

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION 2139 OF 2020

Shri Vitthal Shivappa Umbare ... Petitioner.

V/s.

Dattatraya Shivappa Umbare ... Respondents.

WITH

WRIT PETITION 2144 OF 2020

Shri Vitthal Shivappa Umbare ... Petitioner.

V/s.

Dattatraya Shivappa Umbare ... Respondents.

Mr. A. A. Joshi, Advocate for the Petitioner in both petitions.

Mr.S.S. Aradhye, Advocate for Respondent in both petitions.

CORAM : ROHIT B.DEO, J.

DATE : JULY 27, 2022

PC :

1. These petitions involve common facts and emanate from internecine dispute between two brothers and the bone of contention is the reconstruction and repairs of the suit property, which according to the plaintiff in RCS 458 of 2018, he was occupying. The defendant in the suit, who is the brother of the plaintiff, vehemently objected to the reconstruction or repairs on the premise that the suit

property is joint family property which is not partitioned by metes and bounds. Notably and significantly, it is indubitable that there are three residential houses and the defendant himself is occupying and residing in a residential house which is on the left side of the suit property. The residential house on the right side of the suit property is occupied by the third brother, who is not a party to the litigation.

2. The significance of this factual position is that even the defendant has constructed a residential house and is residing therein and even on his own showing, the residential house which he is occupying is part of the joint family property which is not partitioned as yet.

3. Be that as it may, the plaintiff preferred an application, seeking temporary injunction, restraining his brother from obstructing and interfering with reconstruction or construction which the learned trial Judge allowed vide order dated 16.07.2019. The defendant lodged counter claim and in that he moved an application exhibit 31,

seeking injunction against the plaintiff from undertaking the reconstruction or construction which the learned trial Judge declined.

4. The defendant challenged both orders in Miscellaneous Civil Appeals 35 of 2019 and 36 of 2019. By separate judgments, the learned appellate Judge allowed both the appeals. Injunction granted in favour of the plaintiff was set aside and the defendant was granted the injunctive relief which he had sought vide exhibit 31 in the counter claim.

5. These petitions filed by the plaintiff, assail the aforesaid judgments in Miscellaneous Civil Appeal 35 of 2019 and Miscellaneous Civil Appeal 36 of 2019.

6. At the outset, I may note that the plaintiff has placed on record two identical undertakings in both the petitions. The relevant part of the undertaking in writ petition 2144 of 2020 reads thus :

"I undertake to this Hon'ble court as under :

A] That if this Hon'ble court allowed or permits me to carry out repairs by way of construction of my residential house comprising in City Survey no. 4255 A,B & B/1, in that event I will not seek any equity if decision goes against me in RCS no. 458 of 2018 and such construction will be subject to the final decision in said suit and counter claim filed by the respondent herein.

B] I further states that I will take care that the activity of carrying out said repairs / construction will not cause any damage/s to the adjoining residential premises of my brother i.e. respondent / defendant.

C] I further states that I will not claim any independent right in the said construction if decision in said suit goes against me and same shall be subject to the final decision in said suit."

7. Even de-hors the undertaking which only furnishes an additional reason, I am satisfied that the judgments impugned must be set aside.

8. It is common ground that all the three residential houses constitute joint family property. The three brothers were residing in the respective residential houses and were separate in mess. Even if it is assumed that the suit property is part of the joint family property and is not partitioned, the same logic applies to the residential houses

occupied by the other two brothers. It is not as if the plaintiff was intending to construct a residential house for the first time on portion of the joint family property which was previously open or vacant, the plaintiff was the occupant of a structure qua which he undertook reconstruction or repairs. The shares shall be ascertained and if necessary the joint family property shall be equitably partitioned in the counter claim/suit. However, till that time it would be unjust to expect the plaintiff to dislocate and shift merely because the residential house which was occupied by him was dilapidated and requires extensive repairs or reconstruction.

9. In any event, the defendant, who is the brother of the plaintiff and who himself is merrily occupying the adjacent residential house, cannot be heard of contending that the plaintiff has no right to carry out reconstruction or repairs.

10. Such an approach cannot be countenanced in equity jurisdiction. I am more than satisfied that the judgments impugned must be set aside and I order accordingly.

11. Application exhibit 5 in Regular Civil Suit 485 of 2018 is allowed and the order passed by the learned trial Judge shall stand restored.

12. It is needless to observe that I have considered the matter only from the perspective of entitlement of equitable relief and no observations made herein shall prejudice any of the party to the litigation and their contentions shall be decided independently and on their own merit in the trial.

13. This court expects that the undertaking given by the plaintiff shall be scrupulously adhered to.

14. Petitions are allowed in the aforesaid terms.

(ROHIT B. DEO, J.)

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