

(1945) 12 BOM CK 0018
In the Bombay High Court
Case No : Second Appeal No. 653 of 1943

Manilal Ratanchand Shah

APPELLANT

Vs

Nanubhai Jesingbhai

RESPONDENT

Date of Decision : 06-12-1945

Acts Referred:

Specific Relief Act, 1877 — Section 54, 55

Citation : (1947) 49 BOMLR 84

Hon'ble Judges : Lokur, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Lokur, J.—This appeal arises out of a suit filed by the plaintiffs to obtain various injunctions in respect of a chhindi or lane to the north of defendant No. 1's house. The plaintiffs claimed that the said chhindi was of the joint ownership of themselves and defendants Nos. 1 and 3, whereas defendant No. 1 contended that he was the sole owner of the chhindi. He opened doors and windows in the northern wall of his house abutting on the chhindi and also threatened to put up a balcony projecting 2 feet 9 inches into the chhindi at a height of 14 feet 10 inches from the ground. The plaintiffs prayed for an injunction requiring him to close the openings in his northern wall and restraining him from constructing the said balcony. The trial Court held that the chhindi belonged jointly to the plaintiffs and defendants Nos. 1 to 3 and granted an injunction restraining defendant No. 1 from projecting his balcony on the northern side of his wall beyond two feet into the chhindi. The reliefs in respect of the doors and openings in the wall were refused. Defendant No. 1 appealed to the District Court and the plaintiffs put in cross-objections. The learned District Judge confirmed the findings of the trial Court, but came to the conclusion that even a balcony extending to two feet into the chhindi would be an ouster of the joint owners and issued a general injunction restraining defendant No. 1 from constructing any balcony overhanging the chhindi in suit. The cross-objections put in by the

plaintiffs with regard to the doors and openings were dismissed. The decree of the trial Court was modified accordingly, and defendant No. 1 has appealed against that decree. The plaintiffs have also put in cross-objections in this Court regarding the doors and openings in the northern wall of defendant No. 1's house, but they were not pressed. As regards the ownership of the chhindi, the evidence, both oral and documentary, has been fully considered by the Courts below, and the finding that it belongs jointly to the plaintiffs and defendants Nos. 1 to 3 is a finding of fact which is based on good evidence and has to be accepted in second appeal. It is true that in several title-deeds of defendant No. 1 the chhindi is described as appertaining to defendant No. 1's house. But that is an admission in one's own favour which has no evidentiary value. The main defence of defendant No. 1 rests upon the so-called copy of the partition-deed in which the house together with the chhindi was allotted to his share. But it is not a certified copy and it does not purport to bear any signature. No explanation is offered why the original of the partition-deed is not produced. Both the Courts below have rightly held that document to be inadmissible in evidence and refused to rely upon it. In the city survey record the chhindi is shown as of joint ownership. Although it cannot be treated as a document of title, yet in the absence of any evidence to throw doubt upon the entry the Courts below were right in accepting it as correct and in holding that the chhindi is not owned exclusively by defendant No. 1.

2. The only other question argued in this Court is the projection of a balcony which defendant No. 1 wants to put up outside the northern wall of his house projecting into the common chhindi. He intended to have a balcony of 2 feet 9 inches in width, but the learned trial Judge has allowed him to extend it only two feet into the chhindi observing that

By such projections there would not be any ouster of co-tenants from the air space occupied by the projections and that such projections would not be inconsistent with the joint ownership and possession of the ground underneath, if the balcony would be allowed to project on the chhindi to the extent of two feet only, as such projection would be the normal use of the air column over the chhindi and would not be inconsistent with the joint ownership of the chhindi.

The learned District Judge observed that there was no decided ease on the subject to the effect that a co-owner could construct a balcony overhanging a common chhindi and that the construction of such a balcony would be an ouster of the other co-owner's right to use the column of air situate on the land of the entire chhindi. There are, however, two unreported cases of this Court dealing with this subject. In *Ranchhodbhai Vallabh v. Patel Dahyabhai* (1939) S.A. 6316, decided by Sen J., on March 17, 1939 (Unrep.) where the balcony covered the entire width, Sen J. thought it a proper case for restraining the construction of such a balcony by an injunction. He observed :-

...it is admitted that both the parties are joint owners of this plot of land and I think that it would be restricting the claim of the plaintiff unduly to hold that he

claims only the right of passage through it and nothing more. Prima facie, therefore, the plaintiff has the right, though he has not so far exercised that right, to the whole aerial column above the land in question as a tenant-in-common with the defendants, and as the balcony covers the whole breadth of this area, there is prima facie an ouster of the plaintiff to that extent.... The defendants are asserting their sole title to the entire column of air above the projection.

In *Kandoi Jhaverdas v. Master Mahomed Ibrahim* (1938) S.A. 579. decided by Wassoodew J., on March 24, 1938 (Unrep.), where the balcony did not cover the whole of the common street, Wassoodew J. refused to grant an injunction, observing :-

In this case it is not suggested that the defendants' act in projecting the balcony would be inconsistent with the continuance of the joint ownership and possession of the ground underneath. The height of the balcony is about 12 to 14 feet above the level of the common ground, and its projection, as I have said, is only 18 inches, beyond the Limits of the defendants' land. If there is no allegation and proof that such projection would cause material discomfort to the other owners, or would be an obstruction or a hindrance to the common use of the land, it was wrong to imagine a grievance which in fact did not exist, or rather which was not supported by the evidence. There must be clear evidence of ouster amounting to a trespass which would justify the interference of the Court in a case of this kind.

These facts are similar to the facts of the present case. The granting of injunctions is regulated by Sections 54 and 55 of the Specific Relief Act and it is entirely in the discretion of the Court, though the discretion is to be sound and reasonably guided by judicial principles. There are cases in which a perpetual injunction is granted against a co-owner when he threatens to commit a trespass upon the common property for his own benefit. But, as held in *The Shamnugger Jute Factory Co. v. Ram Narain Chatterjee* I.L.R (1886) 14 Cal. 189 no decision has gone so far as to establish the 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 damages to be sustained by the one side or the other from the granting or withholding of the injunctions".

3. In the present case although the balcony proposed to be put up by defendant No. 1 overhangs the common chhindi there is no question of his sole occupation so as to deprive the plaintiffs' enjoyment of the existing actual user of that chhindi. The plaintiffs have not alleged that the balcony would in any way interfere with their enjoyment of the chhindi. It is clear from the plan that the chhindi is used only as a passage by the neighbours for going to the latrines and a balcony at a height of more than 14 feet from the ground is not likely to interfere with the user of the chhindi in any manner. As observed in *Akshay Kumar Shaha v. Bhajagabinda Shaha* I.L.R (1929) Cal. 92 even the sole occupation of the common property by itself is not ouster unless it is attended by an assertion of a hostile title and unless ouster causes some difficulty or

inconvenience to the other co-owners, a Court of law will exercise its discretion in not granting a perpetual injunction. I, therefore, hold that the injunction issued against defendant No. 1 should be limited to exceeding the-projection of the balcony beyond two feet into the common chhindi, as decreed by the trial Court.

4. For these reasons, I allow the appeal, set aside the decree of the lower appellate Court and restore that of the trial Court. Parties shall bear their own costs throughout. Cross-objections are dismissed. Parties; to.. bear their own costs.