

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 948 OF 2018**

1. Shri Lincon Sassandra Vaz,
Son of Joao Avelino Vaz,
Aged 46 years,
Married, Seaman, and his wife
2. Smt. Agnela Maria Benjila Jumila Rebello,
Daughter of Joaquim Lourenco Rebello,
Aged 42 years, Housewife,
Both residents of Milleanwaddo,
Cuncolim, Salcete, Goa.
(for self and constituted Attorney
of Petitioner No.2.) ... Petitioners

V e r s u s

1. Shri Johnson Marcelino Pereira,
Son of late Joao Roberto Pereira,
Aged 39 years, and his wife,
2. Smt. Famina Pereira,
Wife of Johnson Marcelino Pereira,
Aged 27 years,
both residents of H. No.58,
Milleanwaddo, Cuncolim, Salcete, Goa.
3. Shri Luizinho Gomes,
Son of Rosario Gomes,
Aged 44 years and his wife
4. Smt. Janice Isabel Gomes,
Wife of Shri Luizinho Gomes,
Aged 38 years
Both resident of Flat No.F.F.1,
Commercial cum Residential Complex,
Goa Housing Board Colony,
Near Maruti Mandir,
Rumdamol, Davorlim,
Navelim, Salcete, Goa.
5. Shri Alvito Floriano Coutinho
alias Alvito Coutinho,
Also known as Alvito Floriano Nolasco

Coutinho, Son of Pedro Nolasco Coutinho
Aged 70 years, Accountant and his wife,

6. Smt. Carol Christine Coutinho
Daughter of Joseph Paes,
Aged 57 years,
Both resident of 2,
Grayling Crescent Croydon,
Victoria, 3136, Australia.
7. Shri Austrio Coutinho alias
Austrio Nolasco Coutinho,
son of Pedro Nolasco Coutinho,
Teacher, aged 69 years
and his wife,
8. Smt. Brita Irene Coutinho,
Daughter of Sven Johansson, Teacher,
Both residing at 13, Caboni Court,
Milgrave, Victoria 3170, Australia.
9. Smt. Maria Vera Consolacao Coutinho,
Alias Maria Vera Consolacao Fernandes,
Daughter of Pedro Nolasco Coutinho,
Aged 57 years, and her husband
10. Shri Raul Manuel Epifanio Fernandes,
Son of Josephrarea Margus Fernandes,
Aged 60 years,
Both residing at
9, Mardene Court
Milgrave, in the State of Victoria
Australia.
11. Smt. Carma Viena Coutinho
Alias Viena Coutinho or Carma Viena Rodrigues,
Daughter of Pedro Nolasco Coutinho,
Aged 71 years, and her husband
12. Shri Boniface Norbert Rodrigues,
Son of Thomas Eugene Rodrigues
Aged 73 years,
Both residing at 24, Northcliffe,
Eaton Bray, in the Country of
Badforshire, England,
(the Respondents no.5 to 12 are
represented by their Power of Attorney

Shri Albino J. H. D'Silva alias
Dr. Jose Honorato Albino D'Silva,
aged 40 years, Resident of Majorda,
Salcete, Goa.

... Respondents

Mr. R. G. Ramani and Mr. P. Shenvi Kakodkar, Advocates for
the Petitioners.

Mr. V. G. P. Dukle, Advocate for the Respondent nos.1 to 4.

Coram :- C. V. BHADANG, J.
Reserved for Order on : 08th July, 2019
Order Pronounced on : 15th July, 2019

JUDGMENT

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

2. The challenge in this petition is to the Order dated 13.07.2018, below exhibit D-31, passed by the learned District Judge at Margao in Regular Civil Appeal No.40/2014. By the impugned order, the learned District Judge has allowed application exhibit D-31 filed by the respondent nos.1 to 4 (the appellants before the learned District Judge) for appointment of a Commissioner under Order XXVI Rule 9 of the Civil Procedure Code (CPC, for short).

3. The petitioners are the original defendant nos.9 and 10. The respondent nos.1 to 4 being the original plaintiffs had filed

Regular Civil Suit No.149/2006/E against the petitioners and the respondent nos.5 to 12 (the defendant nos.1 to 8). That is a suit for declaration that the Sale Deed dated 15.10.2001 executed by the respondent nos.5 to 12 in favour of the petitioners is null and void and for consequent correction of the survey records by declaring the respondent nos.1 to 4 as the co-owners of the suit property which is land surveyed under no.554/6 situated at Cuncolim, Salcete, Goa.

4. The respondent nos.5 to 12 were proceeded exparte by the learned Trial Court.

5. On the basis of the rival pleadings, the learned Trial Court framed the following issues :

- 1.** Whether the plaintiffs prove that they are entitled for declaration that the Sale Deed dated 15.10.2001 is to be declared null and void ?
- 2.** Whether the plaintiffs prove that they are the co-owners of the suit property?
- 3.** Whether the plaintiffs prove that the names of the defendant nos.9 and 10 are to be deleted from the

occupants column of Form 1 and 14 of the suit property ?

4. Whether the plaintiffs prove that they are entitled for declaration of Sale Deed dated 09.05.2006, as null and void ?

Additional issue settled on 10.07.2009

Whether the plaintiffs prove that the Deed of Rectification executed by the defendant nos.1 to 8, with the defendant no.9 and 10, which is registered under No.622 at pages 226 to 235 of Book No.1, Volume No.284 dated 30.01.2008 is null and void ?

What relief ? What order ?

6. The learned Trial Court answered all the issues in the negative and dismissed the suit vide judgment and decree dated 18.01.2014. The respondent nos.1 to 4 have challenged the same before the learned District Judge in Regular Civil Appeal No.40/2014 in which they filed an application for appointment of Commissioner. The respondent nos.1 to 4 contended that the suit has been dismissed, inter alia, on the

ground that they have not identified the property better known as 'Gormand' and 'Chichegally" by boundaries or by plan drawn by an expert. It was contended that the Sale Deed dated 29.08.1902 relied upon by the petitioners gives extent of the property 'Chichegally' as 46 hands long. It was contended that the dispute involved is about the identity and the boundaries of the suit property and the parts thereof and, as such, a local investigation by a Commissioner would "serve the cause of justice" as the plan produced by the expert engaged by the petitioners is not clear. It was, therefore, prayed that the Head Surveyor from the Survey Department be appointed to identify the suit property or part thereof which the petitioners claim as having inherited or purchased by their Predecessors in title.

7. In para 5, the respondent nos.1 to 4 have stated thus :

"...That the Commissioner be directed to conduct local investigation and to peruse all documents relied upon and produced by parties who be directed to supply the same to the Commissioner. That the parties be permitted to cross examine the said Commissioner, if they desire."

8. The application was opposed on behalf of the petitioners, inter alia, on the ground that the same is not

bonafide and is filed with a view to delay the proceedings. It was contended that the petitioners have already examined an expert Engineer Mr. Neelesh Laad, who has submitted his report along with a plan which is there on record. It is pointed out that the expert has been cross examined at length and nothing has been brought out in the cross examination to discredit the evidence of the expert and the report and the plan submitted. It is contended that one of the plaintiffs, who has examined himself as Pw.1, has acted as an expert claiming to be an Engineer by profession and has sought to identify the suit property by making markings on the survey plan while leading his evidence. It is thus submitted that there was no case made out for appointment of a Commissioner.

9. The First Appellate Court in the impugned order has found that there is a dispute as to the boundaries and, therefore, it is necessary that a local investigation is conducted for the purpose of elucidating the matter in dispute. In that view of the matter, the First Appellate Court had appointed the Commissioner.

10. I have heard Mr. Ramani, the learned Counsel for the petitioners and Mr. Dukle, the learned Counsel for the contesting respondent nos.1 to 4. Perused record.

11. Mr. Ramani, the learned Counsel for the petitioners, has submitted that there is no dispute as to the identity or the boundaries in this case, inasmuch as, it is not in dispute that the land surveyed under no.554/6 of Village Cuncolim is the suit property which is more specifically described in plaint para no.1. It is submitted that the petitioners have not disputed the said description in para 1 of the written statement. It is pointed out that the property consists of two parts, plot A admeasuring an area of 486 square metres consisting of an old residential house and plot B admeasuring an area of 114 square metres which also consists of an old residential house. It is thus submitted that there is absolutely no dispute as to the identity or the boundaries of the property being land survey no.554/6. It is submitted that the respondent nos.1 to 4 had amended the plaint and in that also there is no dispute as to the boundaries or to the identity raised. It is submitted that the issues framed by the learned Trial Court would also indicate that there is no dispute as to the identity of the suit property. He submitted that the learned District Judge was in error in appointing the

Commissioner on the premise that there is a dispute as to the identity or boundaries of the suit property. Learned Counsel pointed out that Pw.1, himself claims to be an expert being a Civil Engineer and apart from that, the petitioners have examined an expert Mr. Neelesh Laad, Dw.2, who has produced his report dated 05.02.2012 along with plan which is there on record. It is thus submitted that it is for the learned District Judge to decide on the basis of the evidence as to whether the contesting respondents succeed in establishing their claim and the jurisdiction cannot be relegated to the Commissioner nor the contesting respondents can be allowed to collect evidence under the garb of local investigation.

12. Mr. Ramani, the learned Counsel for the petitioner, has placed reliance on the decision of this Court in the case of **Syed. Mushtaque Ahmad s/o. Syed Ismail & Ors. vs. Syed Ashique Ali Khan s/o. Haidar Ali, 2011 SCC OnLine Bom 886** and the decision of the Orissa High Court in the case of **K. Raghunath Rao vs. Tumula Jailaxmi, 1986 SCC OnLine Ori 70**. The learned Counsel has taken me through the amended copy of the plaint in order to submit that it is the case made out by the contesting respondents themselves that the suit property originally consists of two parts by name 'Gormand' and 'Chichegally" and insofar as the entire property

is concerned, there is absolutely no dispute about identity or boundaries.

13. Mr. Duple, the learned Counsel for the respondents has supported the impugned order. It is submitted that in an appropriate case, the Court can appoint the Commissioner for local investigation in order to elucidate any matter in dispute and the learned District Judge having exercised the discretion properly, no case for interference is made out. The learned Counsel has pointed out that there is a dispute as to the area or extent of the two portions and, therefore, the learned District Judge was right in appointing the Commissioner. Reliance on behalf of the respondents is placed on the decision of this Court in the case of **Shri Vassant Tukaram Prabhu vs. Smt. Xalinibai Borcar & Ors. (Appeal from Order no.71/2013)**, decided on 28.03.2014 in order to submit that whenever there is controversy as to the identity or boundaries of the suit property, the law would require the Court to suo motu exercise its power under Order XXVI Rule 9 of CPC for appointment of a Commissioner for local investigation.

14. I have considered the rival circumstances and the submissions made. As noticed earlier, there is no dispute as to the identity or the description of the property as set out in

para 1 of the plaint and even the amended plaint. The suit property essentially consists of the land survey no.544/6 of Village Cuncolim, Salcete Goa. The issues framed by the Trial Court as reproduced above also do not indicate that there is any dispute as to the identity or boundaries of the property. At no point of time, any attempt was made to get any such issues framed had there been any dispute as to the identity or boundaries of the suit property. The petitioners have already examined a Surveyor Mr. Neelesh Laad (Dw.2), who has produced his report along with a plan. Pw.1 also claims to be an expert being a Civil Engineer. This entire oral evidence is there on record for the First Appellate Court as the final fact finding Court to appreciate and then to decide the appeal on its own merits. There cannot be any manner of dispute with the proposition that in a case where there is a dispute as to identity, the Court would normally appoint a Commissioner for local investigation in order to assist the Court and to elucidate any matter in dispute. The power under Order IX Rule 9 of CPC is essentially for the Court to exercise even suo motu, as held by this Court in the case of **Vassant Tukaram Prabhu** (supra). It is well settled that the said power cannot be used by a party to collect evidence. The question whether there is any attempt by a party to collect evidence under the garb of the appointment of a Commissioner or whether the Court

requires such local investigation for elucidating any matter in dispute is a question which depends on the facts and circumstances of each case. In the present case, it does not appear that there is any dispute as to the identity or the boundaries of the suit property and, therefore, the appointment of the Commissioner in my considered view and that too at the appellate stage is not justified.

15. The learned Counsel for the respondent nos.1 to 4 has pointed out the observations of the Trial Court in para 17 of the judgment which is impugned in the appeal, in order to submit that the Trial Court has observed that the respondents have not identified the suit property 'Gormand' and 'Chichegally' by boundaries or by plan or by examining an expert. It would be significant to note that this observation is not with respect to identity or boundaries of the suit property as a whole namely the land survey no.544/6 but about the two portions of the suit property. In fact, by virtue of an amendment to the plaint, the respondent nos.1 to 4 had claimed that the suit property consists of two parts and, therefore, if at all it was found necessary, could have examined an expert during the course of the trial. The observations in para 17 of the Trial Court shows that these respondents did not examine any expert though opportunity

was given to Pw.1 for the said purpose. The Pw.1 being a Civil Engineer has made his own markings on the Government Survey Plan at exhibit 35 showing the property marked between A to A1 as property 'Gormand' and the property shown by the letters A, B, C, D as the part purchased by Custodio Coutinho. Thus, the parties had an opportunity to lead their evidence including that of an expert which was availed of by the petitioners. Pw.1 has also led his evidence claiming to be an expert as a Civil Engineer. Normally, in such a case, it is for the First Appellate Court to decide the matter after considering the oral and the documentary evidence on record. The only ground on which the Appellate Court has appointed the Commissioner is that there is a dispute as to the identity and the boundaries of the property, which, in my considered view, is not correct. This Court in the case of **Syed. Mustaque Ahmad** (supra) after noticing the issues framed has found that there is no dispute as to the boundaries or as regards encroachment and had therefore set aside the order appointing a Commissioner.

16. The Orissa High Court in the case of **K. Raghunath Rao** (supra), has held that an order for appointment of Commissioner under Order XXVI Rule 9 of the CPC is

discretionary and although the power is of wide amplitude, for the same reasons, it requires restraint vide exercise thereof.

17. The judgment in the case of **Vassant Tukaram Prabhu** (supra), turned on its own fact. There cannot be a dispute as to the principle referred to therein but as indicated earlier, the question whether the appointment of a Commissioner for local investigation is necessary for elucidating the matter in dispute, will depend on the individual facts obtaining in each case.

18. I have carefully gone through the impugned order and I do not find that the same can be sustained. The petition is accordingly allowed. The impugned order is hereby set aside. The application-exhibit D-31, is hereby dismissed.

19. Rule is made absolute in the aforesaid terms with no order as to costs.

C. V. BHADANG, J.

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