

(2009) 08 BOM CK 0071

In the Bombay High Court

Case No : Appeal From Order No. 53 of 2009 and Civil Application No. 146 of 2009

Gurudas Ramchandra Pilankar and wife and Vidya Gurudas Pilankar

APPELLANT

Vs

Manuel Adelaide Conception and Others

RESPONDENT

Date of Decision : 21-08-2009

Acts Referred:

Goa, Daman and Diu Mundkars (Protection from Eviction) Act, 1975 — Section 8A

Citation : (2009) 08 BOM CK 0071

Hon'ble Judges : U.D. Salvi, J

Bench : Single Bench

Advocate : M.B. D'costa and J.A. Lobo, for the Appellant; V. Menezes and A.D. Bhobe, for the Respondent

Final Decision : Dismissed

Judgement

U.D. Salvi, J.—The present application for staying the impugned order dated 06.05.2009 passed by the learned Civil Judge, Senior Division, Panaji in Special Civil Suit No. 43/2009/A is taken up for hearing alongwith the main appeal for final disposal by consent of the parties.

2. The respondent No. 1/Manuel Conception, one of the co-owners of the suit property surveyed under No. 11/6 and 13/4 of village Morombi-o-Grande, Mercês, Tiswadi, Goa had instituted the said Special Civil Suit No. 43/2009/A in the Court of the Civil Judge, Senior Division, Panaji for permanent injunction restraining the appellants/defendant No. 1/Gurudas Pilankar and defendant No. 2/Vidya Pilankar as well as the codefendants/ respondent from doing any further construction in the suit property as well as for mandatory injunction seeking demolition of the structure erected by the defendants therein. The respondent No. 1/landlord further moved an application for temporary prohibitory injunction in terms of the prayers made therefore pending the hearing and final disposal of the suit. This application for interim prohibitory injunction was suitably replied

and contested by the defendant Nos. 1 to 5. Specifically the contesting defendants contended that the defendant Nos. 1 and 2 are the mundkars in relation to the suit house and as such, they have been residing in the suit house made of mud walls and tiled roof. According to the contesting defendants, the onset of monsoons last year saw the collapse of the eastern wall of the suit house which was weakened due to the construction of the adjoining house; and this mishap brought about damage to the other walls by causing cracks in the walls and this prompted them to apply for repairs permission from the defendant No. 6/Village Panchayat; and following the grant of such repairs permission the repairs could not be undertaken as the damage caused to the suit structure was of serious nature, and they therefore, filed an application for reconstruction of the house on the existing plinth. The contesting defendants contended that the defendant No. 6/Village Panchayat called upon them to submit ownership documents in respect of the suit property and this prompted them to file an appeal under the provisions of Goa Panchayati Raj Act against such requisition. In the meantime, the Panchayat as well as the office of the B.D.O., the contesting defendants contested issue of licence for repairs of the house and in the process of carrying out such repairs, the middle portion of the house collapsed requiring re-construction of the suit house. The contesting defendants further contend that the Additional Director of Panchayat passed order dated 16.02.2009 allowing them to repair the house as per the licence issued by the Panchayat on humanitarian grounds. It is on such back ground, the defendants contend the reconstruction was undertaken only to be halted with the impugned order dated 06.05.2009 passed by the Civil Judge, Senior Division, Panaji.

3. Presently, the learned Senior Advocate Mr. D'costa for the appellants submitted that the suit structure stands as per the photographs at page 358 and 359 showing the masonry walled ground floor structure without any plastering, flooring, electrification, plumbing, without doors and window shutters. This fact has also been admitted by the appellant No. 1/Gurudas Pilankar in his affidavit dated 17.08.2009.

4. The contesting defendants are making claim to the suit house as mundkar and not as its owner. However, there is no declaration of their mundkarship made by the Mamlatdar under Goa, Daman and Diu Mundkars (Protection from Eviction) Act 1975. Though an application for declaration is pending before the Mamlatdar, the appellants cannot claim as of a right the mundkarship in relation to the suit house unless a declaration is made by the Mamlatdar u/s 8-A of the said Act. The judgments of this Court in *Shri Vincente Cabral v. Smt. Sunandabai Dayanand Bandodkar* in 1991 (2) GLT 331 and *Assam Rajyik Kerosene Feriwalla Santha Vs. State of Assam and Others*, categorically lay down the prerequisite of declaration of mundkarship for enforcement of the rights available to the mundkars. On the other hand, respondent No. 1/landlord claims to be the co-owner of the suit house whose proprietary rights thereto have been injured and further injury to his property rights needs to be curbed.

5. Learned Senior Advocate Mr. M.B. D'costa for the appellants/contesting defendants submitted that there has been a delay in initiating the steps to curb the alleged injury to the proprietary rights of the respondent No. 1/landlord and the re-construction of the suit house had to be undertaken due to the collapse of the suit house. Obviously, the submissions made on behalf of the appellants as well as the records reveal that the reconstruction of the suit house has been undertaken following the issuance of permission for repairs dated 05.12.2008 issued by B.D.O., Tiswadi, Panaji and permission dated 18.12.2008 issued by the Village Panchayat, Mercas. These permissions do not permit demolition of existing structure or its part or reconstruction on its place and only permit minor repairs without altering the existing structure. The records further reveals that the respondent No. 1/landlord was pursuing the opposition to the matter of issuance of such repairs/permission with the Village Panchayat, Mercas, right from December, 2008.

6. On this back ground, learned Civil Judge, Senior Division relying on the judgment reported in 1992 (2) B.C.R. 298 of the Bombay High Court did not see merit in the contention that the application for prohibitory injunction was hit by latches. Rightly the question of delay is to be balanced with the rights of the aggrieved party and the delay by itself could not disentitle the plaintiffs to the relief. In the instant case, the respondent/landlord, claims to be the co-owner of the suit property and the rights of the appellants as mundkar have not been clearly established by the declaration to be made by the Mamlatdar as per Section 8-A of the Goa, Daman and Diu Mundkars (Protection from Eviction) Act 1975. Any further construction on the suit property therefore, could be a continuing injury to the rights of the plaintiffs.

7. In the course of the hearing of this appeal, taking into consideration the plight of the appellants, a proposal to bring about working solution to the problem as conceived by the appellant was considered. In this context, learned Senior Advocate Mr. D'costa for the appellants cited unreported judgment in Appeal From Order No. 83 of 2007 dated 12.09.2008 Smt. Sunita Karbotkar and Ors. v. Shri Satish Rajaram Nachinolkar and Ors. in order to justify completion of the reconstruction of the ground floor of the suit house particularly in the light of the fact that the decision of the suit is likely to take considerable time. Such concession he pleaded would be without claiming any equities in his favour. To show the bonafides of the appellants, learned Senior Counsel for the appellants further tendered undertaking given by the appellant No. 1 Gurudas and the affidavit of respondent No. 2 Keshav Pilankar dated 20.08.2009. However, the respondent No. 1/landlord is averse to such working solution to the problem. According to the learned Counsel Mr. Menezes for the respondent No. 1/landlord such concession for completion of reconstruction of the ground floor of the suit house could be directly in conflict with the Village Panchayat Act in as much as the repair licence granted by the Village Panchayat does not conceive of such reconstruction nor such licence has now remained in force.

8. Perusal of the judgment in Smita Karbotkar's case (supra) shows that the replacement of thatched leaves roof with cement asbestos sheets was allowed to be made without creating any equity in favour of the parties in whose favour such permission was granted. However, in the said case no thought appears to have been given to the infringement of law by grant of such permission. Certainly, this Court cannot employ its discretion to over step the limitations of law in force due to lack of valid reconstruction licence. However, liberty can be granted to the appellants to move the Trial Court for any such concession if the Village Panchayat grants permission to carry out such reconstruction or regularise such reconstruction.

9. From the total view of the material placed before this Court, no error can be found in the impugned order. The appeal therefore, fails with no order as to costs.

10. In view of this order, the appellants withdraw the undertaking dated 20.08.2009. Undertaking thus stands withdrawn. Liberty is granted to the appellants to pursue the matter with the Village Panchayat for grant of permission to reconstruct the suit house or get the suit house regularised. The Respondent No. 6/Village Panchayat shall hear the respondent No. 1/Manuel Conception before granting any such permission for reconstruction or regularisation of the suit house. Nothing herein shall be read by the Village Panchayat in favour of either parties and the application for grant of permission to reconstruct or regularise the said reconstruction shall be considered independently on its own merits.

11. The present appeal and Civil Application therein stand disposed off accordingly.