

(2012) 02 BOM CK 0149
In the Bombay High Court
Case No : Writ Petition No. 107 OF 2012

Mr. Francis Xavier Lobo

APPELLANT

Vs

Mrs. Raquela de Cruz e Lobo and Others

RESPONDENT

Date of Decision : 02-02-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 26 Rule 7, Order 26 Rule 9, Order 39 Rule 7, 105

Constitution of India, 1950 — Article 227

Citation : (2012) 02 BOM CK 0149

Hon'ble Judges : F.M. Reis, J

Bench : Single Bench

Advocate : J.P. Mulgaonkar, for the Petitioner, for the Appellant;

Final Decision : Dismissed

Judgement

F.M. Reis, J.—Heard Shri J. P. Mulgaonkar, learned Counsel appearing for the Petitioner. The above Petition challenges the Order dated 02.12.2012 passed by the learned Civil Judge, Senior Division, Vasco, in Regular Civil Suit no. 119/2010, whereby an application filed by the Respondents under Order 26 Rule 7 read with Order 26 Rule 9 of the Civil Procedure Code, came to be allowed and a Commissioner was appointed to inspect the suit property and to file the report as regard to the present status of the construction done by the Petitioner in the suit property.

2. Shri Mulgaonkar, learned Counsel appearing for the Petitioner, has assailed the impugned Order essentially on the ground that the learned Judge had exercised its jurisdiction in material irregularity whilst passing the impugned Order inasmuch as the learned Judge has failed to consider that an earlier application under Order 39 Rule 7 of the CPC was filed and was already rejected and, as such, the question of exercising jurisdiction under Order 26 Rule 7 and 9 would not arise at all. The learned Counsel further pointed out that the said application was barred by the principles of res-judicata. Learned Counsel further pointed out

that it is well settled that the Court cannot assist the parties to collect evidence and, as such, in allowing the application for appointment of the Commissioner the Court would assist the Respondents to collect evidence in support of their case. Learned Counsel has further taken me through the impugned Order and pointed out that the learned Judge has rightly come to the conclusion that an application under Order 26 Rule 7 and 9 of the CPC cannot be granted to collect evidence but, however, the learned Judge went to allow the application on the ground that it would be appropriate to obtain a Commissioner's report in order that the position at the site could be ascertained to assist the Court. Learned Counsel further pointed out that if the impugned Order is allowed to stand, it would amount to irreparable failure of justice to the Petitioner. Learned Counsel further pointed out that as such application could not have been entertained by the learned Judge when issues had not been framed in the suit.

3. Having heard the learned Counsel and on perusal of the record, I find that it is not in dispute, that an application for temporary injunction filed by the Respondents came to be disposed of, inter alia, restraining the Petitioner by way of temporary injunction from carrying out any further construction in the suit property bearing survey no. 243/1 of Village Cortalim Taluka Mormugao, till the disposal of the suit. It is also not in dispute that the said Order is still in operation. On perusal of the application filed by the Respondents, at para 2 thereof, there is a specific allegation to the effect that despite of the Order of temporary injunction, the Petitioner is carrying out the construction by covering such activities by tarpaulin. The learned Judge, whilst passing the impugned Order has taken note of the fact that the Respondent has been prevented from approaching the suit construction as the activities are done by covering tarpaulin which naturally prevents the Respondent to inspect the nature of the work being carried out. Apart from that, the learned Judge in exercising its jurisdiction under Order 26 Rule 7 and 9 of the Civil Procedure Code, has found it appropriate that the Court would require such a report for the purpose of deciding the issue in controversy. The contentions of the learned Counsel appearing for the Petitioner to the effect that the impugned Order would lead to collect evidence for the benefit of the Respondent, cannot be accepted. It is always open to the Court for the purpose of considering the dispute raised by the parties to decide the suit on merits to appoint a Commissioner for local investigation.

4. The contention of the learned Counsel appearing for the Petitioner that the application filed by the Respondent is barred by the principles of res-judicata, is to be rejected. The earlier application under Order 39 Rule 7 of the CPC was rejected as the Court felt that appointment of Commissioner would amount to collecting of evidence in the contempt proceedings and, in any event, it would not serve the purpose as the Commissioner would not be able to ascertain when such work was carried out. Merely because such an application came to be rejected, it cannot be said that the Court cannot exercise powers under Order 26 Rule 9 of the Civil Procedure to appoint a Commissioner for local investigation so that the position at the site can be ascertained to assist the Court. Apart from

that, the earlier Order can also be challenged at the time of challenging the Judgment on merits. The Apex Court in the Judgment reported in Nawab Shaqafath Ali Khan and Others Vs. Nawab Imdad Jah Bahadur and Others, , has held at para 38 and 39 thus :

38.It may be true that in terms of Section 105 of the CPC when an appeal against the final decree is passed, legality of the said order could be challenged in the appeal. Only because a civil revision application has not been filed, the same, in our opinion, would not attract the principle of res judicata as an appeal from the final decree could still be maintained.

39. In C.V. Rajendran while holding that the principle of res judicata applies in different stages of the same proceedings, it was held: (SCC p.449, para 6)

6... Here what is sought to be reagitated is not really the order of remand but the order deciding a germane issue which was allowed to become final at an earlier stage of the same suit. The principle of res judicata applies as between two stages in the same litigation so that if an issue has been decided at an earlier stage against a party, it cannot be allowed to be reagitated by him at a subsequent stage in the same suit or proceedings. This position is laid down in Hope Plantations Ltd. v. Taluk Land Board to which one of us (Syed Shah Mohammed Quadri, J.) was a party.

However, as noticed herein before, in this case, an appeal from a final decree is maintainable.

Considering the said Judgment of the Apex Court, the said contention is to be rejected as there was no finding on any germane issue in the suit.

5. The contention of the learned Counsel appearing for the Petitioner to the effect that the application itself was not maintainable as issues have not been framed, has to be rejected, as admittedly, in the present case, no such contention was raised before the learned Judge whilst disposing the impugned Order. Apart from that, there is no bar for the Court to exercise such jurisdiction in the circumstances of the case at any stage of the suit.

6. The next contention sought to be canvassed by the learned Counsel

appearing for the Petitioner to the effect that in case the impugned Order is allowed to stand grave injustice would occasion to the Petitioner, is another contention which is only to be noted to be rejected. It is not submitted in what manner such Order would cause injustice to the Petitioner. The Order has been passed in exercise of the jurisdiction which was available to the Court under Order 26 Rule 7 and 9 of the CPC and in the interest of justice, I find that there is no jurisdictional error committed by the learned Judge whilst passing the impugned Order. In any event, this Court cannot exercise its jurisdiction under Article 227 of the Constitution of India in respect of such Orders which are passed in exercise of such jurisdiction and in the interest of justice to enable the Court to decide the matter in controversy. Hence, I find that there is no merit in

the above Petition. Hence the Petition stands dismissed.