

IN THE BOMBAY CITY CIVIL COURT AT BOMBAY

NOTICE OF MOTION NO.1565 of 2010

IN

L.C.SUIT NO.5570 OF 2005

1. M/s. Joy Auto Works
through Proprietor Mr.Mulji
Umarshi Shah, carrying on
Business at 35, A-B, S.K.Bole Marg,
Old Prabhadevi Road, Near Agar Bazar,
Dadar, Mumbai 400 028.
- 1(A) Mukesh Mulji Shah
- 1(B) Kiran Kulji Shah
- 1(C) Jayshree Mulji Shah
All adults, Indian Inhabitant,
Residing at 5, Saras Baug,
Sion Trombay Road, Deonar,
Mumbai – 400 088.
2. Mrs.Prabhavanti Mulji Shah
An Adult aged about 61 years
Indian Inhabitant having residing
At 5, Saras Baug,
Sion Trombay Road, Deonar,
Mumbai – 400 088. Plaintiffs

V/s.

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1. Sumer Builders Private Limited
A Company having its office at
220, Commerce House, 140,
Nagindas Master Road, Fort,
Mumbai 400 023. ... Defendant No.1
2. Municipal Corporation for Greater Bombay
Through "G" North Ward,
having office at Mahapalika Marg,
Mumbai 400 001. ... Defendants No.2

Advocate Mr.Niranjan for the plaintiffs.

Advocate Mr. Dalal, for defendant No.1.

Advocate Mr. Chhabriya, for defendant No.2.

CORAM: HIS HONOUR JUDGE
SHRI S.P.KULKARNI
(Court Room No.23)

DATE: 28th September, 2010.

ORAL ORDER

1. The present notice of motion has been moved by
defendant No.1 for stay of instant suit till hearing and final

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disposal of OOCJ Contempt Petition No.79/09 filed by defendant No.1 against plaintiff and defendant No.2 before Honourable High Court.

2. It is the case of defendant No.1 that the two plots in question i.e. FP 878 and FP 879 are involved in this suit. Originally the defendant No.1's Predecessors property was CS 1218 and on introduction of Town Planning Scheme, the plot was given OP No.227. The plot admeasured 4874.85 sq.yards. Thereafter on implementation of Town Planning Scheme IV, Mahim, the original plot No.227 became Final Plot No.878 (1000 sq.yards) and Final Plot No.879 (3600 sq.yards) and a part of original plot was proposed under DP Road. The Final Plot No.878 touches proposed 40 ft. wide DP Road. Pursuant to the award of the Arbitrator Final Plot No.878 admeasuring 1000 sq.yards was allotted to Dr.Moreshwar Javale and Mr.Vinayak Javale in lieu of Original Plot No.231 admeasuring 1617 sq.yards described under CS No.1223, Dadar. The property being Final Plot No.879 admeasuring 3043.50

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sq.meters was allotted to the Predecessor of defendant No.1. Defendant No.1 purchased the Final Plot No.879 under the Indenture of Conveyance dated 28/12/2004. When defendant No.1 tried to put two gates at the entrance of the property, Mr.Mulji Shah, i.e. defendant No.1 filed BCCC Suit No. 5570/05 against present defendant No.1 on the ground that it restricts access to his property FP 878. Ad-interim relief in terms of prayer clause (a) was granted in notice of motion No. 4901/05 to the plaintiff and it came to be disposed off by this Court on 23/12/2005 by modifying ad-interim order. The plaintiff was permitted only pedestrian access from access 1 shown in the plan at Ex.A/A-1. The plaintiff Mr.Mulji Shah preferred Appeal No.432/06 before the Honourable High Court and it came to be dismissed by order dated 12/12/2007. Thereafter plaintiff Mr.Mulji Shah filed SLP (C) 1868/08 before Honourable Supreme Court. The Honourable Supreme Court in its order dated 02/04/2009 observed that the motorable access from access 1 should be preserved till 40 ft. wide DP Road adjacent to plot 878 became available to

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plaintiff Mr.Mulji Shah for ingress and egress. The Honourable Supreme Court therefore directed that the said road is available only till construction of 40 ft. wide DP Road in terms of assurance given by Municipal Corporation of Greater Mumbai in order dated 07/08/1984 passed in Writ Petition No. 1667/84 and/or directions in Writ Petition No.2443/06 wide order dated 14/02/2008. By the said order it was further stated by Honourable Court that 40 ft. wide DP Road was available giving motorable access to FP 878. Defendant No.1 herein would not be deprived of enjoyment of its property and would be entitled to move trial Court to revoke the right of way through defendant No.1's FP 879 granted by Order of Honourable Supreme Court of India. It was further stated that the order of Honourable Supreme Court would not stand in the way of any order being passed by the Trial Court.

Defendant No.1 filed Writ Petition No.2443/06 for issue of Writ of Mandamus, directing respondent Bombay Municipal Corporation to implement Town Planning Scheme by developing the proposed road shown in green line

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on the plan Ex.E in the petition and for removal of the contravening structure on defendant No.1's Plot FP 879. The Writ Petition was disposed off by order dated 14/02/2008 with necessary directions to the Corporation to take immediate step to implement the Town Planning Scheme. Due to inaction on the part of authorities to implement the construction of DP Road and to remove contravening structure defendant No.1 filed Contempt Petition No.57/08 for implementation of scheme and construction of DP Road. The authorities were directed to appear before the Court to make statement about the status of the road. By an order dated 26/03/2009 passed in Contempt Petition No.57/08 it was noted that out of 69 hutments/structures on the proposed DP Road, 30 structures were demolished. The Honourable High Court directed Chief Engineer (Development Plan) to file his affidavit. Pursuant to the order the officer filed his affidavit and stated that out of these 50 eligible occupants, 22 eligible occupants have already been shifted by M/s Sanjeevani Developers and these structures as well as 8 non-eligible structures have been

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removed by the Corporation. It is also stated that the Corporation has also removed contravening structure standing on FP 879. Sub-Engineer Town Planning (Implementation), Mr.Dhondiram Patil, in his affidavit dated 01/04/2009 filed in Contempt Petition No.57/08 in paragraph No.3 stated that the structures abutting FP 878 have been removed and motorable access has been made available to the plot.

3. The Honourable High Court on 23/04/2009 directed the authorities to visit FP 879, 879 and DP Road and survey the property and also to hand over possession of FP 879 to defendant No.1. In pursuance to the order dated 23/04/2009 in Contempt Petition No.57/08, the Assistant Municipal Commissioner (G-North Ward) on 04/05/2009 visited the property owned by the defendant. The Assistant Municipal Commissioner (G-North Ward) was shown that the plaintiffs have put up barbed wire fencing of tin sheets blocking entire area reserved for proposed 40 ft. DP Road abutting the Final

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Plot No.878. Defendant No.1 through their lawyer's letter dated 04/05/2009 addressed to the Advocate for plaintiff informed that the plaintiffs have encroached upon DP Road. The said letter was not replied. Thereafter on or after 04/05/2009 officers of BMC removed the tin sheets put up by plaintiffs on the proposed DP Road. The Contempt Petition No.57/08 came to be disposed off by the Honourable High Court by an order dated 0705/2009 wherein the BMC made statement that encroachment on the entire DP Road was shifted, save and except some loose live electrical wires. However after removal of encroachment of plaintiffs on DP Road, the plaintiffs had again sought to encroach on the road by putting tin sheets across the road and usurping the road into their FP 878. Defendant No.1 intimated this fact to the Joint Commissioner of Police and senior Police Officials by filing complaint against plaintiff. Similarly by letter dated 12/05/2009 the officers of BMC were intimated that plaintiffs have again put up tin sheets across the road, which obstructed the entry or exit beyond FP 878. In the meanwhile

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the site survey was carried out on 20/05/2009 and on 22/05/2009 by the office of City Survey to demarcate FP 878, FP 879 and DP Road.

4. Defendant No.1 thereafter filed Contempt Petition No. 79/09 against the authorities and the plaintiffs for having committed contempt of order dated 14/02/2008 in Writ Petition No.2443/06 and order dated 07/05/2009 in Contempt Petition No.57/08 by putting tin sheets across DP Road and encroaching upon land forming part of 40 ft. wide DP Road abutting FP 878. By an order dated 04/02/2010 the Contempt Petition was admitted and show cause notices were issued to the plaintiffs who are respondents Nos.6(a) to (d) in Contempt Petition No.79/09. The entire purpose of putting tin sheets across the road and causing obstruction to the authorities in construction of proposed DP Road is to cause delay in necessary order being passed for vacating the temporary access granted to the order dated 02/04/2009 by the Honourable Supreme Court of India and to create impediment

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in compliance of directions passed by the Honourable Supreme Court. Defendant No.1 therefore claimed that the plaintiffs are in breach and disobedience of the stay order passed in Writ Petition No.2443/06 and Contempt Petition No. 57/08. Stating these facts defendant No.1 brought to the notice of the Court that his application for adjournment came to be rejected by this Court and the Court ordered to proceed with the hearing of the instant suit. He also claimed that the plaintiffs in Notice of Motion No.4109/05 claimed the same reliefs as prayed for in the suit and the plaintiffs have been granted temporary access till construction of DP Road only. The plaintiff is unnecessarily creating hurdles in the construction of DP Road by making encroachment and therefore defendant No.1 filed Contempt Petition No.79/09 filed against plaintiff and defendant No.2, in which show cause notices have already been issued to the plaintiffs and defendant No.2. Defendant No.1 therefore claimed that the proceeding of trial in the suit would result in unnecessary cost and inconvenience to defendant No.1, which could be

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avoided if the trial Court await the decision of the Honourable High Court pending contempt proceeding for the removal of offending structure of proposed DP Road and hence prayed that further proceeding in the suit be stayed till decision in Contempt Petition No.79/09.

5. The plaintiff replied the instant notice of motion and stated that the defendant No.1 is a powerful builder and officers of defendant No.2 are colluding with defendant No.1 to deprive plaintiffs by their legitimate rights. He placed reliance upon paragraph Nos.6 and 9 of the order of Honourable High Court in A.O. Stamp No.20501/09 dated 07/09/2009.

“6.In terms of the judgment of the Supreme Court, the Trial Judge was required to verify as to whether a 40 feet wide D.P. Road had been constructed by the Municipal Corporation, providing motorable access to final plot 878 which belongs to the Appellants. The Assistant Engineer manifestly filed

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a misleading Affidavit before the Trial Court. Paragraph 7 of the Affidavit seems to suggest that all the offending structures which were abutting final plot 878 have been removed and the occupiers of final plot 878 did have a motorable access from the path which abuts Final Plot 878. What the affidavit suppresses from the Court, is an admitted position which has emerged before the Court, which is to the effect that, as a matter of fact, a 40 feet wide D.P. Road has still not been constructed as of today by the Municipal Corporation. During the course of the hearing, Counsel appearing on behalf of the Municipal Corporation has stated that the entire D.P. Road as envisaged in the order of the Supreme Court, has not been constructed; that there is a toilet block which is obstructing the construction of the road and that an access only of approximately 11 ft is available at the relevant point for seeking access to Final Plot 878. These facts which have been stated before the Court

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by Counsel appearing on behalf of the Municipal Corporation ought to have been disclosed before the Bombay City Civil Court. Not merely were these facts suppressed by the Officer who deposed the Affidavit but a patently false and misleading reply was filed before the Trial Court to make it appear, as if an access through a 40 ft wide D.P. Road was available.

9. An untrue statement was made by the Defendant in his Affidavit in reply filed on behalf of the Municipal Corporation before the Trial Judge. A notice shall be issued to Nandakumar S. Sakpal, working as Assistant Engineer T.P.(I) G/N Ward in the Municipal Corporation, to explain as to why action should not be taken against him in accordance with law for filing a false Affidavit. The notice to the Deponent of the Affidavit shall be returnable on 22nd September 2009, when the Deponent shall be personally present before the Court.”

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6. The plaintiffs further claim that this is the fourth application for adjournment and statements in the same prayers are made. This Court has observed in its order dated 30/03/2010 that contempt is a separate issue and has nothing to do with the merits of the matter. The plaintiff therefore claimed that defendant No.1 is unnecessarily delaying the trial though the evidence has been filed long back in the suit and on these grounds he prayed for dismissal of notice of motion.

7. Defendant No.2 Municipal Corporation filed its reply dated 03/07/2010 and consented for staying the present suit. Defendant No.2 claimed that plaintiffs thus encroached upon DP Road abutting FP 878 and blocked their access to FP 878 through DP Road and on count of encroachment of plaintiff, defendant No.2 and its officers are made to face contempt action. In short defendant No.2 put up the same pleas as raised by defendant No.1 and also claimed that all the

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offending structure, plaintiffs own encroachment have been removed and plaintiff encroachment is blocking road. They further claimed that the contempt petition would decide fate of the road and indirectly the prayers in the instant suit and therefore it is not necessary to proceed with the instant suit and it be stayed.

8. Heard advocate Mr.Dalal for defendant No.1, advocate Mr.Niranjan for plaintiffs and Mr.Chhabria for defendant No.2 BMC. Following points arise for my determination and my findings on them for the reasons stated below are as under;

POINTS

FINDINGS

1. Whether it is just and proper to stay the proceeding in the suit till disposal of Contempt Petition?

- Yes

2. What order?

- As per final order.

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REASONS

9. At the outset I would like to state that there is no dispute about the orders passed by the Honourable High Court and Honourable Supreme Court and the pendency of Contempt Petition before the Honourable High Court. Therefore it would be waste of time and energy to resite those orders passed earlier. Admitted position is that the motorable road to the property of plaintiff is made available through the property of defendant No.1 till the DP Road is available and once 40 ft. DP Road is made available to the plaintiff to his FP 878, the said privilege would be withdrawn. It is available to the plaintiff because of the order of Supreme Court. It is on record that on the identical issues suit has been filed as well as Writ Petition has been filed and both are proceeding parallel to each other. Therefore it would be necessary for me to site the prayers of the plaintiff in the instant case. The plaintiff made following prayers;

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- (1) For permanent injunction restraining defendant No.1 or his agent, servants from obstructing and interfering in plaintiffs use, occupation and possession of FP 878 and FP 879 together with structure standing thereon alongwith two access roads and or putting up construction or place gates upon the said property.
- (2) For permanent injunction restraining defendant No.2 and its officers for approving plan for construction of compound wall or gates which may obstruct free use of access road to the plaintiff.
- (3) For permanent injunction against defendant No.2 and its officers for approving any plans for construction of compound wall or gates or building on CTS No.879 until defendant No.2 provides access to FP 878 as per provision of PP Scheme.

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10. The above three reliefs have been claimed in the suit with other interim reliefs in the same terms, that is in short, the plaintiff prays for permanent injunction against defendant No.1 for obstructing its use and possession and remaining two prayers are in respect of access by DP Road. Therefore considering these prayers one can definitely say that prayer (b) and prayer (c-1) added by way of rider IV in the plaint are relating to the 40 ft. DP Road, which is the subject matter of Contempt Petition involved in the Contempt Petition No.79/09 and it would set at rest the controversy if the DP Road is available. The order of Honourable Supreme Court is also available to the plaintiff only till DP Road is made available to them and therefore this Court is directed to see the availability of DP Road and then decide further course of action in respect of the interim relief in favour of the plaintiff. Therefore on going through the entire record and proceedings of the various litigations sought by the parties before the Honourable High Court, I also find that the result of Contempt Petition No.79/09 would seal the fate of this

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litigation in respect of prayer clause (b) and (c). Prayer clause (a) is in respect of the personal obstruction which could be decided, but the main relief is in respect of DP Road, which is bound to be decided in the Contempt Petition. Hence in such contingencies I am satisfied that it would be in the interest of justice to stay this suit till disposal of the Contempt Petition and no valid purpose would be served by proceeding with the suit, because the decree in respect of prayer clause (b) and (c), would be redundant even if granted to the plaintiff and the motorable access through DP Road will be available to him. It is brought on record that plaintiff himself is blocking the construction of DP Road by putting tin sheets compound of which the photographs are on record and this fact is not been denied by him. Moreover this fact has been substantiated by the affidavit of defendant No.2 BMC that plaintiff has created hurdles in the preparation of DP Road. Therefore by forcing the trial of the instant suit, the plaintiff is trying to take undue advantage of his own wrong and hence I find that the instant notice of motion deserves to be allowed

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and it would be in the interest of justice to wait till decision of the Contempt Petition before the Honourable High Court. However defendant No.1 shall ensure that the Contempt Petition is expeditiously prosecuted. If the proceeding in the Contempt Petition are not carried out expeditiously by defendant No.1, the plaintiff would be at liberty to apply for setting aside this order. Hence I record my finding in the affirmative and pass following order:

ORDER

1. N/M No.1565/2010 is allowed in terms of prayer clause (a).
2. The trial of the suit is stayed till hearing and final disposal of O.O.C.J. Contempt Petition No.79 of 2009. However, it is made clear that if defendant No.1 commits any default in diligent prosecution of the Contempt Petition, then the plaintiff would be at liberty to move this Court for trial of the suit.

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3. Costs to be costs in the cause.
4. N/M No.1565/2010 stands disposed off accordingly.

Date: 28/09/2010

(S.P.KULKARNI)
Judge,
City Civil Court,
Gr. Bombay.

Order Dictated on : 28/09/2010.

Transcribed on : 28/09/2010 and 29/09/2010.

Signed on :

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