

(1999) 09 BOM CK 0084

In the Bombay High Court

Case No : Civil Revision Application No. 26 of 1999

Shri Efigenio Dias and Another

APPELLANT

Vs

Shri Malaquias D"Costa and Others

RESPONDENT

Date of Decision : 09-09-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 7, 115, 151

Citation : (2000) 1 ALLMR 533 : (2000) 2 BomCR 713 : (2000) 2 CivCC 559 :
(2000) 2 MhLj 209

Hon'ble Judges : R.K. Batta, J

Bench : Single Bench

Advocate : A.N.S. Nadkarni and P.A. Kamat, for the Appellant; M.S. Usgaonkar,
for the Respondent

Judgement

R.K. Batta, J.—The petitioners challenge order dated 21st January 1999 of Civil Judge, Senior Division, Margao, whereby Court Commissioner was ordered to be appointed under Order XXXIX, Rule 7 C.P.C.

2. In order to appreciate the controversy between the parties it is necessary to state the background in which this application was filed. The petitioners (plaintiffs) had filed a suit for permanent injunction seeking to restrain the respondents (defendants) from in any manner entering and interfering in the suit property under Survey No. 39/40. An application for temporary injunction was filed in the said suit seeking to restrain the respondents from taking forcible possession of portion of property to make an access leading to their property. The defendants made a counter-claim claiming the suit access through the property of the plaintiffs and sought restrain on the plaintiffs from obstruction of the suit access. The Civil Judge had dismissed the plaintiffs' application and respondents application was allowed. The trial Court by a cryptic and non-speaking order had disposed of the application for injunction filed by the parties and by order dated 22nd January 1998 in Appeal from Order Nos. 1 and 2 of 1998 the matter was remanded to the trial Court for fresh disposal. On remand

the Civil Judge granted the injunction application of the plaintiffs and dismissed the injunction application of the defendants. This order was subject matter of challenge in Appeal from Order No. 53 of 1998 filed by the defendants. By order dated 16th July 1998 in the said Appeal from Order No. 53 of 1998 it was held that in the absence of requisite pleadings, the defendants could not succeed in proving their alleged right of way and the Civil Judge had rightly pointed out that the defendants had another way available to have access to the road inasmuch as the sketch maps produced at pages 86 and 133 show the situation of the properties of both the parties. It was further pointed out in the said order that the defendants were owners in possession of Survey No. 39/17 having an access to approach the road on the North and the said access passes through the properties bearing Survey Nos. 39/12 and 39/15 on the East and Survey Nos. 39/11 and 39/14 on the West.

3. The application in question under Order XXXIX, Rule 7 read with section 151 of C.P.C. was filed on 19th September 1998 by the defendants. In this application it was alleged that in view of the restraint order passed by the Court from passing through Survey No. 39/40, that is to say, through the plaintiffs' property, the defendants are unable to come out of their house and the only alternative is to jump the compound walls and to come to the main road which the defendants are now doing. It was further stated in the application that since the plaintiffs claim that the access passing through Survey Nos. 39/12 and 39/15 is being used by the defendants, it is essential that a Commissioner be appointed in order to inspect the site and report about the so called alleged access pleaded by the plaintiffs and as shown in the sketch produced by them. Accordingly, it was prayed in the said application that a Commissioner be appointed to inspect the site and report about the existence of the access as shown in the sketch by the plaintiffs.

4. Before the trial Court it was urged that one of the observations made in the order whereby the defendants were restrained from going through the plaintiffs' property is that the defendants have separate access, but the defendants contend that this access is not accessible as it is filled with garbage and dirt and it is not possible to go through it and as such a Commissioner be appointed to find out the nature of this access, whether it exists or not. The trial Judge held:-

"Plaintiffs contend that there is alternative access available to the defendants. Plaintiffs have also shown how the said access is available. Defendants contend that the said access does not exist. Therefore, what is the situation at loco will become clear only when an inspection of the said alternative access is made and to do it an outside agency is must. Either Court can inspect the suit property or can appoint the Court Commissioner. I am not inclined to go and inspect the suit access. Hence in the interest of justice, I feel that this Civil Miscellaneous Application deserves to be allowed."

5. Learned advocate for the petitioners argued that the alternate access available to the defendants is not subject matter of the suit; that after the disposal of the

temporary application, the Commissioner could not have been appointed with reference to the said alternative access as this would amount to re-opening the issue which had been finally decided and that a Commissioner cannot be appointed to collect evidence for the parties. He, therefore, contends that the order in question is liable to be set aside.

6. Learned Senior Counsel Shri M.S. Usgaonkar argued that this Court in Appeal from Order No. 53 of 1998 vide order dated 16th July, 1998 had also held that in the absence of requisite pleadings the defendants could not succeed in proving their alleged right of way. He, therefore, submitted that the defendants had subsequently filed an application for amendment and the amendment had been allowed and as a result the defendants are now claiming access through the property of the plaintiffs as of right. According to Senior Counsel, this fact justifies the filing of the application for appointment of Commissioner.

7. The application in question under Order XXXIX, Rule 7 read with section 151 C.P.C. was filed on 19th September 1998. The amendment application was filed much later, that is to say, 30th December 1998. The application under Order XXXIX, Rule 7 read with section 151 C.P.C. as well as the application for amendment have been disposed of by separate orders on 21st January 1999. Therefore, it is clear that the application for appointment of Commissioner was not, in fact, made after the amendment was allowed but the application in question was made much prior to that. Moreover, it is pertinent to note that the defendants by the application in question now intend to collect evidence on the findings of the Court that there does exist an alternate way from the house of the defendants to the road on the North passing in between Survey Nos. 39/14, 39/15, 39/11 and 39/12. The suit access which is claimed passes through the property of the plaintiffs, which is Survey No. 39/40. Therefore, strictly, the alternate access is not subject matter of the suit though, it may have some relevancy in the matter. However, the defendants could perhaps seek appointment of the Commissioner under Order XXXIX, Rule 7 C.P.C. before the controversy regarding the alternate access had been decided for the purpose of temporary injunction. Order XXXIX, Rule 7 C.P.C. falls in the Chapter "Temporary Injunctions and Interlocutory Orders". The sole purpose of filing the application in question appears to be to re-agitate the question of alternate access pending final disposal of the suit by collecting evidence through the Commissioner. This obviously cannot be permitted, in the facts and circumstances of the case, by filing an application under Order XXXIX, Rule 7 C.P.C. The application in question, in my opinion, is nothing but abuse of process of law and it deserves to be dismissed with costs.

8. For the aforesaid reasons the revision is allowed. Application dated 19th September 1998 filed under Order XXXIX, Rule 7 read with section 151 C.P.C. is, hereby, dismissed with costs. Rule is made absolute accordingly.

9. Application dismissed.