

IN THE HIGH COURT OF BOMBAY AT GOA.

WRIT PETITION NO. 959 OF 2017.

LOURENCE VICTORINO
FERNANDES @ LAWRENCE
FERNANDES AND ANR.,

... Petitioners.

Versus

PASCOAL FERNANDES AND 10 ORS.,

... Respondents.

Shri Rohit Bras De Sa and Ms. V. Shetye, Advocates for the petitioners.
Shri A. Bhobe and Ms. A. Fernandes, Advocates for the respondent no.5

Coram:- DAMA SESHADRI NAIDU, J.

Date:- 7th January 2020

ORAL ORDER

The petitioners, as the plaintiffs, filed Special Civil Suit No.26/2014/B (187/1996) for perpetual and mandatory injunctions.

2. The Petitioners complained that the respondents trespassed upon their property and raised structures. So they wanted the defendants restrained from raising further structures. That apart, they also wanted the trial Court to direct them, through a mandatory injunction, to pull down or demolish all the illegal structures raised till then.

3. In the suit, the petitioners filed two interlocutory applications: one under Order 39 Rule 1 and 2 of CPC, and the other under Order 26 Rule 9, read with Section 151 of CPC. The former one is for an ad interim injunction to restrain the respondents from raising further

structures and the latter for having a Court Commissioner appointed. That Court Commissioner, the petitioners plead, should visit the site and take measurements of the illegal constructions carried out by the defendants in the suit property.

4. Through its order, dated 12.7.2017, the trial Court dismissed the petitioners' application for the appointment of the Court Commissioner. It has reckoned that the petitioners' application under Order 26 Rule 9 of CPC is to gather evidence. Aggrieved, assailing the order, dt.12.07.2019, the petitioners have filed this Writ Petition under Article 227 of the Constitution of India.

5. Heard Shri Rohit D'Sa, the learned counsel for the petitioners; and Shri A. Bhobe, the learned counsel for the fifth respondent.

6. Indeed, it is too well established to be disputed that the plaintiff has the legal, primary, or persuasive burden to establish his case. Then the burden shifts. The Supreme Court in *Addagada Raghavamma v. Addagada Chenchamma*¹, has held that there is an essential distinction between the burden of proof and the onus of proof. The burden of proof lies upon the person who has to prove a fact, and it never shifts; but the onus of proof shifts. Under the Indian Evidence Act, Sections 101 to 103 define what these two species of burden are and decide which burden lies on whom.

7. That said, in an adversarial system, the Court does not play

¹ AIR 1964 SC 136

favourites; it assists neither party in gathering evidence. In the same breath, I also note that every petitioner under Section 26 of CPC cannot be for gathering evidence.

8. In this case, the petitioners and the respondents are not neighbours; therefore, there is no question of the respondents surreptitiously or insidiously encroaching upon the petitioners' property. They are, as petitioners put it, rank trespassers. If at all they have been raising structures on the property not owned by them, they are, then, trespassers—perhaps in settled possession. In that context, primarily the petitioners must establish that they own the property. In the petitioners' establishing that fact, the commissioner's report plays no role.

9. On the other hand, once the petitioners' title or entitlement to the property stands established by, say, documentary and oral evidence, a third party raising structures on their property will have the onus shifted on to them that they have legitimately possessed the property and their raising structures, too, has a justification. The defendants' failing on their evidential burden, at the end of the day, the petitioners can insist on the defendants to remove the structure and bear the costs for that if they fail to do so. In all this crisscross of burdens of proof and shifting onuses, the extent of structures plays no role, nor does the Commissioner's appointment aids the Court in determining any essential adjudicatory factor.

10. Indeed, Shri Rohit D'Sa has relied on *Kolhapuri Bandu Lakade v. Yallappa Chinappa Lakade*². In that judgment, this Court, per Justice B. R. Gavai (as His Lordship then was), has considered the Supreme Court's judgment in *Haryana Waqf Board v. Shanti Sarup*³. Then, it has ruled that a commissioner can be appointed to ascertain the range or extent of encroachment.

11. As I have already noted, in this case there is no allegation of encroachment; on the contrary, the allegation is of trespassers. In a case of encroachment, the presupposition is that the encroacher has his own legitimate extent but, beyond that, trenched on the neighbour's. Then, physical demarcation of the land, perhaps, serves some purpose. But in the case of a rank outsider trespassing on and occupying a piece of property, as the petitioners allege, the measurement of structures that alleged trespasser raised serves, in my view, no purpose. Not does it advance the cause of either party to the suit.

12. Then, the petitioners' counsel has also placed reliance on *Rasiklal Mohanlal Gangani v. State of Goa*⁴, in which, according to him, the Court preserved the petitioners' right to seek an appointment of the commissioner at an appropriate time. I am afraid it is premature for me to rule on that aspect. If the law permits the petitioners to seek the appointment of Court Commissioner at a later stage, they may have all

²Judgement, dt.14.3.2011

³(2008)8 SCC 671

⁴Judgment, dt.25.6.2019

their options open in that regard.

So I conclude that the trial Court's order, dated 12.7.2017, is unassailable and calls for no interference. As a result, the Writ Petition stands dismissed.

DAMA SESHADRI NAIDU, J.

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