

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 68 OF 2019**

Rasiklal Mohanlal Gangani &
Another Petitioners

Versus

State of Goa, Thr. the Chief
Secretary & 7 Others Respondents

Mr. Rohit Bras De Sa, Advocate for the Petitioners.

Ms. Priyanka Kamat, Additional Government Advocate for
Respondent Nos. 1 to 5.

Mr. P.A. Kamat, Advocate for Respondent No. 6.

Mr. A.D. Bhobe with Ms. A. Fernandes, Advocates for
Respondent No. 7.

CORAM:- C. V. BHADANG, J.

RESERVED ON: 25th JUNE, 2019

PRONOUNCED ON: 16th JULY, 2019

ORDER:

The challenge in this petition is to the order dated 08.01.2019 (below Exhibit-67), passed by the learned District Judge at Panaji in Civil Suit No. 33/2012. By the impugned order, the learned Trial Court has dismissed the application (Exhibit-67), filed by the petitioners/plaintiffs for appointment of a Commissioner under Order XXVI, Rule 9 of the Civil Procedure Code (CPC, for short).

2. The brief facts are that the petitioners have filed the aforesaid suit, against the respondents for declaration that the construction license granted to the petitioners by the respondent no. 6-Village Panchayat of Taleigao in year 1994-95 and No Objection Certificate (NOC) from the Town and Country Planning Department dated 22.02.1994 is subsisting and binding upon the said Authorities and for a further declaration that the initiation of the proceedings under the Goa Land Revenue Code, 1968 (Code, for short) and the consequent show cause notice, alleging encroachment on the government land to the extent of 90 square metres, in survey no. 248/1, plot no. 36 of village Taleigao, is illegal and bad in law and for consequential reliefs as to compensation etc.

3. It appears that plot no. 36 was then included within the limits of Panaji Municipal Council, now respondent no. 7 i.e. City Corporation of Panaji.

4. In August, 1997, the Chief Officer of then Panaji Municipal Council had issued a stop work notice to the petitioner no. 1, which is to the following effect.

“Pursuant to instructions received from Government vide letter No. PWD/WDI/ADM-14/138/97-98 dated 4.6.97, it is informed that your

plot no. 36 under development is affected by the land acquisition vide notification no. 1258/56/69 dated 8.8.1969 for construction of new road linking Dona Paula via Bambolim."

5. Subsequently, proceedings have been instituted against the petitioners under the provisions of the Code before the Deputy Collector and SDO, Panaji under Section 40(2) read with Sections 41 and 184 of the said Code. It is contended that the petitioners have encroached upon the government land by constructing a residential house on an area of 90 square metres in survey no. 248/1, plot no. 36 as aforesaid.

6. The suit is contested by the respondents. The learned Trial Court has framed issues, which were recast on 25.10.2016. They read as under:

1. *Whether the plaintiffs prove that the State is bound by the principles of promissory estoppel and cannot revoke the licenses granted by the State and is under legal obligation to extend/ renew the same ?*
2. *Whether the plaintiffs prove that the State is liable to compensate the plaintiffs since the plaintiffs have acted upon permission/license granted by the State to his detriment and therefore the State is liable to compensate the plaintiff for amount Rs.4,82,55,750/- (Rupees Four Crores Eighty Two Lakhs Fifty Five Thousand Seven Hundred and Fifty only) ?*

3. *Whether the plaintiffs prove that the State is liable to issue renewal license/permission and occupancy certificate to the plaintiff and withdraw show cause notices of stay/demolition ?*
4. *Whether the plaintiffs prove that the State Authority are liable to pay compensation and damages of Rs.4,82,55,750/- ?*
5. *Whether the plaintiffs prove that the show cause notice issued by the defendants are illegal and liable to be withdrawn ?*

7. On 28.11.2018, the petitioners filed an application under Order XXVI, Rule 9 of CPC for appointment of a Commissioner with the following terms of reference:

“(A) Whether the plaintiff's construction on plot no. 36 that is the suit property is affected/encroached on the land demarcated for road widening by the Defendant State Authority.

(B) It is therefore prayed that Court may direct for appointment of Commissioner for the purpose of determination of points.”

8. The application was opposed on behalf of the contesting respondents, mainly on the ground that it is a backdoor attempt to collect evidence, which is not permissible.

9. The learned Trial Court has dismissed the application, by the impugned order *inter alia* on the ground that the petitioners have commenced their evidence in the suit and the burden to prove the suit claim is on the petitioners. The learned Trial Court has found that the petitioners have filed yet another application to bring on record a report of an expert, which application is still pending. The learned Trial Court has found that this is not a case where there is a boundary dispute or dispute as to the encroachment. The learned Trial Court has found that the authorities relied upon on behalf of the petitioners pertain to the boundary dispute or dispute as to the encroachment. In that view of the matter, the application came to be dismissed.

10. I have heard Mr. De Sa, the learned Counsel for the petitioners, Ms. Kamat, the learned Additional Government Advocate for the contesting respondent nos. 1 to 5. I have also heard Mr. Kamat, the learned Counsel for the respondent no. 6 and Mr. Bhobe, the learned Counsel for the respondent no. 7.

11. Mr. De Sa, the learned Counsel for the petitioners has submitted that although, the stop work notice of the year 1997, refers to a land acquisition vide notification dated

08.08.1969 for construction of new road linking Dona Paula via Bambolim, till date, no part of plot no. 36 has been acquired. It is submitted that the stop work notice in respect of the construction of an adjoining owner, which is much further than the construction of the petitioners, towards the proposed road, has been withdrawn. It is submitted that the appointment of the Court Commissioner will help the Court in elucidating the matter as to whether, any part of plot no. 36 or the construction therein is affected by the laying of the road linking Dona Paula via Bambolim. It is submitted that looking to the nature of the dispute, the Trial Court ought to have appointed the Commissioner.

Reliance is placed on the decision of the Supreme Court in the case of **Mohd. Mehtab Khan & Others Vs. Khushnuma Ibrahim Khan & Others (2013) 9 SCC 221** and **Haryana Waqf Board Vs. Shanti Sarup & Others (2008) 8 SCC 671** and the decision of this Court in the case of **Sulemankhan & Others Vs. Bhagirathibai Asalmol & Another (2014) 6 Bom CR 177; Kolhapuri Bandu Lakade Vs. Yallappa Chinappa Lakade & Others (2011) 3 Bom CR 807; Bento Antonio Gomes alias Antonio Bento Gomes Vs. Rosario Salvador Carneiro & Others (2014) 1 Bom CR 678; Kashinath Chopade Vs. Purushottam Tekade &**

Others (2005) 6 Bom CR 267 and Girish Vasantrao Bhoyar & Another Vs. Nimbaji Warluji Bambai (2009) 4 Mah LJ 371.

12. Ms. Kamat, the learned Additional Government Advocate for the principle contesting respondent nos. 1 to 5 has submitted that this is only a backdoor entry to collect evidence under the garb of appointment of the Commissioner. It is submitted that it is for the concerned Court to find that the appointment of the Commissioner is necessary for elucidating any matter in dispute and as the Trial Court has rightly refused to exercise discretion, no case for interference is made out.

13. The learned Counsel for the other contesting respondents have also supported the impugned order.

14. I have carefully considered the rival circumstances and the submissions made. Indisputably, the petitioners have obtained the necessary license from the local authorities as well as NOC from the Town and Country Planning Department for the construction, which is already undertaken. It transpired during the course of the arguments at bar that the construction of the petitioner in plot no. 36, comprising of a ground floor + 3

storeys is also complete. The stop work order, which was issued in the year 1997 by the Chief Officer of then Panaji Municipal Council shows that it was on account of the fact that plot no. 36 was allegedly affected by the land acquisition vide notification dated 08.08.1969 for construction of new road linking Dona Paula via Bambolim. The stop work notice appears to be based on a letter from the Executive Engineer, PWD, Panaji dated 04.06.1997.

15. It is now well settled that the power under Order XXVI, Rule 9 of CPC for appointment of the Commissioner has to be exercised by the Court *inter alia* when the Court finds that it is requisite or proper for the purposes of elucidating any matter in dispute. It is further well settled that a party cannot insist for appointment of such Commissioner for collecting evidence. Whether, there is an attempt by a party to collect evidence under the garb of appointment of the Commissioner or whether, the Court needs the same for elucidating the matter in dispute, would depend upon facts and circumstances of each case. The stage at which, such appointment of the Commissioner is sought would also be relevant. The Court has to consider all relevant circumstances while deciding whether, the appointment of the Commissioner is necessary for

elucidating any matter in dispute between the parties. Normally, the suit involving boundary disputes, encroachment and/or identity of the property are considered the ones where the Court would normally appoint such a Commissioner. It is not necessary to multiply authorities on the point.

16. Coming to the present case, *prima facie*, at this stage, a perusal of the issues as recast on 25.10.2016, do not show that there is a boundary dispute as such. That apart, the parties are yet to lead evidence in the suit. The Trial Court has noted that that an application filed by the petitioners for placing reliance on an expert report is still pending. In that view of the matter, in my considered view, no case for appointment of a Commissioner is made out at this stage. The petition is accordingly dismissed. However, it will be open to the learned Trial Court to appoint a Commissioner either suo motu or on an application of either of the parties after the conclusion of the evidence, if so found necessary. In the circumstances, there shall be no order as to costs.

C. V. BHADANG, J.

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