

Amrut

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO.55 OF 2022

ARJUN G.NAIK

... Appellant

Versus

TARAMATI T. NAIK AND ANR.

... Respondents

Mr Chirag Angle, Advocate for the Appellant.

Mr Kaif Noorani, Advocate for Respondent No.1 under Legal Aid Scheme.

CORAM: M. S. SONAK, J.

DATED : 5th JANUARY 2023

ORAL ORDER :

1. Heard Mr Angle, learned counsel for the Appellant, and Mr K. Noorani, appointed under the Legal Aid Scheme for Respondent No.1.
2. The Appellant is the original plaintiff, and the Respondents are the original defendants. Respondent No.1, Taramati Naik, is the widow of the Appellant's brother.
3. The Appellant instituted Regular Civil Suit No. 35/2014/C to injunct Taramati Naik from demolishing and reconstructing the suit house, which the Appellant claims is co-ownership property. The Appellant also alleged that no permissions were obtained from

Respondent No.2 – Panchayat for undertaking such activity, which was urged as an additional ground in the relief of injunction.

4. The trial Court decreed the suit. However, the Appellate Court has reversed this decree. Hence, this appeal.

5. Mr Angle, learned counsel for the Appellant, presses the following questions, which according to him, constitute the substantial questions of law in support of this appeal.

(i) Whether when the Respondent No.1 having admitted that the suit house being a common house of Arjun, Kashinath, Santosh and Tulshidas Naik, in the absence of consent of all the co-owners the Respondent No.1 could have demolished and reconstructed the suit house?

(ii) Whether the Appellate Court having held that the demolition and the reconstruction of the suit house by the Respondent No.1 being illegal, the Appellate Court was justified in setting aside the Judgment and Decree dated 27/02/2019 passed in Regular Civil Suit No.35/2014/C?

6. Mr Angle submits that there is no dispute and even otherwise at least proved from the evidence on record that the suit house, as well as the property in which the suit house is located, is a co-ownership property. He submits that it is well settled that a co-owner cannot demolish or reconstruct a co-ownership property without the consent of all other co-owners. He submits that the Appellant had never consented to the illegal activity of Respondent No.1. There is evidence that no permissions were obtained from the Panchayat by Respondent

No.1. Based on all this, he submitted that the relief of injunction was due and should have been granted. He relies on *Ramkrishna Bapu Kotkar Vs Namdeo alias Narayan Nagesh Kotkar*¹, *Mr. Vishnu Govind Naik Vs Mr. Harischandra Dattaram Thakur & Another*² and *T. Lakshmipathi and others Vs P. Nithyananda Reddy and others*³ in support of his contentions.

7. On the other hand, Mr K. Noorani, learned Advocate for Respondent No.1, submitted that the injunction relief is equitable. The First Appellate Court has quite correctly declined such relief to the Appellant. He pointed out that the Appellant is the brother-in-law of Respondent No.1. The Appellant admitted during cross having appropriated the portion of an ancestral property by himself constructing on the plinth of a portion of the ancestral house. He pointed out that all co-owners except the Appellant consented to Respondent No.1 for repairing a mud wall that collapsed due to inclement weather and replacing the roof tiles, which, as a consequence, had suffered damage. He pointed out that the repairs were complete in all respects and only some painting works remained.

8. Mr Noorani submitted that the injunction relief was entirely misplaced in light of the pleadings and the evidence on record. He submitted that the Appellant had not sought any partition decree, and the mere making of construction or improvement in the common

1 2006 (1) AllMR 617

2 2006 (5) AllMR 558

3 (2003) 5 SCC 150

property does not amount to ouster. He relies on *Bachan Singh Vs Swaran Singh*⁴.

9. The rival contentions now fall for my determination.

10. The First Appellate Court, in a well-reasoned judgment, has held that since the relief of injunction is equitable, the Appellant is not entitled to the equitable relief relying upon cogent facts which emanate from the evidence on record. But, even otherwise, it is well settled that if one seeks, equity must do equity. Here, there is evidence of the Appellant's inequitable conduct qua his deceased brother's widow concerning the co-ownership property, which is the subject matter of the case.

11. Though there is no dispute that the property which is the subject matter of the suit is co-ownership property, the Appellant (PW1) admitted in his cross-examination about constructing his house on the plinth of the portion of the suit house which is in his possession. He also revealed that the house number of the ground plus the first floor he constructed is 2/1. Thus, it is apparent that the Appellant appropriated his share of the suit house by demolishing the southern portion and reconstructing the house with ground plus one floor. Thus, if the Appellant alleges ouster by his brother's widow merely because the widow has repaired a collapsed wall and replaced some tiles, then this ouster principle should apply with much greater

4 I.L.R. Punjab and Haryana 340

vigour to the act of the Appellant, which he admitted in the course of his cross-examination.

12. In any case, the evidence on record bears out the wall collapsed and the consequent repairs undertaken by Taramati to the same. Taramati also admitted to having replaced the roof tiles. Mr Noorani explained that as a result of the collapse of the wall, even roofing was affected. He rightly submitted that this was only an improvement of the portion of the common property almost exclusively possessed by Taramati. The Appellate Court has evaluated the evidence and, after coming into close quarters to the reasoning of the trial Court, reversed the finding recorded by the trial Court. The Appellate Court pointed out the erroneous approach of the trial Court in this matter. The trial Court failed to consider the Appellant's admission and the Appellant's conduct. The trial Court also failed to consider that this was a case of mere repair to the wall, which had collapsed and consequential replacement of some roof tiles. If all these matters were to be cumulatively considered, no case was made to grant any relief of injunction.

13. All the decisions relied upon by Mr Angle no doubt hold that the co-owners cannot construct in the undivided property without obtaining consent from all co-owners. However, the record evidence shows that the co-owners appeared to have appropriated some specific portions for their exclusive use. Therefore, though there may not be an ouster, this is a mere case where one of the co-owners had undertaken

repairs to preserve the property and its portion where she resides as a widow of the Appellant's brother. In such a factual situation, the principles set out in the decisions relied upon by Mr Angle would not apply. Instead, the Division Bench of the Punjab and Haryana High Court ruling about the mere making of construction or improvement of the common property, not amounting to an ouster, would apply.

14. Considering the collapsed or damaged wall was being repaired, or some tiles were replaced in the peculiar facts of this case, no injunction could follow. At least *prima facie*, the Appellant, from a position of strength, had already appropriated himself a portion of the common property by constructing a portion of the plinth of this very suit house structure which is a ground plus one floor. There is nothing on record that the Appellant obtained consent from any co-owners or at least Taramati. Mr Noorani states that the co-owners realizing the plight of Taramati and the fact that she was only repairing the wall or replacing the tiles, have been given consent. Only the Appellant, from a position of strength, is resisting consent and, at the same time, enjoying the portion of the common property which he has appropriated without such consent from the other co-owners.

15. Both the substantial questions of law as proposed, therefore, do not arise and in any case, will have to be answered against the Appellant.

16. Mr Noorani also pointed out that the Court had explicitly permitted the completion of the repair works and tiles replacement.

He submitted that only certain painting works remained to be completed. Accordingly, this appeal fails and is hereby dismissed. Accordingly, interim relief, if any, is hereby vacated. In the peculiar facts of the present case, there shall be no costs.

17. The Court appreciates the assistance rendered by Mr K. Noorani, appointed under the Legal Aid Scheme to appear on behalf of the widow Taramati. However, the Goa State Legal Services Authority must pay Mr Noorani the professional fees following the rules. These fees are undoubted, in addition to this Court's gratitude.

18. The Civil Application No.67 of 2022 does not survive the disposal of the Second Appeal, and the same is disposed of accordingly.

M. S. SONAK, J.