

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO.358 OF 2014**

MR. PRABHAKAR NAGUESH TENDULKAR

(SINCE DECEASED) THR. LEGAL HEIRSPETITIONERS

V/S

MR. PUNDALIK HARISHCHANDRA

FALARI DECEASED THR.

THEIR LEGAL HEIRS AND ANR.RESPONDENTS

Mr. Joaquim Godinho, Advocate for the Petitioners.

Mr. Sudin Usgaonkar, Advocate for Respondents.

CORAM : N.M. JAMDAR, J.

DATE : 3 February, 2015

ORAL ORDER :

By this petition, the petitioners challenge the orders passed by the District Judge, North Goa, dated 21 April 2014 dismissing the Rent Appeal filed by the petitioners challenging the order passed by the Rent Controller, Mapusa dated 21 January 2010. By the impugned order, Rent Controller has directed the petitioners to hand over vacant and peaceful possession of the suit premises to the respondents.

2. The respondents filed an application under Section 22(2) (a) and 23(3) of the Goa Daman & Diu Buildings (Lease, Rent and Eviction) Control Act, 1968 ('The Act', for short) before the Rent controller seeking possession of the suit premises from the petitioners. The suit premises is a house situated in jurisdiction of Mapusa Municipality. The house is more than 125 years old. It consists rooms, separate worship room for deity, open courtyard, a well and some open space. On the ground floor there are 13 rooms. On the first floor there is a hall and room on one side and 2 halls and room on the other side. There was a compromise between brothers and the property was divided and the part of the property came to the share of the respondents. The respondents thereafter became landlord of 7 rooms including portion on the first floor. The petitioners occupy one of the 7 rooms on the ground floor and carry on business of a printing press. The other 6 rooms are occupied by other tenants.

3. The respondents sought eviction of the petitioners on the ground that the premises in their possession are inadequate as there are 9 members of the family. The respondents in the application spelt out the difficulty faced by them in view of shortage of accommodation and sought for possession from the petitioners.

4. The petitioners filed a written statement and contested the claim of the respondents. The petitioners questioned genuineness of the need of the respondents and sought for dismissal of the application. The Rent Controller perused the record and heard the arguments of both sides. The Rent Controller came to the conclusion that the need pleaded by the respondents is genuine and bonafide and the respondents require the premises. The Rent Controller also found that though the petitioners were carrying out commercial activity in the premises of the possession and that would not change the character of the entire premises as a residential house. The Rent Controller also came to the conclusion that the entire

building was always used for residential purpose and it is in fact a residential house. The argument of the petitioners that respondents cannot seek possession of commercial premises from them was rejected by the Rent Controller and the Rent Controller by the impugned order allowed application and directed the petitioners to hand over possession of the premises.

5. The Rent Appeal filed by the petitioners was considered by the District Court. Same argument as made before the Rent Controller, that the respondents cannot seek possession from the petitioners of the premises which are being used by him for commercial purpose was made before the District Court. The bonafide need of the respondents/landlord was also questioned. The District Court assessed the evidence on record and the nature of the premises and came to the conclusion that the premises will have to be considered as a residential house and merely because small part in possession of the petitioners was being used for commercial activity, it cannot be

considered as a commercial premises. The finding as regards the bonafide need of landlord was confirmed. The District Court accordingly dismissed the appeal.

6. I have heard Mr. J. Godinho, the learned Counsel for the petitioners and Mr. Sudin Usgaonkar, the learned Counsel for the respondents.

7. Mr. Godinho submitted that the scheme of Section 23 of the Act indicates that if landlord has occupied part of the residential building and the part is being used for commercial purpose, the landlord is to be precluded from recovering the possession of the area used for commercial purpose by the tenant. Mr. Godinho relied on Section 23(3) of the Act to buttress his submissions. Mr. Godinho also relied upon the decision of the learned Single Judge of this Court in the case of *Evaristo Estenesiaoc Rodrigues V/s. Vaman Anant* reported in **1986 (3) Bom.C.R. 560** which according to the learned Counsel supports his contention. Mr. Godinho also relied upon

the decision of the Apex Court in the case of ***Precision Steel & Engineer Works & Anr. V/s. Prem Deva Niranjana Deva Tayal*** reported in **(2003) 2 SCC 236** to contend that the nature of the premises will not be relevant if there is a written document in favour of the tenant permitting him to use the premises for commercial purpose. Mr. Godinho submitted that the findings recorded by both the Courts below that the premises cannot be commercial premises, is incorrect. He submitted that the petitioners are carrying on business since the year 1967. Mr. Godinho submitted that the area in his occupation abuts the main road where the business of printing press is being carried out so also the other tenants occupying the 7 rooms are carrying out commercial activity and, therefore, the premises will have to be treated as commercial premises. Mr. Godinho also submitted that Section 23(3) of the Act does not permit the landlord to recover premises if tenant is occupying part of the residential property for commercial purpose and the respondent cannot succeed unless the section is struck down. He submitted that the decisions relied upon by the District

Court are distinguishable since in those cases there was challenge to the validity of sections in question.

8. Firstly, the question whether the premises are residential or commercial will have to be considered. This is essentially a question of fact. Mr. Usgaonkar has placed on record certain documents which were part of the proceedings below. One of them is a document issued by Public Works Department on 29 March 1952. In this document, the entire building has been mentioned as a residential house of the owner. There is a specific certificate issued by the Taxation Department of the Municipal Council on 14 November 1990 in which it is categorically stated that the building is not commercial but residential. The Courts below have found that the nature of the building is such that it is purely a residential bungalow. The bungalow which is almost 125 years old has a courtyard, rooms on the ground floor, a room for deity, verandas. All the rooms on the ground floor, which are let out to tenants are accessible from inside the house. Mr. Usgaonkar has

submitted these rooms were let out by the respondents due to financial difficulty. The area to the share of respondents is 266.50 square metres, out of it 7 rooms on the ground floor comprise of 73 square metres. The balance area of approximately 193 square metres is in possession of the petitioners, which is being used for residential purpose. So the entire record, which has been rightly appreciated by both the Courts below, indicates that the building is a residential house. This is also supported by certificate issued by the local authorities.

9. There is no perversity in this finding of fact. It is the contention of Mr. Godinho that all this will have to be ignored and what should only be considered is the document executed by the landlord in favour of the petitioner. In this context the decision of the Apex Court in the case of ***Busching Schmitz Private Ltd. V/s. P.T. Menghani and Anr.*** reported in ***AIR 1977 SC 1569*** relied upon by Mr. Usgaonkar will have to be noticed. A question arose before the Apex Court as to whether

purpose for which premises is let out would be conclusive test to determine its nature. The Apex Court held that this would have to be determined considering all the relevant aspects. The Apex Court held that it is possible that the part of the residential house may be for some reason used as commercial, but that will not make it into a commercial premises. In the present case, there is a clear finding of fact that the entire building was in fact used and the major part of it continued to be used as a residential premises.

10. Even assuming that part of the premises in possession of the petitioners is to be considered commercial, the question will remain whether the respondent is precluded from seeking recovery of possession under Section 23(3) of the Act. The bare perusal of Section 23(3) indicates that there is no such embargo. The first part of the Section covers a contingency where the landlord had occupied part of the residential building, but thereafter the Section does not indicate that the part which is sought to be occupied and recorded should also

only be residential.

11. Mr. Godinho has relied upon decision in the case of ***Evaristo Estenesiaoc Rodrigues*** (supra). However, in the decision in the case of ***Mr. Krishna P. Rivonkar V/s. The Chairman, V.K.S.C. Society & Ors.*** reported in ***1993 (2) Bom.C.R. 261***, the learned Single Judge (Dr. E.S. Da Silva, J.) found that the decision in the case of ***Evaristo Estenesiaoc Rodrigues*** (supra) *per in-curiam* as the decision of the Division Bench of this Court in the case of ***Vinayak Jaiwant Camotim V/s. M.N. Shanmugham Chetty*** reported in ***1990 (1) GLT 58*** was not noticed and also the decision of the Apex Court in the case of ***Busching Schmitz Private Ltd.*** (supra) referred above was wrongly interpreted. Dr. E.S. Da Silva, J. categorically held that there is no restriction on the landlord to exercise his right to seek recovery of part of the possession from tenant which he is using for non-residential purpose.

12. Once that is the interpretation of Section 23(3), then

there is no question of respondent requiring to challenge the validity of Section 23(3). Section 23(3) in its plain language does not bar recovery of possession of part of the premises used in non-residential purpose. It is by interpretation that the petitioner seeks to introduce the concept in the section. Even as per Mr. Godinho this interpretation will mean that the landlord cannot ever recover possession of such commercial premise let out, but can recover its possession if such premise let out are residential. The Apex Court in the case of ***Rajesh Vij V/s. Dr. Raminder Pal Singh Sethi and Ors.*** reported in ***(2005) 8 SCC 504*** held, considering the provisions of Rent Act of the other State, that such distinction would be violative of Article 14 of the Constitution of India. No interpretation should be placed on a Section which would lead to it being struck down as violative of the Constitution. Further, no construction should be adopted which renders the section an absurdity. Legislature could have never intended while enacting Section 22(3) that the landlord will never be able to recover part of the residential premises let out to the tenant

which are being used as commercial, in any case, in the present case the findings of fact is that the entire premises are to be treated as residential.

13. As regard the bonafide need of the respondents landlord, there is a concurrent finding of fact. Genuineness of the need of the landlord was not seriously challenged. Main argument was based on Section 22(3). The respondents have proved that they have large family and they need the premises. Nothing is shown to interfere with this concurrent finding of fact. In the circumstances, there is no merit in this the petition. The petition is rejected.

N.M. JAMDAR, J.

NH/-