

Maria S.

**IN THE HIGH COURT OF BOMBAY AT GOA
WRIT PETITION NO.589 OF 2023**

1.Mr Anthony Roque D'Souza,
Son of late Florence D'Souza
Aged 65 years of age, married,
private service, Indian National.

2.Mrs Linda D'Souza,
wife of Anthony Roque D'Souza,
59 years of age, married,
housewife, Indian National;
both residents of H.No.63,
Arpora, Bardez Goa.
(Registered addresses)

... Petitioners

Versus

1. State of Goa
Through Chief Secretary of Goa
Secretariat, Porvorim,
Bardez Goa.

2. Directorate of Settlement And
Land Records,
Panaji-Goa.

3. Inspector of Survey And Land
Records,
City Survey Mapusa Goa.

4. Mamlatdar of Bardez,
Mapusa Goa
(Registered addresses)

...Respondents

Mr Dhaval D. Zaveri, Advocate *with Mr Nehal Govekar, Advocate for the Petitioners.*

Mr Prashil Arolkar, Additional Government Advocate *for the Respondents.*

CORAM:
DATED :

PRAKASH D. NAIK, J
12th SEPTEMBER, 2023

ORDER:

1. The petitioner invokes jurisdiction of this Court under Article 227 of the Constitution of India to assail the order dated 22.08.2023 passed by Adhoc District Judge-I (FTC) at Mapusa Goa in Civil Suit No.49/2017 by virtue of which the application for appointment of Court Commissioner for local investigation has been rejected.

2. The petitioners filed a suit before the Court of Civil Judge, viz. Suit No.49/2017 seeking declaration that the plaintiffs are owners of additional area of 207.16 sq.mts in respect of suit property A Survey No.81/2 and an additional area of 229.18 sq.mts in respect of suit property B Survey No.81/8. The petitioners also sought declarations to Directorate of Settlement And Land Records and Inspector of Survey And Land Records, City Survey Mapusa, Goa to correct the survey records/plans of the Survey Plan in respect of the suit property A, B and C as per the Survey Report dated 06.06.2022 and that an area of 207.16 sq.mts to be added to the New Survey No.81/2 suit property A and further area of 229.18 sq.mts to be added to New Survey No.81/8 situated in property B. The area of 171.37 sq.mts, i.e. pathway be reduced towards the eastern side of the pathway by an area of 70.72 sq.mts and 100.65 sq.mts on the western side of the pathway of the suit property C Survey No.81/7. It was also prayed that the Mamlatdar, Bardez, Mapusa, Goa be directed to correct and include an area of 207.16 sq.mts in the suit property

A Survey No.81/2 and an area of 229.18 sq.mts in the suit property B Survey No.81/8. The Directorate of Settlement And Land Records, Panaji-Goa and Inspector of Survey And Land Records, City Survey Mapusa, Goa be directed to maintain an area of 78.50 sq.mts which is a pathway of the suit property C Survey No.81/7 as per the Old Cadastral Survey No.300. The Directorate of Settlement And Land Records and Inspector of Survey And Land Records be directed to maintain an area of 123.38 sq.mts which is shown as a road of the suit property A Survey no.81/2 as per the Old Cadastral Survey No.297(part) and 296(part) shown as pathway and as mentioned and shown in red colour by Surveyor.

3. The defendants filed written statements in the suit on 29.05.2018. Issues were framed on 03.09.2021. Additional written statement was filed by the defendants on 13.03.2023. Affidavit-in-evidence of witness of plaintiff(PW-1) was filed on 15.12.2021. Examination-in-chief was recorded on 14.03.2022. Affidavit-in-evidence of witness plaintiff(PW2) was filed on 14.01.2023 and examination-in-chief was recorded on 17.04.2023. Affidavit-in-evidence of DW No.1 was filed and the examination-in-chief and cross-examination was recorded on 27.06.2023.

4. The petitioners preferred an application for appointment of Commissioner on 03.07.2023 and contended that the petitioner/plaintiff No.1 has examined himself as witness and Mr Jose Fernandes has been examined as PW2. The reference was made to the evidence of witnesses including DW No.1 and it

was contended that in order to ascertain and verify the factual position in respect of the pathway/road passing through the property Survey No.81/2 and 81/8 of Village Arpora and also to ascertain the dimension of pathway/road, the Executive Engineer be directed to appoint an engineer or technical engineer or any other appropriate officer of the Department of Executive Engineer, PWD as Commissioner. The application was opposed by the respondents by filing reply contending that it is not permissible to appoint Commissioner for collecting evidence under Order XXVI Rule 9 of CPC. The plaintiff has closed his evidence after examining himself and a Surveyor as expert witness and both have failed to prove that the road as shown in the Survey Plan does not exist on site. The plaintiff is seeking appointment of Commissioner to gather evidence which he himself could not produce.

5. The learned Adhoc District Judge-1, FTC, North Goa, Mapusa dismissed the application dated 03.07.2023 for appointment of Commissioner on the ground that the plaintiffs are seeking appointment of Commissioner to verify the presence of pathway/road passing through Survey No.81/2 and 81/8 of Village Arpora and to ascertain the dimensions of the pathway/road. The burden lies on the plaintiffs to prove the issue no.5.

6. Subsequently, the petitioner preferred another application for appointment of Commissioner on 02.08.2023 and contended that the defendants have examined witness DW 1 Mr Patrick H. Gaonsalves, i.e. defendant No.3 and have closed their

case. The said witness in the cross-examination has stated that tarred road is not passing through Survey No.81/2 and 81/8 of Arpora Village. In order to ascertain and verify the factual position at loco in respect of the road passing through the properties Survey No.81/2, 81/7 and 81/8 of Village Arpora, an engineer or technical engineer may be appointed as Commissioner. It was also stated that the plaintiff had filed similar application on 03.07.2023 and the said application was rejected on 20.07.2023. When the earlier application for appointment of Commissioner was filed by the plaintiff, the defendants had not closed their case. Both the parties have concluded their respective evidence and therefore the present application for appointment of Commissioner has been filed. The Court can review the order dated 20.07.2023 and no prejudice would be caused to the defendants if the Commissioner is appointed by the Court. The application was opposed by the defendants by filing reply stating that similar application has been rejected by the Court vide order dated 20.07.2023. The application is barred by *res judicata*. The learned Adhoc District Judge-I dismissed the application with costs of Rs.2000/- vide order dated 22.08.2023. It was observed that the previous application was rejected by the Court. The plaintiff has to prove his case on his own. There is no change in circumstances from the order passed earlier dismissing the application for appointment of Commissioner.

7. Learned advocate for the petitioner, Mr Zaveri, submitted that the plea of *res judicata* cannot be applied to the present case. The evidence of the defendants was closed after passing

the previous order of rejection of application for appointment of Commissioner. When the matter relates to demarcation of property, it is necessary to appoint a Commissioner. The impugned order is contrary to mandate of Order XXVI Rule 9 of CPC. The petitioners have asserted that comparison of Old Cadastral Survey Plan, Re-Survey Plan and New Survey Plan in respect of the properties reveal that the respondents have made a mistake in showing the road and pathway with different widths which has resulted in depriving the petitioners the area to which they are otherwise entitled to in law, which is backed by a Surveyor Report and evidence. The respondents have erroneously shown a road of greater width than actually exists at loco passing through Survey No.81/7 and to the west of Survey No.81/2 and to the east of Survey No.81/8. Independent Court Commissioner is required to be appointed to give opinion for the purpose of elucidating any matter in dispute. A subsequent application was filed after closing of the evidence which was not available during the earlier application.

8. Learned advocate for the petitioner relied on the following decisions:-

- a) ***Dnyandeo Vithal Salke and Others v/s. Dagdu Kadar Inamdar¹***
- b) ***Shantaram Dattatray Kekan and Others v/s. Bhausaheb Karbhari Kekan And Another².***
- c) ***Kolhapuri Bandu Lakade v/s. Yallappa Chinappa Lakade, since deceased through Pooja @ Poojari Y. Lakade and others v/s.***

¹ (2017) (3) Mh.L.J

² 2022 SCC OnLine Bom 6466: (2023) 1 AIR Bom R 554: (2023) 2 Mah LJ77

Yallappa Chinappa Lakade, since deceased through ***Pooja @ Poojari Y. Lakade*** and others³

- d) ***Malhar s/o Ganpat Bokerphod and others v/s. Shivaji s/o Vishwanath Pawal***⁴.
- e) ***Haryana Waqf Board v/s. Shanti Sarup And Others***⁵.

9. Learned advocate for the respondents submitted that the petitioner is delaying the proceedings by preferring applications repeatedly. The previous application was rejected by the Court. Principle of *res judicata* is applicable. There was no change in circumstances to entertain second application. The petitioner has failed to adduce evidence in their support and cannot compel the Court to collect evidence on their behalf. The second application was not maintainable in law.

10. Learned advocate for the respondent has relied upon the decision in the case of ***Shaikh Isak s/o Shaikh Amir v/s. State of Maharashtra and another***⁶.

11. There is no dispute that the petitioner had earlier preferred an application for appointment of Commissioner which was rejected vide order dated 20.07.2023. The petitioner preferred another application before the trial Court for similar relief. However, it was contended that the previous application for appointment of Commissioner was filed by the petitioners and at

³ [2011 (3) Mh.L.J.]

⁴ [2014(4) Mh.L.J.]

⁵ (2008) 8 SCC 671

⁶ 2011 (3) Mh.L.J.

that time the defendants had not closed their case. In paragraph 10 and 11 of the plaint, the petitioners had pleaded that there exists a pathway passing through the suit properties A, B and C and the same is shown on the Old Cadastral No.296, 297 and 300 of Village Arpora, Bardez Goa. The existing pathway is shown on the Re-Survey Plan prepared by respondents No.2 and 3. In the New Survey Plan of the suit properties A and B, the respondents No.2 and 3 have shown broad road in different widths. In the suit property C the respondents No.2 and 3 have shown pathway with more width. When the petitioners sought Old Cadastral Survey Plan, Re-survey Plan and New Survey Plan in respect of the suit properties, it was learnt that respondents No.2 and 3 have made mistake in showing and pathway with different widths. The evidence of defence witness examined by the defendants was closed.

12. Order XXVI relates to ***Commissions to examine witnesses***. Any Court may in any suit issue a commission for the examination on interrogatories or otherwise of any person resident within the local limits of its jurisdiction who is exempted under this Code from attending the Court or who is from sickness or infirmity unable to attend it.

13. Rule 9 of Order XXVI provides for ***Commissions to make local investigations***. As per Rule 9, in any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any mesne profits or damages or annual net profits, the Court

may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court.

14. The Court may direct Commission to make local investigations for the purpose of elucidating any matter in dispute or for ascertaining a market value of any property or the amount of mesne profit or damages or annul net profits.

15. The petitioners' contention is that the comparison of Old Cadastral Survey Plan, Re-survey Plan and New Survey Plan in respect of suit properties, reveal that the respondents made a mistake in showing the road and pathway with different widths resulting in depriving the petitioners an area to which they are otherwise entitled which is backed by Surveyor Report and evidence for the reason of which the relief of declaration regarding ownership of an additional area of 207.16 sq.mts. in respect of the Survey No.81/2, ownership of an additional area of 229.18 sq.mts in respect of Survey No.81/8 and ownership of an additional area of 171.37 sq.mts in respect of Survey No.81/7 of Village Arpora, Bardez-Goa, i.e. 70.72 sq.mts to the east and 100.65 sq.mts to the west of the pathway passing through Survey. The petitioners have also claimed that the respondents have erroneously shown a road of greater width than actually exists at loco passing through Survey No.81/7, Survey No.81/2 and Survey No.81/8. The petitioners had pointed out to the Court that the previous application has been rejected and there is change in circumstances to entertain the second application.

16. In the case of ***Shantaram Dattatray Kekan and Others v/s. Bhausahab Karbhari Kekan And Another*** (supra), this Court has dealt with the powers of Court to appoint Court Commissioner with reference to Order XXVI Rule 9 of CPC. It was observed that in several decisions referred to therein, this Court has consistently taken a view that the appointment of Court Commissioner cannot be done in order to enable the parties to collect evidence. The appointment of Court Commissioner for measurement of the land either for fixation of boundaries or for determination of possession ideally should be done only after the parties make out a case by recording evidence. After having considered the provisions of the Code under which civil Court is empowered to appoint Court Commissioner as well as various decisions of this Court on the subject it is clear that there is no hard and fast rule that Court Commissioner can be appointed only at particular stage. This Court in some cases permitted appointment of Commissioner even before the commencement of trial and in some cases the appointment of Court Commissioner before the commencement of trial is held to be erroneous. The common thread that runs through all the decisions is regards the principle that the Court Commissioner cannot be appointed in order to enable the parties to collect evidence. On account of this principle this Court has held that even before a party adduces evidence, he cannot seek appointment of Court Commissioner. However, if the facts of a particular case requires the Court to ascertain the physical status of the land, the Court has power to appoint Court Commissioner at any stage does not appear to be circumscribed. It all depends upon facts and circumstances of each case. In the

said case the Court held that the plaintiffs were yet to adduce their evidence. There was specific prayer for measurement of the suit property and fixation of boundaries. The plaintiffs were granted liberty to file application for appointment of Court Commissioner for measurement of land and fixation of boundaries after conclusion of evidence of parties.

17. In the case of **Malhar s/o Ganpat Bokerphod and others v/s. Shivaji s/o Vishwanath Pawal** (supra), this Court observed that in case of boundary dispute or dispute about identity of land, Court should order local investigation by taking assistance of experts, disputes regarding boundaries can be best adjudicated.

18. In the case of **Shaikh Isak s/o Shaikh Amir v/s. State of Maharashtra and another** (supra), this Court observed that the application was filed belatedly after evidence was recorded and written evidence was filed by parties and hence, there was possibility of filing such application to fill up certain lacunae.

19. In the facts of the present case appointment of Commissioner is warranted. The factual matrix of this case would indicate that rejection of first application would not be a bar to entertain the second application. The second application was preferred after closure of evidence of defendants. Considering the nature of dispute local inspection is necessary.

ORDER

- (i) Writ Petition is allowed.
- (ii) The impugned order dated 22.08.2023 passed by the Adhoc District Judge-I FTC, North Goa is set aside.
- (iii) The application at Exhibit D-49 filed by the petitioners is allowed.
- (iv) The trial Court is directed to grant the reliefs prays in application Exhibit D-49.
- (v) Petition stands disposed of.

(PRAKASH D. NAIK, J.)

MARIA SUZANA REBELLO

[Signature]