

14 September 2023.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO. 1098 OF 2022
WITH
INTERIM APPLICATION (ST.) NO. 20369 OF 2022
(FOR STAY)

1. Vijaykumar Angrish, Aged
82 years, Indian Inhabitant,
residing at Flat No.14, Shree
Trimurti CHS Ltd., Plot No. K-
69/78, South Avenue, 17th
Road, Khar (West), Mumbai
400052.

2. Dr. Bhaskar S. Hosangadi, R
Aged 83 years, Indian
Inhabitant, residing at Flat
No.9, Shree Trimurti CHS Ltd.,
Plot No. K-69/78, South
Avenue, 17th Road, Khar

14 September 2023.

(West), Mumbai 400052.

3. Suresh Rohra, Aged 63 years, Indian Inhabitant, residing at Flat No.12, Shree Trimurti CHS Ltd., Plot No. K-69/78, South Avenue, 17th Road, Khar (West), Mumbai 400052.

4. Sanjay Rohra, Aged 58 years, Indian Inhabitant, residing at Flat No.12, Shree Trimurti CHS Ltd., Plot No. K-69/78, South Avenue, 17th Road, Khar (West), Mumbai 400052.

....APPELLANTS

: V E R S U S :

1. The Municipal Corporation of Bombay, A Statutory Authority, established and constituted under the Mumbai

14 September 2023.

Municipal Corporation Act,
1888 having its office at
Mahapalika Marg, Mumbai -
400 001 and its H/West Ward
Office at 2nd Hasanabad Lane,
Khar (West), Mumbai 400
052.

2. Shree Trimurti Co-operative
Housing Society Ltd., a society
registered under the
Maharashtra Co-operative
Societies Act, bearing its
registration No. BOM/HSG-
842 OF 1965, having its office
at Plot No. A-69/78, South
Avenue, 17th Road, Khar
(West), Mumbai 400052.

3. Evershine Builders Private
Limited A company
incorporated under the

14 September 2023.

Companies Act, 1956,
having its registered office at
215, 2nd Floor, Veena Beena
Shopping Centre, Station Road,
Bandra (West), Mumbai 400
050.

.....RESPONDENTS

Mr. Ghanshyam Upadhyay a/w. Mr. Vijay Jha i/by. Law Juris,
Advocate for Appellants.

Ms. Smita Tondwalkar, for Respondent No.1-M.C.G.M.

Mr. Vishal Kanade a/w. Ms. Gaurangi Patil and Mr. Parth K.
Mehta i/by. GP & Associates, for Respondent No.2.

Mr. Swapnil Bangur a/w. Ms. Neha Mehta, Ms. Aayushi Gohil for
M.T. Miskita & Co. for Respondent No.3.

CORAM : SANDEEP V. MARNE, J.

Resd. On : 8 September 2023.

Pron. On : 14 September 2023.

JUDGMENT :

1. This Appeal is filed by the Appellants challenging order dated 25 November 2022 passed by the City Civil Court dismissing Notice of Motion No. 2188/2022 filed by Plaintiffs

14 September 2023.

seeking temporary injunction of stay to the notice dated 1 July 2022 issued by the Municipal Corporation of Greater Mumbai under Section 354 of the Mumbai Municipal Corporation Act, 1888 (Act of 1888).

2. Plaintiffs are members of Defendant No.2-Society which has appointed Defendant No.3 to carry out redevelopment of the Building. The suit building consists of total 17 flats. The Municipal Corporation issued notice dated 1 July 2022 under Section 354 of the Act of 1888 stating that the suit building has been classified under 'C-1' category and is required to be vacated and demolished immediately. Plaintiffs instituted Long Cause Suit No.1576/2022 before the City Civil Court challenging notice dated 1 July 2022 and seeking injunction against the Defendants from demolishing the suit building. In their plaint, Plaintiffs contended that a detailed structural audit report of the suit building was submitted by M/s. DARV Engineers & Consultants Private Limited on 17 October 2020 classifying building into 'C2-B' category and the said report was sent by the Plaintiffs to the Municipal Corporation. In the suit, Plaintiffs filed Notice of Motion No.2188/2022 seeking temporary injunction against the Defendants to restrain them from demolishing the building and stop them from taking any action in pursuance of the notice dated 1 July 2022. By order dated 16 July 2022, the City Civil Court refused *ad-interim* relief in the Notice of Motion. Plaintiff therefore filed Appeal

14 September 2023.

from Order Nos. 772/2022 and 769/2022 before this Court, which came to be disposed of by order dated 1 August 2022 directing the City Civil Court to decide the Notice of Motion expeditiously. The interim protection granted by this Court on 28 July 2022 and 29 July 2022 was continued during the pendency of the Notice of Motion subject to filing of Undertakings that the Plaintiffs would continue to reside in the building at their own risk.

3. The City Civil Court thereafter heard Notice of Motion No.2188/2022 and by its order dated 25 November 2022, was pleased to dismiss the same. While dismissing the Notice of Motion, the interim protection granted by this Court was continued for a period of two weeks.

4. Appellants have accordingly filed the present Appeal challenging the order dated 25 November 2022. When the Appeal came up before this Court on 2 December 2022, the interim protection was continued. The Appeal was heard on 6 December 2022 and after noticing that there were two contrary structural audit reports, one submitted by the Appellants and other submitted by the Society, this Court directed that the matter be referred to the Technical Advisory Committee (**TAC**) which was directed to prepare and submit a report after carrying out the usual inspection and upon conducting specific tests.

14 September 2023.

5. In pursuance of the order passed by this Court, TAC has submitted report dated 06 July 2023 classifying the building in 'C-1' category with a recommendation for its immediate evacuation and demolition. The report of TAC dated 06 July 2023 as well as the report of the structural auditor appointed by TAC have been furnished to the Appellants.

6. Mr. Upadhyay, the learned counsel appearing for Appellants would submit that the structural audit report submitted by Sardar Patel College of Engineering (**SPCE**) was highly doubtful in nature and that the report does not even bear any date. That there is a substantial delay on the part of TAC to submit its report. That absence of date on the report of SPCE and delay in submission of reports both by SPCE and TAC would speak volumes about doubtful nature of both the reports. That the said reports have been procured by Society and Developer in connivance with the Municipal Corporation.

7. Mr. Upadhyay would further submit that in pursuance of order passed by this Court, TAC was required to conduct the enquiry itself. However, TAC has merely relied upon the report of SPCE without undertaking any examination of the building on its own. That therefore the entire action of TAC is in violation of order passed by this Court on 16 December 2022. He would further submit that Appellants were not

14 September 2023.

granted any opportunity of hearing either by TAC or SPCE and that therefore a fresh structural audit of the building is necessary. Mr. Upadhyay would invite my attention to the report of TAC to highlight the failure of SPCE to conduct 'Cement Aggregate Ratio Test'. He would place reliance on the guidelines formulated by the Municipal Corporation for declaring private and municipal buildings as 'C-1' category and would submit that conduct of Cement Aggregate Ratio Test is mandatory under the guidelines. He would submit that the report of TAC as well as SPCE are in violation of the MCGM guidelines and therefore no cognizance of the said reports can be taken. He would submit that though the building is in good condition and though its life can easily be extended, the same is deliberately being declared as dangerous to protect the interests of the developer. He would also raise certain allegations against the Managing Committee of the Society, who according to him, have deliberately kept out reputed developers of the fray and want the development to be carried out only through Defendant No.3. He would pray that the ad-interim relief which is operational is required to be made absolute during pendency of the suit.

9. Ms. Tondwalkar, the learned counsel appearing for the Respondent-Municipal Corporation would oppose the petition. She would submit that the TAC has conducted the enquiry in pursuance of order passed by this Court on 16

14 September 2023.

December 2022 and has submitted its report. That TAC has appointed an independent structural auditor of repute in the light of the contradictory reports submitted by the Society and the Plaintiffs. That TAC has relied upon the report of the independent auditor while recommending categorization of the suit building as 'C-1'. She would invite my attention to the critical observations made by SPCE in its audit report while recommending immediate evacuation and demolition of the building. She would submit that TAC has granted opportunity of hearing to all the parties and principles of natural justice have not been violated. That there is no perversity in the findings of the TAC. That TAC being an expert committee, no fault can be found in the action of the Municipal Corporation in acting on the expert committee's recommendations.

10. Ms. Tondwalkar, would then invite my attention to TAC's report which has compared the test results in all the three structural audit reports. She would submit that as per the parameters, if the report of Ultrasonic Pulse Velocity Test is below the range of 2.0 to 3.0 Kms/per second, the same is to be treated as 'doubtful'. That as per the structural audit report of the Plaintiff's auditor, the result of Ultrasonic Pulse Velocity test is 1.82 Kilometer per second which falls in 'doubtful category'. That therefore even as per the report of the structural auditor of Plaintiffs, the building does not clear the Ultrasonic Pulse Velocity test.

14 September 2023.

11. About absence of date on the report of SPCE, Ms. Tondwalkar would submit that the report has been received by TAC on 24 April 2023. She would submit that delay, if any, in receipt of the report from SPCE is attributable to Plaintiffs and the Society who delayed payment of fees of SPCE. That on receipt of fees, the report was released by SPCE. She would further submit that failure of SPCE to conduct Cement Aggregate Ratio Test would not impact the ultimate result. The test only shows quality of cement used for construction of the building which in olden days (1970) was only M-15 or M-20 and the ratio was mostly 1 : 2 : 4 (cement : sand : aggregate).

12. Mr. Kanade, the learned counsel appearing for Defendant-Society would oppose the petition submitting that in the light of the report submitted by Expert Committee nominated in pursuance of orders passed by this Court, the finding of categorization of the building can no longer be doubted. That the building was constructed in the year 1976 and that out of 16 members, only three are dissenting. Mr. Kanade would invite my attention to the recommendations made by the structural auditors of the Appellants who had opined that after carrying out major structural repairs of the building, life of the building can be extended by only five years. That for such major structural repairs, the Society will have to spend Rs.500 to 600/- per sq.foot for extending the life only for

14 September 2023.

five years, that too subject to carrying out periodical maintenance. Mr. Kanade, would submit that TAC inspected the building on 6 January 2023 in presence of structural auditors of Society and Plaintiffs. It therefore cannot be said that the Committee did not carry out its own inspection. He would submit that once substantial compliance to the guidelines formulated by Municipal Corporation is demonstrated, this Court would be loathe in interfering with the recommendations of the expert committee. About failure of SPCE to conduct Cement Aggregate Ratio Test, Mr. Kanade would submit that Plaintiffs have not made out a case that no conclusion can be reached in absence of such a test. In support of his contention, Mr. Kanade would rely upon judgment of this Court in the case of *Dattaram H. Mohite V/s. Municipal Corporation of Greater Mumbai and Others*, Appeal from Order (St.) Nop. 95738/2020 decided on 8 December 2020 and *Narendra Ratilal Shah V/s. Municipal Corporation of Greater Mumbai* decided on 8 April 2021 (Writ Petition (L.) No. 8927/2021)

13. Mr. Bangur, the learned counsel appearing for the Developer, would oppose the petition. He would submit that the main grievance of the Plaintiffs was failure to conduct independent structural audit has been met with TAC and SPCE conducting their own audits. Once reports of audit conducted in pursuance of the order passed by this Court is placed on record, no further interference can be made in recommendations of the

14 September 2023.

Committee. That report of Expert Committee must be taken on its face value. That full opportunity of hearing has been given to all the parties by following the principles of natural justice to the hilt. He would pray for dismissal of the petition.

14. In rejoinder, Mr. Upadhyay, would submit that the judgment of this Court in ***Narendra Ratilal Shah*** (supra) actually supports Plaintiff's case that there is no substantial requirement. That the words used in the guidelines for conduct of all tests is 'shall' and therefore non-conduct of a particular test cannot be left at the discretion of SPCE or TAC. That TAC has not carried out the inspection on its own except one visit and has blindly relied upon SPCE's report, which is faulty.

15. Rival contentions of the parties now fall for my consideration.

16. Plaintiffs have challenged notice dated 1 July 2022 in their suit which is issued under the provisions of Section 354 of the Mumbai Municipal Corporation Act, 1885. The notice states that the building is declared in 'C-1' category and the occupants were directed to vacate the same immediately. There are contrary structural auditors reports relied upon by the Plaintiff and the Society. The Society relied

14 September 2023.

upon the structural audit report of Tech Restrength Consulting Civil Engineers. The said report recommended as under :

Hence keeping in view, the observations made during visual inspection and after conducting the Non Destructive Test along with Chemical Analysis, Core Test & Cement Aggregate Ration, we conclude that the existing Ground + 5 Floors External R.C.C. Frame Structure consisting of 01 Wing having 17 Flats is found in dangerous dilapidated and critical condition and is found unsafe for human habitat. Thus, the Techno economical serviceable life of this structure has got expired and is found beyond Repairs. Therefore we strongly recommend to immediately evacuate the Structure and demolish the same under the supervision of a Structural Engineer.

17. On the contrary, Plaintiffs have relied upon the structural audit report of M/s. DARV Engineers and Consultants Private Limited which recommended as under:

CONCLUSIONS AND RECOMMENDATIONS

Our field staff inspected the building structure. All external areas have been inspected and record taken for distress.

The building is in habitable condition, but unless remedial measures are taken to address defect areas and corrective steps taken without delay, it could deteriorate further.

It is seen that RCC paradi top; of a balcony of vacant flat from upper floor has fallen on ground. The steel is not rotten. Hence we can say somebody is playing mischief with the structure and the society should stop it.

Propping done at entrance canopy, passages & at some more spaces are not done properly as well as those are unnecessary. It is because we have seen no bulging of columns nor bending of beams. No where re-bar steel is exposed. Only thing is structure is old one and need repairs under proper guidance.

14 September 2023.

Hence we recommend that society should immediately carry out the work mentioned in the Proforma 'B'.

The methodologies suggested for remedial actions are appended under section **TECHNICAL SPECIFICATIONS**.

The report provides for all factual data. All efforts have been taken to present the report in proper format. However, if any discrepancy is observed, it should be brought to the notice of the authors and the same shall be verified and corrected based on field data. No data has been extrapolated.

DARV Engineers & Consultants shall not reveal the data or report to any third party, unless so specifically asked for by the client. DARV Engineers & consultants reserves the right to destroy all data once the report has been approved and accepted by the Society.

This report has been compiled, validated and presented by us based on the structural License of Mr. M.A Ansari – M. Tech (Structure) STR/A/44, structural Engineer of DARV Engineers & Consultants Pvt. Ltd. and issued by the MCGM.

The building shall be repaired under the supervision and guidance of a structural engineer registered with MCGM. Habitability and completion certificate from the MCGM registered structural engineer under whose supervision and management the work will be carried out within six months & shall be obtained and submitted to MCGM after completion of the entire Work.

18. While Plaintiff's Architect classified the building in 'C2-B' category, it recommended that the life of the structure can be extended by a period of five years after carrying out major repairs.

19. The City Civil Court while rejecting Plaintiff's Motion, found the structural audit report of M/s. DARV

14 September 2023.

Engineers & Consultants Private Limited to be untrustworthy and unreliable as its validity was only for six months. It held in paras, 34, 35 and 36 as under :

34. No doubt, according to plaintiffs, now there are two conflicting structural audit reports in respect of the suit building and hence, it is necessary to refer matter to TAC. But so far as, this aspect is concerned, report of October 2020, on which plaintiffs relying is not found as trustworthy and reliable, because, as per the contents therein itself, a validity of the same was for six months only. Moreover, in the said report itself, specific directions were issued to conduct and urgent and necessary repairs of the suit building. Nothing is on record to show that, after the said report plaintiffs complied those directions and made urgent repairs to suit building. It further appeared that, the recent photographs of the suit building are placed on record by defendant No.3. On perusal of those photographs it appears that, the suit building is really in very ruinous and dilapidated condition. Those photographs prima facie supports the contents in the structural audit report filed by the defendant.

35. It is a fact that, when, an Appeal filed by plaintiff against ad-interim relief order was pending, the plaintiffs have conducted fresh structural audit and the said recent report is placed on record. As per the said report of plaintiff, the suit building is declared in C-2B category. The said report is of dtd 19/8/2022. Said structural auditor visited the suit building on 07/08/2022. According to plaintiffs, though, their previous report of the year 2020 is expired, their recent report of Technity engineers and consultant is contrary to the report of defendants and by considering the same, it is necessary to refer the matter to TAC. But, though, plaintiffs have filed their recent report 19/8/2022 the same can not be treated as a contrary or conflicting report. Because, I as per the said report measurement of ultrasonic Pulse Velocity Test is shown as 2.10 k.m./ sec. But, if the said measurement is below 3.0 then, it is treated as doubtful. This

14 September 2023.

Test measurements are in favour of defendants structural Audit report. Hence, prima facie it can be said that, concrete quality of the suit building is not up to the mark as per ultrasonic Pulse Velocity Test, recently conducted by plaintiffs structural auditor.

36. Moreover, as mentioned in clause 16 (vii) of plaintiffs structural audit report 19/8/2022 a life of said building can be enhanced for the period of five years, considering the age of the said building. Thus, as per the said recent report of plaintiffs, life of the said building can not be extended for the period of more than, five years though, urgent repairs to it can be carried out. Therefore, at present, report submitted by defendant by which the suit building declared in C- 1 category can be accepted. Therefore, there is no any necessity to refer the matter to TAC.

20. This Court took note of both, the reports as well as the findings recorded by the City Civil Court and held that the Court could not have drawn inference on the basis of some random observations in the report and substitute its own views with that of technically qualified experts. This Court therefore passed the following order on 16 December 2022 :

1. Learned counsel for the Appellant seeks leave to file additional affidavit. Leave is granted. To be filed in the Registry within a period of one week.

2. The Appellant herein has challenged the order dated 25/11/2022 passed by the learned City Civil Court, Borivali Div., Dindoshi, Mumbai dismissing the Notice of Motion No.2188/2022 in L.C. Suit No.1576/2022.

14 September 2023.

3. Heard learned counsel for the Appellants and learned counsel for the Respondents. I have perused the records and considered the submissions advanced by the learned counsel for the respective parties.

4. The Appellants herein have filed a suit challenging the notice dated 01/07/2022 issued by the Corporation under section 354 of MMC Act, 1888. The records prima facie indicate that the occupants of the building had agreed for re-development. However, there was dispute amongst the members regarding validity of the re-development agreement. The Appellants who are the members of the society as well as the developer has filed suits which relate to the re-development agreement. It is stated that the said suits are pending before this Court. During the pendency of the said suits, the Corporation issued notice under section 354 of MMC Act.

5. The notice under section 354 was issued on the basis of the report submitted by the Respondent No.2 - Society classifying the structure as C-1 category. The Appellant had also submitted a structural report which classifies the structure in C-2B category. Since the validity of the said report was of one year, the Appellant submitted 2nd report dated 19/08/2022, which once again classified the building into C-2B category. The learned Judge has observed that in the 2nd report, measurement of ultrasonic Pulse Velocity Test is shown as 2.10 k.m./sec. The Trial Court therefore inferred that there is no conflict between both the reports.

6. As noted above, in the 2nd report dated 19/08/2022 for the reasons stated, the structure was classified as C-2B category. The Trial Court could not have drawn inference on the basis of some random observations in the report and substituted its own view for that of technically qualified experts. Considering that both the reports have given conflicting findings viz. that the building is in C-1 category and the 2nd report stating that it

14 September 2023.

is in C-2B category, in my considered view, it is necessary to refer the matter to the TAC Committee. The TAC shall prepare a report after carrying out usual inspection and upon conducting specific tests as per the judgment of the Division Bench of this Court in Original Side Writ Petition (L) No.1135/2014 dated 23/6/2014 and upon following the guidelines of the Corporation. The TAC report shall be submitted within four weeks from the date of the order. Ad-interim relief, if any granted earlier, to continue till the next date of hearing. Learned counsel for the Petitioner states that undertaking given earlier shall continue till the next date.

7. Stand over to 20/1/2023.

21. The TAC constituted in pursuance of judgment of this Court dated 23 June 2014 in Writ Petition (Lodg.) No. 1135/2014 took cognizance of the matter after the order of this Court was placed before it by the Designated Officer of the Municipal Corporation. TAC inspected the building on 6 January 2023 in presence of structural consultants of both, Plaintiffs and the Society. The building was physically inspected by the TAC on 16 January 2023. After conducting inspection on 6 January 2023, TAC conducted the meeting on 16 January 2023 which was attended by structural consultants of both the sides. After hearing both the sides, TAC passed following order on 16 January 2023 :

Due to difference in opinion of structural consultants of society and petitioners, the TAC has Unanimously come to the conclusion that Third Party Audit shall be carried out of the building under reference from reputed

14 September 2023.

institution such as IIT Mumbai/Veermata Jeejabai Technical Institute (VJTI)/Sardar Patel College of Engineering (SPCE) immediately from receipt of this order. The expenses required for the same shall be borne by the society and petitioner 50-50 percent each. Till that time petitioners were directed to take necessary precautions such as propping, etc. to the building in Consultation with their Structural Engineer. In the meantime, if any kind of mishap happens to the building / occupier / passerby etc., BMC will not be responsible for the loss of life and property which shall be noted.”

22. It appears that TAC thereafter invited Expression of Interest from IIT-Mumbai, VJTI and SPCE for carrying out structural audit of the building. TAC however received willingness from SPCE. Accordingly, both the sides were directed to contact SPCE for carrying out structural audit of the building by paying the requisite fees vide letter dated 3 February 2023. It appears that fees of SPCE were not paid either by Plaintiff or by the Society and therefore the Municipal Corporation sent reminder dated 10 March 2023 for payment of SPCE's fees. After payment of fees, SPCE conducted inspection of the building on 25 March 2023 and 28 March 2023 and submitted its report to TAC on 24 April 2023 categorizing building as 'C-1' for being immediately evacuated and demolished. SPCE made following critical observations in its report :

The backside of the middle portion of the building (South-R.K. Mission Marg) is in highly deteriorated and

14 September 2023.

dangerous condition. Many of the external columns are cracked. Most of the internal columns have developed wide longitudinal cracks. Most of the staircase columns are bulged and have developed multiple wide longitudinal cracks. Most of the internal and external beams have developed wide longitudinal cracks. Many beams have Cover Concrete fallen, reinforcement exposed and highly corroded. Few beams are sagged. Most of the balcony walls/ pardi walls are cracked with cover concrete fallen, reinforcement exposed and highly corroded. Many slabs are cracked and sounds hollow. At most locations flooring tiles are cracked and undulations are observed indicating settlement of the building. Most of the internal and balcony slabs have developed multiple cracks, sounds hollow with many having Cover Concrete fallen, reinforcement exposed and highly corroded. The common passage slabs are cracked, sagged, tilted and are in dangerous condition. At many places slabs and beams are prop supported. The mid landing beams and floor beams are cracked at most places.

Most of the balcony walls/ pardi walls are cracked with cover concrete fallen. reinforcement exposed and highly corroded. Many of the balcony slabs are cracked, sounds hollow with cover concrete fallen, reinforcement exposed and corroded. The balcony walls are tilted and are in dangerous condition at many places at backside of the middle portion(South-R.K. Mission Marg). The condition of balconies on back side is especially critical. On back side(South- R.K. Mission Marg) many balcony walls and beams have cover concrete fallen, reinforcement exposed and corroded. Portion of balconies on back side(South-R.K. Mission Marg) have partly collapsed and remaining portion is in dangerous condition.

The staircase is in poor condition. At most places staircase columns have developed multiple wide

14 September 2023.

longitudinal cracks and are bulged. The mid landing beams and floor beams are cracked at most places. The staircase waist slab has developed multiple cracks at most places and is sagged and in dangerous condition at few places. Some portion of waist slab and landing slab has cover concrete fallen, reinforcement exposed and corroded. There are two terraces one part terrace at fourth floor level and other above fifth floor level. The slabs of both the terraces have developed multiple cracks. The cap room beams are cracked. The cap room slab is cracked and sounds hollow. The columns above terrace are also cracked.

At few places deep penetration of tree roots at plinth level is observed. Separation cracks are observed at plinth level at many places indicating the possibility of settlement. At many locations walls are cracked and at few places especially at plinth level cracks are diagonal in nature.

23. The TAC thereafter considered the report of SPCE and prepared its final report on 6 July 2023 with following order :

“The building Known as Shree Trimurti CHSL, Plot No.K 69/78, 17th Road, Santacruz (West), Mumbai-400 054 is unanimously classified as C-1 category i.e. to be evacuated immediately and demolished immediately by taking proper safety measures under the strict supervision of Structural Consultant. In case of any untoward incident resulting to loss of life and property, BMC will not be held responsible.

14 September 2023.

In the meanwhile, safety precautionary measures i.e. propping etc. wherever required shall be taken with utmost care to avoid any untoward incident.”

24. In the manner aforestated, the Expert Committee (TAC) constituted in pursuance of the judgment of this Court dated 23 June 2014 passed in Writ Petition (Lodg.) No.1135/2014 has carried out the exercise of inspecting the building and calling for the report of an independent structural auditor and has thereafter recommended immediate evacuation and demolition of the building. TAC was directed to conduct the inspection and submit its report on account of two contrary reports submitted by the structural auditors of the Plaintiff and the Society. Independent structural audit report of SPCE and report of expert committee of TAC, have both recommended classification of the building in ‘C-1’ category and its immediate evacuation and demolition. As could be seen from above observations, the Expert Committee has carried out the physical inspection and appointment of structural auditor by following principles of natural justice. TAC had called upon three institutes of repute, IIT, VJTI and SPCE to express their willingness to carry out structural audit of the building. SPCE expressed willingness to carry out the structural audit. There are no allegations of *mala fides* against the team deputed by SPCE who carried out the structural audit of the building. In that view of the matter, this Court would be left with no other alternative but accept the structural audit report of SPCE and

14 September 2023.

final recommendations of TAC. In this connection, following observations of Division Bench of this Court in its judgment in ***Narendra Rathilal Shah*** (supra) would be relevant :

8. Perusal of the report of the TAC reveals that its members had been to the site of the said building and its independent observations are noted in Sl. Nos. 1 to 13 of paragraph 8 thereof. Such observations do provide ground for the TAC to reach the conclusion it did. It is certainly not a case where the TAC, without any site inspection and without the requisite satisfaction, arrived at a conclusion that the said building is unsafe and dangerous and, thus, requires to be demolished. There has been appropriate ascertainment of the condition of the said building by conducting requisite inspection at the site and the findings are not merely based on mechanical acceptance of the report of the structural engineer appointed by the respondent no.5. Had the independent observations under paragraph 8 not been there, the surviving petitioner could have something to say. In such view of the matter, we find no reason to hold that the TAC had mechanically proceeded to discard the structural audit report of the structural engineer appointed by the tenants.

25. In view of receipt of report of independent structural auditor and recommendations of TAC constituted in pursuance of judgment of this Court, it would be *prima-facie* difficult for this Court to accept Plaintiff's case that the building is habitable.

26. Mr. Upadhyay has canvassed before this Court that the report of SPCE is doubtful and is required to be ignored essentially on account of three factors viz. absence of date on the report, delay in submission of the report and failure to

14 September 2023.

conduct Cement Aggregate Ratio Test. So far as the absence of date on the report of SPCE is concerned, it has come on record that the same was submitted to TAC on 24 April 2022. So far as the allegation of delay is concerned, following chronology of events would indicate that there is no inordinate delay :

(i) *16 December 2022*- This Court passed order directing test to be conducted by TAC.

(ii) *6 January 2023* - TAC inspected the building.

(iii) *16 January 2023* - TAC conducted the meeting in the presence of structural consultants of Plaintiff and Society and passed order for conduct of third party audit.

(iv) *24 January 2023* - TAC invited Expression of Interest from IIT, VJTI and SPCE.

(v) *3 February 2023* - After receipt of interest expressed by SPCE, Plaintiffs and Society were directed to approach SPCE and pay fees for audit.

(vi) *10 March 2023* - On account of failure of Plaintiffs and Society to pay fees of SPCE, reminder was given to Plaintiffs and Society.

(vii) *25 March and 28 March 2023*- After payment of fees, the SPCE conducted inspection of the building.

(viii) *24 April 2023* - SPCE submitted structural report to TAC.

(ix) *23 June 2023*- Members of the TAC met.

(x) *6 July 2023* - TAC submitted its final report.

14 September 2023.

27. Considering the above chronology of events, it cannot be said that there was any delay on the part of SPCE or TAC in either conducting the structural audit or in submitting the final report.

28. So far as failure of SPCE to conduct 'Cement Aggregate Ratio Test' is concerned, perusal of additional affidavit filed by the Plaintiffs on 8 September 2023 would indicate that there is no assertion in the Affidavit that conduct of such test would have yielded in any contrary result. Infact the Affidavit is silent about non-conduct of such test. The Municipal Corporation has clarified that the test is conducted essentially to find out the ratio of use of cement, sand and aggregate. Mr. Upadhyay has strenuously relied upon the guidelines framed by M.C.G.M., the relevant portion of which reads thus :

The structural auditor shall carry out specific test like ultrasonic pulse velocity test, rebound hammer test, half-cell potential test, carbonation depth test, and core test, chemical analysis, cement aggregate ratio as may be considered by MCGM and shall submit structural audit report in Performa B(Attached) as prescribed by MCGM.

(emphasis and underling supplied)

14 September 2023.

29. It is relying on the above guidelines that Mr. Upadhyay has contended that conduct of 'Cement Aggregate Ratio Test' being mandatory, failure to conduct the same would vitiate SPCE's structural audit report. I am unable to agree. SPCE has conducted all other tests, results whereof point out that the condition of the building is not stable. There has been substantial compliance with the guidelines. Plaintiffs cannot be permitted to selectively pick up a stay aberration for altogether discarding the report of SPCE and recommendations of TAC. In this connection, following observations made by this Court in its judgment in *Dattaram H. Mohite* (supra) would be relevant:

4. The learned Counsel for the plaintiff, would urge that, the Corporation in gross violation of Guidelines dated 25.10.2018 categorized suit structure in Category "C-1". Thus, he submits, non-observance of procedure, has prejudiced the interest of plaintiffs. In support of this contention, Counsel has taken me through the guidelines and particularly Clause No.1.02 to 1.09. Relying on the Clause-1.07, Counsel would submit that, in terms of this Guideline, Ward Executive Engineer ought to have appointed independent structural auditor from a panel of auditors to visit the suit building and submit structural audit report to the Court.

5. Clause-1.07 of Guideline, cannot be read in isolation, but with Clauses-1.02, 1.03 and 1.04. In fact, plaintiff's case, would be governed by Clause-1.05, in as much as, there were two conflicting structural audit reports submitted by two stakeholders of the same building and therefore reports were referred to T.A.C. as directed by this Court vide order dated 10.09.2020. Clause-1.05 says that, the decision of the T.A.C. will be final and binding on all the parties. Report of the T.A.C., shows that the representatives of the plaintiffs participated in the proceedings before the Committee as well, when the

14 September 2023.

building was inspected by the members of the Committee. In these circumstances, submissions of the learned Counsel for the appellant, that Executive Engineer ought to have submitted a detail report and/or that the Court ought to have appointed independent structural auditor from the panel of Auditors is completely misplaced. Inso far as, Clause- 1.02 is concerned, it contemplates a situation when owner/occupier fails to submit a structural audit report as per the notice issued under Section 353B of the Act. In such eventuality, guidelines direct Ward Executive Engineer to inspect the building and categorize it and on receipt of the findings on category, Clause-1.03, mandates, the same shall be communicated to the tenants and occupants. Next, Clause-1.04 contemplates, when occupants; dispute classification of the building, they shall be asked to appoint their own registered structural engineer and auditor. However, if occupants do not appoint their structural auditor, the Ward Executive Engineer shall submit a detailed report with remarks alongwith the structural audit report to Deputy Chief Engineer (Building & Proposal) in terms of plaintiff's case is not governed by Clause-1.07 of the Guidelines, but by Clause-1.05, which says, report of the T.A.C. is final and binding on all stakeholders.

6. Thus, after going through the pleadings of the parties and the report of the T.A.C., in my view, the Corporation has substantially complied with the requirement of law before declaring and categorising the building in "C-1" category. It is settled law that, mere procedural irregularity could not vitiate the trial, unless the same results in miscarriage of justice. In other words, procedural irregularities cannot vitiate the action itself. In the case in hand, the learned Judge, after noticing the fact that the plaintiffs were not given sufficient time to appoint their structural auditor vide order dated 10.09.2020, directed the Corporation to consider the conflicting reports and arrive at a just decision. The material on record, shows the plaintiffs were afforded sufficient representation in the proceedings before the TAC. Therefore, no interference is called for in the impugned order."

(emphasis supplied)

14 September 2023.

30. Even as per the report of the Plaintiff's own structural auditor, the structure has failed the 'Ultrasonic Pulse Velocity Test'. The said structural auditor of the Plaintiffs has also not arrived at a definitive finding that the building is structurally stable. On the contrary, he has recommended carrying out major repairs of the building which according to it, would extend its life by only five years. The report of the said structural consultant is dated 17 October 2020 and by now three out of five years are already over. Thus, even going by the report of the structural auditor of the Plaintiffs, if major repairs were carried out to the building, the same would last for maximum period of another two years. I have also gone through the photographs of the building placed on record by the Respondents, as well as those taken by SPCE during the course of site inspection. The photographs also depict seriously dangerous condition of the building which is likely to give up any moment. No doubt, Plaintiffs have filed undertakings owning responsibility for any mishap. However, for their differences with the Society and other flat owners about choice of the developer, it would be too dangerous to permit them to occupy such highly dangerous structure any further.

31. In these circumstances, it would be highly dangerous to accept any technical objections sought to be raised by Plaintiffs for further delaying evacuation and demolition of the building. It appears that there are some disputes between the

14 September 2023.

Plaintiffs and the Managing Committee of the Society about selection of the Developer. There are independent proceedings pending with regard to the said disputes. However, pending resolution of the said disputes, evacuation and demolition of the building cannot be delayed any further. In the present case, I am concerned with the limited issue of validity of notice dated 1 July 2022 issued under the provisions of Section 354 of the Act of 1888. By now more than one year has elapsed from the date of issuance of the said notice.

32. In my view, since independent structural auditor and TAC both have recommended immediate evacuation and demolition of the building, no *prima-facie* case exists in favour of the Plaintiffs for grant of any interim injunction during pendency of the suit. The only plausible error in the order of the City Civil Court, which was sought to be highlighted by Plaintiffs, was about non-conduct of third party structural audit. That error is also now obviated on account of conduct of third party structural audit by SPCE and recommendations of TAC. Therefore, Plaintiffs cannot be granted temporary injunction in the form of stay to the impugned notice during pendency of the suit.

33. In the result, I find that Plaintiffs are not entitled to any temporary injunction during pendency of the suit. No error

14 September 2023.

can be traced in the Order of the City Civil Court. Appeal being devoid of merits is **dismissed** without any orders as to costs. Needless to clarify that the observations made in the judgment are *prima-facie* for deciding Plaintiffs' entitlement for temporary injunction.

34. With dismissal of the Appeal from Order, Interim Application (St.) No. 20369/2022 does not survive. The same is disposed of as having become infructuous.

NEETA
SHAILESH
SAWANT

Digitally
signed by
NEETA
SHAILESH
SAWANT

Date:
2023.09.14
14:56:30
+0530

SANDEEP V. MARNE, J.