

(1972) 04 KAR CK 0007
In the Karnataka High Court
Case No : Misc. First Appeal No. 97 of 1972

Ganapatsa Narayansa Habib	Vs	APPELLANT
Tuljansa Narayansa Habib		RESPONDENT

Date of Decision : 14-04-1972

Acts Referred:

Citation : AIR 1972 Kar 309 : (1972) 2 MysLJ 126

Hon'ble Judges : K. Jagannatha Shetty, J

Bench : Single Bench

Advocate : V. Krishnamurthi, for the Appellant; R.U. Gouly, for the Respondent

Final Decision : Allowed

Judgement

K. Jagannatha Shetty, J.—The building bearing CTS No. 197. Ward No. 2, Hubli is in dispute between the parties to this appeal. It is described as Item No. 1 in the plaint presented by the appellant. It is admittedly in possession of defendant No. 1 who is the respondent before me.

2. The suit is for possession of the said property and also for permanent injunction against defendant No. 1 restraining him from making any structural alterations or demolition thereon, alternatively claiming 1/3 share in all the suit properties on the ground that the parties to the suit are members of a Hindu undivided family. So far as the disputed property is concerned, the plaintiff's primary case is that it was allotted to his share by the family partition of the year 1944 and that defendant No. (1) has been ever since in the permissive occupation and of late, he has unauthorisedly demolished a portion with a view to make a lot of structural alterations therein. With these allegations, in the court below, he obtained an ad interim temporary injunction against defendant No. 1.

3. Defendant No. 1 in his written statement admitted the partition pleaded by the plaintiff but he said that the said property was allotted to his share and not to the plaintiff. He further said that he is in possession of the house as a owner. In his affidavit in support of the application for vacating the injunction, he has

stated that the said property is very old and the kitchen portion of it has already collapsed and it therefore requires urgent reconstruction and that any addition or reconstruction to the building would not cause loss to the plaintiff. He also filed an undertaking in the court below that the repairs he effects and the structure or building he erects, would be unconditionally removed without claiming any compensation, in the event of the plaintiff succeeding in the suit. The lower court was very much impressed with this undertaking and relying on the decision of the Kerala High Court in *Thomas Ben Vs. Parvathy Ommini*, it vacated the temporary injunction. The plaintiff, aggrieved by the order has appealed to this court.

4. The court below did not go into the rival contentions of the parties. It rested its decision upon the undertaking given by the defendant, placing reliance on the above said decision of the Kerala High Court. The facts of the Kerala case are not similar. It was in respect of constructing a building on a vacant land which was claimed by the plaintiff as his own. The defendant therein gave an unconditional undertaking to pull down and remove the building without claiming any compensation in case the plaintiffs were found entitled to recover possession of the property. *Baghavan, J.*, while distinguishing the principles of the decision of the Calcutta High Court in AIR 1914 Cal 362, held that the plaintiffs should not be given an order of Injunction as they would not suffer any irreparable injury.

5. In my view, the ratio of the decision of the Kerala High Court cannot be applied to the present case. The defendant herein is seeking to make structural alterations and additions to the existing building. It may not be easy to remove or pull down the new constructions without damaging the old existing structures. The parties claim the property on the basis of an alleged family partition of the year 1944. If they are not able to prove the said partition, the plaintiff has undoubtedly 1/3 share in all the suit schedule properties including the house in question. If, on the other hand, the plaintiff is able to establish his primary case, he is entitled to the said house and the defendant has no right to make any alterations to it.

6. In these circumstances, should the court restrain the defendant from repairing the house or making any structural alterations, is the only question for consideration before me. The plaintiff at the worst, would be a co-sharer with defendant No. 1. In such a case, the court will have to enquire into all the circumstances of the case, and will see what is fair and reasonable as between co-sharers. The act complained of must be injurious and the term "injury" means something substantial, something that materially affects the position of the parties. But there is no such broad proposition that one co-owner is entitled to an injunction restraining another co-sharer from exceeding his rights, absolutely and without reference to the amount of damage to be sustained by the one side or the other from the granting or withholding of the injunction. The court will have to determine the question on the facts of each case and consider where does the balance of convenience lie and whether it is desirable that the status

quo should be maintained or is it right that the defendant should be allowed to make alterations to the building.

7. The right approach to this question is that laid down in *Israil v. Shamser Rahman* ILR 41 Cal 436 : AIR 1914 Cal 362. In that case, the plaintiffs who were joint owners with the defendants in respect of the property in suit sued them for declaration of title thereto and applied for an injunction to restrain the defendants from building on the land. The trial court granted the temporary injunction which was vacated by the appellate Court. When the matter came up before the High Court in a Civil Revision Petition, Justice Mookerjee sitting with Justice Beachcroft, set aside the appellate order and said thus :

"But a co-owner who was with the tacit or express consent of his co-sharer, in sole occupation of a portion of joint property, was not entitled to change the nature of that possession or to use the property in a mode different from that in which it had previously been used."

Now, upon the facts stated in the present case, the act complained of is regarding the material alterations to the existing building. Under circumstances like these, the matter for consideration at this stage is where the balance of convenience lies and is it proper that the defendant 1 should be allowed to make any structural alterations to the building. In my opinion, defendant No. 1 should be restrained from doing so. The undertaking given by him before the court below should not weigh with this court against the granting of the interim relief to the plaintiff, because, pulling down the new construction in the event of the plaintiff succeeding in the suit, is likely to cause more damage to the building.

8. At this stage, learned counsel for defendant No. 1 said that his client should at least be permitted to rebuild the fallen portion of the kitchen attached to the said house. He said that there is a considerable difficulty to reside in the house as the portion of the kitchen has already fallen down. I think the request is reasonable and no injustice would be caused to any party if I permit defendant No. 1 to rebuild that portion. But, it is made clear that no structural alterations to the existing building should be permitted.

9. For the reasons stated above, I allow the appeal setting aside the impugned order. There will be an injunction against defendant No. 1 restraining him from further tampering with the property CTS 197 or making any structural alterations thereon. But this shall not come in the way of his reconstructing the fallen portion of the kitchen.

10. In the circumstances of the case, there will be no order as to costs.