

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 651 OF 2019**

Mr. Oliver Juzinho Smith D'Sa, son of late Salvacao Coutinho, aged 75 years, retired from Margao Municipal Council, Indian National, resident of Flat No. 1, Ground Floor, Yamuna Apartments, Shirvodem, Navelim, Salcete-Goa.

.... Petitioner

Versus

1. Mrs. Inacinha D'Costa, wife of Mr. Remedios D'Costa, aged 70 years, housewife, resident of 16/5, Vazangal, Shiroda, Ponda-Goa and her husband,
2. Mr. Remedios D'Costa, major in age, retired, resident of 16/5, Vazangal, Shiroda, Ponda-Goa.
3. Mr. Bernardo D'Souza, son of late Manuel A.F. D'Souza, aged 73 years, retired from MPT, resident of House No. 353, Bogda, Desterro, Vasco-da-Gama-Goa.
4. Mr. Anthony Rodrigues, major in age, business, resident of House No. 353, Bodga, Mormugao-Goa.
5. Mr. Bimrao Singave, major in age, Homeguard, resident of House No. 353, Bodga, Mormugao-Goa.

.... Respondents

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

Mr. S.D. Lotlikar, Senior Advocate with Mr. Prasheen Lotlikar, Advocate for Respondent Nos. 1 and 2.

CORAM :- C. V. BHADANG, J.

RESERVED ON :- 23rd September, 2019

PRONOUNCED ON :- 24th September, 2019

JUDGMENT:

Rule made returnable forthwith. The learned Counsel for the contesting respondent nos. 1 and 2, waives service. Heard finally by consent of parties.

2. The challenge in this Petition is to the order dated 29.06.2019, passed by the learned Senior Civil Judge at Vasco-da-Gama, in Regular Civil Suit No. 70/2014/B, by which, an application (Exhibit D/65), filed by the petitioner/decreed holder, for appointment of a Commissioner, for determination of mesne profits, has been dismissed.

3. The brief facts are that the petitioner had filed the aforesaid suit for eviction and possession, which was dismissed, by the learned Trial Court. The petitioner challenged the same before the learned District Judge at Margao in Regular Civil Appeal No. 57/2018. The learned District Judge, allowed the Appeal vide judgment and order dated 29.12.2018 and the original defendant nos. 1, 2, 4 and 5 have been directed to vacate the suit portion of the house and deliver peaceful and vacant possession of the same to the plaintiff. The learned Trial Court is directed to hold an inquiry into the mesne profits.

4. In the said inquiry, before the Trial Court, the petitioner has examined himself as AW-1. It is at this stage that the petitioner has filed an application for appointment of a Commissioner to “assist in the matter of determination of mesne profits”, which has been dismissed on the ground that the suit does not involve any boundary dispute or a dispute as regards to the encroachment and the Court Commissioner cannot be appointed to collect evidence.

5. I have heard Mr. De Sa, the learned Counsel for the petitioner and Mr. Lotlikar, the learned Senior Counsel for the contesting respondent nos. 1 and 2.

6. Mr. De Sa, the learned Counsel for the petitioner has pointed out that the Court can appoint a Commissioner in the matter of determination of mesne profits under Order XXVI, Rule 9 of the Code of Civil Procedure (CPC, for short). It is submitted that the Trial Court was in error in refusing to appoint a Commissioner, on the ground that the suit does not involve any dispute as to the boundary or encroachment or that the appointment of a Commissioner would tantamount to the petitioner collecting evidence with the assistance of the Court. The learned Counsel has placed reliance on the decision of the

Supreme Court in the case of **State of West Bengal Vs. Bireswar Dutta Estate Private Ltd.** (Civil Appeal No. 4419/2001 decided on 18.11.2010), **Mahant Narayana Dasjee Varu & Others Vs. Board of Trustees, the Tirumalai Tirupathi Devasthanam AIR 1965 SC 1231** and the decision of this Court in the case of **Humayun Dhanrajgir and others Vs. Ezra Aboody (2008) 6 BOM CR 862.**

7. Mr. Lotlikar, the learned Senior Counsel for the respondent nos. 1 and 2 has supported the impugned order. It is submitted that the petitioner cannot take the assistance of the Court for collecting evidence, as has been rightly held by the learned Trial Court and it is for the petitioner to lead evidence on the point of mesne profits, if so advised.

8. I have considered the circumstances and the submissions made. Order XXVI, Rule 9 of CPC reads thus:

9. Commissions to make local investigations—In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to

report thereon to the Court:

Provided that, where the State Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules.

It can thus be seen that Order XXVI, Rule 9 of CPC specifically clothes the Court with power to appoint a Commissioner for ascertaining the market value of any property or the amount of mesne profits or damages or annual net profits, under the later part of Rule 9 of Order XXVI of CPC. The Trial Court has failed to notice this part of Rule 9 of Order XXVI of CPC. Under the first part, normally, where the Court finds it necessary for elucidating any matter in dispute that a Commissioner can be appointed and it is fairly well settled that the Court would normally appoint such a Commissioner, where the dispute is regarding the boundary marks and/or encroachment. However, merely because the suit does not involve any such dispute, is not sufficient to refuse the appointment of a Commissioner, when Order XXVI, Rule 9 of CPC specifically provides for such appointment, for ascertaining the mesne profits. It is not necessary to multiply authorities on the point for the simple reason that the Trial Court has failed to notice Rule 9 of Order XXVI of CPC, which permits the Court to appoint a Commissioner to ascertain the mesne profits. A

Commissioner could have been appointed in the facts and circumstances of the present case.

9. Mr. De Sa, the learned Counsel for the petitioner has suggested the names of some PWD Officers and also Mr. Suvrat S. Bhobe, who is Government approved Valuer.

10. In the result, the following order is passed:

ORDER

- (i) The Petition is allowed.
- (ii) The impugned order is hereby set aside.
- (iii) The application (Exhibit D-65) is allowed. Mr. Suvrat S. Bhobe, is appointed as the Commissioner to ascertain the mesne profits and to report accordingly, at the cost of the petitioner.
- (iv) Needless to mention that the report filed by the Commissioner/Valuer, shall be subject to objection, if any, raised on behalf of the respondents, which shall be decided in accordance with law.
- (v) Rule is made absolute in the aforesaid terms, with no order as to costs.

C. V. BHADANG, J.