

IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
CIVIL APPELLATE SIDE JURISDICTION.
CIVIL APPLICATION NO.2221/2015
IN
FIRST APPEAL NO.1392/2010

Morris Benny Kenny ... Intervener

Gangaram Jethya Bhandari & Ors. ... Applicants
Vs.

Velerian Anthony Ferreira ... Respondent

Mr. R. A. Thorat, Senior Advocate with S. Y. Amare with Chatanya Malgaonkar for the Applicant

Dr. Chandrachud with Mr. Rakesh Singh i/b. M. V. Kini & Co. for the Appellant.

Mr. Depak Chitnis Chiparikar i/b. M/s. Deepak Chitnis Chiparikar & Co. for Respondent.

CORAM : K. K. TATED, J.

DATE : JULY 2, 2015

P.C.:

1. Heard. This Application is preferred by a third party for stay of the order dated 30/01/2014 passed by this court (Coram : R. P. SondurBaldota,J.) in Civil Application No.446/2013 which reads thus:

“Mr. Chitnis, the learned Advocate for the respondents states that the respondents shall demolish the portion of the road falling on the property in their possession within a period of 3 weeks from today. Stand over by 3 weeks i.e. till 20th February 2014.”

2. To comply with the said order, the original Plaintiff preferred Civil Application No.489/2014 for providing necessary police protection to demolish the said constructed road on the portion of the

Plaintiff's property. In that Civil Application, this court, by order dated 23/06/2015 directed Gorai Police Station, Mumbai to provide police protection to the Plaintiff to comply with order passed by this court on 30/01/2014. Hence, the third party preferred the present Civil Application for stay of the order dated 30/01/2014 on the ground that their easementary rights will be affected if the said road is removed.

3. The learned counsel for the Applicants submits that the Applicants are using the said road for last more than 40 years. In support of this contention, the Applicant relied on the Plaintiff's statement dated 26/03/2013 recorded by the Gorai Police Station. He submits that in the said statement before the Police Authority, the Plaintiff admitted that the Applicant/ intervener is using the said road for last more than 40 years. The learned counsel for the Applicant submits that if the said road is removed/ demolished as per the order dated 30/01/2014 their easementary right of use will be affected. He further submits that this court, on 23/01/2015 granted liberty to the Applicant to take appropriate steps to protect their right to use the road for ingress and egress, if they are entitled. He submits that in view of the said statement made by the Plaintiff before the Police Authority on 26/03/2013 and as the liberty is granted by this court vide order dated 23/02/2015, this court be pleased to stay the operation and implementation of the order dated 30/01/2014 passed in Civil Application No.446/2013 to enable the Applicant to initiate the legal proceedings to protect their rights in respect of the road. He further submits that if the said order is not stayed for some time, irreparable loss and injury will be caused to them.

4. The learned counsel Mr. Dr.Chandrachud for the Appellant / Defendant vehemently opposed the Civil Application. He submits that the Plaintiff, in Suit No.1629/1996 nowhere stated and/or described about the road. In support of this contention, he relied on an affidavit of examination in chief filed by the Plaintiff as well as the order passed by the Trial Court dated 05/02/2010. He further submits that when the Plaintiff preferred Civil Application No.1602/2010, the Respondent / Plaintiff made a statement before this court that they will not create third party right, title and interest without permission from this court on the suit property. Clause 5 of the said order dated 12/10/2011 passed by this court (Coram : A. S. Oka, J.) in Civil Application No.1602/2010 reads thus:

“5. The learned counsel appearing for the Respondents on instruction of the Respondents states that till the disposal of the Appeal, the Respondents shall not create any third party rights without prior permission of the Court. The statement is accepted.”

5. The learned counsel for the Defendant submits that the Applicant failed to place on record any documentary evidence to show that they have any right, title and interest in the said property i.e. road except the statement dated 26/03/2013 made by the Plaintiff before the Police Authority. He further submits that though this court passed order dated 23/06/2015 directing the Police Authority to provide police protection to the Plaintiff to comply with earlier order dated 30/01/2014, same was not complied. On the basis of this submission, the learned counsel for the Defendant submits that there is no question of granting any stay to the order dated 30/01/2014.

6. The learned counsel for the Respondent/Plaintiff also vehemently opposed the Civil Application. He submits that they made a statement before this court on 30/01/2014 in Civil Application No.489/2014 that they will remove the said road within 3 weeks from the date of that order. He submits that the Plaintiff attempted to comply with the said order, however, every time same was prevented by the Applicant herein. He further submits that even the Plaintiff, as per order dated 23/06/2015 approached the Police Authority to provide a police protection to comply with order dated 30/01/2014, however, they failed and neglected to do so. To that effect the learned counsel for the Plaintiff relies on paragraph 6 of his affidavit dated 01/07/2015 which reads thus :

“6. I say that on 30th June 2015 I had engaged the service of a JCB Contractor, who had agreed to bring JCB on 30th June 2015 to demolish the said road; however the Respondent No.2 intentionally and deliberately brought a heavy truck and parked the said truck at the entrance of the said unauthorizedly constructed road thereby prevented me from bringing JCB to demolish said unauthorizedly constructed road and in view thereof I could not bring the JCB and could not demolish the said unauthorizedly constructed road on 30th June 2015. I had taken the photographs of the said truck which had been deliberately brought and parked at the said road. I say that I have in fact told the police that Mr. Mories Kenny has brought the said truck and not allowed me to demolish the said road. I requested the police to grant me necessary support to take action against said Mr. Mories Kenny by directing him to remove the said truck however the police refused to take any steps and pointed out to me that there is no order to remove the said truck however the police refused to take any steps and pointed out to me that there is no order to remove the said truck. I say that in spite of payment of the charges in Gorai Police Station to the police the police has refused to grant any cooperation and assistance to me.”

7. The learned counsel for the Respondent/Plaintiff submits that for non compliance of order dated 30/01/2014 the Defendant filed Contempt Petition No.334/2014 which is pending before this court. He further submits that the Plaintiff is ready and willing to comply with the statement made by them before this court. Hence, this Hon'ble Court should not stay the operation and implementation of the order dated 30/01/2014 as prayed by the Applicant in Civil Application.

8. Heard both sides at length. It is to be noted that present Civil Application is filed by a third party for stay of the order dated 30/01/2014 passed by this court in Civil Application No.446/2013. As the Applicant is not a party either before this court or Trial Court, the Applicant has no right to prefer this Civil Application at this stage. Therefore, there is no question of considering the present Civil Application. Moreover, the Applicant has already preferred a Civil Application for adding them as party. Same is pending for hearing and final disposal. The contention made by the Applicant about their right in respect of the said road cannot be decided in the present Civil Application merely on the basis of the statement recorded by the Police Authority on 26/03/2013. Except the said statement, the Applicant has not placed on record any document to show that their right, title and interest in respect of the said road. Therefore, I do not find any substance in the Civil Application. Hence, same stands rejected.

(K.K.TATED, J.)