

(1983) 07 BOM CK 0019

In the Bombay High Court

Case No : Civil Revision Application No. 143/B of 1982

Raghuvir Harischandra Salgaonkar

APPELLANT

Vs

Saraswati Pundalik Salgaonkar

RESPONDENT

Date of Decision : 15-07-1983

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 18 Rule 18, Order 39 Rule 2A

Citation : AIR 1984 Bom 284

Hon'ble Judges : Ginwala, J

Bench : Single Bench

Advocate : P. Mulgaonkar, for the Appellant;

Judgement

Ginwala, J.—The respondent has instituted a suit against the applicant and two others for permanent injunction restraining the applicant from carrying out any construction on the suit land which, according to her, is jointly owned by her and the applicant. Her case was that the applicant was not entitled to carry on any construction on the said land without her consent. This suit was instituted on 10-4-1980. On the same day the respondent-plaintiff also filed an application for ex parte temporary injunction, supported by affidavits sworn by herself and two witnesses. On the same day learned trial Judge visited the spot and made a note of what he had seen. He recorded that in the house which the applicant was constructing, tiles in the front portion had protruded 6 inches from the front wall and on the back side roof portion admeasuring 2x2 meters approximately was not covered with tiles. But his order passed again on the same day i. e. 10-4-1980, the learned trial Judge granted ex parte temporary injunction restraining the applicant from certain limits and from covering the back side with tiles which, as said above, had not been so covered. In pursuance of the show cause notice issued to the applicant he appeared in the suit and resisted the application for temporary injunction. He also adduced some oral and documentary evidence. After hearing the parties the learned trial Judge under his order passed on 28-5-1980 confirmed the ex parte temporary injunction granted

earlier.

2. On 16-6-1980 the respondent by her application moved the trial court to take action against the applicant under Rule 2A of Order 39 of the Civil P. C. (hereinafter referred to as "the Code") for disobeying the temporary injunction. It was alleged in this application that in spite of the injunction the applicant on 1-6-1980 had covered the front roof with palm leaves as also side walls and that he had covered the roof which was open with tin-sheets. The applicant resisted this application. The learned trial Judge again visited the spot on 26-7-1980 and recorded his notes. He noted that there was extension to the front portion covering the same with tin-sheet, palm leaves and wooden rafters and bamboos and the back portion which was open since 10-4-1980 had been covered with palm leaves. Thereafter by his order passed on 29-7-1980 after hearing the parties and taking into consideration unqualified apology which was offered by the applicant he desisted from taking any action and directed the applicant to remove all palm leaves, tin-sheets as well as wooden rafters and ribs within 24 hours failing which he would have no alternative but to send the applicant to jail for disobedience of the order. On the next day i. e. on 30-7-1980 the applicant stated in writing that he had complied with the order of the Court and further requested the Court and further requested the Court to permit him to cover the front roof with palm leaves and the rear roof with tin-sheets. The respondent opposed this request and submitted that the applicant had not only not removed the material which he was ordered to do but had also covered the roof with more tiles and tin-sheets. By an application made on 6-8-1980 the respondent requested the Court to inspect the suit house for the purpose of verification of her said allegations, "without notice to the defendant as otherwise the defendant may play hide and seek game.

The learned trial Judge was pleaded to grant this request and forthwith inspected the spot for the third time on the same day i. e. on 6-8-1980. He noted that the portion of the roof which on 10-4-1980 had been left uncovered and which had been covered with palm leaves on or before 26-7-1980, had then been covered with tiles. He, however, noticed that 8 rows of tiles were still not there in an area of roughly admeasuring 2 1/2 meters and that area was covered partly with palm leaves and partly by plastic. The learned Judge noted that but for this, the order of the Court had been complied with. He also noticed that the front portion of the house was covered with palm leaves which was not there previously. On 26-8-1981, by her application the respondent moved the Court again for taking action against the applicant under the said Rule.

3. On 12-9-1980 some oral evidence was adduced by the parties. The respondent examined her son-in-law namely, Vithal Naik and on his part the applicant examined two witnesses.

4. On 9-12-1981 the learned trial Judge passed order directing the applicant to be detained in Civil Prison for a period of 15 days for the alleged disobedience of the temporary injunction. Being aggrieved by this order the applicant preferred

appeal to the District Court. The same came to be dismissed on 6-8-1982. It is against these orders that the present revision application has been filed.

5. Mr. Mulgaonkar, the learned counsel for the applicant, submitted that the learned trial Judge had erroneously relied on the evidence is not in consonance with the allegations which the respondent had made in her application for contempt. Mr. Mulgaonkar submitted that the learned trial Judge had mainly and substantially relied on his inspection notes in coming to the conclusion that the applicant had disobeyed the temporary injunction. Mr. Mulgaonkar further pointed out that the learned trial Judge used his inspection of the spot as evidence and had in fact substituted the evidence by his inspection. As regards the appellate order Mr. Mulgaonkar submitted that the learned District Judge had not at all considered the evidence on record and the submissions which had been made on the part of the appellant and had disposed of the appeal in a cursory manner.

6. The respondent had not appeared in this Court.

7. At the outset it must be stated that the order passed by the learned trial Judge on 9-12-1981 does not clearly indicate as to for what act of disobedience the applicant was being punished. It is not clear whether he was being punished for covering the front and rear portions of the house with palm leaves or tiles despite the temporary injunction granted on 10-4-1980 or whether he was being punished for extending this roof further, after inspection on 26-7-1980. It seems that the applicant was not given a clear idea as to what was the act for which action was being taken against him under Order 39 Rule 2A. It has to be remembered that proceedings since the contemner stands to be imprisoned as a consequence thereof. It is therefore, necessary that he must have a clear idea and notice, as in a criminal case, as to what case he has to meet, so that he could adduce evidence accordingly. We, therefore, find that at the threshold the proceeding taken by the learned trial Judge against the applicant suffers from this material irregularity.

8. Perusal of the order passed by the learned trial Judge would show that he has placed extensive and substantial reliance on his own notes of inspection of spot. He has even gone to the length of rejecting the evidence of the witnesses of the applicant in preference to his own notes. The impugned order would show that the learned trial Judge has used these notes and his own observations of the spot as a piece of evidence against the applicant. On going through the said order one gets impression that the learned trial Judge has not only given prominence to his own observation and notes of inspection but has based his finding solely thereon, because, as can be seen, the evidence of the respondent's witness does not go to support her case. If that evidence is left out, as it should be, one is left entirely with what has been recorded by the learned Judge in his notes of inspection. The question, therefore, is whether the learned Judge was right in doing so.

9. Rule 18 of Order 18 of the Code empowers the Court to inspect any property or thing concerning which any question may arise and this power can be exercised by the Court at any stage of the suit. This rule has been amended by the Amendment Act of 1976 making it obligatory on the Court to make a memorandum shall form part of the record of the suit. Now plain reading of this rule would indicate that such a memorandum is only to be a part of the record of the suit and the Legislature does not say that it has to be treated as evidence in the suit. It is obvious that such memorandum or the notes of inspection based on the observations of the Judge cannot be treated as evidence in the suit or proceedings and cannot be on par with any evidence because in that case the Judge himself would be a witness and the party against whom the memorandum or the notes go would have no opportunity of cross-examining the Judge. In other words, in using the notes as evidence the Judge would render himself as a witness in the case which cannot be countenanced under any system of law. The question then is what is the purpose of empowering the Court to inspect the site. It is now well settled that this power had been conferred on the Court with a view to enable it to understand and appreciate the evidence on record. In a given case the Judge may not be in a position to properly understand and appreciate the evidence on record. In a given case the Judge may not be in a position to properly understand and appreciate the oral and documentary evidence on record without himself seeing the situation on the spot. It is to this limited extend that the Court is permitted to see the spot and draw its notes. This power therefore, cannot extend to enable the Court to rely solely or wholly on its observations disregarding the evidence which is on record. As has been stated by a Division Bench of this Court in *Amratlal Vs. Land Acquisition Officer*, that due weight would be attached to what the Judge observes in his inspection but the purpose of local inspection is not to make it a substitute for evidence, but to assist in its appreciation. In this connection reference may also be had to the observations of the Privy Council in *Kessowji v. G. I. P. Railway Co.* ILR (1907) 31 Bom 381 where the case was decided on the observations made by the Judges of this Court and not on the testimony which had been recorded in the suit. It is, therefore clear that the observations made by the Court can be used only for purpose of better following and understanding the evidence on record but not to be substituted for the evidence or to contradict the evidence placed before the Court and make it a foundation of its judgment. It is within these parameters that the Court has to use its observations as recorded in the memorandum of inspection of the spot.

10. Applying these principles to the facts of the present case it would appear that the learned trial Judge has followed them in the breach. As said above not only heavy reliance has been placed on the notes of inspection in preference to the evidence on record, but the order is based purely on his notes. In my opinion, therefore, such approach by the learned trial Judge was entirely erroneous and has resulted in material irregularity, or I would even say, illegality, in exercising the jurisdiction under Rule 2A of Order 39 of the Code. For these reasons,

therefore, the order of the trial Court cannot be sustained.

11. The learned District Judge while deciding the appeal does not seem to have taken into consideration this infirmity in the order of the trial Court. His order would indicate that he has taken the said order as true and correct and has dismissed the appeal without considering the pros and cons of the matter. Had the learned District Judge cared to consider the approach of learned trial Judge in using the notes, he would have concluded that the impugned order could not have been sustained. In my opinion, therefore, the sustained. In my opinion, therefore, the appellate order also suffers from the same infirmity.

12. The result, therefore, is that revision application is allowed and the orders passed by the Courts below are hereby set aside and the applicant is discharged. In the circumstances of the case there shall be no order as to costs.

13. Application allowed.