

ADRIANA DIONISIO, ET AL., PETITIONERS, VS. JUDGE RODOLFO ORTIZ OF THE REGIONAL TRIAL COURT OF QUEZON CITY, BRANCH 89 AND PABLO TAN GONZAGA, ET AL., RESPONDENTS.

G.R. No. 95738, December 10, 1991

Ponente: GUTIERREZ, JR., J.

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GUTIERREZ, JR., J.:

The controversy in the instant case arose from the private respondents' act of opening a new gate along Howmart Road claiming an easement of right of way in their favor.

The facts are as follows:

The petitioners are co-owners of lots contiguous to each other situated in the Sitio of Kangkong, District of Balintawak, Quezon City.

The private respondents are also co-owners of lots which are adjacent to the lots owned by the petitioners. Lot 272-B has an area of 1,427 sq. m. which was later subdivided into two lots where Lot 272-A was assigned to Chua Lee and Chua Bun Tong pursuant to a memorandum agreement executed by and between them. They are also owners of another lot at the upper portion of Lot 272-B with an area of 914 sq. m.

By virtue of an agreement entered into between the owners of the contiguous lots and the members of the Quezon City Industrial Estates Association (QCIEA), a right of way was granted over Howmart Road which is a private road traversing the contiguous lots owned by the petitioners, among others, in favor of the QCIEA members. In return for its use, QCIEA paid compensation to the petitioners for this right of way. The private respondents are bona fide members of the QCIEA.

In order to have access to Howmart Road, there is a gate in private respondents' 914 sq. m. lot fronting Howmart Road and another gate in Lot 272-A. As a result of the subdivision of Lot 272, the private respondents opened a new gate in Lot 272-B also fronting Howmart Road which is now the gate in question.

On October 5, 1989, under the instructions of Maxima Dionisio, certain persons commenced the digging of four holes in a parallel line and afterwards put up steel posts welded to a steel plate in front of the newly constructed gate of private respondents amidst the latter's protestations. The petitioners claim that the surreptitiously constructed gate opened directly into the house of Maxima Dionisio, exposing them to air and noise pollution arising from the respondents' delivery trucks and service vehicles.

On November 7, 1989, the private respondents instituted a civil action for damages against the petitioners. The complaint sought the immediate issuance of a writ of preliminary injunction ordering the petitioner to remove the barricade erected by them in front of the iron gate.

On January 8, 1990, respondent Judge Ortiz issued an Order granting the writ of preliminary mandatory injunction. The dispositive portion of the order reads:

"ACCORDINGLY, plaintiffs' prayer for the issuance of a writ of preliminary mandatory injunction is GRANTED, and a writ of preliminary mandatory injunction shall issue ordering the defendants to remove the barricade erected by them in front of the iron gate of the plaintiffs at their Lot 272-B, within twenty-four (24) hours from receipt of the writ, and in case of their failure to do so, the plaintiffs are authorized to remove the said barricade by themselves, the expenses for which is chargeable to the defendants, upon plaintiffs' putting up of a bond in the amount of P20,000.00, approved by this Court, and conditioned as provided in the Rules, within five (5) days from receipt of this order." (Rollo, p. 34)

The petitioners then filed a petition for certiorari before the Court of Appeals assailing the Order of Judge Ortiz.

Fifteen days later, the petitioners removed the barricade in front of the gate of the private respondents after they failed to obtain a temporary restraining order (TRO) from the Court of Appeals enjoining the lower court from implementing its order.

The Court of Appeals dismissed the petition on the ground that the issue has already become moot and academic since the petitioners have already complied with the Order of the lower court.

The petitioners' motion for reconsideration was likewise denied.

Hence, this petition alleging that:

"THE HONORABLE COURT OF APPEALS ERRED IN HOLDING THAT PETITIONERS' COMPLIANCE WITH THE ORDER DATED 8 JANUARY 1990 GRANTING THE WRIT OF PRELIMINARY MANDATORY INJUNCTION RENDERS THE PETITION FOR CERTIORARI MOOT AND ACADEMIC CONSIDERING THAT:

1. THE HONORABLE COURT OF APPEALS CAN STILL GRANT PRACTICAL RELIEF TO THE PARTIES BY RECALLING OR LIFTING THE WRIT OF PRELIMINARY MANDATORY INJUNCTION.
2. THE ISSUANCE OF THE WRIT OF PRELIMINARY MANDATORY INJUNCTION SHOULD NOT PREEMPT THE RESOLUTION OF THE PETITION ON THE ISSUE OF THE VALIDITY OF THE ORDER GRANTING THE WRIT." (Rollo, pp. 17-18)

The real issue to be resolved in this case is whether or not the private respondents have an easement of right of way over Howmart Road. Afterwhich it can be determined whether or not the private respondents are entitled to the injunctive relief.

The private respondents' claim that they have every right to use Howmart Road as passageway to EDSA by reason of the fact that public respondents are bonafide members of the QCIEA which has a standing oral contract of easement of right of way with the petitioners. The contract is still subsisting even after its alleged expiration in December, 1988 as evidenced by the two (2) letters signed by Maxima Dionisio and Atty. Telesforo Poblete, counsel for the Dionisio Family addressed to the QCIEA requesting for an increase in the compensation for said right of way. In such a case, it is alleged that the petitioners did not have the right to put the barricade in question in front of the private respondents' gate and stop them from using said gate as passageway to Howmart Road.

There is no question that a right of way was granted in favor of the private respondents over Howmart Road but the records disclose that such right of way expired in December, 1988. The continued use of the easement enjoyed by QCIEA including the private respondents is by the mere tolerance of the owners pending the renegotiation of the terms and conditions of said right of ways. This is precisely shown by the two letters to the QCIEA requesting for an increase in compensation for the use of Howmart Road. Absent an agreement of the parties as to the consideration, among others, no contract of easement of right of way has been validly entered into by the petitioners and QCIEA (see *Robleza v. Court of Appeals*, (74 SCRA 354 [1989])). Thus, the private respondents'

claim of an easement of right of way over Howmart Road has no legal or factual basis.

Not having any right, the private respondents are not entitled to the injunctive relief granted by the lower court.

We have held in several cases that in order to be entitled to an injunctive writ, one must show an unquestionable right over the premises and that such right has been violated. (*Rivera v. IAC*, 169 SCRA 307 [1989]; *Viray v. CA*, 191 SCRA 308 [1990]; *Buayan Cattle Co. Inc. v. Quintillan*, 128 SCRA 276 [1984])

The party applying for preliminary injunction must show that (a) the invasion of the right sought to be protected is material and substantial; (b) the right of complainant is clear and unmistakable; and (c) there is an urgent and paramount necessity for the writ to prevent serious damage. (*Director of Forest Administration v. Fernandez*, 192 SCRA 121 [1990]; *Phil. Virginia Tobacco Administration v. Delos Angeles*, 164 SCRA 543 [1988])

In the case at bar, the private respondents have not shown that there is an urgent and paramount necessity for issuance of the writ.

The records show that there are two (2) gates through which the private respondents may pass to have direct access to EDSA: (1) the northern gate which opens directly to EDSA; and (2) the southern gate along Howmart Road. The records also disclose that the petitioners and the other lot owners previously prohibited and prevented members of QCIEA from opening new gates. The claim that they were forced to open a new gate by reason of the subdivision of Lot 272 where a wall was constructed between these 2 lots is untenable. The private respondents can not assert a right of way when by their own or voluntary act, they themselves have caused the isolation of their property from the access road. Article 649 of Civil Code justifies petitioners' claim, to wit:

"Art. 649. The owner, or any person who by virtue of a real right may cultivate or use any immovable, which is surrounded by other immovables pertaining to other persons and without adequate outlet to a public highway, is entitled to demand a right of way through the neighboring estates, after payment of the proper indemnity.

"Should this easement be established in such a manner that its use may be continuous for all the needs of the dominant estate, establishing a permanent passage, the indemnity shall consist of the value of the land occupied and the amount of the damage caused to the servient estate.

"In case the right of way is limited to the necessary passage for the cultivation of the estate surrounded by others and for the gathering of its crops through the servient estate without a permanent way, the indemnity shall consist in the payment of the damage caused by such encumbrance.

"This easement is not compulsory if the isolation of the immovable is due to the proprietor's own acts. (564a)
(Underlining Supplied)

The construction of a wall between the 2 lots leaving only a small passageway between them is an act imputable to the private respondents which precludes them from asserting a right of way. The opening of the new gate would definitely be very convenient to the private respondents but mere convenience is not enough to serve as basis for the assertion of a right of way. (see *Ramos, Sr. v. Gatchalian Realty, Inc.*, 154 SCRA 703 [1987])

It was therefore inaccurate for the lower court to state that the private respondents have shown a clear right to justify the issuance of the writ of preliminary injunction when the facts and circumstances of the case do not warrant it. In such a case, certiorari will lie to correct the abuse of discretion committed by the lower court. (*Maguan v. Court of Appeals*, 146 SCRA 107 [1986]). Such task was incumbent upon the Court of Appeals when the petitioners filed their petition for certiorari before it questioning the propriety of the Order of the lower court. The respondent Court, however, dismissed the petition on the ground that the issue was already moot and academic upon the petitioners' compliance with the Order of the respondent Judge.

The fact that the barricade constructed by the petitioners was already removed upon the issuance of the questioned preliminary injunction does not make the petition moot and academic as ruled by the Court of Appeals. The granting of the writ and the subsequent compliance should not preempt the determination of the issue brought before it. The validity of the Order was precisely the subject of the petition for certiorari. As aptly explained in the case of *Anglo-Fil Trading Corporation v. Lazaro*, 124 SCRA 494 [1983]:

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"The petitioners' contention that the lifting of the restraining order had rendered moot and academic the injunction case in the trial court is likewise untenable. A restraining order is distinguished from an injunction in that it is intended as a restraint on the defendant until the propriety of granting an injunction *pendente lite* can be determined, and it goes no further than to preserve the status quo until such determination. Therefore, the grant, denial, or lifting of a restraining order does not in anyway pre-empt the court's power to decide the issue in the main action which in the case at bar, is the injunction suit. In fact, the records will show that the trial court proceeded with the main suit for injunction after the lifting of the restraining orders." (At p. 512)

The Court of Appeals has the power to recall or lift the writ of preliminary mandatory injunction so issued if it finds that the party is not so entitled. However, in dismissing the petition the court, in effect affirmed the lower court's finding that the private respondents were indeed entitled to the writ of preliminary injunction. But as we have earlier found, the private respondents are not entitled to the injunctive relief considering that they have no clear right over Howmart Road.

WHEREFORE, the petition is hereby GRANTED. The questioned decision of the Court of Appeals and the Order of the Regional Trial Court in Civil Case No. Q-89-3949 are SET ASIDE. The writ of preliminary injunction is hereby LIFTED.

SO ORDERED.

Bidin, Davide, Jr., and Romero, JJ., concur.

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