

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.600 OF 2014

Joy Auto Works, Mumbai and Ors.	 Appellants
<i>V/s.</i>	
Sumer Builders Pvt. Ltd., Fort, Mumbai & Anr.	 Respondents

ALONG WITH

CIVIL APPLICATION NO.512 OF 2017
IN
APPEAL FROM ORDER NO.600 OF 2014

Sumer Builders Pvt. Ltd., Fort, Mumbai	 Applicant
<i>In the matter between</i>	
Joy Auto Works, Mumbai and Ors.	 Appellants
<i>V/s.</i>	
Sumer Builders Pvt. Ltd., Fort, Mumbai & Anr.	 Respondents

Mr. Cherin N. Lapashiya, I/by M/s. Niranjan & Co., for Appellant Nos.1(a) to 1(c) and 2.

Mr. Ram Apte, Senior Counsel, a/w. Mrs. Madhuri More, for Respondent No.2-MCGM.

Mr. Prasad Dani, Senior Counsel, a/w. Ms. Yasmin Bhansali and Kahmish Khan, I/by M/s. Yasmin Bhansali & Co., for the Applicant in CAA/512/2017.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

DATE : 12TH OCTOBER, 2018.

P.C. :

1. Heard Mr. Lapashiya, learned counsel for Appellant Nos.1 and 2; Mr. Dani, learned Senior Counsel for Respondent No.1; and Mr. Apte, learned Senior Counsel for Respondent No.2-Municipal Corporation.

2. This 'Appeal from Order' takes an exception to the order dated 19th March 2014, passed by the City Civil Court, Mumbai, thereby allowing the Notice of Motion No.1685 of 2012 filed in L.C. Suit No.5570 of 2005 in terms of prayer clause (b). The said Notice of Motion was taken out by Respondent No.1 herein, seeking following reliefs :-

- “(a) that this Hon'ble Court be pleased to appoint, at the costs of the Defendant No.1, a Court Commissioner being Officer of this Hon'ble Court to visit the site shown as a Road and shaded in brown colour on the plan annexed at Exhibit-A hereto and to submit a report to this Hon'ble Court giving a detailed account, whether a motorable road has been constructed by the Defendant No.2 adjacent to F.P. No.878 giving a motorable access to F.P. 878 of TPS-IV, Mahim;*
- (b) On the report of the Court Commissioner stating that the road shown in blue on the plan at Exhibit-A has been constructed by the Defendant No.2 and is a motorable road, then, pursuant to Clause 29 of the Order dated 2nd April 2009 passed by the Hon'ble Supreme Court of India in SLP(C) No.1868 of 2008 filed by the Plaintiff as Appellant therein, the order permitting a motorable access to the Plaintiffs through FP 879 till 40 ft. D.P. Road abutting FP 878, be revoked in view of the construction of motorable 40 ft. D.P. Road and this Hon'ble Court do further order that the Plaintiffs be restrained from using motorable access from FP 879 to reach FP 878.”*

3. Thus, this Notice of Motion raises the dispute as to '*whether there is an existing 40 feet wide D.P. Road or the motorable access road?*' As

the entire dispute is revolving around this issue only, this Court was, by its order dated 19th September 2018, pleased to hold that, in order to verify whether there is motorable access to the property of Appellants and whether the construction of 40 ft. wide D.P. Road is complete, existing situation at site was required to be brought on record. Hence, the direction was given to the Respondent-Municipal Corporation to file affidavit of its concerned officer to bring on record the present situation. This direction was given considering that, in the earlier affidavit of Mr. Sanjay Vishwanath Joshi, the Officer of the Respondent-Municipal Corporation, which was filed in the 'Contempt Petition' before the Trial Court, it was seen that the construction of 40 ft. wide D.P. Road under the 'Town Planning Scheme' has been completed, except for removal of structure in Suit No.707 of 2011 and the minor encumbrances. Moreover, the said affidavit was filed in the year 2013 and hence, it was found desirable to have on record the present situation as to the existence of the motorable access road and about removal of the structure and other encumbrances, if any, and whether the construction of 40 ft. wide D.P. Road is complete or not.

4. In pursuance thereof, today, the affidavit of Mr. Harish Chavan, who is working as Sub-Engineer, Town Planning Department, G/North Ward Office of the Respondent-Municipal Corporation, is filed on record. In his affidavit, he has categorically stated as follows :-

“I say that Defendant No.2, i.e. M.C.G.M., has constructed 40 feet wide D.P. Road under the Town Planning Scheme, which is adjacent to FP 878 OF TPS – IV Mahim. This road gives motorable access to FP 878 of TPS-IV Mahim. The road starts from S.K. Bole Road to Acharya Rao Saheb N.M. Kale Marg. It is known as Purushottam Gulli, Opposite S.K. Bole Road. I say that, this is 40 feet wide D.P. Road. It has footpath on both sides of the road. I say that, there are Street Light Poles existing on the said road. This road is maintained by MCGM.”

5. This part of his affidavit clearly goes to show that, there is actually 40 ft. wide D.P. Road in existence and it is being maintained by the Respondent-Municipal Corporation.

6. Paragraph No.3 of his affidavit deals with the status of the structure, which was the subject-matter of the B.C.C. Suit No.706 of 2011. His own words can be reproduced as follows :-

“I say that, the Suit has been filed by Nataline Peter Fernandis with respect to 'Notice' dated 5th March 2011, which was issued by Defendant No.2. I say that, the structure, which is subject-matter of Suit No.706 of 2011 is a Room No.14A in Calcuttawala Chawl, situated on FP 881, Off S.K. Bole Road, Agarbazar, Dadar (West), Mumbai – 28. I say that, the Hon'ble City Civil Court at Bombay has given an interim protection by its order dated 12th March 2011 to the structure on FP 881. I say that the FP 881 is beyond the FP 878. I say that, for motorable access to FP 878, there is no encumbrance on the footpath or road. I say that the owners of FP 878 have a clear motorable access to their plot

from the 40 feet D.P. Road, abutting FP 878 of TPS - IV Mahim.”

7. In paragraph No.4 of the affidavit, he has further stated that,

“The Appellant, who is occupying FP 878, has put up gates on the 40 feet D.P. Road, abutting its property and is using the D.P. Road for motorable access to its property.”

8. Along with the affidavit, he has also produced on record the photographs to show that, 40 ft. wide D.P. Road is abutting FP 878 and the gates put up by the Appellants, through which Appellants' motorable access to his property is from the 40 ft. wide D.P. Road.

9. The Appellants have contested this affidavit of the Sub-Engineer by filing the affidavit-in-rejoinder, contending that, there is no such D.P. Road in existence. However, the photographs produced on record by the Appellants themselves clearly go to prove the existence of the motorable access road, as several four wheelers, cars can be seen on the said road. Hence, it can hardly be accepted that, no such motorable access road is in existence. Even if the Appellants are contesting the affidavit filed by the Respondent-Municipal Corporation, at this stage, the said affidavit needs to be relied upon, to negative the case of the Appellants. At the interim stage, this Court cannot go beyond the same, especially having regard to the photographs, which are produced on record.

10. This Appeal, therefore, being without merits, stands dismissed.

11. Learned counsel for the Appellants, at this stage, seeks extension of the order of ad-interim relief, which is running in this case. However, in view of the above-said findings and observations made by this Court, no such case is made out for extension of the ad-interim relief. Hence, this request stands rejected.

12. In view of the dismissal of the Appeal, Civil Application No.512 of 2017 does not survive and the same stands disposed off as infructuous.

[DR. SHALINI PHANSALKAR-JOSHI, J.]