

(2023) 01 BOM CK 0106
In the Bombay High Court
Case No : Writ Petition No. 9980 Of 2022

Hemant Vasant Jagtap & Anr

APPELLANT

Vs

Haji Abdul Malik Haji Yunusisa & Ors

RESPONDENT

Date of Decision : 24-01-2023

Acts Referred:

Code Of Civil Procedure, 1908 — Section, 36, 151, Order 21 Rule 32, Order 39 Rule 2A

Citation : (2023) 01 BOM CK 0106

Hon'ble Judges : Sandeep V. Marne, J

Bench : Single Bench

Advocate : R.M. Haridas, Anilkumar Patil, V.S. Nimbalkar

Final Decision : Allowed

Judgement

Sandeep V. Marne, J

1. Rule, returnable forthwith. With the consent of the Learned Counsels for the parties, called out for final hearing.
2. By this petition, the petitioner challenges the order dated June 30, 2022 passed by the 4th Jt. Civil Judge, Junior Division, Malegaon rejecting petitioners' application for providing police protection to assist them in cultivating the suit land in pursuance of the order of interim injunction passed in his favour.
3. The suit is filed by the petitioners-plaintiffs seeking permanent injunction against the defendants from interfering in their possession over the suit property. In application filed for temporary injunction, the trial Court was pleased to pass the order dated January 7, 2022 temporarily restraining the defendant no.1 from causing any kind of obstruction to the possession of the plaintiffs over the suit property. It is contended that defendant no.1 has filed an Appeal before the District Court challenging the order of temporary injunction. However, it is a common ground that till date, the order trial court dated January 7, 2022 is neither stayed nor varied by the Appellate Court. The order of injunction continues to operate.

4. Petitioners filed application at Exhibit-52 contending that when they approached the suit property on January 8, 2022 for flattening the same with a JCB Machine for cultivation purposes, the defendant no.1 and his accomplice threatened, assaulted and thereby prevented them from entering the suit property. It is further contended in the application that an FIR has been lodged against the defendant no.1, who was arrested. It is further contended that, after being released from custody, defendant no.1 was likely to harass the plaintiffs and further prevent them from cultivating the land. In this background, a prayer was made for police protection for cultivation of the land.

5. The application was resisted by defendant no.1 by filing reply, submitting that the plaintiffs were never in possession of the suit property. That defendant no.1 has constructed a house in the suit property in which his servants reside. It is further contended that on January 8, 2022, the plaintiffs attempted to cause damage to the shed constructed by defendant no.1 by use of JCB machine. That the plaintiffs had arrived at the suit property on January 8, 2022 with goons carrying weapons and the defendant no.1 was threatened and even fired upon. It is contended that on the basis of the FIR lodged by defendant no.1, plaintiffs and their Advocate were arrested and later released on bail. It is further contended that defendant no.1 is in possession of the land admeasuring 10 acres out of the suit property.

6. The trial Court proceeded to reject the application at Exhibit-52 by its order dated June 30, 2022 observing that the petitioner/plaintiff had to first file application under the provisions of Order 39 Rule 2A of the Code of Civil Procedure and solicit assistance of the police and thereupon the Court could exercise powers under Section 151 of the Code of Civil Procedure for giving police protection as a last recourse considering the facts and circumstances of the case.

7. I have heard the learned counsels appearing for the parties at length.

8. The order of temporary injunction granted by the trial Court, breach of which is alleged by Petitioners, reads thus:

"1. Application Exh.05 is allowed.

2. The defendant No.1 and his agents and servants or any persons on his behalf is hereby temporarily restrained from causing any kind of obstruction to the possession of plaintiffs over the suit properties bearing Gat No.153 and 157 (more particularly described in plaint para 1) situated at village Malde, Tal. Malegaon till the decision of main suit."

9. From the contents of the reply filed by defendant no.1 to application is at Exhibit-52, so also the submissions made before me today, it is clear that defendant no.1 is claiming to be in possession of the suit property even today. It is the case of defendant no.1 that there is a shed in the suit property in which servants of defendant no.1 reside. Thus, the factum of defendant no.,1 being in

possession of the suit property even after passing of the order of temporary injunction dated 7 January, 2022, is admitted. These contentions would lead to an inference of violation of order of temporary injunction.

10. However, what is contended on behalf of defendant no.1 is that the order of temporary injunction passed on January 7, 2022 does not envisage eviction of defendant no.1 from the suit property or demolition of his construction therein. I am unable to agree. The order of temporary injunction is passed by recording a finding that the plaintiffs are in lawful possession of the suit property. If there is any error in that finding recorded by the Trial Court, it is for the defendant no. 1 to take necessary steps in that regard. As of today, the order dated January 7, 2022 continues to operate. In the light of this position, it cannot lie in the mouth of defendant no.1 to insist that he can continue to be in lawful possession of the suit property. If he has indeed entered upon the suit property even after injunction order, such a conduct would be in the teeth of the order of temporary injunction dated 7 January, 2022.

11. In the light of such admitted violation of order of temporary injunction dated January 7, 2022, only three issues raised by defendant no.1 need to be addressed. The first contention of defendant no.1 is that, an Appeal challenging the order of temporary injunction dated January 7, 2022 has been filed before the District Court, which is pending and this Court, instead of entertaining the present petition, should direct the Appellate Court to expedite the hearing of the Appeal. Thus, in action initiated against him for breach of order of temporary injunction, defendant No, 1 is expecting a favorable order to have his appeal heard expeditiously. I am afraid, the jurisdiction of this Court cannot be used in terrorem like this, that too by a party who has brazenly breached the order of temporary injunction. It is further sought to be contended that the plaintiffs are avoiding service of notices in the Appeal, on account of which Appeal is not being taken up for hearing. Be that as it may. As of today, the Appellate Court has not set aside or stayed the order of temporary injunction dated January 7, 2022. Mere filing of an appeal against the order of temporary injunction would not act as stay to that order. Also of relevance is the fact that, period of more than one year has elapsed from the date of passing of order of temporary injunction dated January 7, 2022 and apart from mere lodging of appeal, the defendant no.1 has not taken any steps to have his prayer atleast from ad interim stay decided from the Appellate Court. Under the ruse of pendency of appeal, defendant No. 1 would not have a license to violate the order of temporary injunction.

12. The second contention of the learned Counsel appearing for defendant no.1 is that the plaintiff admits filing of an application under the provisions of Order 39 Rule 2A of the Code and since they have an appropriate remedy of seeking appropriate orders under that provision, order of trial Court refusing to exercise power under Section 151 of the Code to give police protection need not be interfered with. Provisions of Order 39 Rule

2A read thus:

“2A. Consequence of disobedience or breach of injunction.

(1) In the case of disobedience of any injunction granted or other order made under rule 1 or rule 2 or breach of any of the terms on which the injunction was granted or the order made, the Court granting the injunction or making the order, or any Court to which the suit or proceeding is transferred, may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in the civil prison for a term not exceeding three months, unless in the meantime the Court directs his release.”

13. True it is that a successful litigant in whose favour order of temporary injunction is granted, has an appropriate remedy under the provision of Order 39 Rule 2A of the Code, in case violation of order of injunction is noticed. However, considering the peculiar facts and circumstances of the present case, which are more particularly dealt with in this order, in my view, mere pendency of application under the provisions of Order 39 Rule 2A, cannot be a reason for this Court, not to interfere in the order passed by the trial Court refusing to provide police protection to ensure compliance with the order of injunction. The second issue raised by the defendant No. 1 is interlinked to the third issue, which is being separately dealt with. It is also required to be noted that, as on the date of passing of the impugned order of the trial Court, such an application under the provisions of Order 39 Rule 2A was not filed. The same has been filed much after passing of the impugned order.

14. The last contention raised on behalf of the learned Counsel appearing for defendant no.1 is that the provision of police protection for enforcement of the order of temporary injunction is an extreme step which a Court should avoid, unless there is an imminent threat. There can be no dispute to this proposition. However, from the pleadings raised by parties in application at Exhibit-52 and reply filed thereto, it is apparently clear that the parties have raised allegations of violence against each other by assaulting each other on January 8, 2022. Both the parties thus admit that some degree of violence did take place on January 8, 2022 after passing of the order of interim injunction dated January 7, 2022. Furthermore, the defendant No. 1 is emphatic in his stand, not only before the trial court but even before this court, that he will continue to remain in possession of the suit property notwithstanding order of temporary injunction operating against him. There are allegations against him of use of force to prevent the plaintiffs from entering upon the suit property. He is brazenly breaching the order of injunction and is expecting that the court should first explore the possibility of granting reliefs to plaintiffs under provisions of Order 39 Rule 2A so as to let him be in possession of suit property in breach of order of injunction.

15. In this connection, in the judgment of this Court in *Nirabai J. Patil vs. Narayan D. Patil*, 2004(1) Mh.L.J. 1058 this Court has held as under:

“5. Section 36 of the code of Civil Procedure (hereinafter referred to as said

Code) provides that the provisions of the said Code relating to execution of decree are also applicable to execution of orders in so far as they are applicable. Under the provisions of Rule 32 or Order XXI, mode is prescribed for execution of decree for injunction. In so far as decree for injunction is concerned, the same can be executed by attachment of property of the person disobeying the decree for injunction or by detention of such person or by both. Rule 2(A) of Order XXXIX of the said Code empowers the Court to penalise the person who has disobeyed the order of temporary injunction. Rule 11 of Order XXXIX of Code of Civil Procedure permits the Court to strike out defence of defendant who commits breach of an order of the Court. The object of all the said provisions is to ensure that the orders passed by the Court of law are implemented and obeyed by all concerned. Section 151 of the said Code saves inherent power to Civil court to make such orders as may be necessary for meeting the ends of justice. Some High Courts have taken a view that under Section 151 of the said Code, Court has power to direct the Police Authorities to give necessary aid for implementation or for enforcing the order of temporary injunction."

8. As observed by this Court in the aforesaid judgment, the grant of police aid is an extreme step and therefore order for grant of police help or police assistance cannot be made unless the Court is fully convinced about the existence of grave emergency such as apprehension of violence by the persons against whom the order has been passed. It is very difficult to give exhaustive list of circumstances in which the Court can exercise the said power. However, said power is to be exercised with caution and the said power can be exercised only after the Court is fully convinced of existence of grave situation warranting exercise of said power."

(emphasis supplied)

16. Thus, in appropriate cases where the Court is fully convinced about existence of grave emergency, such as apprehension of violence by the persons against whom the order has been passed, police protection can be provided for enforcement of an order of injunction under the provisions of Section 151 of the Civil. In the present case, it was specifically pleaded by the plaintiffs in their application that the defendant no.1 caused violence on January 8, 2022 on account of which he came to be arrested. True it is that, a counter-allegation is made by defendant no.1 against the plaintiffs of indulging in similar kind of violence leading to their arrest. Without going into the merits of the allegations made by rival parties, an inescapable conclusion that emerges from the pleadings raised in application at Exhibit-52 and reply filed therein, is that some degree of violence has taken place at the site. In these circumstances, it can safely be inferred that exceptional circumstances do exist where power under Section 151 of providing police protection for enforcement of the order of temporary injunction ought to have been exercised.

17. This Court would have been loath in ordering police protection for enforcement of injunction order. But it is the brazen stand of defendant no, 1

which is worrisome. Far from showing a remorse for his action of continuance in possession contrary to order of injunction, defendant No. 1 continued to justify his action even before this court and demanded that this Court must expediate his appeal rather than considering the petition on merits.

18. From the conduct of the defendant no.1, it appears that he has scant regard to the order of temporary injunction passed by the trial Court on January 7, 2022. It appears that the defendant no.1 carries an impression that, he has the liberties to disobey the order of temporary injunction without any consequences. Considering the peculiar facts of the case, I am of the view that this is a fit case where police protection is required to be provided, in order to enforce the order of temporary injunction dated January 7, 2022 passed by the trial Court. However, this order is being passed in peculiar facts and circumstances of the case and shall not be construed to mean that in every case involving allegations of violation of injunction order, provision of police protection is warranted. Also, it needs to be clarified that observations made in the present order shall not influence the mind of the appellate court while deciding the appeal filed by defendant no. 1 challenging the order of temporary injunction dated January 7, 2022. It will also be open to the defendant No. 1 to make a request to the appellate court for expeditious hearing of the appeal/application for ad interim relief. Plaintiffs/Petitioners shall appear before the appellate court and cooperate for expeditious hearing of proceedings before appellate court.

19. I therefore proceed to pass the following order:

(i) The order dated June 30, 2022 passed by the 4th Jt. Civil Judge, Junior Division, Malegaon below application at Exhibit-52 filed in Regular Civil Suit No. 347/2021 is set aside and plaintiffs' application at Exhibit-52 stands allowed in terms of the prayers made therein.

(ii) The trial Court shall pass necessary consequential orders in order to ensure provision of police protection for enforcement of its order of temporary injunction dated 7 January, 2022.

(iii) The Writ Petition is allowed to the above extent. Rule is made absolute.