

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 236 OF 2019**

Amit Narayan Pai Petitioner
Versus
Domigos Felicio Dias, Rep. by his POA,
Hyacinta Pamela Barreto e Soares Respondent

Mr. Shivan Desai, Advocate for the Petitioner.

Mr. Dhaval D. Zaveri, Advocate for the Respondent.

CORAM : C.V. BHADANG, J.

DATE : 19th June, 2019

ORAL ORDER:

The petitioner filed Regular Civil Suit No. 68/2015/B (new) [Special Civil Suit No. 82/2008/B (old)], against the respondent, for specific performance of an agreement for sale. Subsequent thereto, the respondent filed Special Civil Suit No. 54/2009/B, for possession of the suit premises, on the ground that the petitioner has obtained forcible possession of the suit premises. Admittedly, the subsequent suit filed by the respondent, came to be stayed under Section 10 of the Code of Civil Procedure (CPC, for short).

2. The suit filed by the petitioner came to be decreed and that decree is subject matter of challenge, at the instance of the respondent, before the learned District Judge, in Regular

Civil Appeal No. 78/2015. In that Appeal, the respondent filed an application under Order XVI, Rule 1 of CPC, for production of the following documents:

- i. *Plaint in SCS No. 54/2009/B before the Civil Judge Senior Division at Panaji Goa alongwith Application for temporary injunction filed by Appellant;*
- ii. *Written Statement in the above suit filed by the Respondent;*
- iii. *Affidavit in Rejoinder to the above written statement filed by the Appellant;*
- iv. *Application u/s 10 of C.P.C. 1908 filed by the Respondent in the above suit;*
- v. *Reply to above Application filed by the Appellant;*
- vi. *Order dated 18/12/2010 passed by the Ld. Civil Judge Senior Division at Panaji Goa in SCS No. 54/09/B;*
- vii. *Medical Report of the Appellant dated 20/07/2006, 05/10/2007 and 25/05/2009;*
- viii. *Police complaints dated 30/08/2008 and 01/09/2008 filed by the Appellant against the Respondent;*
- ix. *Legal Notice issued by the Advocate for the Appellant to the Deputy Superintendent of Police at Panaji, Goa dated 03/10/2008;*
- x. *Admission and discharge card of Goa Medical College Bambolim, Goa of the Appellant in the year 2011;*
- xi. *Reply dated 20/04/2016 under the R.T.I. Act, 2005 comprising of F.I.R. No. 69/2014 under Section 154 of Cr.P.C. 1973 dated 20/02/2014;*
- xii. *F.I.R. No. 75/2014 dated 25/04/2014 u/s 154 Cr.P.C. 1973 filed by the Appellant against the Respondent under Sections 465, 468, 448 I.P.C. 1860 alongwith copy of the complaint dated 01/04/2014.*

3. The learned District Judge allowed the said application by order dated 19.01.2018 and directed the Trial Court to record evidence in support of the said documents. That order was challenged by the petitioner before this Court in Writ Petition No. 204/2018, which was decided by consent of parties on 09.08.2018 in the following terms:

- (i) *The part of the order permitting production of the documents under Order XLI, Rule 27 of CPC is hereby confirmed.*
- (ii) *In view of the fact that the learned Counsel for the petitioner does not dispute the existence of the documents, the part of the order sending the matter back to the learned Trial Court to record evidence, is hereby set aside.*
- (iii) *The learned Appellate Court shall decide the appeal on its own merits and in accordance with law.*
- (iv) *The issue about relevancy, effect and the probative value of the documents is left open, to be gone into by the Appellate Court.*
- (v) *The petition is disposed of in the aforesaid terms, with no order as to costs.*

4. The respondent thereafter filed affidavit of evidence of the respondent (appellant before the learned District Judge), seeking to prove the aforesaid documents. The petitioner filed an application (Exhibit-26), for rejection of the affidavit in evidence, as according to the petitioner, the respondent was not entitled to lead fresh evidence, particularly, in view of the

fact that the existence of the documents, as produced, was not disputed by the petitioner.

5. The learned District Judge, by the impugned order dated 05.02.2019, has dismissed the application (Exhibit-26), filed by the petitioner. Hence, this petition.

6. I have heard Mr. Desai, the learned Counsel for the petitioner and Mr. Zaveri, the learned Counsel for the respondent. Perused record.

7. Mr. Desai, the learned Counsel for the petitioner has submitted that once, Writ Petition No. 204/2018 was disposed of by consent of parties, where the petitioner had not disputed the existence of the documents, there was no occasion for the respondent to lead evidence, particularly, when the order passed by the learned District Judge, directing the learned Trial Court to record evidence, was set aside by this Court. It is submitted that this is only an attempt to get over with the adverse inference drawn by the learned Trial Court as the respondent, where the respondent had not stepped into the witness box.

8. Mr. Zaveri, the learned Counsel for the respondent has supported the impugned order. It is submitted that, merely because the existence of the documents is not disputed, does not absolve the respondent from proving the contents of the documents in accordance with law. It is submitted that the provisions of Order XLI, Rule 28 of CPC, are consequent to the production of documents being allowed. The learned Counsel has placed reliance on the the decision of the Supreme Court in the case of **Uttaradi Mutt Vs. Raghavendra Swamy Mutt, (2018) 10 SCC 484.**

9. I have carefully considered the submissions made. At the outset, it is necessary to note that the existence of the documents, as are produced, by the respondent before the learned Trial Court, has not been disputed by the petitioner. The documents at serial nos. (i) to (vi) above, are part of the record in Special Civil Suit No. 54/2009/B. It cannot be accepted or envisaged that the respondent would be required to prove the contents thereof. For instance, the respondent cannot be expected to prove the contents of the written statement filed by the present petitioner in Special Civil Suit No. 54/2009/B as well as the reply filed by the petitioner to the application under Section 10 of CPC, filed by the respondent.

In my considered view, the affidavit in evidence can only be permitted and has to be confined to documents at serial nos. (vii), (viii), (x) and (xii) above.

The impugned order is accordingly partly modified to the aforesaid extent. Needless to mention that it would be open to the petitioner to cross examine the respondent, if so advised.

The petition is disposed off in the aforesaid terms, with no order as to costs.

C. V. BHADANG, J.

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