
(1979) 08 KL CK 0015
In the High Court Of Kerala
Case No : C.R.P. No. 1790 of 1979-J

I. Gouri and Others

APPELLANT

Vs

C.H. Ibrahim and Another

RESPONDENT

Date of Decision : 20-08-1979

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1
Transfer of Property Act, 1882 — Section 44

Citation : AIR 1980 Ker 94

Hon'ble Judges : T. Chandrasekhara Menon, J

Bench : Single Bench

Advocate : P.C. Balakrishna Menon and V.P. Mohan Kumar, for the Appellant;
K.P. Dandapani, for the Respondent

Final Decision : Allowed

Judgement

T. Chandrasekhara Menon, J.—This revision petition arises out of a rejection of an application for temporary injunction filed by the plaintiffs. The plaintiffs who are petitioners here instituted a suit for partition of the plaint schedule property which is having an extent of 11 cents. The case is that the plaint schedule property was allotted to their paternal uncle, one Govindan, as per the decree in the partition suit, O. S. 17 of 1953. Govindan died in 1962 and the plaintiffs and their 3 brothers who are the legal heirs of the said Govindan got the property along with another item which is 26 cents in extent, and which also lies nearby. The plaintiffs' brothers assigned the present plaint item to one Mrs. Jane James holding themselves out as the exclusive owners in the property. The conveyance was not of any undivided interest of theirs in the properties obtained under the partition decree. Mrs. Jane James assigned the property to the defendants by document dated 20-2-1970. According to the defendants they got possession by the assignment whereas according to the plaintiffs, the defendants tried forcefully to enter in the plaintiffs' property. This led to a suit, O. S. 112 of 1979 filed by the plaintiffs for a permanent injunction to restrain the defendants from entering into the property. Though a temporary injunction had been granted in

that suit in the first instance, after the appearance of the defendants that injunction had been vacated. Thereafter, the present suit for partition had been filed where the plaintiffs claimed 4/7 share in the property. And as stated earlier along with the suit the application for temporary injunction was filed for restraining the defendants from putting up any construction in the plaint schedule property, the decision in which has led to the present revision petition.

2. The trial court granted temporary injunction in the first instance, and on the view that the suit is bad for nonjoinder of necessary parties and for partial partition dismissed the petition. Aggrieved by that the plaintiffs filed an appeal, before the District Judge, Kozhikode, C. M. A. No. 56 of 1979. The learned District Judge has confirmed the decision of the trial court holding that the petitioners are not entitled to the equitable relief of temporary injunction. In the circumstances the plaintiffs have approached this court.

3. What is contended before me by the petitioners is that by permitting the respondents to go on with the construction in the plaint schedule property, irreparable injury is being caused to the petitioners. The view of the court below that the failure of the inclusion of their entire properties and non-imp leading of their brothers would show mala fide intention on the plaintiffs' part is incorrect. It is pointed out that by the sale deed dated 1-3-1978 what is conveyed to Mrs. Jane James is a specific item of property and not the undivided share of the assignors. The suit cannot be bad for partial partition. As far as the other item of property is concerned, the defendants have no interest and therefore there is nothing wrong in filing a separate suit as regards the present plaint item. According to the plaintiffs it is trite law that a co-owner should not be allowed to alter the nature and character of the property by making construction to defeat the rights of the major sharers. A stranger assignee from a co-owner is not in law entitled to compel the plaintiffs to include all co-ownership properties in the suit for partition and it is open to the co-owners to keep one item in common. The suit property is not coparcenary property, but only a property held in tenancy in common and the alienee has no right to insist on the inclusion of other items of co-ownership properties.

4. It will be useful before this court goes into the question as such, to consider how the court below has considered the question. The trial court disallowed the prayer for temporary injunction mainly on the ground of want of bona fides on the part of the plaintiffs in not including the remaining item of property to which they have got co-ownership right along with their brothers. The learned District Judge points out that the appellants had admitted that another portion having an extent of 26 cents of land situated very close to the plaint property is an item over which the plaintiffs have got 4/7 share along with their brothers. The court did not go into the question whether the suit is bad for partial partition because the learned counsel for the respondents admitted that a suit for partial partition is not bad and that he is not disputing that proposition. But, then the court accepted the contention of the respondents that there is no invariable right for a

co-owner to file a suit for partition leaving out the other items of co-ownership property. The normal insistence in a suit for partition is that all the properties of the co-owners must be included in the suit and it is only under exceptional circumstances that a suit for partial partition is entertained. There must be some justifiable circumstances for excluding certain other items of the co-owners in the suit for partial partition. Some such circumstances justifying the exclusion of certain items in a suit for partition are: (1) When the items excluded are not in the joint possession of the coparceners or co-owners rendering those items not available for partition; (2) If the item or items excluded are impartible; (3) If the items excluded are held jointly with strangers who have no interest in the family property (4) Due to ignorance regarding the existence of such omitted items of co-ownership property. Then the learned District Judge would say that in this case, the plaintiffs have no case that their brothers have transferred their rights in the suit property with the knowledge and consent of the plaintiffs. Therefore, when they say that they want stills to continue along with those brothers in exercising their rights over the major portion of the co-ownership property, it is difficult to find bona fides in it. The court would then say that if the major part is also included in the partition, the defendants would have been, entitled to substantiate before the court that in the partition it would be equitable to allot the plaint item to their share and the major portion to the share of the plaintiffs. The major portion left out has an extent of more than double the extent of the plaint item. In the circumstances if both the items have been included in the suit for partition, the plaintiffs would only have been entitled to get a decree for an area which is less than the extent of the other major portion left out. In such circumstances, normally any court would be inclined to allot the plaint item as defendants' share. The conduct of the plaintiffs in not including the other item loudly speaks of the ulterior motive behind the framing of the suit as one for partial partition excluding the major portion over which the plaintiffs have got rights along with others. The District Court then considers the contention whether plaintiffs as co-owners are entitled to get an injunction from the court irrespective of the question whether all the items of co-ownership property are included in the partition suit or not. There relying on the decisions of the Allahabad High Court in Chhedi Lal and Another Vs. Chhotey Lal, and of the Orissa High Court in Lingaraj Misra and Others Vs. Bhubaneswar Mohapatra and Others, and Ganesh Panigrahi Vs. Jura Sahu and Others, the court said it is not persuaded to hold that once it is shown that the plaintiffs are co-owners, they have a right to claim for the grant of an order of injunction from the court restraining another co-owner from putting up any structure or building in the co-ownership property. Even that apart granting of an extraordinary relief like that of a temporary injunction could only be made upon considerations of equity and justice. The learned District Judge would further add that it is not told how the plaintiffs' right would be prejudiced if they had come to the court claiming partition of both the items of their co-ownership properties nor is it told as to how their interest will suffer if their share is made up from the other item excluded in the suit. The learned District Judge took the view that it is a case

where the plaintiffs insist on a pound of flesh by adopting a very unreasonable stand (by) which they do not want a partition of the major portion of the property at all notwithstanding what their brothers have done with respect to the suit property. He adds:--

"The present suit by the plaintiffs appears to me to be blurred by black spots of mala fides and their hands not very clean. To such persons the court cannot render assistance in exercising extraordinary powers for granting equitable reliefs like temporary injunction".

As a further reason the court stated that if the other item is included in the suit, there is every possibility that in the final end of the partition suit, the suit property may be allotted to the present defendants and if they are allowed to put up the building only then, after lapse of a long period, by which time the cost of construction and of materials is likely to shoot up tremendously as indicated in the present trend in the construction costs it would certainly result in the denial of equity in favour of the defendants. In this view the District Judge concurred with the finding of the trial court and the appeal is dismissed.

5. In taking the view I am afraid the learned District Judge has not correctly understood the law on the matter. If several owners are in possession of an undivided property, none of them has a right to appropriate to his exclusive use any portion of this property and this will effect a compulsory partition in his own favour according to his choice. (See *Shadi v. Anup Singh* ILR (1890) All 436 . Woodroffe has said :--

"Every co-proprietor has right of veto to forbid anything being done to the common property without his consent and with a view to enforce this right, a person can sue to restrain his co-sharers from building on the common property."

One coparcener, therefore, has no right to place any constructions upon what belongs to all, and if he does so, another coparcener may obtain a mandatory injunction for its removal without proving any special damage. No doubt, there is no broad proposition that one co-owner is entitled to an injunction restraining another co-owner from exceeding his rights absolutely, and without reference to the amount of damage sustained by one side or the other from the granting or withholding of the injunction. (See *Shamugger Jute Co. v. Ram Narain* (ILR(1887) Cal 189)). It is also true that where the defendant has not made use of the joint property in a way inconsistent with the continuance of the joint ownership and possession, injunction will not issue as a matter of course. In *Israil v. Samset* ((1914) CWN 176) it was held that temporary injunction ought to be granted restraining the defendants from proceeding any further with the building construction. The facts of that case were these. The plaintiffs and defendants were joint owners in respect of a certain piece of land, but the defendants alone were in occupation of it with the consent of their co-owners. On May 11, 1913, the defendants began to dig for the foundation of a substantial building which they intended to erect on the land. On May 24, the plaintiffs

brought a suit for declaration of title and injunction to restrain the defendants from building on the land and applied for a temporary injunction. It was found that a substantial portion of the building had been erected after the defendants became aware of the institution of the suit and of the application for temporary injunction. It was in such circumstances a temporary injunction was granted. One of several co-sharers of joint undivided property has no right to erect a building on land which forms part of such property so as to materially alter the condition thereof without the consent of his co-sharer. The Court will interfere in a proper case, where the injury is of a permanent or recurring character or where there is a denial of title or exclusion since such exclusion amounts to a forcible partition. What was held by a Full Bench of the Allahabad High Court in *Shadi v. Anup Singh* (ILR(1890) All 436), which I have referred to earlier, was that where a co-sharer builds upon land, in excess of the share which would come to him in partition, and when the plaintiff co-sharer could not, on partition, be adequately compensated, the defendant-co-sharer, who builds upon such joint land, may be restrained by injunction from proceeding with the building and the building, so far as it has proceeded, may be directed to be pulled down, and the defendant may also be prohibited from building on the land as exclusive owner at any future time. Woodroffe in his *Law of Injunctions* (1964) has summarised the rules governing the granting of injunctions in cases between co-owners:--

"(1) The Courts will, in all cases be cautious of interference with the possession and enjoyment of joint property.

(2) If one co-sharer uses the joint property to the greater profits of himself, but without damage to the co-sharers, there is no cause of action.

(3) In as much as each co-sharer is entitled to a portion of every part of the joint property, the Court will not as a general rule, enforce merely strict rights and will not interpose where the user is slightly in excess of the right.

(4) Where there is an infringement of a character which is sufficiently substantial to entitle to some relief, the Courts will, in the determination of the question whether an injunction should be granted, have to consider whether the injury is adequately remediable by damages and partition. If that be the case, an injunction will be refused.

(5) In the particular case of alleged injury through cultivation in the ordinary course by a co-sharer in actual occupation and sole use of the property, damages and not an injunction will ordinarily be granted even though the cultivation has the effect of excluding a co-sharer, unless such exclusion is in denial of that co-sharer's title, in which case an injunction will be granted, such a rule being necessitated by the climate, soil and other peculiar circumstances of this country in which the lands are ordinarily cultivated in common.

(6) In all other cases, an injunction may be granted where act complained of involves the exclusion of the co-sharer, or some other material and substantial injury not remediable by partition or damages, such as the material and

injurious alteration of the nature and condition of the property to which the parties are jointly entitled."

6. In *Krehl v. Burrell* ((1877) 7 Ch D 551 (554) Jesse) M. R. remarked:--

"If with the notice of the right belonging to the plaintiff, and in defiance of that notice, without any reasonable ground, and after action brought, the rich defendant is to be entitled to build up a house of enormous proportions at an enormous expense, and then say, in effect to the Court, you will injure me a great deal more by pulling it down than you will benefit the poor man by restoring his right, that simply means that the Court in every case, at the instance of a rich man, is to compel the poor man to sell him his property at a (sic) valuation. That would be the real result of such a decision...If I accede to this viewI should add more to the number of instances which we have from the days in which the Bible was written until the present moment in which the man of large possessions has endeavoured to deprive his neighbour, the man of small possession, of his property with or without adequate compensation."

The Court, will therefore, be justified in granting a perpetual injunction to restrain one of several co-sharers from appropriating to himself with the building, in which his co-sharers have an interest and from building upon it, and if he has proceeded to build upon it, the Court will grant a mandatory injunction directing that the building so far as has proceeded be pulled down. Then as stated earlier, this cannot be treated as a broad proposition that one co-owner is entitled to an injunction restraining another from exceeding his rights absolutely and without reference to the amount of damages to be sustained by one side or the other from granting or withholding the injunction. In the matter of injunction there is considerable difference between a case in which the other co-owners acting with diligent watchfulness of their rights seek by an injunction to prevent the erection of a permanent building and a case where after a building has been erected at a considerable expense they seek to have it removed. Even if a case falls under the former category, an injunction should not be granted unless there is ouster or other substantial injury.

7. In *Chhedi Lal and Another Vs. Chhotey Lal*, , the decision relied on by the District Judge, the principle of law has been stated in the following manner:--

"As a result of the foregoing discussion, it appears to us that the question of the right of co-sharers in respect of joint land should be kept separate and distinct from the question as to what relief should be granted to a co-sharer, whose right in respect of joint land has been invaded by the other co-sharers either by exclusively appropriating and cultivating land or by raising constructions thereon. The conflict in some of the decisions has apparently risen from the confusion of the two distinct matters. While therefore a co-sharer is entitled to object to another co-sharer exclusively appropriating land to himself to the detriment of other co-sharers, the question as to what relief should be granted to the plaintiff in the event of the invasion of his rights will depend upon the circumstances of

each case. The right to the relief for demolition and injunction will be granted or withheld by the Court according as the circumstances established in the case justify. The Courts may feel persuaded to grant both the reliefs if the evidence establishes that the plaintiff cannot be adequately compensated at the time of the partition and that greater injury will result to him by the refusal of the relief than by granting it. On the contrary if material and substantial injury will be caused to the defendant by the granting of the relief, the Court will no doubt be exercising proper discretion in withholding such relief. As has been pointed out in some of the cases, each case will be decided upon its own peculiar facts and it will be left to the Court to exercise its discretion upon proof of circumstances showing which side the balance of convenience lies. That the Court in the exercise of its discretion will be guided by considerations of justice, equity and good conscience cannot be overlooked and it is not possible for the Court to lay down an inflexible rule as to the circumstances in which the relief for demolition and injunction should be granted or refused."

8. What this decision lays down is not different from what has been stated earlier by me. It has been specifically stated there that while a co-sharer is entitled to object to another co-sharer exclusively appropriating land to himself to the detriment of other co-sharers, the question as to what relief should be granted will depend upon the circumstances of each case. The right to the relief for demolition of any construction put up and for an injunction will be granted or withheld by the Court according as the circumstances established in the case justify. As far as this case is concerned taking the suit property alone into consideration it cannot be said that it can be divided in such a manner that the portion where the building is sought to be made can be allotted to the defendants. The plaintiffs petitioners cannot be compelled to bring another suit to take into other property where the defendants have no interest.

9. In Pakkiri Kanni Vs. Haji Mohammad Manjoor Saheb by Agent Habibulla Saheb, it had been held that there is no direct authority that a suit for partition of common property, not joint property, is liable to dismissal on the ground that all the common property, in respect of which it might have been brought, has not been included. The plea of partial partition is not available when a suit for division of common property, and not joint property, is in question.

10. Even in the case of joint property when the claim is against an assisgnee from a coparcener, the right which the alienee acquires is to stand in the shoes of his vendor and to work out his rights by a suit for partition and in such a suit, if without prejudice to the rights of the other members of the family, it is possible to have the share alienated allotted to the alienor, it may be allotted to the alienee in the right of the alienor. Where the sale of joint family properties is challenged by the non-alienating coparceners as not binding on their shares, they have been allowed to bring a suit for partition of the alienated items only and recover their shares therein leaving the share of the alienating coparcener in the possession of the alienee. This is an exception to the rule against partial

partition. The alienee, if he is not satisfied with the share of the alienor which is left undisturbed in his hands, and, is anxious to claim an allotment of the whole of the items or a greater portion of it, must work out his rights in his own suit for a general partition. See the law on the matter fully discussed in K. Peramanayakam Pillai Vs. S.T. Sivaraman and Another, . It was pointed out by Mr. Bhaskaran, learned counsel for the respondent that his client has filed a suit for partition wherein the respondent seeks to get an equity in the matter of allotment of the plaint schedule property to his assignees.

11. The law is that the right of a co-owner to raise construction or to make other improvement on the common property really depends on the consent, express or implied, or on the sufferance of the other co-owners. And when one co-owner commences to build without seeking the consent of the others and in spite of the protest to the construction, the possession of the co-own raising the construction at once becomes wrongful and the work will have to be stopped by an order of injunction. The wrongful possession or an ouster by a co-owner is itself an injury to the other co-owners and the latter would not be required to prove any other injury to them in order to sustain action for in-junction. (See Mitra's Co-ownership and Partition -- Fifth Edition pp. 127 & 128). If this be the law, the learned District Judge was wrong in holding that the "suit by the plaintiffs appears to be blurred by black spots of mala fides." This is especially so when such co-owners can seek partition of the property alienated without being compelled to file a suit for general partition. Now it has been brought to my notice that the respondents have filed a suit for partition taking in the other co-ownership property also so as to facilitate working out equity between the parties in the matter of allotment of the actual land. If at a later stage of the suit the respondents are able to satisfy the court that the present plaint property could be given to the defendants on the basis of such allotment to their assignors, namely, the brothers of the plaintiffs and the other co-ownership property could be allotted to the sisters, the plaintiffs, without injury or detriment to them, at that stage the defendants can ask for vacating the order of injunction. I am not expressing any opinion on the merits of the defendants' contention that the present suit is really engineered by the brothers fraudulently and collusively acting in concert with their sisters, the present plaintiffs. On the evidence on record at this stage one may not be able to express an opinion with regard to that.

12. Therefore setting aside the orders of the courts below there will be a temporary injunction to restrain the defendants from putting up any further constructions on the plaint schedule property. This order is subject to my earlier remark that the defendants can at a later stage of the suit seek to vacate this order if they are able to establish that the property could be equitably allotted to them. It is only just and proper that the present suit is tried along with the suit for partition filed by the defendants taking the other property where the brothers are also made parties. Parties can move for joint trial of the two suits before the trial court immediately. I am not expressing any opinion on the right to relief of

the defendants in the other suit. I would direct the trial court to dispose of the matter as expeditiously as possible, in any view of the matter, within three months from the date of the receipt of the records.

Send back the records forthwith.