

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 711 OF 2016**

Mr. Sitaram D. Mapsekar, R/o Deul
Wada, Dhargalim, Pernem, Goa. Petitioner

Versus

Mr. Pramod R. Pandey, r/o
Premranjan Niwas, House No.
710/36, Chonwada, Dhargal,
Pernem, Goa. Respondent

Mr. Amey Jagdish Sinai Kakodkar, Advocate for the
Petitioner.

Mr. Jagannath Jayant Mulgaonkar, Advocate for the
Respondent.

CORAM:- C.V. BHADANG, J.

DATE:- 19th SEPTEMBER, 2016.

ORAL JUDGMENT:

Rule. The learned Counsel for the
respondent waives service. Heard finally by
consent of the parties.

2. The petitioner, who is the defendant is
challenging the order dated 10.05.2016 passed by
the learned Trial Court, below Exhibit-16 in
Regular Civil Suit No. 105/2014, by which an
application filed by the petitioner under Order
10(2) of the Civil Procedure Code (CPC), has been

dismissed.

3. The brief facts are that the respondent has filed the aforesaid suit for possession of the suit shop and for injunction against the petitioner, claiming that the petitioner has forcibly obtained the possession of the suit shop. The petitioner has raised the defence that the respondent had entered into an agreement of sale dated 23.06.2009 with one Tajdin Hyder Ali and had also delivered possession of the suit premises in pursuance of the agreement of sale. It is further contended that said Tajdin Hyder Ali has inducted the petitioner into the shop premises. In that view of the matter, the petitioner filed application (Exhibit-16) claiming that Tajdin Hyder Ali is a necessary party to the suit and he may be joined as a party-defendant.

4. The learned Trial Court by impugned order has found that the suit is in respect of property bearing survey no. 202/19-D, whereas the agreement

for sale with Tajdin Hyder Ali is for the shop existing in property bearing survey no. 212/19-A. The learned Trial Court has then went upon to observe that even, assuming that the survey number is wrongly mentioned, Tajdin Hyder Ali is neither a necessary, nor a proper party, because 'admittedly', no possession of the suit shop was handed over to him by the respondent. The learned Trial Court further found that since Tajdin Hyder Ali was not put in possession of the suit shop, he could not have executed the leave and license agreement in favour of the petitioner.

5. I have heard Mr. Kakodkar, the learned Counsel for the petitioner and Mr. Mulgaonkar, the learned Counsel for the respondent. With the assistance of the learned Counsel for the parties, I have perused the impugned order.

6. It is submitted by Mr. Kakodkar, the learned Counsel for the petitioner that discrepancy as to the survey number is a bonafide

error, in as much as it is not the claim of the respondent that he is holding a different property bearing survey no. 212/19-A, in which there are shops constructed. It is further pointed out that in the reply filed by Tajdin Hyder Ali, it is claimed that it is a bonafide error, to which there is no rejoinder filed by the respondent. It is next contended that Tajdin Hyder Ali has specifically claimed in his reply that he was put in possession of the suit shop by the defendant and as such, the learned Trial Court was in error in holding that 'admittedly', the possession of the suit shop was handed over to Tajdin Hyder Ali. He submitted that the finding recorded by the learned Trial Court is patently erroneous and beyond record. It is submitted that Tajdin Hyder Ali would be a necessary party and his joinder would avoid multiplicity of proceedings, as one of the issue would be whether the possession of the suit shop has been hand over to Tajdin Hyder Ali.

7. On the contrary, it is submitted by the learned Counsel for the respondent that Tajdin Hyder Ali is neither a necessary nor a proper party. The learned Counsel has pointed out that the respondent being *dominus litus* can decide as to who should be joined as party-defendant to the suit. The learned Counsel submitted that the Court can direct addition of any party if, such a party is found to be proper or a necessary party. It is submitted that one of the defences raised is about the suit being bad, for non joinder of party, which will have gone into at the trial of the suit.

The learned Counsel has placed reliance on the decision of the Hon'ble Supreme Court in the case of **Vidur Impex and Traders Private Limited and Others Vs. Tosh Apartments Private Limited and Others**, (2012) 8 SCC 384.

8. I have carefully considered the rival circumstances and the submissions made. There cannot be any manner of dispute with the

proposition that the respondent being *dominus litus* can decide as to who should be added as party-defendant to the suit. This right of the petitioner is however subject to provisions of Order I, Rule 10(2) of CPC to add/strike off any party. In so far as the addition of a party is concerned, the Court has to find out whether the proposed party is necessary or a proper party as held by the Supreme Court in the case of **Vidur Impex** (supra) (para 41 of the judgment). In the present case, it is not necessary to go into the question about the discrepancy of the survey number at this stage, in as much as the case set up is that the said error is a bonafide and inadvertent error, as claimed by the petitioner and this issue can be gone into at the trial. The learned Trial Court has also proceeded on the assumption that the survey number is wrongly mentioned and then found that Tajdin Hyder Ali is neither a necessary nor a proper party.

9. A necessary party is one, in the absence of whom no effective decree can be passed, while a proper party is a person, whose presence would enable the Court to completely, effectively and properly adjudicate upon the issues, though he may not be a person against whom a decree is to be passed. In the present case, the issue in the suit is whether the petitioner has forcibly obtained the possession of the suit shop premises. The petitioner has already raised a defence that the suit is bad for non joinder of the necessary party. Thus, it is the respondent/plaintiff who is at the risk of the suit being liable to be dismissed on the ground of non joinder of a necessary party. It is always open for the petitioner to establish its case before the Trial Court that the suit is bad for non joinder of Tajdin Hyder Ali.

10. Furthermore, *prima-facie* at this stage, it appears that the agreement of sale executed in favour of Tajdin Hyder Ali does not make any

reference to delivery of possession. I would hasten to add that no conclusive opinion is expressed in this regard and all the rival contentions of the parties are left open. At this stage, I do not find that any exception can be taken to the impugned order. The impugned order does not call for any interference in the exercise of the supervisory jurisdiction of this Court. The petition is without any merit and is dismissed, with no order as to costs.

C.V. BHADANG, J.

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