

IN THE HIGH COURT OF BOMBAY AT GOA

MISC.CIVIL APPLICATION NO. 792 OF 2018

IN

WRIT PETITION NO. 26 OF 2018

PALLAVI S. KAVLEKAR AND 2 ORS., ... Applicants

Versus

VIKAS MADAN., ... Respondent

Adv. Ashwin D. Bhobe for the Applicants.

Adv. K. Noorani, for the Respondent.

Coram:- C. V. BHADANG, J.

Date:- 14th December 2018

P.C.:

This is an application for recall of the order dated 19/6/2018 passed by this Court in Writ petition no.26/2018. The present applicant was the respondent in the said petition. The present respondent, Vikas Madan, has filed Regular Civil Suit no.109/2012/D against the applicants for eviction, recovery of possession and certain other reliefs. It is contended that the suit premises were granted to the present applicant on a Leave and Licence basis, which has expired.

2. The respondent filed an application purportedly under Order XV A of the Code of Civil Procedure (C.P.C, for short) for a direction to the applicant to deposit the licence fee. The learned trial court by an order dated 1/11/2017 dismissed the application

on the ground that the respondent had not explained as to under which provision of law such a direction can be issued. The trial court was of the opinion that granting such a relief would be "as good as deciding the suit" Feeling aggrieved, the respondent filed Writ petition no.26/2018 before this Court.

3. The record discloses that a notice was issued to the present applicant (the respondent in writ petition no.26/2018) on 15/1/2018. However, the applicant failed to remain present, though served. Looking to the limited issue involved, this Court found it appropriate to issue notice for final disposal to the applicant which was accordingly issued on 5/6/2018 and again in spite of service of the said notice, this court noted that the applicant had chosen not to remain present. It was in these circumstances that on 19/6/2018 the learned counsel for the petitioner in the said petition was heard and the petition was allowed, directing the present applicant to deposit the licence fee. The arrears of licence fee up to 30/6/2016 were directed to be deposited before the trial court on or before 31/8/2018 and the applicant was further directed to continue to deposit the licence fee on and from 1/7/2018, on or before 10th of each English Calendar month.

4. The present application is filed by the applicant on the ground that earlier, Writ Petition no. 26 of 2018 was assigned to Court

room no.2 and on 19/6/2018, the applicant continued to wait for her turn and for the petition to be called out in court room no.2. However, after the first session was over and the matter was not called out, the applicant made inquiry and learnt that the petition was before Court room no.3. When the applicant made inquiry, she learnt that the writ petition has already been disposed off. It is in these circumstances that the applicant is seeking recall of the order.

5. I have heard the parties on the aspect of recall. Shri Bhobe, the learned counsel for the applicant contended that the absence of the applicant was on a bonafide belief that the matter would come up before the Court room no.2 and thus there was no intentional absence and the order needs to be recalled.

6. On the contrary, the learned counsel for the respondent has placed reliance on the decision of the Supreme Court in the case of BUDHIA SWAIN AND OTHERS VS. GOPINATH DEB AND OTHERS (1999) 4 SCC 396, in order to contend that the present case does not fall under the circumstances, in which the Supreme Court has found that the court can recall its earlier order made. It is submitted that the court can recall an order if (i) fraud has been practised on the court; (ii) when the court is misled by the party; (iii) where the court itself has committed a mistake. It is submitted that in the absence of any of these

conditions being, satisfied the order is not liable to be recalled. It is submitted that even otherwise no case for recall is made out on merits.

7. I have given my anxious consideration to the submissions made. It was indicated to the parties that, in order to give a quietus to the matter, the parties may also address on the merits of the challenge in the writ petition no.26/2018 . Accordingly, I have heard the learned counsel for the parties on merits, of the challenge to the order dated 19/6/2018 and I do not find that any case for recall of the order is made out.

8. Shri Bhobe, the learned counsel for the petitioner contended that it is the case of the respondent that he had advanced a sum of Rs.10,00,000/- to the applicant, as referred to in para 8 of the plaint in which it is contended by the respondent that in the year 2009 the applicants (defendants before the trial court) in need of financial assistance of Rs.10,00,000/- and therefore, had approached the respondent, with a request to advance the said sum at the prevailing bank interest and had agreed to repay the said amount within twelve months. The applicant had further agreed to transfer and hand over the vacant and peaceful possession of the suit premises to the respondent, by way of security, towards repayment of the said amount. It is thus submitted that on his own saying according to the respondent, it

is not the case, that the applicant is in possession of the suit premises as a licensee. It is submitted that in the absence of a relationship between the parties either as landlord and tenant or a licensor and licensee, no direction as envisaged under Order XV A of C.P.C can be issued.

9. On the contrary, it is pointed out by Shri Noorani, the learned counsel for the respondent that on 30/9/2009, the applicant had executed a sale deed in favour of the respondent and there is a contemporaneous Leave and Licence agreement between the parties and thus the previous transaction of the advance of the amount would fall into insignificance. It is submitted that admittedly there is a Leave and Licence agreement dated 30/9/2009 executed between the parties and as such, the application filed by the applicant under Order XV A of C.P.C was perfectly maintainable.

10. In order to counter this, Shri Bhobe, the learned counsel for the applicant has pointed out the prayer clause (b)(i) in which the respondent has prayed for recovery of an amount of Rs.3,60,000/- towards interest at the rate of 18% p.a. on the said amount from 30/9/2010 till realization. It is submitted that the case of ownership and recovery of interest cannot go together.

11. Shri Noorani, the learned counsel for the respondent, on

instructions, states that the respondent is not desirous of pressing for the relief as claimed in prayer clause (b)(i) of the plaint and confines his case to the recovery of possession and licence fee/arrears of rent from 1/10/2009. The statement is accepted.

12. On hearing the learned counsel for the parties, it appears that admittedly there is a sale deed executed by the applicant in favour of the respondent and there is a contemporaneous Leave and Licence Agreement also executed and therefore, it is not possible to accept that the application under Order XV-A of C.P.C was not maintainable.

13. Coming to the merits of the impugned order passed by the learned trial court. A bare perusal of the impugned order shows that the trial court has not noticed the provisions of Order XV-A of C.P.C. This Court placing reliance on the decision of this Court in the case of PHILOMENA D'SOUZA VS. JOHN JANUS BARRETO 2013 (5) Mh LJ 220, had allowed the petition, as noticed earlier. Thus I do not find that any different conclusion can arise in the matter even on merits. In that view of the matter, the application is dismissed with no order as to costs.

C. V. BHADANG, J.