

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 637 OF 2019

MARGARETA ESTELLA MASCARENHAS AND
ANR., ... Petitioners

Versus

ANACLETO CONCECAO PIEDADE
RODRIGUES AND ANR., ... Respondents

Mr. Sanman R. Keny and Mr. Laxman Assoldekar, Advocates
for the Petitioners.
Mr. Nikhil Pai, Advocate for the Respondent nos.1 and 2.

Coram:- C. V. BHADANG, J.

Date:- 23rd September, 2019

P.C.

The challenge in this petition is to the order dated 05.07.2019 passed by the learned Trial Court in Regular Civil Suit No.63/2013/B by which an application for appointment of a Commissioner filed by the petitioners/plaintiffs has been dismissed.

2. The case made out by the petitioners is that the respondents-defendants have committed encroachment to the extent of 1.5 metres (as per the claim originally made in the suit), on the land of the petitioners. It is undisputed that the petitioner is yet to open his evidence in the suit. It is at this stage that the petitioners filed an application for appointment of a

Commissioner which has been dismissed by the Trial Court on the ground that there was a partition case filed by the respondents which has been decided and a separate survey holding no.75/1-E has been allotted to the property of the respondents and, secondly, the petitioners have not challenged the said order. The learned Trial Court has also found that the Court cannot be asked to collect evidence by appointment of a Commissioner.

3. Mr. S. Keny, the learned Counsel for the petitioners, has strenuously urged that there are three survey reports namely dated 15.05.2014, 23.09.2014 and 19.04.2018 which, according to the learned Counsel for the petitioners, are discrepant with each other. It is submitted that the petitioner is not aggrieved by the partition effected in the case filed by the respondent but the grievance essentially is the encroachment committed by the petitioners in the property of respondents for which a Commissioner ought to have been appointed.

4. Mr. Nikhil Pai, the learned Counsel for the respondent nos.1 and 2, pointed out that the petitioner is yet to start with his evidence and this is not a case where the petitioners can seek appointment of a Commissioner as essentially it is for the Court to appoint a Commissioner, if it finds necessary for elucidating any matter in dispute. The learned Counsel for the respondents

states that the petitioners have produced three reports of private surveyor on record out of which the last report was filed after the passing of the impugned order.

5. Mr. Keny, the learned Counsel for the petitioners submit that there are only two survey reports one filed along with the suit and one after the passing of the impugned order to clarify the order passed in the partition proceedings.

6. I have carefully considered the circumstances and the submissions made. It is true that normally in a dispute of the present nature, the Court may require assistance of a Commissioner for elucidating the matter in dispute. However, the fact remains that principally it is the requirement of the Court to find that appointment of such Commissioner is necessary for elucidating any matter in dispute. In a given case, such requirement of the Court can only arise after the petitioners/plaintiffs lead their evidence.

7. For the present, even according to the petitioners, there are two survey reports which are already placed on record one at the time of filing of the suit and one after the impugned order is passed. Thus, it is for the petitioners to lead their evidence first and it would be open for the petitioners to seek appointment of Commissioner thereafter, if so advised, by filing properly

constituted application. If such an application is filed after the plaintiffs conclude their evidence, the Trial Court shall consider such application on its own merits and in accordance with law and without being influenced by the observations in the impugned order.

8. The petition is disposed off in the aforesaid terms.

C. V. BHADANG, J.

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