

SUPREME COURT OF INDIA

Joy Auto Works

Sumer Builders (P) Ltd.

C.A.No.2131_____of 2009

(Altamas Kabir and Dr.M.K.Sharma JJ.)

02.04.2009

JUDGEMENT

Altamas Kabir, J.

1. Leave granted.

2. One Khatau Bhanji (hereinafter referred to as 'Bhanji') was said to be the owner of Original Plot No.227 measuring 4874.95 sq. yards within the city of Mumbai. The Arbitrator appointed under the *Maharashtra Regional and Town Planning Act, 1966* (hereinafter referred to as the '1966 Act') passed an Award on 24.2.1962 in respect of the said plot and Original Plot No.231 owned by one Javle. In terms of the Award, Javle lost all his rights to Original Plot No.231 while Original Plot No. 227 was divided into plot No. 878 (1000 sq. yards), plot No.879 (3647 sq. yds.) and plot No. 877. By virtue of the said Award, Bhanji was given Final Plot No. 879 measuring 3647 square yards in lieu of Original Plot No.227, while Javle was given plot No.878 measuring 1000 square yards in lieu of Original Plot No.231, and Plot No.877 was earmarked for the construction of a 40 feet Development Plan Road (hereinafter referred to as 'DP Road').

3. The appellants herein claimed that they had been granted lease of 1305 sq. yards. out of plot No.879 on 20.10.1962 by Bhanji, which was contiguous to plot No.878, which was also under the occupation of the appellants.

“The appellant No.1 claims to have been running an automobile garage and carrying on other connected activities on the said properties since 1979 and in connection with the business it had two motorable accesses to plot No.878 through the portion of plot No.879 demised in favour of the appellant by Bhanji, for egress and ingress to and from the public road. According to the appellants there was no other motorable access either to plot No.878 or the portion of the plot No.879 under the occupation of the appellants.”

4. According to the appellants in an attempt to have them evicted from plot No.878 Javle complained to the Bombay Municipal Corporation that the said plot was being used by the appellants for commercial purposes although in the Development Plan the same had been

earmarked for residential purposes. On such complaint notices were issued for removal of the structures in which such commercial activities were being carried out. Ultimately, however, plot No.878 was purchased by the appellants from Javle and no further steps were taken by the Bombay Municipal Corporation pursuant to the said notices.

5. In the meantime, the respondent No.1 acquired Bhanji's interest in the remaining portion of plot No.879 and began obstructing the use of the motorable access from the public road to plot Nos.879 and 878.

“Accordingly, on 11.6.2005 the appellants wrote to the respondent No.1 informing it of their right in Final Plot No.878 and the portion of Final Plot No.879 under their occupation together with the two access roads. Since despite the said letter the respondent No.1 brought two iron gates and building-material to block the entrance to 5 plot Nos.878 and 879 from the public road, the appellant No.2 and the original plaintiff-Mulji Shah were compelled to file L.C. Suit No.5570 of 2005 in the City Civil Court at Bombay for perpetual injunction and by Notice of Motion prayed for an injunction to restrain the respondent from obstructing or interfering with the use, occupation and possession of plot No.878 and plot No.879 to the extent of 1305 sq. yards together with the structures thereupon with motorable access to and from the public road through plot No.879. The appellants prayed for an injunction to restrain the respondents from constructing or placing any gates upon plot No.879, pending the hearing and final disposal of the suit and also to restrain the defendant No.2, the Bombay Municipal Corporation, from approving any plans for construction of a boundary wall or gates on plot No.879, which would obstruct the free and full use of the two accesses by the appellants from the public road.”

6. Considering the facts indicated hereinabove the Trial Court initially granted an ad- interim injunction against the respondent No.1 on 23.12.2005. Upon notices being served the respondents contested the claim and respondent No.1 contended that he had acquired the ownership of Final Plot No. 879 measuring 3043.50 sq. yards by a Deed of Conveyance executed in his favour on 20.12.2004.

7. When the Notice of Motion was taken up for hearing the Respondent No.1 contended that in terms of the Town Planning Scheme-IV (TPS-IV) there is a 40 feet wide D.P. Road abutting plot No.878 through which the appellants have a right of passage.

“According to the respondents the appellants have a right of passage from plot No.878 7 only from the D.P. Road and at no point of time had they enjoyed any right of passage through the property of the respondent No.1, nor have they established any prescriptive right or an easementary right of necessity so as to attract the provisions of Sections 13, 19 and 41 of the *Indian Easement Act, 1882.*”

8. After hearing the parties on the Notice of Motion the Trial Court rejected the claim of the appellants regarding the two access points through plot No.879 but allowed the appellants to

use one of the two access passages, referred to as Access No.2, to reach their plot from the public road. Such access was, however, denied for the use of vehicles.

9. While passing the aforesaid order, the Trial Court took note of the fact that Mr. Javle, the vendor of Appellant No.2 had by Writ Petition No.1667 of 1984 sought a direction upon the Bombay Municipal Corporation to remove the hutments on the land abutting Final Plot No. 878 which had been set aside for a 40 feet wide D.P. Road and to construct the said road expeditiously. The said writ petition was withdrawn on 7.8.1984 purportedly in view of the statement made by the Bombay Municipal Corporation that action would immediately be taken under the 1966 Act and that the demolition of encroachments, which was preventing the construction of the road, would be carried out in accordance with law. A Notice issued by the Bombay Municipal Corporation on 8.8.1984 to that effect, was challenged by one Arun Sales, a licensee of the Appellant No.1, who filed L.C. Suit No. 5822 of 1984 against the Bombay Municipal Corporation challenging the said notice. Ultimately, the Notice of Motion taken out in the suit was dismissed and the suit itself came to be disposed of in view of a settlement between the appellants and some members of the Javle family whereby the appellant No.2 acquired Final Plot No.878 from the Javle family.

10. In the appeal preferred by the appellants herein the appeal Court accepted the position that the Original Plot No.227 had been divided into Final Plot No.879 measuring 3043.50 sq. yards and Final Plot No.878 which belong to appellant No.2 in respect whereof there is no dispute.

“However, the appeal Court also came to a finding that there was no material on record to show that the appellants had ever exercised any right of access through Final Plot No.879 belonging to the respondent No.1 and when the appellant No.2 purchased Final Plot No.878 under TPS-IV it was clearly understood that in order to approach the said plot she would have a right of passage through the proposed 40 feet wide D.P. Road provided under the Scheme. As a result, the appellant No.2 could claim a right of passage to and from plot No. 878 against the Bombay Municipal Corporation only through the proposed D.P. Road. Furthermore, the Appellant No.1 being the husband of the Appellant No.2 and since the structure on Final Plot No.879 was contiguous to Final Plot No.878, he could also claim right of passage from the said D.P. Road. The appeal Court held that merely because the Bombay Municipal Corporation had failed to discharge its duties in providing a road and passage to the appellants the appellants could not claim such a right through property belonging to others and thereby create obstructions in their use of the property. The appeal Court, accordingly chose not to interfere with the limited relief granted by the trial Court and dismissed the appeal.”

11. It is the said order of the Appeal Court dated 12.12.2007 which is the subject matter of challenge in the present appeal.

12. Appearing in support of the appeal Mr. C.A. Sundaram, learned Senior Counsel emphasized the fact that in the absence of any other access to Final plot No.878 or the

portion of plot No. 879 the only means of access for over 35 years had been through plot No.879 which formed part of the Original Plot No.227 which was sub-divided into plot Nos.878, 879 and 877. Mr. Sundaram also submitted that the 40 feet wide D.P. Road, indicated in the Development Plan under TPS- IV, was only in contemplation when the Award was passed by the Arbitrator under the 1966 Act and on account of the various encroachments and obstructions the said road has never been constructed. This, in fact, had prompted Javle to file a Writ Petition for a direction upon the Bombay Municipal Corporation to remove the said encroachments and constructions and to take up the construction of the road immediately. Mr. Sundaram submitted that in the absence of any actual road adjacent to plot No.878, the owner thereof had access to her land only through plot No.879. Mr. Sundaram contended that only after the respondent No.1 had acquired the ownership of plot No.879 in 2004 that such right was attempted to be disturbed by the Respondent No.1 by threatening to put up a boundary wall and an iron gate to prevent the use of such passage which was being used for more than 35 years.

13. Mr. Sundaram submitted that though the Special Leave Petition had been filed against an interim order it had become necessary to do so since the only means of egress and ingress to and from plot No.878 and the portion of plot No.879 under the possession of appellant No.1 would be completely obstructed, if the respondents were not restrained from obstructing the motorable access to the said plots which the appellants had been enjoying for over 35 years. Mr. Sundaram urged that the Courts below had wrongly relied on only a proposal for the construction of a 40 feet wide D.P. Road adjacent to plot No. 878 in passing a limited interim order without ascertaining whether such road had actually been constructed and was in existence. Mr. Sundaram also submitted that both the Courts below had lost sight of the fact that plot No.878 and the portion of plot No.879 under the occupation of the appellants was completely land-locked since the construction of the 40 feet wide D.P. Road next to plot No.878 was still in the realm of planning and had not yet been executed.

In other words, the appellants had no access to their portion of the plots under their occupation except through plot No. 879.

14. Mr. Sundaram's submissions were strongly opposed by Mr. Dushyant Dave, learned Senior Counsel appearing for respondent No.1. He strenuously urged that the appellants never had any right of passage through plot No.879 and their access to plot No.878 and the portion of plot No.879 under their occupation was from the 40 feet wide D.P. Road which was adjacent to plot No.878. Mr. Dave also urged at the outset that the Special Leave Petition was not maintainable since it was directed against the orders passed in an interlocutory application in which concurrent findings of fact had been arrived at.

15. Mr. Dave then contended that, in any event, since plot No. 878 and the portion of plot No.879 under the occupation of the appellants had been earmarked in the Master Plan for residential purposes under no circumstances could the appellants be permitted under the provisions of the 1966 Act to continue with commercial activities thereupon.

16. Mr. Dave also contended that it is for the very same reason that a complaint had been made by Javle and notices had been issued thereupon by the Bombay Municipal Corporation to the appellants to remove the structures which were being used for such commercial purposes.

17. From the site plan which had been made Exh. `A' in the suit, Mr. Dave pointed out that the claim of the appellants to a right of motorable access through plot No.879 renders the said plot unfit for any use by the respondent No.1 and that in the earlier suits the appellants have never asserted such right.

18. Mr. Dave submitted that while disposing of the Notice of Motion dated 11.9.1975, the learned Trial Court noticed the fact that after obtaining an ad-interim order of injunction, the appellants had tried to convert the temporary structures on the plots in question into a permanent ones. Mr. Dave also submitted that while dismissing the Notice of Motion, the High Court also took into consideration the Town Planning Scheme No.IV, Mahim, which came into force on 15th August, 1963, whereunder the Final Plot allotted to Bhanji and Javle could not be used for commercial purposes and that accordingly the appellants were not entitled to an order of injunction which would have the effect of altering the said Scheme and the use of the plots earmarked for particular purposes.

19. On behalf of the Bombay Municipal Corporation it was submitted by Mr. Shekhar Naphade, learned Senior Counsel, that in the Development Scheme conceived by the Planning Authority different plots had been earmarked for different purposes. Mr. Naphade urged that under the TPS-IV Scheme certain Final Plots which had been identified for industrial purposes could be used for such purposes only. Similarly, except the plots which had been allotted for `public purposes' the remaining plots could be used for residential purposes and Final Plot Nos. 878 and 879 fell within the ambit of paragraph 1(n) of TPS-IV and could be used for residential purposes only. Mr. Naphade submitted that the appellants had been offered an alternative plot of land measuring 500 sq. yards at Powell Land Industrial Estate, Kondivili, Bombay, but such offer had been turned down by the appellants.

20. Ultimately, on the complaint made by Javle, the appellants were issued notices under Sections 89 and 90 of the 1966 Act to remove the structures from the plots in question and also for the eviction of the appellants therefrom.

21. Mr. Naphade submitted that upon service of the said notices, the appellants filed Suit No.6544 of 1975 in the City Civil Court at Bombay, inter alia, for a declaration that the Final Scheme viz. TPS-IV was not binding on the appellants and that the said notices under Sections 89 and 90 of the said Act were illegal and void and had no effect in law. In the said suit, the appellants took out a Notice of Motion for an ad-interim order of injunction to restrain the Bombay Municipal Corporation from demolishing the structures which had been put up in Final Plot No.878 and a part of Final Plot No.879. Ultimately, as indicated hereinabove, the Notice of Motion was dismissed and the appeal taken against the said order was withdrawn by Mulji Shah on 1st August, 1977.

Subsequently, on 29th September, 1977, Mulji Shah filed another suit in the City Civil Court in Bombay, being Suit No.7540 of 1977, in which an ex-parte ad-interim order was passed restraining the Bombay Municipal Corporation from removing him from the Final Plot No.878 and a part of Final Plot No.879 and from removing the structures thereupon in any manner. The said Notice of Motion came up for hearing in 1979 and was dismissed for default and the ad-interim injunction was vacated.

22. Mr. Naphade also submitted that thereafter Dr. K.V. Javle filed Writ Petition No.1667 of 1984 and prayed for a Mandamus upon the Bombay Municipal Corporation and its officers to carry out their statutory obligations under the 1966 Act and the rules framed thereunder and in particular to give effect to the TPS-IV, Mahim, by directing the said authorities to remove all the structures, temporary or otherwise, from Final Plot No.878 and to direct the authorities of the Bombay Municipal Corporation to hand over and deliver vacant possession of the said plot measuring 1000 sq. yards and for a further direction on the said respondents to construct the DP road adjoining Final Plot No.878. Mr. Naphade pointed out that on the assurance given on behalf of the Bombay Municipal Corporation and its authorities that notice for demolition would be issued under Sections 89 and 90 of the 1966 Act and served within two weeks and demolition will be carried out as prescribed in law, the writ petition was allowed to be withdrawn by order dated 7th August, 1984.

23. Mr. Naphade submitted that in 1984 a fresh notice was given to the appellants for removal of the structures on the plots in question. Thereafter, as mentioned hereinabove, Arun Sales, a licensee of the Appellant No.1, filed L.C. Suit No.5822 of 1984 against the Bombay Municipal Corporation challenging the notice dated 8th August, 1984, and obtained interim orders which were subsequently vacated.

24. Mr. Naphade contended that the structures raised by the appellants were not in conformity with the Town Planning Scheme though in the suit filed by the appellants an attempt has been made to make out a case that since the 40 feet wide DP Road had not yet been constructed by the Corporation, it should not permit any new construction on Final Plot No.879 so as to block the only access available over the said plot to Plot No.878. Mr. Naphade submitted that such a case was against the provisions of the Town Planning Scheme and taking advantage of an order of injunction, the appellants could not be allowed to continue to use plot No.878 and the portion of plot No.879 in their occupation for commercial purposes.

25. Mr. Naphade submitted that the learned Trial Judge had, while denying motorable access through plot No.879, allowed access otherwise to the appellants from the main road to the premises under their occupation.

26. Since the appellants have come up against the refusal of the High Court to grant their interim prayer to have motorable access to plot No.878 and a portion of plot No.879 under their possession from the main road through plot No.879 during the pendency of the suit, we can only consider the case of the parties on a prima facie basis, inasmuch as, the suit is yet to

be decided on merits. The case being argued on behalf of the appellants, may not ultimately be dependent upon whether the appellants run any commercial venture on plot No.878 and the portion of plot No.879 under their possession, but the question of such a right of passage may ultimately be relevant if it is established that there is no other access to the said premises. Accordingly, having regard to Exh.A in the suit, which is a site plan which has been referred to as Exh.C in the paper book at page 120, some provision has to be made even at the interim stage to preserve a motorable access from the main road to the premises under the occupation of the appellants so that upon development of plot No.879 such a right is not totally extinguished. While the Trial Court has allowed access on foot from the main road to the said premises, in our view, a motorable access should be preserved at least till the 40 feet wide DP road adjacent to plot No.878 is available to the appellants for egress and ingress from their portion of the premises, which is otherwise land-locked, on till the disposal of the suit.

27. It would not be appropriate on our part to make any observation on the merits of the case of the parties since the same is yet to be decided. We are only required to ensure the balance of convenience and inconvenience and the equities between the parties at this stage. We are also required to consider if any of the parties will suffer irreparable loss and injury unless an interim order, as prayed for by the appellants, is allowed or denied. This is not one of those cases where the appellants may be suitably compensated by damages in case their suit succeeds.

28. Having considered the submissions advanced on behalf of the respective parties, including that of the Bombay Municipal Corporation, we are of the view that ad- interim protection, as prayed for by the appellants, should be given in the facts and circumstances of the case.

29. We, therefore, direct that the appellants/ plaintiffs will be entitled to a motorable access from the main road to Plot No.878 through Plot No.879 and the portion of Plot No.879 in their possession either till the disposal of the suit or till the construction of the 40 feet wide D.P. Road running adjacent to Final Plot No.878 by the Bombay Municipal Corporation in terms of the assurance given by it on 7th August, 1984, in Writ Petition No.1667 of 1984 and also in terms of the directions given in Writ Petition No.2443 of 2006 filed by the Respondent No.1 before the Bombay High Court, whichever is earlier. However, once the said 40 feet wide D.P. Road is constructed by the Bombay Municipal Corporation, giving clear motorable access to Plot No.878, the Respondent No.1 should no longer be deprived of the full enjoyment of its property and will be entitled to move the Trial Court to get the right of way through Plot No.879 granted by this order revoked and this order will not stand in the way of such an order being passed by the Trial Court, if it is satisfied that sufficient motorable access is available to the appellants on account of construction of the 40 feet wide D.P. Road. We also make it clear that the right of motorable access to Plot No.878 through Plot No.879 granted by this order to the appellants will not preclude the Bombay Municipal Corporation from taking any action as it may be entitled to under the 1966 Act or other relevant enactments in relation to the Town Planning Scheme No.IV, Mahim. Furthermore, subject to any order to the contrary that may have been passed in any other proceeding,

the Bombay Municipal Corporation must implement the assurance given by it on 7th August, 1984, when the Writ Petition No.1667 of 1984 was permitted to be withdrawn, regarding construction of the 40 feet wide D.P. Road adjacent to Final Plot No.878, with utmost expedition.

30. We, therefore, allow the appeal to the extent indicated hereinabove.

31. There will be no order as to costs.