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(1977) 12 AHC CK 0024

Allahabad High Court

Case No: Second Appeal No. 3069 of 1967

Prabhoo	APPELLANT
Vs	
Doodh Nath and Others	RESPONDENT

Date of Decision: Dec. 2, 1977

Acts Referred:

- Specific Relief Act, 1963 - Section 39

Citation: AIR 1978 All 178

Hon'ble Judges: B.N. Sapru, J

Bench: Single Bench

Advocate: Radha Krishna, for the Appellant; Hyder Husain, for the Respondent

Final Decision: Dismissed

Judgement

B.N. Sapru, J.
The facts found by the courts below are that one Shanker had four sons, namely, Prabhoo, Gayadin, Surajdin and Ram Din (who died issue-less). Prabhoo, the defendant appellant as mentioned earlier is the son of Shanker whereas the sons of Suraj Din and Gaya Din sons of Shanker are the plaintiff-respondents.

2. The plot in dispute has been found to be the joint property of the sons and grandsons of Shanker.

3. According to the plaintiff-respondents" case the defendant appellant had started making constructions on khata No. 59 area 42 bighas 15 biswas which is the joint property of the parties to the suit, without the consent of the plaintiff-respondents and despite their protests. According to them they lodged a report to the police when the defendant respondent started laying the foundations on 20-1-1960. Despite their protests when the defendants started making constructions on 1-2-68 the plaintiffs filed the suit on 4-2-1966 praying for a mandatory injunction for the removal of the constructions on the land in suit.

4. On 4-2-1966 an application was made on behalf of the plaintiff-respondents praying that an interim injunction should be issued restraining the defendants from proceeding further with the constructions, and they also prayed that a Commissioner be appointed to serve the injunction order on the defendant-appellants. It was also further prayed that the Commissioner should also report about the position of the constructions.

5. The interim injunction prayed for was granted and the defendant appellant was ordered to desist from making further constructions. The Commissioner was also directed to serve the defendant-appellant and to report about the situation of the constructions. It may be added that subsequently, the injunction order was modified to the extent that the defendant-appellant was permitted to thatch the uncovered constructions.

6. The Commissioner served the injunction order and also submitted his report. According to the report the constructions were about a month or 6 weeks old and the constructions were only half complete and that they had not been roofed either. They were also reported to be "kachcha"" that is not made of bricks.

7. The defendant appellant had set up title in himself which plea has been negatived by the courts below and it has been held that the property was joint property of the sons of Shanker. The defence plea further was that there were old constructions on the site where the new constructions stood and that they had fallen down and that the defendant-appellant was making reconstruction over the site of the fallen down constructions. This plea has also been found to be without any basis and the constructions have been held to be new.

8. The trial court found that the plaintiff-respondents had their house immediately adjacent to the place where the defendant appellant was making his constructions on the joint land of the parties. It further held that as the plaintiff respondents'' house was adjacent to the area where the defendant appellant was making his constructions, this land was likely to go to the plaintiff-respondents'' share in the event of a partition of the land between the parties. It also observed that one of the accepted rules of partition is that when it comes to allotment of land, it should be allotted to a party which would be of maximum use to it considering other attendant circumstances. In these circumstances the trial court held that the plaintiff-respondent would suffer a loss which could not be compensated by allotment of any other portion of the land. The trial court also held that the plaintiff had filed the suit for injunction expeditiously without waiting for the constructions to be completed. Having recorded these findings the trial court decreed the suit for removal of the constructions.

9. The defendant-appellant filed an appeal. The lower appellate court was of the view that as the constructions were made over joint land and the suit had been filed without delay, the plaintiff-respondents were, as a matter of law entitled to get a decree for the removal of the constructions as the same had been made by the defendant-appellant despite the protests by the other co-sharers. The lower appellate court held that the action of the

defendant-appellant was unjustified and hence, demolition should be ordered.

10. Aggrieved by the order of the lower appellate court, the defendant appellant has filed the instant second appeal. It has been urged that the lower appellate court erred in law in dismissing the defendant"s appeal without considering whether a demolition order should be made. In this connection the learned counsel for the appellants has referred to a Full Bench decision of this Court in the case of Chhedi Lal and Another Vs. Chhotey Lal, . In that case after an exhaustive review of the cases of the Ouah Chief Court and of the Allahabad High Court the Full Bench observed as follows : (At p. 204 of AIR).

"As a result of the foregoing discussion, it appears to us that the question of the right of co-sharers in respect of joint land should be kept separate and distinct from the question as to what relief should be granted to a co-sharer, whose right in respect of joint land has been invaded by the other co-sharers either by exclusively appropriating and cultivating land or by raising constructions thereon. The conflict in some of the decisions has apparently risen from the confusion of the two distinct matters. While, therefore, a co-sharer is entitled to object to another co-sharer exclusively appropriating land to himself to the detriment of other co-sharers, the question as to what relief should be granted to the plaintiff in the event of the invasion of his rights will depend upon the circumstances of each case. The right to the relief for demolition and injunction will be granted or withheld by the Court according as the circumstances established in the case justify. The Court may feel persuaded to grant both the reliefs if the evidence establishes that the plaintiff cannot be adequately compensated at the time of the partition and that greater injury will result to him by the refusal of the relief than by granting it. On the contrary if material and substantial injury will be caused to the defendant by the granting of the relief, the Court will no doubt be exercising proper discretion in withholding such relief. As has been pointed out in some of the cases, each case will be decided upon its own peculiar facts and it will be left to the Court to exercise its discretion upon proof of circumstances showing which side the balance of convenience lies. That the Court in the exercise of its discretion will be guided by considerations of justice, equity and good conscience which cannot be overlooked and it is not possible for the Court to lay down an inflexible rule as to the circumstances in which the relief for demolition and injunction should be granted or refused."

In applying this principle laid down by the Full Bench the position that emerges is that the Court must examine whether in the circumstances of the case a decree for a mandatory injunction requiring the removal of constructions should be granted or not.

11. One of the tests to determine whether a mandatory injunction should or should not be granted is whether the plaintiffs, who objected to the constructions being made by a co-owner on a joint land, did so at the earliest or, waited till the constructions had been completed. In the first case injunction would normally be issued whereas if the constructions had been allowed to be completed, an injunction would normally be refused, as the basis for refusing injunction would be that be their conduct in not objecting

at the earliest stage, the joint co-owners had induced the maker of the constructions to believe that he could make it, and in doing so spent money and effort.

12. In the instant case, the finding is that the co-owners objected and lodged a report with the police and thereafter instituted a suit as soon as possible when the defendant-appellant continued with the constructions. The constructions have also been found to be semi-complete.

13. Another test for determining whether an injunction should be issued requiring the removal of the constructions is that where the defendant has expended considerable sums of money over a construction, the Court may take that factor into account while deciding the suit. In this case, the value of the constructions has been found to be Rs. 500/- and the constructions are incomplete and, therefore, an injunction cannot be refused on the ground that valuable construction, have been raised on the land by the defendant-appellant.

14. One of the pleas raised by the defendant-appellant was that the land where the constructions were being raised, was originally agricultural, but had, by the time the constructions were undertaken, become abadi site. A map was filed with the plaint which shows that the house of the plaintiff respondents, and the houses of two other persons, are immediately adjacent to the land over which the constructions are being made by the defendant-appellant. It is well known that with the advance of urbanisation in the country many lands which were used for agricultural purposes are now being used as abadi sites and houses are being constructed thereon. With the mounting pressure of population more accommodation is needed. It may be that in the peculiar facts of a case it may be found that it is in the greater social interest that agricultural land be diverted to providing accommodation to the people. The mere fact that the nature of the land is being altered may not be treated as a decisive factor for determining whether a perpetual injunction should be granted requiring the defendant to demolish the constructions which he had made or to restrain him from making further constructions despite objections of co-owners of the land. The plea of the defendant-appellant that the land has lost its character as agricultural land and has become abadi site, may not be without substance. However, on this ground alone the defendant-appellant is not entitled to appropriate the land to his own use by making constructions thereon without the consent of his co-owners.

15. Another factor that must be borne in mind is that one co-owner has not in law any right to appropriate land to himself out of a joint land against the consent of his co-owners. High-handed action by one co-owner cannot be encouraged by courts of law. Unless some special equity is shown in favour of the defendant in a suit for demolition of constructions, which are in the process of being made by him without the consent of the co-owners a decree for demolition should not be refused especially when the co-owners have come to court at the earliest.

16. The defendant-appellant could have sought partition and thereafter if he had been allotted this portion of the land, or any other land nearby, made his constructions thereon. He chose not to do so. It has not been shown that any other land in this very large area of 42 bighas and odd is not suitable for building purposes.

17. The trial court had recorded a finding that the defendant-appellant had by his action caused a loss which could not be compensated to the plaintiff-respondents by making the constructions in question. Its view was that this land would have normally come to the plaintiff-respondents on a partition of the property, as their house was immediately adjacent to the site of the constructions. The lower appellate Court, however, recorded no finding in this regard. Its view was that the defendant-appellant had no right to make the constructions against the wishes of the plaintiff respondents and as they had instituted a suit as soon as possible after the constructions were started, they were entitled to a decree in their favour. In other words, the lower appellate Court has found that the plaintiff-respondents were not required to show any special damage. I am of the view that in the peculiar fads of this case it is unnecessary to determine whether & plaintiff in a suit for demolition of constructions made over joint land, should prove special damage, specially as the constructions are incomplete and their value is only about Rupees 500/- as found by the trial court, which valuation was not challenged before the lower appellate court. The plaintiffs having instituted the suit very soon after the constructions started being made and having not in any manner acquiesced in the constructions by the defendant-appellants were rightly granted a mandatory injunction directing the removal of the constructions.

18. In the result, the appeal fails and is dismissed with costs.