

IN THE HIGH COURT OF BOMBAY AT GOA
CIVIL REVISION APPLICATION NO. 8 OF 2018

Mrs. Veenaben R. Parekh, Senior Citizen, w/o late Ramesh Parekh, Indian National, r/o Flat M-1, Shivangi Apartments Co-operative Housing Society, Baina, Vasco da Gama, Goa.

Through Constituted Attorney Mr. Nazir Khan, major in age, s/o Akbar Khan, r/o Flat No. 302, Murgao Avenue, Vasco da Gama, Goa.

.... Applicant

Versus

Mr. Atmaram Dhuri, major in age, r/o H. No. 45, Gopika Niwas, Behind Baina Church, Baina, Vasco da Gama, Goa.

.... Respondent

Mr. John Abreu Lobo, Advocate for the Applicant.

Mr. C.A. Coutinho, Advocate for the Respondent.

CORAM : C.V. BHADANG, J.

DATE : 13th June, 2019

ORAL ORDER:

The challenge in this revision application, under Section 115 of the Code of Civil Procedure (CPC, for short), is to the judgment and decree dated 27.11.2017, passed by the learned Civil Judge Junior Division at Vasco in Regular Civil Suit No. 83/2014/D. By the impugned judgment and decree, the suit filed by the respondent, under Section 6 of the Specific Relief Act, 1963 (Act, for short) has been decreed.

2. The respondent filed the aforesaid suit against the applicant, under Section 6 of the Act. The subject matter of the suit is flat no. F-1, admeasuring 75 square metres on the first floor of a building better known as Shivangi Apartment Co-operative Housing Society Limited (Society, for short), standing on the property known as Gina, surveyed under chalta no. 167 of P.T. Sheet no. 171, situated at Baina, Vasco-da-Gama. The construction of the said building, consisting of a basement, ground floor and two upper floors (as per the sanctioned plan) was undertaken by M/s Ashwini Associates, as per the development agreement entered into with the owner. Mr. Mandy Andrew is the sole proprietor of M/s Ashwini Associates, who had obtained financial assistance for construction of the said building from the Goa State Co-operative Bank, Vasco Branch (Bank, for short). It appears that on account of failure to repay the loan, the said Bank had raised a dispute before the Arbitrator and the learned Arbitrator, by an award, had directed Mr. Mandy Andrew and two sureties to jointly and severally pay the amount due along with interest.

3. In execution of the said award, a final sale notice was published in daily newspaper 'Lokmat' on 04.02.2011, for auction of flat no. F-1 on the first floor, admeasuring 75 square

metres and flat no. S-2 on the second floor, admeasuring 75.88 square metres. Presently, we are only concerned with flat no. F-1, which was purchased by the respondent in the auction on 18.02.2011, for a consideration of Rs.10,10,000/-. Accordingly, the authorized representative of the Bank had issued acceptance letter dated 21.02.2011 and sale confirmation letter dated 25.02.2011 to the respondent and subsequently, a certificate of sale was executed before the Sub-Registrar of Mormugao, in favour of the respondent on 02.04.2011. In pursuance of the said auction purchase, the possession of the said flat was handed over on 10.03.2011 by the Recovery Officer of the Bank to the respondent.

4. According to the respondent, he has been occupying the suit flat no. F-1, as an owner thereof and has been paying the electricity bills and had also applied for the membership of the said Society.

5. It was the material case of the respondent that somewhere in the last week of April, 2014, when the respondent with his family had gone out of station and when he returned on 02.05.2014, he found that some unknown person had broken the lock and had trespassed into the suit flat. The respondent

reported the matter to police on 03.05.2014 and filed a suit for possession, injunction, mesne profits etc.

6. The applicant resisted the suit, *inter alia* on the ground that he has no concern with flat no. F-1, situated on the first floor of the building. The material case made out was that he was in possession of flat no. M-1, admeasuring 70 square metres on the mezzanine floor of the building. According to the applicant, he had purchased the said flat for a total consideration of Rs.4,55,000/-, as per the agreement for sale dated 26.03.1997, from Mr. Andrew, who is the proprietor of M/s Ashwini Associates. It was contended that the applicant is also the shareholder of the said Society and has been regularly paying electricity bills of the flat i.e. flat bearing no. M-1. It was also contended that Mr. Andrew had passed a receipt dated 08.11.2000, towards the receipt of the entire consideration of Rs.4,55,000/-.

7. On the basis of the rival pleadings, the learned Trial Court framed the following issues:

1. *Whether the plaintiff proves that the defendant has taken the forcible possession of the suit flat on 02.05.2014 ?*

2. Whether the plaintiff proves that the plaintiff is entitled for mesne profit @10,000/- per month ?

3. What relief ? What order ?

8. The respondent examined himself as PW-1 along with Pramod Kavlekar (PW-2), Dushyant Kamat (PW-3) and Ramesh Parsekar (PW-4) and produced the electricity bills collectively at Exhibit-20, the sale certificate and other documents.

9. The applicant examined himself as DW-1 along with Siddesh Sawant (DW-2) and produced a copy of the agreement dated 26.03.1997 and the share certificate issued by the Society to Mrs. Veenaben R. Parekh, the Power of Attorney dated 30.09.2009, a Deed of English Mortgage dated 02.11.1999 along with the approved plan and location plan of the said building.

10. The learned Trial Court found that the respondent has proved that there is no mezzanine floor in the said building. In short, the learned Trial Court disbelieved the existence of flat no. M-1, as claimed on behalf of the applicant. The learned Trial Court found that the applicant is claiming flat no. F-1 (which is the suit flat) as flat no. M-1. The learned Trial Court

also found that the respondent has proved that he was in possession of the suit flat, six months prior to dispossession and he was dispossessed on 02.05.2014. The learned Trial Court, in such circumstances, has decreed the suit with mesne profits of Rs.4,000/- per month from 02.05.2014, till the delivery of possession.

11. I have heard Mr. Lobo, the learned Counsel for the applicant and Mr. Coutinho, the learned Counsel for the respondent. With the assistance of the learned Counsel for the parties, I have gone through the record.

12. Mr. Lobo, the learned Counsel for the applicant has pointed out the agreement for sale dated 26.03.1997, by which, flat no. M-1, situated on the mezzanine floor of the building was agreed to be purchased by the applicant from Mr. Andrew, for a consideration of Rs.4,55,000/-. He has further pointed out the share certificate of the Society to show that the applicant was a Member of the said Housing Society. This, according to the learned Counsel for the applicant sufficiently establishes the fact of the existence of flat no. M-1 on the mezzanine floor of the building. It is submitted that on the contrary, the respondent has failed to show that he was put in actual possession of flat

no. F-1 by the said Bank after the auction purchase. It is submitted that the electricity bills produced by the respondent clearly show that there was no consumption of electricity, which belies the claim of the respondent of being in physical possession of the suit flat. The learned Counsel has then pointed out the evidence of Ramesh Parsekar (PW-4), in which, the Court Commissioner has volunteered to say that as per the location, there is a flat below the flat of the respondent and there is no shop. It is submitted that the evidence of Ramesh Parsekar (PW-4) has not been properly considered by the Trial Court. It is submitted that there is absolutely no evidence and discussion by the Trial Court on the aspect of actual possession and for the matter of that, dispossession of the respondent on 02.05.2014, as claimed. He, therefore, submitted that the impugned judgment and decree be set aside.

13. Mr. Coutinho, the learned Counsel for the respondent, on the contrary, has supported the impugned judgment and decree. The learned Counsel has relied upon the decision of the Supreme Court in the case of **Sanjay Kumar Pandey & Others Vs. Gulbahar Sheikh & Others (2004) 4 SCC 664** and **Ambadas Khanduji Shinde & Others Vs. Ashok Sadashiv Mamurkar & Others 2017(5) ALL MR 447**

(SC) and the decision of this Court in the case of **Ramesh Madhavrao Shelke Vs. Bhaskar Seetaram Pradhan 2011(2) ALL MR 258**, in order to submit that the suit under Section 6 of the Act is of a summary nature, limited to the finding of dispossession, within a period of six months next before the date of the institution of the suit. It is submitted that the Act does not contemplate any appeal, challenging the decree passed under Section 6 of the Act and the scope for interference in the revisional jurisdiction of this Court, under Section 115 of CPC is limited. It is submitted that a remedy of filing revision is available only by way of exception and unless the applicant is able to point out any jurisdictional error, no case for interference is made out, even where, there are certain errors of facts or law pointed out. The learned Counsel was at pains to point out that the learned Trial Court after properly appreciating the oral and documentary evidence, has rightly come to the conclusion that the mezzanine floor does not exist in the said building and thus, the very existence of flat no. M-1, as claimed by the applicant, is not proved. The learned Counsel submitted that the applicant, has failed to establish the existence of flat no. M-1, much less its possession by producing any evidence. He, therefore, submits that the revision application be dismissed.

14. I have carefully considered the rival circumstances and the submissions made. The dispute involved in the petition is about the identification of the suit flat. According to the respondent, he is the auction purchaser of flat no. F-1, admeasuring 75 square metres on the first floor of the building and he has been put in actual possession of the said flat by the said Bank and was dispossessed by the applicant on 02.05.2014. On the contrary, according to the applicant, he is in possession of flat no. M-1, admeasuring 70 square metres, situated on the mezzanine floor of the building and he has no concern with suit flat no. F-1. It is significant to note that while the existence of flat no. F-1 has not been specifically denied by the applicant, the respondent has specifically questioned the existence of flat no. M-1 on the mezzanine floor of the said building. In fact, the case made out is that there is no mezzanine floor in the said building. The record discloses that the sanctioned plan of the building shows that there are no flats and only shops at the mezzanine floor. Thus, the sanctioned plan does not provide any flats as such, being constructed on the mezzanine floor of the building. The learned Trial Court has noticed that the building was not constructed as per the sanctioned plan and has then relied upon Regulation 84 of the Goa Land Development and

Building Construction Regulations, 2010 (Regulations, for short) in order to hold that no mezzanine floor exists in the said building.

15. Thus, the essential question is about the existence of flat no. M-1, admeasuring 70 square metres on the mezzanine floor of the building. The agreement of sale dated 26.03.1997 shows that the builder had “agreed to build the mezzanine floor”, admeasuring 70 square metres, as indicated on the plan annexed at Annexure-A to the said agreement and to transfer the same in the favour of the applicant for a consideration of Rs.4,55,000/-. It can thus be seen that at the time, when the said agreement was executed, the mezzanine floor was not built and the agreement was essentially to purchase 70 square metres on the mezzanine floor, to be constructed in future. That apart, the learned Trial Court has found that the plan at Annexure-A annexed to the agreement is not produced and there is no document to show that the consideration of Rs.4,55,000/- was paid by the applicant to Mr. Andrew and whether, the final agreement was executed or not. Mr. Lobo, the learned Counsel for the applicant pointed out a share certificate issued by the Society. However, that share certificate does not show any particular tenement, much less flat no. M-1.

There is also no allotment letter by the Society in favour of the applicant in respect of flat no. M-1 on the mezzanine floor. The learned Trial Court had appointed Ramesh Parsekar (PW-4) as the Commissioner to inspect the building and to report whether, there exists mezzanine floor in the building and to ascertain whether, there is flat no. F-1 on the first floor of the building. The first two reports given by Ramesh Parsekar (PW-4) were discarded. However, the third report has been proved at Exhibit-72, in which the Commissioner has reported that flat no. M-1, does not exist and has also reported about the existence of flat no. F-1 on the first floor.

16. Mr. Lobo, the learned Counsel for the applicant has referred to evidence of Ramesh Parsekar (PW-4), in which, the witness has admitted that if, one sees the position of the flat in comparison with the approved plan, the said flat would be at the mezzanine floor above the ground floor. The learned Trial Court has considered this aspect in para 39 of the judgment and has refused to act on the same and to my mind rightly so. Although, it was claimed on behalf of the applicant that there was some misreading of Regulation 84 of the Regulations, defining a mezzanine floor, I find on an overall consideration that it is not possible to envisage existence of a flat on the mezzanine floor,

within the definition of mezzanine floor, as contained in Regulation 84 of the definition of the Regulations.

17. The applicant has failed to produce any document, such as the conveyance deed, if any, the allotment letter from the Society or share certificate in respect of flat no. M-1 to show his possession. Although, in the written statement it was claimed that the applicant is in possession of electricity bills of flat no. M-1, they have also not been produced before the learned Trial Court. The learned Trial Court on meticulous consideration has held that there is no flat no. M-1 on the mezzanine floor.

18. The suit under Section 6 of the Act is in the nature of a summary suit and the scope for interference in the revisional jurisdiction is limited. The Supreme Court in the case of **Sanjay Kumar Pandey** (supra) has held that the remedy of an aggrieved party in a suit under Section 6 of the Act, is to file a Regular Civil Suit, based on title and the remedy under Section 115 of the Code is available only by way of exception. In the case of **Ambadas Shinde** (supra), the Supreme Court has held that the revisional jurisdiction of this Court is limited to cases of illegal or irregular exercise of jurisdiction by the subordinate

Courts and it is not open for this Court to correct errors of facts or law, unless they go to the root of the issue of jurisdiction.

19. I have carefully gone through the impugned judgment and I do not find that the findings recorded are amenable to interference in revisional jurisdiction of this Court.

The revision application is without any merit and is accordingly dismissed, with no order as to costs. The applicant is granted three months time to vacate the suit premises.

C. V. BHADANG, J.

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