

IN THE HIGH COURT OF BOMBAY AT GOA
WRIT PETITION NO.608 OF 2019

Eleuterio Socorro Marques
alias Socorro El Marques

... Petitioner

V e r s u s

Mr. Antonio Teodoro Marques
alias Anthony Theodore Marques

... Respondents

Mr. Rohit Bras De Sa, Advocate for the Petitioner.

Respondent in person.

Coram :- C. V. BHADANG, J.

Date : 26th August, 2019

ORAL ORDER

1. The challenge in this petition is to the judgment and order dated 28.05.2019 passed by the learned Principal District Judge at Panaji in Misc. Civil Appeal No.30/2019. By the impugned judgment, the learned District Judge has partly allowed the application for temporary injunction filed by the respondent-plaintiff and the petitioner-defendant is directed to open the lock of the door on or before 30.06.2019 and the respondent is permitted to use the said access from 01.07.2019 till 30.09.2019 to use the toilet. The parties are real brothers. There was an earlier suit filed by the respondent against the petitioner being Regular Civil Suit No.121/2011/D

before the learned Senior Civil Judge at Panaji. In that, a Consent Decree was passed on 21.03.2018, which reads thus :

"1) The plaintiff and defendant are the joint inheritors of the property of late Estevam Floriano Santana Marques and late Isabela Gomes e Marques, bearing survey no. 20/10 of the Revenue Village of Jue, Taluka Tiswadi, Goa including the house bearing House No.104 presently No.407, existing therein. The suit property and the suit house form part of the said inheritance.

2) The plaintiff and the defendant partition the property in terms of the plan of the suit property and the suit house annexed herewith to form part and parcel of the Decree. More particularly Part A admeasuring 241 sq.mtrs. of plot area and 99 sq.mts of house area shall belong and remain the sole property of the plaintiff and Part B admeasuring 249 sq.mtrs. of plot area and 158 sq.mtrs. of house area shall belong and remain the sole property of the defendant. These shall be independent plots and each shall have a separate entrance. Hence the prevailing arrangement prior to the present consent terms stands demised except as provided hereunder.

3) For period of one year for the plaintiff to reorganize the portion allotted to him, the plaintiff shall access the toilet located near the rear room of the portion allotted to the defendant and marked in the plan. The plaintiff shall move the application for

construction of a new toilet and septic tank by May 2018, and shall complete the same in all respects not later than May 2019.

4) The plaintiff and the defendant agree that the property cannot be equally divided or partitioned/re-partitioned and as such the plot B allotted to the defendant has 59 sq.mtrs. more area in the house. The party getting larger share of the property house that is the defendant will pay the owelty money of Rs.7,00,000/- towards the surplus built up area and Rs.1,50,000/- in full and final settlement, towards claims of the plaintiff towards house maintenance. A Deed of partition shall be executed between the plaintiff and the defendant and their wives, by the end of April 2018. The said amount of Rs.8,50,000/- payable by the defendant to the plaintiff shall be so paid at the time of executing the Deed of Partition.

5) Upon the effecting of the present terms and existing electricity meter shall be retained by the plaintiff and the existing water meter shall be retained by the defendant as these fall in their respective plot area.

6) Each shall give a no-objection to the other for obtaining an independent electricity and water connection in their parts respectively. Hence the plaintiff shall seek a separate water connection and the defendant shall seek a separate electricity connection. It is agreed by the defendant that the

plaintiff shall connect the pipe for the plaintiffs proposed water connection to the one inch private pipe from the road towards the suit property, but just outside the suit property. The necessary applications for the water and electricity connections shall be moved by the Plaintiff and the Defendant respectively latest by May 2018 end, and they shall respectively ensure that the connections are secured by the end of May 2019. Until that period, the water and electricity connections shall continue to be shared in common and the payment shall be equally borne.

7) As agreed by both the parties the amount payable towards legal documentation work hence forth, will be borne by both parties equally.

8) The plaintiff and defendant shall mutually cooperate in the processes for effecting partition of the suit property in the survey records.

9) The defendant shall carry out the physical partition work and partition the house and property as per the plan annexed at his cost after obtaining necessary permission towards building a partition wall inside the house, which shall be 10 inches thick. Making an entrance way and a main door for entry into the portion apportioned to the defendant will be done by the defendant at his own cost as agreed by both parties. Otherwise the internal changes in the house shall be effected in terms of law by each party at their own cost and as they so desire.

10. After the execution of the Deed of Partition the plaintiff and defendant shall shift their respective furnitures and mobile items in their respective parts making way for the defendant to put the partition wall dividing the two parts.

11. The plaintiff and the defendant, therefore, pray that Decree be passed as per the Consent Terms above."

2. Presently, we are only concerned with clause (3) as above. Indisputably, the respondent has filed an execution application for execution of the aforesaid Consent Decree. Prior to that, the respondent filed Regular Civil Suit No.99/2018/D against the petitioner, inter alia, for a mandatory injunction directing the petitioner to open the lock of the "back door" to allow access to the toilet. That application was dismissed by the Trial Court and in appeal the District Court has partly allowed the same in the following terms :

Appeal is hereby partly allowed. The impugned order dated 19.10.2018 is hereby quashed and set aside.

Application for injunction filed by the plaintiff is

partly allowed.

The defendant is directed to open the lock of the door on or before 30.06.2019.

The plaintiff is permitted to use the said access from 01.07.2019 till 30.09.2019.

The plaintiff is further directed to complete the formalities of construction and operation of toilet in all respects before 30.09.2019.

3. I have heard Mr. D' Sa, the learned Counsel for the petitioner and the respondent, who appears in person. Perused record.

4. Mr. D'Sa, the learned Counsel for the petitioner, has submitted that the respondent cannot prosecute the suit particularly when the respondent has already filed an application for execution of the Consent Decree. Secondly, it is contended that no case for grant of a mandatory injunction at the interim stage was made out. The learned Counsel has placed reliance on the decision of the Supreme Court in the case of **Tek Singh vs. Shashi Verma & anr., 2019 SCC Online SC 168**, in order to submit that for grant of such

mandatory injunction at the interim stage, the plaintiff has to establish a strong prima facie case which shall be of a higher standard than a prima facie case normally required for a prohibitory injunction. It is submitted that the respondent has already completed the construction of a toilet in a portion allotted to him and, as such, the respondent does not need the use of the toilet which falls in the portion allotted to the petitioner. The learned Counsel has placed on record a plan which is taken on record and marked 'X' for identification only for the limited purpose of disposal of the present petition and the dispute as to access for a limited period. It is pointed out that there is an access created at the point '4' which can be conveniently used by the petitioner. It is submitted that the petitioner is bent upon entering through the access shown at serial no. 1 in order to interfere with the renovation work undertaken by the petitioner.

5. The respondent, who appears in person, states that although the civil work of the toilet constructed by him in his portion is already complete, some minor finishing work is remaining and the petitioner is yet to obtain a permission from the local authority for use of the said toilet. He submits that he has no intention to interfere with the renovation work undertaken by the respondent in his portion and will not

interfere with the same. The only claim for the limited period is to have an access through the gate at serial no.1 to access the toilet. He pointed out that the access made at serial no.4 is not convenient for use as it is made at a place where earlier there was an existing window. He also submits that he may be allowed time to complete the construction of the toilet in his portion in all respect till 31.10.2019. In other words, the respondent states that he would be using the toilet in the portion allotted to the respondent, through the gate at serial no.1 only till 31.10.2019. The respondent also made a categorical statement that if such a time is allowed up to 31.10.2019, he will not press the application being CMA No.148/2019 for breach of injunction filed by him before the District Court. It is submitted that the respondent shall not claim any extension beyond 31.10.2019. The statement so made is accepted.

6. By the impugned Order, all that the learned District Judge has done is to extend the period during which the respondent is permitted to use the disputed access till 30.09.2019. It now transpires that the construction of an independent toilet by the respondent in a portion allotted to him is partially complete and the respondent is seeking time till 31.10.2019 to complete the said toilet in all respects. The

respondent has also expressed willingness to withdraw CMA No.148/2019 if time is granted till 31.10.2019.

7. At this stage, it is not possible to go into the question whether the access provided at point '4' can be conveniently used or not. There are allegations and counter allegations with regard to the same. Considering the over all circumstances, I find that till 31.10.2019, the respondent can be permitted to access the toilet through the gate shown at serial no. 1 in the plan which is marked 'X' for identification. This will be subject to the condition that the respondent withdraws CMA No. 148 of 2019.

8. In the result, the following order is passed :

ORDER

(i) The petitioner shall open the access shown at serial no.1 in the plan marked as 'X' for identification within one week. The said access shall be kept open till 31.10.2019.

(ii) The respondent shall complete the construction of the toilet in his portion in all respect by

31.10.2019 and shall not claim any access to the toilet situated in the portion allotted to the petitioner after 31.10.2019.

(iii) The respondent shall withdraw/not press the application for breach of injunction being CMA No.148/2019 filed by him and which is pending before the learned District Judge.

(iv) The respondent shall not interfere with the access of the petitioner shown at serial no.2 in the plan marked 'X' for identification and shall not interfere in any manner with the work of renovation undertaken by the petitioner.

(v) The respondent shall not claim any further extension beyond 31.10.2019.

(vi) The appeal is disposed off in the aforesaid terms, with no order as to costs.

C. V. BHADANG, J.

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