

(1987) 11 KAR CK 0044

In the Karnataka High Court

Case No : Regular Second Appeal No. 390 of 1978

N.S. Bangera

APPELLANT

Vs

Rama Bangera

RESPONDENT

Date of Decision : 02-11-1987

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2

Citation : (1989) ILR (Kar) 1382 : (1987) 3 KarLJ 51

Hon'ble Judges : Hiremath, J

Bench : Single Bench

Advocate : K.R. Subbannachar and H.K. Shetty, for the Appellant; B.V. Acharya and H.G. Ramesh, for R-1, for the Respondent

Final Decision : Dismissed

Judgement

Hiremath, J.—The appellants were plaintiffs in O.S. No. 264/71 before the I Additional Munsiff, Mangalore. The plaintiffs sued the defendants for prohibitory as well as mandatory injunction, firstly restraining the defendants from proceeding with the un-authorized construction said to be put up in the suit open site belonging to the joint family of the plaintiffs and defendants; and secondly, to demolish the construction that had come up on the site by the time the suit was filed.

2. It is not disputed that plaintiffs and defendants are governed by Aliasanthana law as administered in the South Kanara District of this State and are the descendants of a common female ancestress Korapolu Hengasu. Defendant-1 is the Ejman of the family living at Mangalore and managing the family properties. The property in question is situate within the municipal limits of Mangalore town presently and is given T.S. No. 860 measuring 30 cents and it is mulgeni land. There is also a family house bearing door No. 7-158. When the suit was filed plaintiff-1 was living in Bombay and the second plaintiff at Mangalore. The first defendant was living at Mangalore and defendants-2 and 3 also at Bombay. It is undisputed that these plaintiffs and defendants are co-owners of this property

entitled to share equally in the entire land. This being the position, plaintiff-1 sent a letter dated 20-1-1971 to the Commissioner, Mangalore Municipality, with copy marked to the first defendant from Bombay alleging that all the co-sharers of this property have right over this property as per the family agreement dated 9-1-1961. They have equal rights and liabilities and they had come to know that the first defendant Rama Bangera was attempting to construct a new building over the open site where there was already existing a house in which he was residing on behalf of the family, it was against their will they had not consented to it and even objected to the same and therefore it was requested not to grant permission to construct the same. Thereafter, on 22-4-1971 the second plaintiff issued notice to the first defendant complaining about this construction and asking him not to proceed with the same as it was without their consent. This notice was served on first defendant on 23-4-1971. No reply was received from the first defendant till the suit was filed before the Vacation Judge on 24-4-1971 with these reliefs. However, defendant-1 sent his reply dated 30-4-1971 as per Exhibit D-1 to the plaintiff's notice referred to above. There was an application in the suit, for temporary injunction restraining the defendant from continuing with the construction of his building and both the Courts have found that in spite of this injunction the construction was completed. An application for breach of injunction also came to be filed before the trial Court complaining that defendant-1 had violated the order of the Court and that necessary action be taken. It is now admitted that the application was not disposed of by the trial Court.

3. The plaintiffs complain that when first plaintiff had gone to Mangalore some days prior to the filing of the suit inquiry at the Municipal Office revealed that construction was started by the first defendant without obtaining any permission. In the notice dated 22-4-1971 the foundation put up by the first defendant was sought to be demolished and a grievance was made in the complaint that defendant-1 was going ahead with the work in speed and day and night. It was only with a view to take advantage of the Courts being closed for summer vacation.

4. In the written statement filed by the first defendant -while admitting that he is a co-owner he maintained that he is entitled to 1/3 rd share in the entire property. He is a senior member managing the family under the agreement referred to in the plaint and he was in possession of only a portion of "A" schedule property which is much less than 1/3rd share. In para-3 he pleaded that having found that the space occupied by him in the portion of the family house is insufficient he intended to construct a small separate house in the plaint schedule property which is in his possession out of his own independent sources as well as out of the resources of his sons who are employed. Thus the building was practically complete and only plastering remained to be done. He maintained in para-6 that being a co-owner he is entitled to construct a house in the portion of the land which is in his possession.

5. The trial Court found on evidence that the first defendant's construction of the house is un-authorized but found that the plaintiffs are not entitled to mandatory injunction for pulling down the same. The first Appellate Court in R.A.No. 53/76 preferred by the plaintiffs agreed with the trial Court that this discretion of granting a mandatory injunction was not necessary to be exercised though it found that the construction was unauthorised and without the consent of the plaintiffs. The main ground on which the Courts below refused to grant the equitable relief of mandatory injunction is that the damage is not irremediable, that a very small portion of the property was utilised for putting up this construction and during partition equities could be adjusted.

6. In challenging this concurring decree of the first Appellate Court it has been urged that both the Courts were in error in holding that the plaintiffs had not proved the damage that was caused to the plaintiffs and ignored the fact that the very construction against their consent is wrongful and amounts to an ouster and this itself is substantial and irremediable injury caused to the other co-owners.

7. Even a co-owner cannot appropriate a portion of the joint family for himself and construct a building thereon for his own use and occupation at his own cost without their permission. During admission the following substantial question of law has been set down for determination:-

"Whether the Court below was right in holding that the plaintiff is disentitled to the relief of mandatory injunction sought for in the suit?"

8. The appellants' Counsel has taken me through the reasoning of the first Appellate Court in extenso and pointed out that the Court was wrong in holding that he had to prove substantial injury caused to the appellants. At para-18 of its Judgment the first Appellate Court observed at the concluding portion that it was incumbent on the part of the appellants to plead as to how the act said to have been committed by respondent-1 had adversely affected their rights as co-owners and how it has caused a substantial injury. They ought to have pleaded that if respondent-1 is permitted to construct a building in the manner he has done, that is going to affect the effective enjoyment of the suit schedule properties jointly or is going to adversely affect the partition of the suit schedule properties that may be claimed in future. Nothing of that sort has been done by the appellants, respondent-1 being a co-owner and Ejman of the family and when he thinks that the present residential house does not fulfil his needs he is entitled to put up an additional structure though at his own cost and though without the consent of the other co-owners. He can be restrained by putting up such structure and therefore appropriate a portion of the land for himself to the exclusion of others only if it is proved that such exclusion and ouster of the other coparceners and such exclusion of the possession has or is going to adversely affect the interests of the other co-owners. Such a sweeping remark by the first Appellate Court is wholly uncalled for inasmuch as it went to the extent of recognising such a right in a co-owner to put up an additional structure even at his own cost and without the consent of other co-owners. Therefore, this

reasoning of the first Appellate Court cannot be sustained. It may be said at once that no co-owner has got such an unqualified right to put up any structure even at his own cost on any portion of the property owned by the co-owners as no one can predicate which specific portion he is entitled to. This reasoning is opposed even to the observations made in the decisions of various High Courts referred to by the Appellate Court.

9. At para-14 of the Judgment the first Appellate Court has referred to a decision of the Lahore High Court in the case of AHMED GUL v. RAHIM KHAN AIR 1926 Lah 52 in which it was held that a mere circumstance of a building having been on a common land without the consent of the co-sharers and despite their protest is not sufficient in itself to entitle the co-sharers to claim the demolition of the building unless it is shown that the erection of the building has actually caused material and substantial injury which could not be remedied. It was also held that it was not shown that such a con-in joint land. In the case of Shanker Lal and Others Vs. Pati Ram it was observed that if one co-owner constructs in joint land buildings of permanent character or of such a character to give exclusive possession to one co-owner to the ouster of other co-owners such an exclusive possession is not justified and can be objected to and the building so constructed could be ordered to be demolished. However if the buildings constructed are of temporary nature no relief of demolition could be granted. In the case of Krishna Kumar Singh and Others Vs. Padum Singh and Others, , it was held that the plaintiff who complained that a building of permanent nature has been put up in a joint property by his co-owner cannot obtain decree for demolition unless he establishes that he has sustained some substantial injury in the act of the co-owner and that he had taken steps in time to prevent erection of the building. In the case of Darshan Lal and Others Vs. Harkesh Singh and Others, , it was held that one co-sharer cannot build upon a joint land without the consent and concurrence of the other co-sharers. The consent or concurrence of other co-sharers can be express or implied. If the joint owners have allowed the construction of the building without challenge for a long time, consent is implied. This Court in the case of GANAPATSA v. TULJANASA 1972 (2) Mys. L.J. 126, 5 while considering an application under Order 39 Rules 1 and 2 CPC, observed that there is no such broad proposition that one co-sharer is entitled to injunction restraining the other co-owner from exceeding his rights absolutely and without reference to the amount of damage to be sustained by one side or the other complaining or withholding the injunction. This decision however, has no direct bearing on the facts of the instant case. What emerges from these decisions is that the co-owner has no such right as came to be recognised by the first Appellate Court to construct over a common property as extracted from the observations above. What is consistently laid down is that if there is no consent either express or implied one co-owner cannot erect any building of a permanent nature on any portion of the common property. At the same time the proof of substantial injury which could not be remedied is also necessary in the matter of granting or refusing mandatory injunction.

10. Counsel for respondent-1 urged that in addition to being a co-owner the first defendant is the Manager or Ejman of the joint family. If it is so he cannot assume for himself any higher rights with regard to dealing with the property enjoyed by the entire family and it cannot be recognised that he has not a right to put up any such constructions on his own. The limitation on all the co-owners in the matter of dealing a property of this nature are the same whether he is a Ejman or a junior member in the family.

11. It is not now disputed that the construction was objected to by the plaintiffs right from the month of January 1971 when a notice was sent by the first plaintiff from Bombay with a copy to defendant-1. In spite of that defendant-1 proceeded with construction and even he applied for permission to the Municipality later, that is, in May 1971 under Exhibit P-9 to construct his building though he pleaded earlier that the building was almost complete and it is not disputed that permission was refused. Under such circumstances, it is argued on behalf of the appellants that the very act committed by the first defendant in appropriating for his use a portion of this common property by putting up a structure which is of the value of about Rs. 8,000/- or so as elicited during evidence the plaintiffs need not have pleaded anything more to say that they had sustained substantial injury or irremediable injury. In support of this argument while relying on the decisions cited by the first Appellate Court a decision of the Kerala High Court in the case of I. Gouri and Others Vs. C.H. Ibrahim and Another, has been referred to by the appellant's Counsel.

12. The learned Judge observed referring to coparcenary property that one coparcener has no right to place any construction upon what belongs to all and if he does so another coparcener may obtain a mandatory injunction for its removal without proving any specific damage. At the same time it was observed that there was no broad proposition that one co-owner is entitled to an injunction restraining another co-owner from exceeding his right absolutely and without reference to the amount of damage sustained by one or the other from the granting or withholding of the injunction. At paragraph-11 of the report it is further observed that the law is that the right of a co-owner to raise construction or to make other improvements on the common property really depends on the consent, express or implied or on the concurrence of the other co-owners and if one co-owner proceeds with the construction without the consent of the others and in spite of the protest to the construction the possession of the co-owner raising the construction at once becomes unlawful and the work will have to be stopped by an order of injunction. Wrongful possession or ouster by a co-owner is itself an injury to the other co-owners and the latter would not be required to prove any injury to them to sustain action of injunction. Similarly, in the case before the Judicial Commissioner's Court of Goa, in the case of JOSE CAETANO VAS v. JULIA LEOCADIA EUCRETIA FERNANDES AIR 1969 Goa 90, it was held that a co-owner in possession of the joint property, has no right to change the user of that property without the consent of the other co- owners. If he does so by starting digging operations with a view to erect a house on joint property and

the aggrieved co-owner comes to the Court with due promptness for restraining him from raising the building, the Court can very legitimately decree the prohibitory injunction. If in the meantime any structure has been raised a decree for a mandatory injunction can also be granted.

13. At page-91 it was further observed that the building if erected by defendant it would amount to clear ouster of the plaintiffs from a portion of the joint property built upon. Some other decisions referred to on the same point have almost laid down the same propositions referred to above.

14. Depending on these decisions it has been urged by the learned Counsel for appellants, that because first defendant has put up a structure of this value in a portion of this property of the co-owners that itself is sufficient injury for the reason that it is wrongful and there is clear ouster of the other co-owners and the plaintiffs need not have pleaded in so many words about the injury that they have sustained. Though it is an equitable relief the grant or refusal even a mandatory injunction, the defendant-1 has conducted himself in a high handed manner inasmuch as in spite of repeated protests he did not refrain from completing the construction.

15. Learned Counsel for respondent-1 has urged that the portion on which first defendant has constructed the building is nearly one cent which is about 1/6th of the property to which the first defendant would be entitled in the event of partition among these co-owners. The dimensions of the building are 28"x16.3/4" which by calculation comes to 1 cent in a total extent of 30 cents of land. Though both the Courts below have found that his act in putting up the construction was unauthorised and in spite of protests the Courts below have properly exercised their discretion in not awarding the extraordinary remedy of mandatory injunction. In the event of partition the other co-owners could be compensated and even this portion could be allowed to the share of defendant-1. Therefore, this Court sitting in second appeal, need not interfere with that discretion of the Courts below. He referred to a decision of the Patna High Court in the case of Krishna Kumar Singh and Ors. v. Padum Singh and Ors. in which the plaintiffs had complained of a building of a permanent" structure on the joint property by his co-owner, and it was held that he cannot obtain a decree for its demolition or for joint possession unless he can establish that he has sustained some substantial injury by reason of the act and that he took reasonable steps in time to prevent the erection.

16. As far as the latter part of the observation is concerned the plaintiffs in fact had complained of this act of defendant-1 and therefore that part of the decision is not attracted.

17. In the case of Chhedi Lal and Another Vs. Chhotey Lal, the Full Bench of the Allahabad High Court observed that while a co-sharer is entitled to object to another co-sharer exclusively appropriating the 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 invasion of his rights will depend upon the circumstances of each case. The right to the relief or demolition and injunction will be granted or withheld by the Court according as the circumstances established in the case justify. The Court may feel persuaded to grant both the reliefs if the evidence establishes that the plaintiff cannot adequately compensate at the time of partition and that accordingly 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 while granting the relief, the Court will no doubt be exercising proper discretion in withholding such relief. Each case will be decided upon its own peculiar facts and it will be left to the Court to exercise its jurisdiction upon proof of circumstances showing which side the balance of convenience lies. That the Court will exercise a jurisdiction will be guided by consideration of justice, equity and good conscience cannot be overlooked and it is not possible for the Court to lay down an inflexible Rule as the circumstances in which the relief for demolition and injunction should be granted or refused.

18. The learned Judges of the Full Bench referred to the various decisions cited before them and, ultimately came to the conclusion that it is circumstances of each case that should weigh while granting or refusing any relief of this nature.

19. It is almost a case of sympathetic approach by the Courts below while refusing issue of mandatory injunction. The Courts no doubt took into consideration the absence of the plea that there was any substantial or irreparable injury but at the same time placed before them the possibility of the other co-owners being compensated in the event of partition. The extent of the land involved was also for their consideration as it is now before this Court for its consideration and the fact that it involves hardly one cent should not be lost sight of. The first defendant no doubt acted in a defiant manner perhaps carrying the impression in his mind that he is an Ejman of the family and therefore could do whatever he found necessary or reasonable. Even though that attitude cannot find support the building has been there for the last 17 years now and it would be unreasonable to award the equitable relief of demolition at this length of time. It is also rather strange that neither the plaintiffs nor defendants have taken steps so far for partition of the property. They might have been reconciled by this time or awaiting the decision of this Court and this appeal is itself is pending for nearly 9 years. On account of this lapse of time defendant-1 is found being in use of this house which he constructed and the first Appellate Court did not think it necessary to advert to the point whether the construction of the building was out of the exclusive funds or the funds of the family in his hands. That is left open.

20. In my view, in view of the measurements of the property and his share in the common property the Courts below kept in view the well established principles in allowing or refusing the remedy of this nature and even though this portion is now in the occupation of the Ejman, ultimately the equities could be worked out in a suit for partition.

21. With these observations, I do not find any reason to interfere with the

discretion exercised by the Courts below. The appeal is liable to be dismissed and the same is dismissed.

22. Parties to bear their respective costs.