

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO.971 OF 2019**

Shri Ulhas Mayekar

... Petitioner

Versus

Mrs. Olga De Souza alias
Olga D'Souza & Ors.

... Respondents

Shri I. Agha, Advocate for the Petitioner.

Shri Rohit Bras De Sa, Advocate for the Respondents.

Coram: - DAMA SESHADRI NAIDU, J.**Date: - 10th December 2019****ORAL ORDER:**

The respondents, as the plaintiffs, have filed Regular Civil Suit No.131/2019/A for mandatory and prohibitory injunctions. The dispute concerns a piece of property. The plaintiffs claim that the property was vacant and that the defendant trespassed and had been trying to raise structures on it.

2. On the other hand, the defendant filed written statement and contested the plaintiffs' case. He claimed that he purchased the property in 1985, constructed a house in 1987, assessed that house to tax, having secured a house number, and has been living in the house for all these years. Besides, the defendant seems to have filed before the Court the repair licence he has secured from the civic authority, that is Gram Panchayat.

3. On the plaintiffs' application under Order 39 Rule 1 & 2 of CPC for an *ad interim injunction*, the trial Court, after taking the defendant's reply, directed *status quo*. True, the defendant contends that though he filed his reply, the trial Court did not hear him before passing order of *status quo*.

4. Later, the plaintiffs applied under Order 39 Rule 2A CPC, alleging that the defendant has willfully violated the order of *status quo* and, thus, he has committed contempt of the Court: he went ahead and constructed a compound wall.

5. In that backdrop, the Trial Court, on 04.11.2019, directed the bailiff to take photographs of the construction. In this Writ Petition, the defendant assails that direction as amounting to gathering of evidence at one party's behest, to the other party's prejudice.

6. After taking me through the record, including the documents the defendant has filed before the trial Court, the petitioners' counsel has argued that, in the first place, the petitioner has not violated the Court's order; second the trial Court has not given him any opportunity to oppose the plaintiffs' application under Order 39 Rules 1 & 2 CPC; third, as the courts have repeatedly held, the trial Court ought not have appointed the bailiff for gathering evidence.

7. On the contrary, the respondents' counsel has argued that given the grave allegation of contempt against the defendant, the trial Court in

its wisdom has only wanted to ascertain the facts before it could proceed against the defendant. Therefore, according to him, the order impugned is unassailable.

8. Heard the learned counsel for the petitioner and the learned counsel for the respondents.

9. There can be no quarrel about the well-established legal proposition that no court can appoint a commissioner to gather evidence, more particularly, for one party, to the prejudice of the other. It is for the parties to lead evidence and to prove their respective cases or disprove the opposite party's case. That said, I must also hold that contempt proceedings stand on a different footing.

10. Contempt proceedings are non-adversarial. There, the petitioner acts as a mere informer; it suffices if he complains to the court that its order is violate and, thus, its majesty has been compromised. It is, then, for the court to act for reasons it feels justified. It may even refuse to act. Precisely for this reason, once a contempt case is dismissed, the informant, that is the petitioner, will have no remedial steps against that dismissal. On the contrary, it is only the alleged contemnor that will have a statutory remedy if he is held guilty of any contempt.

11. Granted, Indian adjudicatory mechanism is adversarial. But it is no iron-clad rule. It is a common law practice we have adopted—with exceptions, too. For example, Order XVIII, Rule 18 of CPC empowers the presiding Judge to visit the property and ascertain the facts. And the

provision reads:

Power of Court to inspect - The Court may at any stage of a suit inspect any property or thing concerning which any question may arise and where the Court inspects any property or thing it shall, as soon as may be practicable, make a memorandum of any relevant facts observed at such inspection and such memorandum shall form a part of the record of the suit.

12. If we proceed further, the learned counsel for the petitioner has insisted that the trial Court appointed bailiff to take photographs and to present them before the Court. It amounts, he stresses, gathering evidence. I am afraid it is not.

13. Under the regime of Rule of Law, once a competent court passes an order, it is the bounden duty of all concerned to act in obedience with that directive. Scrupulous compliance is the legal imperative. Of course, the party aggrieved may challenge the order. But unless a court at higher adjudicatory echelons interferes with that order, the order remains in force, commanding compliance.

14. The order violated, any party can complain to the court that passed the order. I reckon here the locus or standing does not play any role. Informed, the court concerned may act or may not act. If it acts, it invokes, say, the Contempt of Courts Act, or the Constitutional provisions such as Article 215, or, even, Order 39, Rule 2A, as is the case here. Which provision the court invokes depends on its hierarchical status and the cause espoused. These proceedings, then, are quasi-judicial. They require strict procedural compliance.

15. More importantly, the court concerned may not be trigger happy; it will not rush to punish the alleged contemnor. First, it looks for prima faice proof of contempt. That evidence gathered and the court satisfied, it will put the putative contemnor on notice.

16. Here, the trial Court, to be cautious, wanted to satisfy itself that there is some substance in the allegation of contempt. For satisfying itself on that count, it has not asked a third party, not even an advocate, to ascertain the fact. Instead, it wants its own officer—the bailiff—to inspect the site and report. After all, the bailiff is the court officer, deputed by the judicial officer, as his nominee or agent, to ascertain the facts. I do not think it amounts the trial Court's appointing a person to gather any evidence.

17. Put on notice in the contempt, the party may always defend himself. Whatever the bailiff places before the trial Court is only *prima facie* evidence to enable the trial Court to decide whether it should proceed with the contempt case.

18. In *Shri Vishnu Anant Pollshet v. Shri Shankar Bhiva Shetgaonkar*¹ and also in *Sanjay v. Sahebrao*,² this Court, per the respective single Judges, has dealt with the impact of the courts' appointing advocate-commissioners to probe into facts the parties actually required to prove before the court.

1 1998 (1) Goa L.T. 77

2 2001 (1) ALL MR 653

19. Under these circumstances, I find no reason to interfere with the impugned order. When I started dictating, the petitioner's counsel has requested the Court to leave it open for the defendant to have an opportunity to file his say or reply before the trial Court in the contempt petition before the Bailiff could execute the Court's order.

20. I reckon, though the request is innocuous, the defendant has every opportunity to defend himself before the trial Court. As a part of that, he may file his reply, too. At any rate, the trial Court's direction to bailiff need not be put on hold for that purpose. That said, I also hold that the trial Court will endeavour to decide the interlocutory application under Order 39, Rules 1 & 2 of CPC at the earliest.

The Writ Petition is dismissed. No order on costs.

DAMA SESHADRI NAIDU, J.

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