

Andreza

IN THE HIGH COURT OF BOMBAY AT GOA
WRIT PETITION NO. 746 OF 2019
WITH
MISC. CIVIL APPLICATION NO. 1731 of 2022 (F)
IN
WRIT PETITION NO. 746 OF 2019

Alvaro R. Colaco & anr.	... Petitioners
<i>Versus</i>	
Nilu V. Naik & 4 Ors.	...Respondents

Mr. J. J. Mulgaonkar, Advocate for the Petitioner.

Mr. Rohan Desai, Advocate for the Respondent.

CORAM: M. S. KARNIK, J
DATED: 14th MARCH 2023

ORAL ORDER

1. Heard learned Counsel. The Petitioners are the original Plaintiffs.

2. The challenge in this Petition is to an Order passed below Exhibit D-57 by the Trial Court disposing of the application filed by the Plaintiffs for appointment of Commissioner under Order XXVI Rule 9 of the Code of Civil Procedure (CPC). The Plaintiffs have filed a suit for injunction seeking a relief of demolition of the unauthorised construction carried out by the Defendants, The Defendants are the Mundkars.

3. The witnesses are under examination. According to the learned Counsel for the Petitioner, the relations between the parties are strained. Any attempt made by the Petitioner to survey, the encroachment which is subject matter of dispute, is opposed by the Respondents. Learned Counsel submitted that to arrive at a just decision as regards the encroachment, it is absolutely essential for a report to be obtained from a Court Commissioner. The Trial Court while disposing of the application has mentioned that the Plaintiff No.1, Pw.2 and Pw.3-Block Development Officer and Pw.4, who drew the sketch in support of the Plaintiffs' case have been examined. It is further observed by the Trial Court that even otherwise, the Plaintiffs can very much appoint a private Surveyor to ascertain the extent of alleged encroachment. Learned Counsel for the Petitioner however submits that having regard to the relations between the parties, any attempt made on the part of the Plaintiffs to appoint a private Surveyor to ascertain the extent of alleged encroachment will be opposed by the Respondents-Defendants.

4. Learned Counsel for the Respondents, on the other hand, supported the impugned Order. It is submitted that a frivolous application is being filed by the Plaintiff inasmuch as the construction made by the Defendants is well within the limits prescribed by the Mamlatdar and the area stipulated. It is submitted that the Petition be rejected.

5. Heard learned Counsel for the parties. The question whether the structure of the Defendants is in terms of the Mamlatdar's Order is an aspect for trial. The object of appointing a Court Commissioner is to find out the extent of the alleged encroachment. As observed by the Trial Court, witnesses have already been examined by the Plaintiffs in support of their case. The Trial Court has observed that the Plaintiffs can appoint a private Surveyor to ascertain the extent of alleged encroachment. The order secures the interest of the Petitioners.

6. In this view of the matter, I see no reason to interfere with the Order passed by the Trial Court. The Petitioners can always appoint a private Surveyor to ascertain the extent of alleged encroachment in terms of the Order passed by the Trial Court. Even before appointing a private Surveyor to carry out the survey, to raise an apprehension that the Defendants will not cooperate and oppose the Survey, is unfounded.

7. In the event the survey carried out by the private Surveyor is obstructed by the Defendants, the Petitioner can always approach the Trial Court for necessary reliefs including appointing a Court Commissioner. In such an event, the application may be considered on its own merits in accordance with law uninfluenced with the observations made in the impugned Order or by me in this Order.

8. Writ Petition stands disposed of with no order as to costs.
9. Misc. Civil Application No.1731 of 2022(F) stands disposed of.

M. S. KARNIK, J