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IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.573 OF 2023

SANDEEP BABANI KORGAONKAR ... Petitioner.

Versus

SANJIV SIMEPURUSKAR AND 4 ORS. ... Respondents.

Mr Sudin Usgaonkar, Senior Advocate with Ms Divya Parab
and Ms Annelise Fernandes, Advocates for the Petitioner.

CORAM: VALMIKI MENEZES, J.

DATED: 5th March, 2025

ORAL ORDER:

1. The Petitioner impugns an order dated 27.06.2023 passed by the Civil Judge Junior Division, 'D' Court, Mapusa at Exhibit 37 before it, which is an application at the behest of the Petitioner/Original Plaintiff for appointment of a Commissioner, to determine the extent of the encroachment and of the construction by the Respondent in the suit property. The application is dismissed by the Trial Court.

2. The main reason referred to for dismissal of the application by the Trial Court, was that the Petitioner was seeking to delay the matter and to stall his own cross examination. At the relevant point of time, the Petitioner was being examined and was under cross

examination.

3. This is a case where the Petitioner has sought a decree of mandatory injunction and for recovery of possession, apart from a decree of permanent injunction against the Defendants, on the claim that he is the owner of the suit property under Survey No.201/12 of Village Calangute. In the plaint, the Petitioner avers that the Defendants have encroached upon the suit property and erected a construction thereon with dimensions of 6.5 metres x 16 metres covering a total area of 104 square metres with a structure consisting of an RCC frame. In para 4 of the plaint, the Petitioner has specifically pleaded that he engaged an Engineer to determine the exact location and dimensions of the encroachment by the Defendants and a report to that effect was also prepared by the said Engineer. As pleaded in paragraph 4 of the plaint, the plan annexed to the report was relied upon by the Plaintiffs along with photographs of the encroachment.

4. It is in the light of these background facts, that the Plaintiff has stepped into the witness box and after completing his examination, at the stage when he was being cross-examined, sought the appointment of a Government Surveyor to inspect the suit property. The application seeks to inspect the property of the Defendants under Survey Nos. 201/13 and 201/15 to demarcate and determine the location of the encroachment, if any, by the Defendants in the Plaintiff's property, and to further determine whether there was an encroachment in the setback area within the Defendants property.

5. The application, therefore, clearly seeks to obtain an order of appointment of a Commissioner to determine and establish the encroachment by the Defendants, as alleged by the Plaintiff in his plaint. This clearly is a case where the Plaintiff is attempting to get a Commissioner appointed by the Court to establish the encroachment in the suit property as also whether the Defendants have encroached within the setback line within his own property. Such an exercise would be impermissible under the provisions of Order 26 CPC.

6. The Trial Court, in the impugned order, has considered this aspect of the matter, which has referred to the fact that the Plaintiff was under cross-examination and was attempting to have a Court Commissioner appointed to help him establish the extent of encroachment in the suit property. The Trial Court has further opined that if the need arises for appointment of an expert Commissioner based on the evidence led by the parties, it may, at a later stage take that course. In that view of the matter, no interference is called for with the impugned order.

7. Learned Senior Advocate Shri Usgaonkar cites the following case law to buttress his contention that it is always within the power of a Court to appoint a Commissioner to determine the extent of encroachment:

i. ***Vasant Tukaram Prabhu vs. Xalinibai Borcar alias Shalinibai Borkar*** [2014(5) Mh.L.J. 382].

ii. ***Haryana Waqf Board vs. Shanti Sarup and Ors.*** [2008] 8

SCC 671].

iii. *Girish Vasantrao Bhoyar and Anr. vs Nimbaji Warluji Bambal* [2009 (4) Mh.L.J. 371].

8. All these Judgments, are cases where the dispute between the parties was for determining boundaries of a property. These cases were proceedings for demarcation and not suits where the Plaintiff claims encroachment and pleads the level of encroachment in his own property. What is held in these Judgments, in the facts of those cases and would not apply to the present petition.

9. The petition is therefore rejected at the threshold. No costs.

VALMIKI MENEZES, J.