

IN THE HIGH COURT OF BOMBAY AT GOA.

WRIT PETITION NO. 825 OF 2019.

PIE DADE COLACO

... Petitioner.

Versus

JOHN D. MASCARENHAS

... Respondent.

Shri Shivan Desai, Advocate for the petitioner.

Shri C. A. Coutinho, Advocate for the respondent Nos.1(a) to 1(e), 1(f) and 1(g).

Coram:- DAMA SESHADRI NAIDU, J.

Date:- 21st January 2020

Oral Order:

The Petitioner is the defendant, and the respondents are the plaintiffs, in Regular Civil Suit No.92/2009/E, before the Civil Judge, Junior Division, 'F' Court, Margao. The respondent filed the suit for declaration and injunction. The declaration concerns easementary right. I will refer to the parties as they were arrayed before the trial Court.

2. Initially, the suit was decreed. Aggrieved, the defendant carried matter in First Appeal and had it remanded. Now, after the remand, the trial Court took up the matter for further consideration. In that context, the defendant applied to have a commissioner appointed. In fact, he wanted the commissioner to visit the suit property and determine whether there exists any alternative path on the "defendant's property". The trial Court rejected that application.

3. Aggrieved, the defendant has filed this Writ Petition.

4. Shri S. Desai, the learned counsel for the defendant, has fairly submitted that the defendant's application under Order 26 Rule 9 of CPC ought to have been different. Actually, the defendant wanted the commissioner to find out whether there existed any alternative path on his own property. But he ought to have asked the commissioner to ascertain whether there exists an alternative path in any other property, thus, obviating any claim for easementary right over the defendant's property. Shri S. Desai also argues that had the commissioner been appointed, that would have cut short the trial and resolved the issue.

5. I may, for the purpose of resolving the issue in this writ petition, assume that the defendant has, in fact, sought that relief as he had intended: whether there exists an alternative path in any other property.

6. On the other hand, Shri C. A. Coutinho, the learned counsel for the respondent 1(a) to 1(e), 1(f) and 1(g), has strenuously objected to any relief to the defendant. It was on the premise that no commissioner can be appointed to gather the evidence at the behest of either party to the litigation.

7. Indeed, the defendant wanted a commissioner appointed to determine the very core issue in the suit: easementary right. That issue is a matter of evidence. The Court cannot come to the rescue of either

party in the name of appointing a commissioner and asking him to gather evidence. I see no legal infirmity in the impugned order. I therefore, refuse to interfere.

8. That said, I may observe that the statutory mandate under Order 26 Rule 9 of CPC is unmistakable. In any suit, the Court has ample powers to appoint a commissioner and ask him to make “local investigations.” For this, the Court must form an opinion that the local investigation is necessary. And that necessity is to have any matter in dispute elucidated. The Court may also want the commissioner to ascertain the market-value of “any property, or the amount of any mesne profits or damages or annual net profits.”

9. Here the parties have gone before the Court with rival contentions: the plaintiff has asserted that he has an easementary right of access over the defendant’s property; and the defendant has countered that the plaintiff has alternative means of access to his property. Then, it is for the parties to discharge both their primary and evidential burdens.

10. Even after their leading evidence, if the trial Court still reckons that it requires local investigation for having the matter in dispute elucidated, it is for the trial Court to deploy an advocate commissioner, who, in that context, acts as the Court’s agent. But this does not happen at either party’s behest.

With these observations I close the writ petition.

DAMA SESHADRI NAIDU, J.

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