

Vinita

**IN THE HIGH COURT OF BOMBAY AT GOA
WRIT PETITION NO. 281 OF 2023**

EDUARDO CAMILO DA CRUZ @ EDWARD
DCRUZ AND ANR. ... Petitioners.
Vs
VAIBHAV SHASHIKANT CHARI ...Respondent.

Mr. Bhargav Khandeparkar, Advocate for the petitioners.
Mr. Ganesh Naik, Advocate for the respondent.

**CORAM: PRAKASH D. NAIK, J
DATED: 31st August 2023**

ORAL ORDER

1. The petitioners have invoked writ jurisdiction of this Court under Article 227 of the Constitution of India challenging the order dated 24.4.2023 passed by the Ad-hoc Civil Judge, Senior Division “B” Court at Vasco da Gama in Regular Civil Suit No.69/2019/A whereby an application preferred by the petitioner vide Exh. D-21 for summary judgment and preliminary decree of eviction under Order XII Rule 6 and direction for inquiry into mesne profits under Order XX Rule 12(1) (c) of Code of Civil Procedure was rejected.

2. Brief facts narrated by the petitioner which are germane for adjudication of the issues in this petition are as under:-

(i) Petitioners are owner of shop No.6 bearing house tax registration no.1/180/B(2) having built up area of 20.38 sq. mts., situated on the

ground floor of the building Jai-Jui Apartments, Vasco-da-Gama, Goa.

(ii) Vide agreement of leave and licence dated 31.8.2018, petitioners had permitted the respondent to use the suit shop for conducting business for a period of eleven months. The period of eleven months commencing from 1.10.2018 has expired on 31.8.2019. The compensation for using the premises on leave and licence was fixed at Rs.8,000/- per month.

(iii) Since the respondent did not vacate the premises, the petitioners forwarded letter dated 7.8.2019 to the respondent intimating that on expiry of period of licence he has to vacate the premises.

(iv) Legal notice dated dated 26.8.2019 was issued through the Advocate for the petitioners to the respondent calling upon him to handover vacant possession of the shop to the petitioners on 31.8.2019 and to clear all the arrears. It was also intimated in the event, he fails to comply with the demand, the petitioner shall constrained to initiate appropriate proceedings for trespass, ejectment and recovery of mesne profits of Rs.40,000/- per month.

(v) Reply dated 29.8.2019 was forwarded by the respondent contending that the petitioners had told the respondent to renovate the shop and thereafter the respondent had to put certain fixtures, machinery in the said shop on the instructions of the petitioners. It is further contended that the petitioners had told the respondent to purchase the suit shop for a sum of Rs.11,00,000/-. Respondent had arranged the sum of Rs.11,00,000/- by taking loan from financial institution and he has started paying interest on the said loan. Petitioners had promised the respondent to purchase the said shop for sum of Rs.11,00,000/- and at that particular time the respondent was in financial difficulty.

(vi) Petitioners filed a suit in the Court of Civil Judge, Junior Division at Vasco-da-Gama viz Regular Civil Suit No. 69/2019/A for ejectment, mandatory injunction and mesne profits under section 39 of the Specific Relief Act, 1963.

(vii) It was also prayed that the defendant/respondent be directed to pay amount of Rs.8,500/- with interest and Rs.22,000/- per month as mesne profit, from the due date until actual realisation.

(viii) Respondent filed written statement before the trial Court on 3.1.2020. Subsequently an application for amendment of written statement was preferred by the respondent on 4.11.2020 which has

been apparently allowed by the Court. Respondent forwarded a letter dated 27.10.2020 to the petitioner stating that he has paid an amount of Rs.1,00,000/- on 31.1.2020 towards transaction of sale of his suit shop which was agreed to be sold for a consideration of Rs.16,50,000/-.

(ix) Petitioners preferred an application for summary judgment and preliminary decree of eviction under Order XII Rule 6 and direction for inquiry into mesne profits under Order XX Rule 12(1) (c) of CPC.

(x) Application preferred by the petitioners was opposed by the respondent. Written arguments were filed before the lower Court at the instance of the respondent.

(xi) Vide order dated 24.4.2023 learned Ad-hoc Senior Civil Judge, Vasco da Gama, rejected the application preferred by the petitioner.

3. Learned counsel for the petitioners submitted that impugned order is contrary to law and required to be set aside. The trial Court failed to appreciate that the tenant in the suit for eviction is not entitled to retain his possession alleging an agreement for sale, unless such an agreement is a registered agreement protected under Section 53A of the Transfer of Property Act, 1882. Contention of the

respondent that there was amicable settlement between the parties and that the respondent had agreed to purchase the suit shop is absolutely moonshine as the respondent has not even pleaded the date or the other terms of the alleged agreement. Respondent had not filed any counterclaim for specific performance of any agreement for sale. Petitioners had categorically stated in their application that the petitioners do not wish to sell the suit premises. Nothing in the written statement entitles the respondent to hold the suit premises. Thus this was the case for passing summary judgment in terms of law laid down in several decisions, provisions of summary judgment confers discretion on the Civil Court and it is to be exercised judiciously. Petitioners cannot be deprived of their right to possession without legally tenable defence pleaded by the respondent. The trial Court has erred in forming an opinion that the petitioners have not explained the payment of Rs.1,00,000/- made by the respondent to the petitioners. The impugned order is therefore required to be set aside with a direction that application preferred by the application dated 4.1.2023 vide Exh. 21 for passing summary judgment and decree of eviction against the respondent with a direction to respondent to handover possession of the suit premises to the petitioner. Court below be directed to hold inquiry into the mesne profit from the date of suit until handing over the premises.

4. Learned counsel for the petitioners has relied upon following decisions:

1. ***M/s Payal Vision Vs. Radhika Choudhari,*¹**
2. ***Sunil Kapoor Vs Himmat Singh & ors.*²**
3. ***Om Wati Vs Panchi Devi*³**
4. ***Ashok Kumar Bagga vs Rajvnder Kaur*⁴**

5. Learned counsel for the respondent submitted that there is no infirmity in the impugned order dated 24.4.2023. The trial Court has rightly observed that respondent/defendant must be given an opportunity to contest the proceedings and this was not a case for passing summary judgment. Grant of relief sought by the petitioner is discretionary and hence such relief is passed in exceptional circumstances. The trial Court has rightly rejected the prayer for summary judgment and eviction made by the petitioners. Learned trial Court has passed well reasoned order which does not require interference. Issue before the trial Court was not simplicitor handing over of the possession in connection with the leave and licence agreement but the Court also required to consider the fact that there was transaction of sale between the parties and the petitioners had

1 (2012) 11 SCC 405

2 (2010) 167 DLT 806

3 (2012) 190 DLT 720

4 (2021) 0 Supreme (Del) 2057

agreed to sell the suit shop to the respondent. Amount of Rs.1,00,000/- was credited in the account of the petitioners and balance amount towards consideration was to be paid by the respondent. The petitioner has not explained the crediting amount of Rs.1,00,000/- into his account by respondent. Initially the petitioners had requested the respondent to purchase the premises for a consideration of Rs.11,00,000/- and subsequently, it was agreed that premises would be purchased by respondent for a consideration of Rs.16,50,000/-. The case of the respondent in the Written Statement is that there is transaction of sale which is required to be tested in the said proceedings. Respondent had preferred an application for amendment of written statement to plead the aforesaid defence before the trial Court, which application was allowed and thus the Court was required to consider both the issues with regard to the licence and handing over the possession as well as subsequent transaction executed between the petitioners and the respondent. Power of summary judgment can be exercised in exceptional circumstances which is not prevalent in the present case since there was an issue of sale of the suit premises. It cannot be stated that on account of lapse of period of licence, Court should have passed decree of eviction and summary judgment. Respondent must be given an opportunity to defend and not by putting an end to the proceedings by resorting to summary judgment. Learned Civil Judge has rightly

observed that amount of Rs.1,00,000/- was credited to the account of the petitioners and they have not explained the said amount. The respondent had claimed that the amount was towards part consideration for purchase of suit shop.

6. Learned advocate for the petitioners has relied upon following decisions:

1. ***Union of India and another Vs K. C. Sharma and Company and others***⁵
2. ***Karan Kapoor Vs Madhuri Kumar (2022) 10 SCC 496***⁶

7. It is not in dispute that leave and licence agreement was executed between the petitioner and the respondent in respect of the suit shop. Compensation for utilising the premises was Rs.8,000/- per month. Period of licence was eleven months from 1.10.2018 to 31.8.2019. It is not disputed that the petitioner is the owner of the premises, licence period was over and the respondent continued to occupy the premises. Apart from communication dated 7.8.2019, legal notice dated 26.8.2019 was issued to the respondent intimating that he is required to vacate the premises and that the petitioner is entitled to recover the mesne profit till the respondent hands over the actual possession of the premises. Reply dated 29.8.2019 was

⁵ (2020) 15 SCC 209

⁶ (2022) 10 SCC 496

forwarded at the instance of the respondent through his Advocate. Ownership of the petitioner was not disputed. Leave and licence agreement executed between the parties was not in dispute however, it was contended that the petitioners had informed the respondent to purchase this shop for sum of Rs. 11,00,000/- It was also stated that petitioners were subsequently started demanding Rs.15,00,000/- towards sale of shop. The respondent had arranged Rs.11,00,000/- by taking loan. At the relevant time, when the offer was made by the petitioners for purchase of shop, respondent was in financial constraint. Petitioners filed a suit seeking aforesaid reliefs on 3.10.2019. Written statement was filed by the respondent on 3.1.2020. In the written statement it was pleaded that ownership of the premises and the execution of leave and licence agreement was not in dispute. It was stated that proposal for amicable settlement was given which was subsequently withdrawn. Thus, in the written statement dated 3.1.2020 it was the case of the respondent/defendant that there was transaction of sale of suit property between the parties. Subsequently written statement was amended and documents were brought on record by the respondent and it was claimed in the application for production of documents dated 4.1.2020 parties have settled the matter amicably. It was agreed that the plaintiffs shall sell suit shop for total consideration of Rs.16,50,000/- and plaintiffs had received Rs.1,00,000/-. It was also stated that earlier these

documents were not brought on record on account of inadvertence as stated in above the prayer to amend the Written statement was granted.

8. From the aforesaid factual matrix, it can be seen that the defence pleaded by the respondent which is apparently after thought that there was understanding between the parties about purchase of suit shop by the respondent. Petitioners/plaintiffs had denied this transaction. Petitioners have also stated that the said amount of Rs.1,00,000/- was transferred to the account of the petitioners voluntarily by respondent except the version of the respondent that there was transaction of sale of property, there is no authentic document to support such transaction. Learned Civil Judge has observed that this is not simply a case where the lease has expired and therefore the tenant is required to be evicted and landlord is put in possession. Although there is admission that plaintiffs are owners and leave and licence agreement has expired, admission is qualified inasmuch as the defendant have put forth a specific case that he is entitled to be in continuous possession not as either tenant or licensee but as the prospective owner of the shop since he has paid part consideration of Rs.1,00,000/- to the plaintiffs for sale of the said shop to the defendant. Learned Judge has also observed that exercise of powers for summary judgment are discretionary. Relief cannot be granted as matter of right on the request of the plaintiffs.

Plaintiffs have not offered any convincing explanation as regard payment of Rs.1,00,000/-.

9. It is pertinent to note that there was no agreement about sale of suit shop protected under Section 53A of the Transfer of Property Act. Respondent/defendant had contended that there is amicable settlement which is not supported by any evidence except crediting the amount of Rs.1,00,000/- into the account of the petitioner. There is no further payment. Consideration according to the respondent is Rs.16,50,000/- . There are no further steps to complete the alleged transaction. Thus, merely on the oral statement of the respondent it was claimed that there was settlement and understanding of sale of the property. Order XII Rule 6 of CPC provides for summary judgment, preliminary decree of eviction and Order XX Rule 12(1)(c) provided for mesne profits. Licence period was over. There was no reason for the respondent to continue with the occupation of the premises.

10. In the case of *M/s Payal Vision Vs. Radhika Choudhary*(supra), it was observed that in a suit for recovery of possession from a tenant whose tenancy is not protected under the provisions of the Rent Control Act, all that is required to be established by the plaintiff-landlord is the existence of the jural relationship of landlord and tenant between the parties and the

termination of the tenancy either by lapse of time or by notice served by the landlord under Section 106 of the Transfer of Property Act. So long as these two aspects are not in dispute the Court can pass a decree in terms of Order XII Rule 6 of the CPC. The aforesaid provisions sufficiently empowers the Court trying to deliver the judgment based on admissions whenever such admissions are sufficient for the grant of the relief prayed for. Whether or not there was an unequivocal and clear admission on either of the two aspects which falls for determination in every other case where the plaintiff seeks to invoke the powers of the Court under Order XII Rule 6 of the CPC and prays for passing of the decree on the basis of admission whether or not there is a clear admission on the two aspects noted therein.

11. In the case of ***Sunil Kapoor Vs Himmat Singh and ors.*** (supra), it was observed that mere agreement to sell immovable property cannot create any right in the property, save the right to enforce the said agreement. Thus even if respondent/plaintiffs are found to have agreed to sell the property, defendant would not get right to occupy the said property as an agreement purchaser. No right is accrued by the agreement purchaser. Section 53-A of the Transfer of Property Act codifies the doctrine of part performance. A purchaser of immovable property, who in pursuance to an agreement to sell in writing has been put into possession of the property, is

entitled to so remain in possession. In that case, there was no agreement to sell in writing. The respondents/plaintiffs have denied the averments of the defendant. Even if the defendant were to succeed in his suit for specific performance for agreement to sell, till the execution of conveyance deed in pursuance to the decree, if any, in favour of the defendant, he has no ground in law to save his possession of the premises.

12. Similar view is taken in other decisions relied upon by the learned counsel for the petitioners.

13. In the case of ***Union of India and another Vs K. C. Sharma and Company and others*** (supra), it was observed that possession of person who have acted on the contract of lease or agreement of lease, but in whose favour no valid lease is deed is executed nor registered is entitled to protection under Section 53-A of the Transfer of Property Act. Respondents who were in possession of land are entitled for protection under Section 53-A of the Act.

14. In the case of ***Karan Kapoor Vs Madhuri Kumar*** (supra), the tenant had contended that on account of execution of agreement to sell with respect to suit property for consideration of Rs.3,60,000/-, relationship of the landlord-tenants ceased to exist and the defendant acquired the status of the owner as he had already

parted with the possession of the property under the lease agreement, in view of the contents of agreement to sell and in terms specified therein, whether the defence as taken by the defendants was plausible or not was the matter of trial which could be appreciated by the Court after giving opportunity to lead evidence by respective parties.

15. Decisions relied by the respondent can be distinguished on the facts in the case of ***Karan Kapoor Vs Madhuri Kumar*** (supra) it is noted that there were agreements to sell. In the case of ***Union of India and another Vs K. C. Sharma and Company and others*** (supra) the facts were distinct which are not corresponding to the present case.

16. Except oral contention and the fact that amount of Rs.1,00,000/- has been credited into the account of the petitioner, it cannot be said that there is transaction of sale to deny the relief sought in the application preferred by the petitioners. After expiry of licence period respondent was supposed to vacate the premises and there are no further triable issues as claimed by the learned counsel for the petitioner. The trial Court should have conducted inquiry into mesne profits as prayed by petitioner. Learned Judge, therefore, committed an error in dismissing the application preferred by the petitioners for summary judgment and preliminary decree and also for mesne profit.

ORDER

- i. Writ Petition No.281 of 2023 is allowed.
- ii. The impugned order dated 24.4.2023 passed by the Ad-hoc Senior Civil Judge, “B” Court, Vasco-da-Gama in Regular Civil Suit No. 69/2019/B is set aside
- iii. The application preferred by the petitioners dated 4.1.2023 at Exh. 21 for passing a summary judgment and decree of eviction against the respondent with a direction to the respondent to hand over vacant possession of the suit premises to the petitioner in terms of prayers (A) and (B) of the plaint is allowed.
- iv. The trial Court to hold inquiry into mesne profits from the date of filing of the suit until handing over vacant possession of the suit premises.

PRAKASH D NAIK, J.