the Adhoc Additional Senior Civil Judge, Margao in this petition by invoking the jurisdiction of this Court under Article 227 of the Constitution of India.

3. The petitioners who were the original defendants nos.3 & 4 had filed their written statement and additional written statement to the amendment denying the case of the respondents plaintiffs and claimed to be in lawful possession of the suit property pursuant to the Sale Deed executed by the defendants no.1 & 2 in their favour. The plaintiffs had led their evidence after which the petitioners led their evidence and sought to produce the Inspection Report prepared by an expert witness which application came to be dismissed by the impugned order dated 12/10/2007. The petitioners also sought to examine the engineer for which purpose an affidavit was sought to be filed before the Court. The respondents no.1 & 2 as the plaintiffs objected to the examination of the engineer as his affidavit travelled beyond the pleadings and when the learned Trial Judge vide the impugned order dated 27/10/2017 disallowed the said application giving rise to the

petition at the instance of the petitioners/original defendants no.3 & 4.

4. Shri V. Menezes, learned Advocate for the petitioners invited attention to the pleadings in the plaint where the respondents no.1 & 2 claimed a right to the suit property and who had offered challenge to the Sale Deed in favour of the petitioners. He next adverted to the additional written statement filed in support of their case and looking to the tenor of the pleadings it was necessary to examine the expert as their witness who had deposed on the basis of the records produced by the respondents. He placed reliance in **Malay Kumar Ganguly V/s. Sukumar Mukherjee & Ors. [Air 2010 SC 1162]** in support of his case. He submitted that he would purely go on the basis of the documents produced by the respondents and therefore mere exclusion of the expert's report could not be a bar to examine the witness to prove their case. The impugned order dated 21/10/2017 had therefore to be quashed and set aside.

5. Shri S. Mahambrey, learned Advocate for the respondents no.1 & 2 adverted to the impugned order where

the learned Judge had clearly recorded their contentions, examined the relevant provisions of the Evidence Act being Section 45 and 59 thereof and clearly held that the opinion of an expert cannot be given in the form of an oral evidence and had to be necessarily backed with a report. He placed reliance in **Estralla Rubber V/s. Dass Estates Pvt. Ltd. [2001 Law Suit SC 1220]**. The affidavit which was supposed to be filed by the expert was a clear replica of the report which has admittedly been rejected by the learned Trial Court and if permitted would amount to a back door entry. The said expert had made a false statement without visiting the site. The examination of the expert was only an endeavour to fill up the lacuna in the case of the petitioners and therefore the petition had to be dismissed. i would consider their submissions in the light of their case, the judgment relied upon and decide the petition appropriately.

6. Admittedly, the Trial Court had denied leave to the petitioners to produce the report of the expert and although the said order was assailed in this petition, for some reason best known to the petitioners, the challenge to that order rejecting the report was abandoned and challenge to it given

up. What therefore remains in the realm of consideration is the aspect of examination of the expert sans his report which admittedly is out of the purview of consideration for proving the case of the petitioners. It was the case of the respondents no.1 & 2 that they were the owners of the property bearing the distinct land registration number and matríz number situated at Varca since the last more than five decades and that the petitioners as the defendants had no right to the same or any part thereof on the basis of continuous, unobstructed possession and enjoyment of the said property and as the name of the respondent no.1 was erroneously recorded in the survey records. They had instituted the suit for a declaration of their rights and to delete the name of the respondent no.1 from the survey records. The respondent no.1 had not revealed to the petitioners at the time of entering into the sale that the property in question was belonging to the plaintiffs and enjoyed and occupied by them for more than four decades. It was a clandestine transaction between the respondents no.1 & 2 and the respondent no.3 which was not binding on them and therefore null and void. On that premise and as there were acts of trespass, the respondents no.1 & 2, as the

original plaintiffs, had filed the suit declaring the Sale Deed in favour of the petitioners as null and void and to restrain them from interfering with the suit property and any part thereof. The petitioners alongwith the original defendants no.1 & 2 had denied the case of the plaintiffs, that the defendants no.1 & 2 were absolute owners of the property by virtue of the Sale Deed dated 15/11/1995 which they had sold to the petitioners bearing distinct survey no.55/1 and 75/8, that there was no basis in the case of the plaintiffs who were trying to grab the property purchased by them and pressed for the dismissal of the suit.

7. Although it has been the contention of Shri V. Menezes, learned Advocate for the petitioners that they would lead independent evidence of the surveyor to establish their case from the documents of the plaintiffs themselves nonetheless as rightly shown by Shri Mahambrey, the affidavit of the expert engineer was a verbatim reproduction of the report which had been excluded from the purview of consideration by the learned Trial Court. **Malay Ganguly** (supra), was in the context of a Criminal Appeal which fell for consideration before the Apex Court and does not substantiate the case of

the petitioner. No doubt it has been observed therein by quoting the judgment in **State of H.P. V/s. Jai Lal & Ors. [(1999) 7 SCC 280]** that an expert is not a witness of fact. His evidence is really of an advisory character and the duty of an expert witness is to furnish the Judge with the necessary scientific criteria for testing the accuracy of the conclusions so as to enable the Judge to form his independent judgment by the application of this criteria to the facts proved by the evidence of the case. However, this has to be considered in the context of the appeal before the Apex Court where it was dealing with the case of medical negligence. It does not advance the petitioners' case in any which way, hence the departure.

8. In **Estralla Rubber** (supra), the Apex Court reiterated at paragraph 7 the scope and ambit of exercise of power and jurisdiction by a High Court under Article 227 of the Constitution of India which involves a duty on the High Court to keep inferior Courts and Tribunals within the bounds of their authority and to see that they do the duty expected or required by them in a legal manner. The High Court is not vested with any unlimited prerogative to correct all kinds of

hardship or wrong decisions made within the limits of the jurisdiction of the Courts sub-ordinate or tribunals. It is also well settled that the High Court while acting under this Article cannot exercise its power as an appellate Court or substitute its own judgment in place of that of the sub-ordinate Court to correct an error, which is not apparent on the face of the record. The High Court can set aside or ignore the findings of facts of inferior Court or Tribunal, if there is no evidence at all to justify or the finding is so perverse, that no reasonable person can possibly come to such conclusion, which the Court or Tribunal has come to.

9. Shri Menezes, learned Advocate for the petitioner has clearly failed to show from the impugned order that the learned Trial Court had acted beyond the bounds of its jurisdiction while declaring the petitioners' right of examining the expert and in the light of discarding his report entertaining the objections raised by the plaintiffs. There is no case made out to exercise the supervisory jurisdiction of this Court under Article 227 of the Constitution of India.

10. In view thereof, i pass the following

ORDER

The Writ Petition is dismissed with no order as to costs.
Rule stands discharged.

NUTAN D. SARDESSAI, J.

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