

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 633 OF 2018**

1. Shri Varun Kuchadkar,
s/o Shantaram V. Kudchadkar,
aged about 29 years, businessman,
r/o H. No. 1184, Ahilya Shankar Farm,
Pontemol, Curhcorem, Goa.
and two others. Petitioners

V e r s u s

1. Custodio D'Souza,
S/o late Caitan D'Souza,
aged about 63 years, married,
r/o. H. NO. 19/1,
Ernestin Villa, St. Alex Vaddo,
Tilamol, Quepem,
Rep. By his POA,
Shri Anthony D'Souza,
s/o. Late Caitan D'Souza,
aged about 57 years, married
r/o H. No. 70,
Hodar, Curchorem, Goa and anr. Respondents.

Shri C. A. Coutinho, Advocate for the Petitioners.

Shri D. Pangam, Advocate for the Respondent no.1.

Shir P. P. Singh, Advocate for the Respondent no.2.

CORAM: C. V. BHADANG, J.
Date: 4th February, 2019.

ORAL ORDER:

By this petition, the petitioner/Judgment Debtor nos.1, 3 and 4 are challenging the order dated 25/4/2018 passed by the Executing Court in Regular Execution Application no.14/2017/B. The first respondent is the decree holder no.1. For the sake of convenience the parties are referred to in their original capacity.

2. By the impugned order the Judgment Debtor is directed to deposit the amount of penalty as agreed in the consent decree dated 5/10/2016.

3. Regular Civil Suit No.3/2016/A was instituted by the first respondent against the petitioners and the second respondent in which the consent decree was passed on 5/10/2016. It was inter alia agreed that the defendant shall hand over vacant possession of the suit shop no. UG-5 located on the upper ground floor of the building known as “Gurudev Mansion” situated at Curchorem-Goa, to the decree holder no.1 (plaintiff no.1) on or before 30/4/2017 failing which, the defendant no.1 was liable to pay to the plaintiff no.1 a penalty of Rs.10,000/- per month from May 2017 till the recovery of vacant possession. The record discloses that a sale deed came to be executed by the petitioner nos.2 and 3 in favour of the decree holder on 5/5/2017 in respect of the suit shop for a consideration of Rs.1,18,062/-. The sale deed

contains a recital that the possession of the suit shop is with the decree holder (purchaser) since the time of the agreement of sale in the year 1990.

4. Be that as it may, according to the petitioners, the possession of the suit shop is already delivered to the decree holder no.1, which is disputed by the first respondent. The second respondent claims to be in actual possession of the suit shop as a licensee from the Judgment Debtor.

5. The learned trial court in the impugned order has found that the following questions rise in the Execution case:

(i) Whether the judgment debtor nos. 3 and 4 have actually handed over the possession to the decree holder at the time of execution of the sale deed dated 5/5/2017 or not ?

(ii) Why the judgment debtor nos.3 and 4 did not make decree holder as consenting party to the sale deed dated 5/5/2017?

(iii) If the possession was handed over by the judgment debtor nos.3 and 4 to the decree holder, whether the possession of judgment debtor no.2 should be counted as per the instructions of the decree holder or not?

6. In the opinion of the Executing Court determination of all these queries, an inquiry on fact is necessary based on which the amount of penalty will have to be determined. It is in these circumstances that by the

impugned order, while directing the parties to proceed with the inquiry and lead their evidence, the judgment debtor no.1 in the meantime is directed to deposit the amount of penalty. Hence this petition.

7. I have heard Shri Coutinho, the learned counsel for the petitioners and Shri Pangam, the learned counsel for the first respondent and Mr. Singh, the learned counsel for the second respondent. With the assistance of the learned counsel for the parties, I have gone through the record.

8. Shri Coutinho, the learned counsel for the petitioners submitted that once the Executing Court had found that there are disputed questions of fact involved, as to whether the possession of the suit shop is handed over to the decree holder as per sale deed dated 5/5/2017 or not the Executing Court could not have directed the petitioner to deposit the amount of penalty. It is submitted that the sale deed was drafted by the learned counsel for the decree holders. It is submitted that although the second respondent was a licensee in respect of the suit shop, the petitioner got it vacated by getting his electricity connection disconnected and after the possession was obtained from the second respondent, the same is delivered to the decree holder no.1. At one stage it was also contended that if at all the second respondent is presently in possession of the suit shop, it would be a matter between the decree holder

and the second respondent.

9. Shri Pangam, the learned counsel for the first respondent has supported the impugned order. It is submitted that the recitals in the sale deed about the decree holder no.1 (purchaser) being in possession of the suit shop from the year 1990 is not borne out of the record inasmuch as by the consent terms entered into by the parties on 5/10/2016, the defendant no.1 had agreed to hand over the vacant possession of the suit shop to the plaintiff no.1 on or before 30/4/2017. It is submitted that even as per the petitioners, the second respondent was in possession of the suit shop for three successive periods of eleven months each which period expired on 10/4/2017. Thus it cannot be accepted that the decree holder no.1 was in possession of the suit shop from the year 1990. It is submitted that the second respondent is also claiming to be in actual possession of the suit shop and therefore, there is a strong prima faice case to show that the possession is not handed over as agreed. It is submitted that the impugned order does not act to the prejudice of the petitioner in as much as the amount would be lying before the Executing Court subject to the out come of the inquiry.

10. Mr. Singh, the learned counsel for the respondent no.2 submitted that the respondent no.2 is in actual possession of the suit shop where he is

carrying on business of tailoring.

11. I have carefully considered the rival circumstances and the submissions made and I do not find that any case for interference is made out.

12. Prima facie the recitals in the sale deed about the purchaser being in possession of the suit shop from the year 1990 is against the weight of the record, inasmuch as, by the consent terms, agreed between the parties, on 5/10/2016 the defendant no.1 had agreed to deliver vacant possession of the suit shop to the plaintiff no.1 on or before 30/4/2017. It is also the case made out in the affidavit filed today that the second respondent was in possession of the suit shop on Leave and Licence basis for a period of three tenures of eleven months each from 10/9/2014 which period expired on 10/4/2017, after which, the second respondent had no right to continue in occupation. It is the specific case made out that in order to force the second respondent to quit and vacate the suit shop, the petitioners got the electricity connection to the suit shop disconnected some where on 29/4/2017. Thus prima facie it is not possible to accept that the purchaser was in possession of the suit shop from the date of agreement of sale.

13. Although it was contended on behalf of the petitioner that if at all the

second respondent is in possession of the suit shop today, it would be either as a licensee or a tenant of the decree holder. Such a case was never made out before the executing court. Thus the learned counsel for the respondent no.1 is right in contending that prima facie the possession of the suit shop is not delivered as agreed. Albeit this will be subject to any final finding of the Executing Court after the inquiry is conducted. However, till date, there is nothing wrong in the petitioners being asked to deposit the amount. The impugned order does not result into any manifest injustice on the petitioners, which is one of the criteria to justify interference (see the decision in the case of **Shalini Shyam Shetty & Anr. Vs. Rajendra Shankar Patil (2010) 8 SCC 329**). The amount would be lying before the Executing Court and in the event the Executing Court comes to the conclusion that indeed the possession was delivered to the decreed holder no.1, as agreed, the amount can be directed to be returned. However, on the basis of a prima facie examination of the documents, indeed, the possession appears to have not been delivered to the decreed holder no.1. No case of interference is made out. The petition is without any merit and is accordingly dismissed with no order as to costs.

C. V. BHADANG, J.

Ap/

