

IN THE HIGH COURT OF BOMBAY AT GOA

APPEAL FROM ORDER NO.13 OF 2018

- 1 Tirath Ram Sharma
Aged 78 years,
r/o. Sumer Goushala
H.No.1 Barmer, Rajashthan
Rep. by his power of attorney
Holder Shri Jagdish Dhuri Vide
power of attorney dated
21/12/2013.
- 2 Balveer Sharma
S/o. Tirath Ram Sharma
r/o. Villa, Gunai, P.O.
Kot-Beja, Kasanli, District H.P.,
Currently residing at H.No.114/B
Palolem, Canacona, Goa
Represented by POA Jagdish
Dhuri dated 25/03/2013 ... Appellants.

Versus

- 1 Gaurav Mohan Bhagat
- 2 Mohan Bhagat
Both r/o. H.No.not known
Bhagatwada, Char Rasta
Canacona, Goa.
- 3 Surinder Sharma
r/o. Palolem, Canacona, Goa.
Rep. By respondent No.1
as his power of attorney holder. ...Respondents.

Shri C.A. Coutinho, Advocate for the appellants.

Shri J.E. Coelho Pereira, Senior Advocate with Shri V.
Braganza, Advocate for the respondents No.1, 2 and 3.

CORAM: NUTAN D. SARDESSAI, J.

RESERVED ON : 2nd August, 2018.

**PRONOUNCED 24th August, 2018.
ON :**

JUDGMENT :-

1. Heard forthwith with the consent of the learned Advocate for the parties.
2. Admit.
3. Shri V. Braganza, learned Advocate waives service of notice on behalf of the respondents No.1, 2 and 3.
4. The appellants who are the plaintiffs before the Trial Court and aggrieved by the order dated 19/01/2018 passed by the learned Adhoc Senior Civil Judge, Margao dismissing the injunction application are in appeal challenging the said order against the respondents who were the defendants before the Trial Court. The parties would be referred to as 'the plaintiffs' and 'the defendants' for brevity's sake hereinafter.
5. The plaintiffs carved a case that they were the co-owners

of the property in question surveyed under No.133/42 of village Nargarcem with the defendant No.3 and one Eric pursuant to a Deed of Sale dated 09/01/1995 being the 'suit property' for brevity's sake hereinafter. The defendant No.3 was the brother of the plaintiff No.1 and permanently settled in Norway who with his friend Eric being the other co-owner and also a foreign citizen prevailed upon the plaintiffs to put the property to good use by running a business therein. The plaintiffs had appointed a caretaker to look after the property and a Power of Attorney were executed by the plaintiff No.2 accordingly in favour of Constituted Attorney. The defendant No.3 and the said Eric who were admittedly the co-owners with the plaintiff No.1 had not exercised any co-ownership rights in respect of the suit property which was in possession of the plaintiff No.1 as a co-owner. The Canacona Municipal Council had issued a license to the plaintiff No.1 for running a restaurant in the house No.116 located in the suit property and besides the Tourism Department had issued a registration for running of a hotel and moreover the Department of Excise had issued a license for the sale of IMFL and country liquor in favour of the plaintiff No.2. These permissions were obtained after the two co-owners i.e. the defendant No.3 and Eric gave no objection for

the business being run by the plaintiff No.1 through the plaintiff No.2. The plaintiffs had been conducting the business in the suit property from the year 2000 without any interference from the other two co-owners. The defendant No.3 on learning that the plaintiffs had made a profit for the first time in the tourist season of 2012–2013 tried to take over the restaurant by using bouncers and muscleman on 30/11/2003 alongwith the defendants and caused extensive damage to the hotel equipments. The defendant No.3 was placed under arrest and released on bail who thereafter left the country in anticipation of the chargesheet to be filed against him.

6. It was the plaintiffs' case that the defendant No.3 and the other co-owner Eric were not entitled to disturb the plaintiffs from running the restaurant after being put in possession and they had all the licenses from all the statutory authorities to run the business therein. The plaintiffs further did not dispute the right of the other co-owners to partition the property who too could otherwise not disturb the plaintiffs' possession and enjoyment thereof which was not only of the co-owners but otherwise running the business with the permission of the co-owners. The defendant Nos.1 and 2 on 08/03/2014

taking advantage of the plaintiffs' absence from the suit property plucked 500 coconuts without having any right or interest in the suit property. They had no right to the running of the business and the trees located in the suit property and were not entitled to interfere with the plaintiffs' possession therein. The defendants No.1 and 2 on questioning informed their caretaker that they had been authorised by the defendant No.3 to take care of the property. The defendant Nos.1 and 2 again on 10/03/2014 tried to interfere with the functioning of the hotel by the plaintiffs and issued threats despite not having any right in the suit property. Hence the plaintiffs were constrained to file the suit and the application for temporary injunction from interfering with the suit property.

7. The defendants No.1 and 2 denied the case of the plaintiffs as pleaded, carved out a plea that the defendant No.3 was holding an Overseas Citizen of India Card and that the defendant No.3 and Eric had invested the entire amount to buy the suit property who were instrumental in designing the business activity in the suit property. No authority was given by the defendant No.3 to the plaintiff No.2 to handover or authorize any person including Dhuri to act as a caretaker of

the suit property. The defendant No.3 and Eric had exercised their co-ownership right in the suit property and the plaintiff No.2 by misrepresentation included his name in the house tax, electricity connection and the other receipts issued by the other Departments. These defendants had not plucked 500 coconuts nor interfered with the running business of the plaintiffs. No question also arose of interfering in the suit property as no business was conducted in the suit property which was in shambles and unhygienic condition. The plaintiffs were not entitled to any relief much less an injunction as prayed for and therefore the application had to be dismissed. The defendant No.3 opposed the injunction application on the premise that the house standing in the suit property was an old mud house and in an absolute dilapidated condition a portion of which has even collapsed. He admitted that the plaintiff No.1, Eric and he had purchased the suit property vide the Sale Deed dated 09/01/1995 owning 1/3rd share each but denied the plea that he was a foreign national and he is a person of Indian origin and holder of an overseas citizenship Indian Card. There was no basis in the case of the plaintiffs that they were carrying on the business. They also did not have any authority or permission to appoint Dhuri as a caretaker of the suit property

without the authorisation of the other co-owners. The plaintiffs had obtained the documents from the various authorities by misrepresentation and misleading the Government authorities concerned. The plaintiffs to achieve their malafide ends had taken law in their hands and carried out the work illegally without authorization from the defendant No.3 and the other co-owner Eric. The application was therefore liable for dismissal.

8. Heard Shri C. Coutinho, learned Advocate for the plaintiffs who submitted that the plaintiff No.1 was a co-owner alongwith the defendant No.3 and Eric in respect of the suit property while the plaintiff No.2 was his son. The co-owners i.e. the defendant No.3 and Eric had authorized the plaintiff No.2 to carry out the business in the suit property as they were both residents of Norway. The Survey records stood in their names while the license to run the restaurant in the house No.116 was issued by the Canacona Municipal Council in favour of the plaintiff No.2 as early as 2003. He placed reliance in **T. Lakshmipathi and others v/s. P. Nithyananda Reddy and others** [AIR 2009 SC 2427] and in **Jahuri Sah and others v/s. Dwarka Prasad Jhunjunwala and others** [AIR 1967

SC 109].

9. Shri J.E. Coelho Pereira, learned Senior Advocate for the defendant No.3 submitted that this was an appeal on principle and therefore the principle culled out in **Wander Ltd. And another v/s. Antox India Pvt. Ltd.** [1990 (Supp) SCC 727] would squarely apply. The Trial Court had exercised the discretion following the principles laid down by the Hon'ble Apex Court in **Dalpat Kumar and another v/s. Prahlad Singh and others** [AIR 1993 SC 276] and therefore there was no basis to interfere with the order in appeal on the ground of illegality, perversity and non-application of mind. He adverted to the pleadings and submitted that despite the defendant No.3 being a co-owner of the suit property alongwith the plaintiff No.1 and Eric, the plaintiffs were trying to oust the said defendant No.3 from the enjoyment of the suit property. There was no perversity in the findings rendered by the learned Trial Court and therefore the appeal had to be dismissed. He placed reliance in **Kochkunju Nair v/s. Koshy Alexander and others** [(1999) 3 SCC 482] which was duly considered by the Trial Court and submitted that the judgment in **Laxmipati** (supra) relied upon by Shri Coutinho, learned Advocate was

clearly distinguishable on the facts. Shri Coutinho, learned Advocate in reply once again adverted to the same judgment in **Laxmipati**(supra) and submitted that a co-owner was entitled to enjoy the property under an arrangement which was sought to be overlooked on behalf of the defendant No.3. The plaintiffs were not claiming a case of ouster and were seeking the order of injunction against the respondent Nos.1 and 2. The findings rendered by the Trial Court were erroneous and therefore the appeal had to be allowed.

10. i would consider their submissions, the pleadings, the judgments relied upon and in view thereof decide the appeal accordingly.

11. In **Wander Limited** (supra), the Hon'ble Apex Court held that there was no reason for this Court to interfere with the impugned order unless it was shown that it was fraught with illegality, perversity and/or arbitrariness. Merely because a different view was possible, there was no reason to interfere with the impugned order.

12. In **Dalpat Kumar** (supra), the Hon'ble Apex Court observed that it is settled law that the grant of injunction

is a discretionary relief. The exercise thereof is subject to the court satisfying that (1) there is a serious disputed question to be tried in the suit and that an act, on the facts before the court, there is probability of his being entitled to the relief asked for by the plaintiff/defendant; (2) the court's interference is necessary to protect the party from the species of injury. In other words, irreparable injury or damage would ensue before the legal right would be established at trial; and (3) that the comparative hardship or mischief or inconvenience which is likely to occur from withholding the injunction will be greater than that would be likely to arise from granting it. Therefore, the burden is on the plaintiffs by evidence aliunde by affidavit or otherwise that there is "a prima facie case" in his favour which needs adjudication at the trial. The existence of the prima facie right and infraction of the enjoyment of his property or the right is a condition for the grant of temporary injunction.

13. Dalpat Kumar (supra), held that prima facie case is not to be confused with prima facie title which has to be established, on evidence at the trial. Only prima facie case is a substantial question raised, bonafide, which needs investigation and a decision on merits. Satisfaction that there is a prima facie

case by itself is not sufficient to grant injunction. The Court further has to satisfy that non-interference by the Court would result in "irreparable injury" to the party seeking relief and that there is no other remedy available to the party except one to grant injunction and he needs protection from the consequences of apprehended injury or dispossession. Irreparable injury, however, does not mean that there must be no physical possibility of repairing the injury, but means only that the injury must be a material one, namely one that cannot be adequately compensated by way of damages. The third condition also is that "the balance of convenience" must be in favour of granting injunction. The Court while granting or refusing to grant injunction should exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties, if the injunction is refused and compare it with that likely to be caused to the other side if the injunction is granted. If on weighing competing possibilities or probabilities of likelihood of injury and if the Court considers that pending the suit, the subject-matter should be maintained in status quo, an injunction would be issued. Thus the Court has to exercise its sound judicial discretion in granting or refusing the relief of ad interim injunction pending the suit.

14. In **Kochkunju Nair** (supra), the Apex Court observed at paragraphs No. 9, 10 and 11 as below:

“9. Ownership imports three essential rights, namely, right to possession, right to enjoy and right to dispose. If an owner is wrongly deprived of possession of his property, he has a right to be put in possession thereof. All the three essentials are satisfied in the case of co-owner of a land. All co-owners have equal rights and coordinate interest in the property, though their shares may be either fixed or indeterminate. Every co-owner has a right to enjoyment and possession equal to that of the other co-owner or co-owners. Each co-owner has, in theory, interest in every infinitesimal portion of the subject-matter and each has the right, irrespective of the quantity of his interest, to be in possession of every part and parcel of the property, jointly with others (vide *Mitra’s Co-ownership and Partition*, 7th Edn.).

10. A three-Judge Bench of this Court has held in *Sri Ram Pasricha v. Jagannath* that a co-owner owns every part of the composite property along with others. The following statement of law has been made by their Lordships: (SCC p. 190, para 27)

“27. Jurisprudentially it is not correct to say that a co-owner of a property is not its owner. He owns

every part of the composite property along with others and it cannot be said that he is only a part-owner or a fractional owner of the property. The position will change only when partition takes place.”

11. To hold that a co-owner is not an owner and his possession is not the possession envisaged in Section 2(25) of the Act is in conflict with the correct legal position. If a co-owner wants to erect a homestead on the land, he is free to do so. When a division of the co-ownership property takes place, the co-owner who put up the homestead can claim that the said portion may be allotted to his share. Courts would ordinarily grant such equitable relief when claimed (vide *Nutbehari Das v. Nanilal Das*). If the other co-owner objects to the construction of a homestead, he can get the co-ownership property divided by partition, and if the other party is not readily willing to that course, it is open to him to get it partitioned through a suit. These are various remedies available to the co-owner in respect of his land. Merely because he has to resort to such steps, it cannot be said that a co-owner cannot erect a homestead on his land.”

15. In **Laxmipati** (supra), the Apex Court held in the facts and circumstances of the case that no defence or shelter is

available to the appellants behind the plea that they have acquired interest of some of the co-owners. The law as to co-owners is well settled. Where any property is held by several co-owners, each co-owner has interest in every inch of the common property, but his interest is qualified and limited by similar interest of the other co-owners. One co-owner cannot take exclusive possession of the property nor commit an act of waste, ouster or illegitimate use, and if he does so he may be restrained by an injunction. A co-owner may, by an arrangement, expressed or implied, with his other co-owners, possess and enjoy any property exclusively. Such a co-owner can also protect his possession against the other co-owners and if he is dispossessed by the latter, he can recover exclusive possession.

16. In **Jahuri Sah** (supra), a four Judge Bench of the Apex Court held that under the law every co-owner of undivided property is entitled to enjoy the whole of the property and is not liable to pay compensation to the other co-owners who have not chosen to enjoy the property. It is also true that liability to pay compensation arises against a co-owner who deliberately excludes the other co-owners from the enjoyment of the property. It does not, however, follow that the liability to pay

compensation arises only in such a case and no other. Co-owners are legally competent to come to any kind of arrangement for the enjoyment of their un-divided property and are free to lay down any terms concerning the enjoyment of the property. There is no principle of law which would exclude them from providing in the agreement that those of them as are in actual occupation and enjoyment of the property shall pay to the other co- owners compensation.

17. The sheet anchor of the plaintiffs' case is the authority letter issued by the defendant No.3 and Eric in favour of the plaintiff No.2, the son of the Plaintiff No.1 to apply to get a license for the bar and restaurant or maintain both at Palolem – Canacona. This authority letter therefore to all intents and purposes authorises the son of the plaintiff No.1 to get a license for the bar and restaurant and maintain both at Paleim- Canacona. Besides, the plaintiffs particularly the plaintiff No.2 has several other documents in his favour being the license issued by the Canacona Municipal Council from 2003 onwards till 2012, the Trade License from 2013 to 2014, the permission from the Department of Tourism, the receipts from the Canacona Municipal Council in respect of the house in question in the name of both the plaintiffs pertaining to the restaurant in

question apart from the water and electricity bills issued in their names. Moreover the plaintiff No.2 also held the excise license issued by the Department of Excise as late as March 2015 to sell by retail IMFC and country liquor for consumption in the premises bearing Survey No.116 and in respect of which license fees were paid by the plaintiffs from time to time. The plaintiffs had filed the suit in 2014 and thereafter for no explicable reasons had no documents in support of their case to show that they were running the bar and restaurant in the suit premises. It has been the contention of Shri Coutinho, learned Advocate for the plaintiffs that the order of injunction was directed against only the defendants Nos.1 and 2 not against the defendant No.3 but their application for temporary injunction does not indicate so which seeks a blanket injunction order against all the defendants including the defendant No.3 who is admittedly the co-owner of the suit property with the plaintiffs.

18. The learned Trial Court while dealing with the application for temporary injunction was seized of the fact that the Trade License issued in favour of the plaintiff No.2 by the Canacona Municipal Council had been revoked based on the complaint lodged by the defendant No.3 and which fact was not seriously disputed by Shri Coutinho, learned Advocate for the plaintiffs.

There was also a fair concession at his instance that no business was presently being conducted in the suit property. The learned Judge however adopted a contorted view in interpreting the authority letter pursuant to which the defendant No.3 and the other co-owner Eric had authorise the plaintiff No.2 not only to obtain the license for running the bar and restaurant but also to maintain the same and instead concluded that the authority letter did not authorise the plaintiff No.2 to obtain the license in his name and to run the business in the suit property. The permission so granted by the defendant No.3 in favour of the plaintiff No.2 could therefore never have been construed by the learned Trial Court as a document ousting the possession of the other co-owners when what it conveyed was the permission from the defendant No.3 and the co-owner Eric in favour of the plaintiff no.2.

19. The learned Judge otherwise found from the records produced before him that a letter was produced from the Cancona Municipal Council dated 20/09/2016 whereby the application for renewal of the trade license filed by the plaintiff no.2 had been kept in abeyance and furthermore the letter of the Station Fire Officer dated 07/08/2015 was also kept in abeyance and there was no renewal of the NOC of the

Department in the absence of the NOC from the other co-owners. The learned Judge also found from a reading of the pleadings that the defendant no.1 was acting as a Constituted Attorney of the defendant no.3, admittedly the co-owner of the suit property and as such he could not be restrained by an order of injunction from interfering in the suit property. In that view of the matter the learned Judge found that the plaintiffs had failed to make out a prima facie case and as such withheld the relief of injunction. It is not as if the learned Trial Judge was oblivious of the fact that every co-owner has a right of enjoyment and possession with the other co-owners and had interest even to an infinitesimal portion of the co-ownership property but did not find favour with the contention of Shri Coutinho, learned Advocate for the plaintiffs that the co-owners cannot restrain the other co-owners from utilising the property.

20. No doubt **Laxmipati** (supra) did hold that a co-owner may by an arrangement express or implied, possess and enjoy any property exclusively but that cannot be read in the abstract and has to be appreciated in the factual matrix. The plaintiffs No.1 with the defendant No.3 and Eric were the co-owners of the suit property having purchased the same by the Deed of Sale dated 09/01/1995. It is not as if by the undated authority

letter that the defendant No.3 and Eric had permitted the plaintiffs to enjoy the suit property exclusively. The conduct of the plaintiffs to seek the relief of injunction against the defendants including the defendant No.3, admittedly a co-owner would be in conflict with the co-ownership right of the defendant No.3 of the suit property. The judgment in **Laxmipati** (supra), therefore as rightly submitted by Shri Coelho Pereira, learned Senior Advocate, is clearly distinguishable and does not advance the case of the plaintiffs in support of his case.

21. Besides on a reading of the impugned order it is apparent that the Trial Court had exercised the discretion following the principles governing the grant thereof as held in **Dalpat Kumar** (supra), and in an appeal on principle, i would not be inclined to interfere with the discretion exercised by the learned Trial Court only because a different view is possible on a consideration of the matter at large. The impugned order therefore does not call for any interference in appeal and in view thereof, i pass the following:

ORDER

The appeal is dismissed and the impugned order

dismissing the injunction application is confirmed.

mv

NUTAN D. SARDESSAI J.