

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO. 461 OF 2019

IN

FIRST APPEAL NO. 1072 OF 2013

Deoram Parvatrao Sathe ... Applicant

Versus

Shri. Nilesh Dharmpal Hanswani & Ors. ... Respondents

Mr. R.S. Govilkakar a/w Mr. Shaba Khan a/w Mr. Mihir Govilkar for the Applicant.

Mr. Sumit Kothari for original appellant in First Appeal.

**CORAM : B.P. DHARMADHIKARI &
REVATI MOHITE DERE, JJ.**

DATE : MARCH 07, 2019

P.C.:

Heard respective counsel.

Prayer of respondent/original defendant is to permit it to amalgamate suit plot no. 3 admeasuring 2016.70 sq. mtrs with their adjacent plot admeasuring 1650 sq. mtrs and allow them to put constructions upon it. They submit that they shall not create any encumbrance or third party interest on such construction till further orders of the court in the matter. This statement is made upon instructions from respondent no. 2.

2. Our attention has also been invited to previous orders passed by this court in the matter. Counsel for respondent/plaintiff states that earlier inspite of restraining orders, third party interest were created and after cognizance by this court in Contempt Petition No. 20 of 2018 that contempt has been purged. It is pointed out that while granting interim relief, this Court has specifically seen to it that the identity of the suit property is preserved. The contention is earlier efforts were made in two earlier applications and present prayer is therefore, bared by the principles of res judicata. Our attention is also drawn to the orders dated 16/1/2018 on C.A. No. 2478 of 2017 with a submission that very same prayer was then moved and unconditionally withdrawn.

3. The First Appeal No. 1072 of 2013 arises out of the suit instituted in the year 2010. While admitting the appeal and passing the interim orders, this court has looked into the prayer for stay vide C.A. No. 346 of 2016. It appears that another order in that respect was sought by moving C.A. No. 910 of 2016. The appellant by that application sought order restraining construction on the said plot. This Court found that its earlier order dated 25/2/2016 passed after accepting minutes of order presented

jointly, sufficiently protected the equities. However, in latter part of the order, this Court found that the respondents cannot be relieved of their undertaking because such an effort was not earlier countenanced also. We need not in this matter delve more into these facts.

4. The minutes of order dated 5/12/2013 show that the present applicant (respondent no. 7) has undertaken that pending hearing and final disposal of the First Appeal, he will not create third party rights in respect of plot no. 3. The plot no. 3 happens to be portion of bigger plot which admeasures about 20000 sq. mtrs. The area of plot no.3 is 2016.17 sq. mtrs. The Court therefore, accepted the undertaking of respondent no. 7 that it would not change the location or dimensions of the said plot no. 3 at the time of getting the final approval to its lay out which was then tentative.

5. This material on record shows the efforts made by this Court to preserve the said plot as it is to answer the judgment which may be ultimately passed.

6. The applicants/respondent no. 7 now wish to obliterate the identity of that plot no.3 by amalgamating it with their other portion which admeasures 1650 sq. mtrs. Thus they want to

reconstitute the plot and then raise the construction upon it. Respondent no. 7 is in construction business and hence, after the new plot is carved out, joint FSI will be used to raise the construction on new plot.

7. This will not only result in destroying the identity of the said plot but also will militate with the intention of this Court to preserve that plot as it is during the pendency of the appeal.

8. The submission of respondent no. 7 that if the appeal is allowed, it would be required to undo everything, cannot offer any solace at this stage. The efforts have already been made to list the appeal for final hearing and it appears that after realizing that there is no possibility of getting that appeal heard finally in near future, respondent no. 7 has been constrained to file this application. This Court has on earlier occasion already granted respondent no. 7 leave to renew its request for final hearing after specified period. In view of that leave, we find present effort also misconceived.

9. Accordingly we reject the Civil Application. There shall be no orders as to costs.

(REVATI MOHITE DERE, J.)

(B.P. DHARMADHIKARI, J.)