

Vinita

**IN THE HIGH COURT OF BOMBAY AT GOA**

**WRIT PETITION NO. 833 OF 2023.**

1. Mr Caetano Floriano Fernandes, 62 years of age, Son of late Romano Luis Fernandes;
  2. Mrs. Suzie A. T. Carvalho, 50 years of age, Both residents of H. No. 157/1, Musnemoddi, Assolda, Quepem Taluka of Goa.
- .....Petitioners.

Versus

Mr. Rosario Mariano Fernandes, Major of age, Son of late of late Romano Luis Fernandes, Residents of H. No. 158, Musnemoddi, Assolda, Quepem Taluka of Goa.

.....Respondents.

Mr A. D. Bhobe, Advocate for the petitioners.  
Mr C. A. Coutinho, Advocate for the respondent.

**CORAM: BHARAT P. DESHPANDE, J**

**DATED: 8<sup>th</sup> February 2024.**

**ORAL JUDGMENT:**

1. Rule. Rule made returnable forthwith.
2. Heard learned counsel for the parties for final disposal at the admission stage itself.
3. Mr Bhobe, appearing for the petitioners submits that after the inspection was carried out by the Commissioner and submitting his report along with plan, learned trial Court asked both the parties to

submit their objections, if any. At this stage, respondent/plaintiff filed an application with a prayer that he should be allowed to enter the house occupied by the petitioners, with a surveyor/engineer and to take measurements, photographs so as to file objections to the commissioner's report. Another application was filed by the respondent claiming that during his absence one mud wall was demolished and the petitioners erected another wall by changing this position, accordingly, respondent again prayed for inspection by allowing him to enter the premises and taking measurements only for the purpose of filing objections to the Commissioner's report. Respondent also placed some photographs on record.

4. Mr. Bhobe would submit that learned trial Court by the impugned order allowed such application without considering the fact that the Commissioner was appointed to inspect the premises and submit his report. He submits that no reasons are forthcoming for allowing such inspection by the respondent along with his Surveyor/Engineer.

5. Mr Bhobe would submit that as far as allowing to produce documents on record i.e. photographs, petitioners will not object as the same could be produced as allowed by the trial Court. However, petitioners are having serious objection with regards to another inspection and that too by the respondent along with his engineer only to raise objection to the Commissioner's report.

6. Mr C. A. Coutinho, learned counsel appearing for the respondent submits that dispute is between two brothers and the house existing therein is occupied partly by the plaintiff and that of the defendants. He submits that suit is for grant of mandatory injunction and restoring the house to its original condition. He submits that learned trial Court directed the Commissioner to inspect the house and accordingly, report has been submitted. However, in order to raise objection to such Commissioner's report, respondent necessarily requires to inspect the premises occupied by the petitioners along with his Surveyor/Engineer and to take measurement as well as photographs. Mr Coutinho submit that no prejudice is going to cause to the petitioners and order passed by the trial Court is only with regards to procedural aspects.

7. Rival contentions fall for determination.

8. Report of the Commissioner is dated 27.1.2020 who stated that he inspected the said house as per directions of the Court and in the presence of the respective parties and their advocates. He has described the entire house and depicted in a sketch. Such report was handed over to the Court upon which an opportunity was given to the parties to file their objections.

9. The important aspect is the presence of the parties with their advocates at the time of conducting inspection of the suit house by

the Commissioner. Copies of the report along with sketch are furnished to the respective parties.

**10.** Purpose of calling of objections by the parties is to give them an opportunity on the report prepared by the Commissioner for the purpose of filing say or objection. Further inspection and that too in presence of the surveyor or engineer as tried to be projected by the respondent is clearly unwarranted. Very purpose of appointing commissioner who is a surveyor from the government department stands frustrated, if parties are allowed to inspect the premises in presence of their advocate through private surveyor or engineer and that too during the pendency of the suit. Such procedure adopted by the learned trial Court and that too on the ground that no prejudice is going to cause is certainly unwarranted of. The question of procedural law will not come into play since report prepared by parties will be produced as documentary evidence and that too with the permission of the Court.

**11.** Secondly as rightly pointed out by Mr. Bhobe appearing for the petitioners that very purpose of appointing a surveyor from the survey department stands frustrated. If objections are required to be raised, parties are free to file objections, however for that purpose another inspection and that too in presence of private surveyor or engineer is clearly unwarranted.

**12.** Suit as it stand is only for mandatory injunction and the prayer clause is to restore the said house to its original condition. Similarly prayer is for permanent injunction against the petitioner/defendant. Thus subject matter of the suit is with regards to mandatory and permanent injunction on the basis of the pleadings in the plaint.

**13.** Mr. Coutinho is not aware whether there is any temporary injunction granted in favour of the plaintiff/respondent herein. The impugned order would go to show that there is absolutely no discussion as to why Court came to the conclusion that another inspection is necessary and that too in presence of the private surveyor of the plaintiff. Entire discussion is with regards to the documents which was allowed to place on record. Only passing reference is found in paragraph 8 of the impugned order. Thus the impugned order clearly shows that it was passed without proper application of mind and keeping in view provisions of CPC as well as pleadings in the plaint. Application for inspection in presence of the Engineer cannot be allowed only by just asking. There has to be some reasons and that too when the matter is pending before the Court. Having said so, the impugned order qua the aspect of allowing the respondent to inspect the house in presence of the engineer/surveyor and to take out photographs only for raising objection to the Commissioner's report is quashed and set aside.

14. Rule is made absolute in the above terms.
15. Petition stands disposed of accordingly.

**BHARAT P. DESHPANDE, J.**