

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.8838 OF 2013

Smt. Sulochanabai w/o Baburao Jadhav,
Age: 76 years, Occ: Household,
R/o. Plot No. 932, Pensionpura,
Cantonment, Tq. &
Dist. Aurangabad.

...PETITIONER

VERSUS

Kamalbai w/o Papayya Golkunda,
died through her Legal Representatives.

1. Rajkumar s/o Papayya Golkonda,
Age: 65 years, Occ: Agri.,
R/o. House No. 855, Subhash Peth,
Cantonment, Aurangabad
and others.

...RESPONDENTS

...

Mr. Avishkar S. Shelke, Advocate for petitioner.
Respondent No.3-party in person present for all
respondents.

...

CORAM: S.S. SHINDE J.

DATE : 23RD DECEMBER, 2013

PER COURT :

. Heard learned Counsel appearing for the
petitioner. He invited my attention to the
provisions of Section 16 (1) (k) of the

Maharashtra Rent Control Act, 1999 and also to the provisions of Section 126 of the Cantonment Act. It is submitted that, upon perusal of the notices which are sent to the petitioner, it cannot be gathered or construed that, the suit premises are in a dilapidated condition. The Counsel appearing for the petitioner submits that, the Chief Executive Officer of the Cantonment Board has issued notices. In fact, under the relevant provisions, opinion of the Cantonment Board is important. It is his submission that, C.E.O., is not authorized unless there is opinion expressed by the Cantonment Board as such, and therefore, notices sent by the C.E.O., in the first place does not disclose that, the premises are in dilapidated condition and they require immediate repairs/re-construction and secondly, that notice is not the notice by the Board as such. It is further submitted that, in case premises are required for immediate purpose of demolition then only such notice can be sent and tenant can be asked to vacate the premises. It is submitted

that, there was no any imminent danger so as to issue notice to the petitioner to vacate the premises.

2. Learned Counsel for the petitioner invited my attention to the reported judgment of this Court in the case of **Piudad Fernander vs. K.M. Ramesh and others** reported in 1970 BCI (O) 46 and in particular paragraphs-12 and 13 thereof. It is submitted that, unless there is immediate danger and really building require repairs or reconstruction, giving notice to the petitioner for asking him to vacate it could not attract the relevant provisions and in particular the word 'immediate'. The Counsel appearing for the petitioner invited my attention to the evidence of the Junior Engineer who was examined and in particular his cross examination and submits that, said Junior Engineer did not inspect the premises and his evidence was only on the basis of record maintained by the office. It is submitted that, said evidence is of no use to the respondents, in

as much as, he did not visit the premises and secondly, he was not sure whether the premises are in a dilapidated condition or not. It is further submitted that, merely because notices are issued by the C.E.O., of the Cantonment Board, both the Courts below have drawn inferences that, the premises are in a dilapidated condition. In fact, the Court should get itself satisfied that, the premises are in a dilapidated condition and therefore, same premises are required to be vacated and repaired. It is further submitted that, the Court Commissioner was not examined and therefore, the trial Court has rightly disbelieved him. It is further submitted that, if the case is taken in its entirety, there was no immediate/imminent danger to the building and therefore, notices given by the authorities and further the evidence of the witnesses cannot be looked into since nothing has happened to the building till date. Learned Counsel also invited my attention to the grounds taken in the petition, annexures thereto, rejoinder affidavit tendered

across the bar and submits that, the writ petition deserves to be allowed.

3. On the other hand, Respondent No.3-party in person appearing on behalf of all respondents invited my attention to the affidavit in reply from pages 55 to 60 of the compilation of the writ petition and submits that, already possession of the suit premises has been handed over on 18/10/2008. It is further submitted that, after considering the evidence of the respondents and witnesses that, the suit premises are in a dilapidated condition, both the Courts below have rightly passed the impugned judgment and order. The respondent party in person made following submissions.

. It is submitted that, the writ petition is not maintainable and it is abuse of process of law as the petitioner has already delivered the vacant possession of the suit house through legal process on 18/10/2008 to the original owner

deceased Kamalbai w/o Papayya Golkonda in execution proceeding of R.D. No. 104 of 2008. It is further submitted that, the High Court has also admitted in its judgment dated 04/03/2010 in Writ Petition No. 1496 of 2010 that, (i) petitioner was occupying the suit property as tenant, (ii) respondent sole since deceased, was the landlady filed Rent Suit No. 6 of 2001 in the competent Court, seeking eviction of the petitioner and possession of the suit property, (iii) Rent Suit No. 6 of 2001 after hearing the parties came to be decreed by the Court concerned on 24th March, 2008, (iv) the respondent/decreed holder filed execution petition i.e., R.D. NO. 104 of 2008 before the executing Court, seeking execution of the decree passed in Rent Suit No. 6 of 2001, (v) the present petitioner/judgment debtor was served with the notice, issued by the Executing Court, (vi) the executing Court issued warrant of possession against the petitioner, (vii) allegedly, petitioner did not pay heed and therefore, the decree holder/respondent filed

application seeking police help. Said application was allowed by executing Court on 11th August, 2008, (vi) Decree passed in Rent Suit No. 6 of 2001 came to be executed meaning thereby possession of the suit property was taken over from the petitioner through legal process by the decree holder/respondent. It is further submitted that, the High Court had also observed in its above mentioned judgment that, the petitioner did not participate in whole executing proceeding. Petitioner and her Counsel are well aware of above mentioned facts. Certified copy of the above mentioned judgment dated 04/03/2010 and Bailiff report dated 18/10/2008 is placed on record at Exhibit-A collectively alongwith the affidavit in reply.

. It is further submitted that, the petitioner after delivery of possession of the suit house had filed Appeal No. 2 of 2008 before the District Judge, Aurangabad and during pendency of the appeal, broke the lock of the suit house

and made illegal entry therein. Complaint of criminal trespass was filed against the petitioner to Cantonment Police Station, Aurangabad and offence was registered against the petitioner and he was charge sheeted and was convicted by the Judicial Magistrate, First Class, Aurangabad. Certified copies of conviction order dated 14/09/2012 and warrant order of Sessions Court, Aurangabad dated 29/10/2013 are placed on record at Exhibit-B and C respectively alongwith the affidavit in reply. It is submitted that, the petitioner is only trespasser, she has taken the law in her hands, therefore, she is not entitled to file the present writ petition and to claim any relief. Consequently, writ petition deserves to be dismissed with heavy costs in the interest of justice.

. It is further submitted that, the petitioner has accepted the evidence of P.W.1 Triveni Papayya Golkonda and did not raise any objection. The petitioner has not produced any

single evidence to show that, the suit house is not in a dilapidated condition before any Courts. Copy of evidence of P.W.1 dated 08/07/2002 is placed on record at Exhibit-D alongwith the affidavit in reply. It is further submitted that, the petitioner ought to have challenge the notices i.e., Exhibit-38 and 39 and evidence of P.W. 2 Umesh Waghmare, Junior Engineer, Cantonment Board, Aurangabad in due course of time if she was dissatisfied, but not at this belated stage and after delivery of suit house and after conviction. Certified copies of notice dated 12/02/1999, 08/10/1999, 02/06/2006 and evidence of P.W. 2 dated 19/10/2002 are placed on record at Exhibit-E collectively alongwith the affidavit in reply. It is further submitted that, the contents mentioned in ground No. XI are after delivery of whole possession of 1 room with 16 tin sheets, hence her averments are denied by the respondent. Moreover, she has not produced any documentary evidence about legal residing in that suit house, now she is only trespasser. Therefore, she has not

produced any documentary evidence about her tenancy and regular rent payer, after delivery of possession of suit house i.e., after 18/10/2008.

. It is further submitted that, in ground No. XII petitioner has not produced any proof that, she has challenged the affidavit, verification, certificate of Architect about correctness of his opinion. Hence, her averments are denied by the respondents. Certified copy of Architect affidavit dated 13/10/2003 and certificate dated 23/10/1999 are placed on record at Exhibit-F alongwith the affidavit in reply. It is further submitted that, to the context of ground No. XIII, the petitioner ought to have challenged Court Commissioner report before execution of decree, if she was dissatisfied. Now, at this belated stage, it is not just and proper in the eye of law, hence her statement is denied by the respondent. Copy of commissioner report dated 02/09/1999 is placed on record at Exhibit-G collectively alongwith the affidavit in reply. It

is further submitted that, in ground No. XIV the petitioner herself admitted that, she is still residing in the suit house even after delivery of possession, and conviction for trespass. The petitioner has falsely stated in ground No. XI that, she is residing safely and peacefully, therefore, the urgency implicit in the notice is no longer in existence and no emergent action is required in the matter. It is further submitted that, actually her application to Executive Office, Cantonment Board, Aurangabad dated 12/10/1998 and to Station Commander/President Cantonment Board, Aurangabad dated 16/10/1998 itself speaks the suit house is in a dilapidated condition and not fit for human habitation. It is further submitted that, it is the contention of petitioner that, the walls of suit house have been collapsed and she is living in open house where danger of theft is prevailing any time. Certified copy of the application dated 12/10/1998 and 16/10/1998 are placed on record at Exhibits-'H' and 'I' respectively.

. It is further submitted that, contents of ground No. XV are denied by present respondent because petitioner is only trespasser, she has no *locus standi* to state such type of averments about various court judgments and orders after execution of decree and conviction for trespasser. This conduct goes to show that, petitioner does not respect orders of civil court i.e. execution of decree dated 18/10/2008, criminal court's conviction order dated 14/09/2012 and admitted facts in the judgment of this Court in W.P. No. 1496 of 2009 dated 04/03/2010.

. It is further submitted that, petitioner is only trespasser and she has taken law in hand and has not come before this Court with clean hand, therefore, she has no right to claim any relief to call record and proceedings and for issuance of writ of certiorari, order or direction in like nature. It is further submitted that, considering above mentioned material facts and

substance, it is not just and proper to continue her status-quo but her writ petition deserves to be dismissed with heavy costs of Rs.20,000/-. Party in person lastly prays that, status-quo granted by this Court may kindly be vacated and writ petition may be rejected with heavy costs of Rs.20,000/-.

. Party in person further invited my attention to the various annexures annexed to the affidavit in reply and also written notes of arguments and submits that, even after vacating the suit premises, the petitioner forcefully opened the door of the suit premises. Criminal proceedings were initiated against the petitioner. The Court of competent jurisdiction has convicted the petitioner for three months. It is submitted that, interim order passed by this Court is being misused by the petitioner. The petitioner has no any legal authority to stay in the suit premises. At the most, the status of the petitioner can be

termed as 'trespasser'.

4. I have heard the Counsel appearing for the petitioner at length and party in person appearing for all respondents. I have carefully perused the impugned judgment and order passed by the appellate Court thereby decreeing the suit filed by respondent No.1. The findings of facts recorded by the trial Court have been confirmed by the appellate Court. The contention of the Counsel for the petitioner that, premises were not in dilapidated condition has been considered by both the Courts below. Though Architect's report cannot be received in evidence since he was not cross examined, said report has been used for the purpose of only corroboration. So far whether the suit premises were in dilapidated condition or not, from the evidence recorded by the Courts below, it appears that, the Court Commissioner was appointed and after adverting to the Court Commissioner's report, Courts have recorded the satisfaction that, the suit premises are in

dilapidated condition. The Court Commissioner's report should be normally received in evidence unless the parties files application before the Court for summoning the Court Commissioner for examination, as it is clear from reading the provisions of Order 26 Rule 10 of the Code of Civil Procedure. Nothing has been brought to the notice of this Court that, the petitioner did make such prayer before the trial Court so as to call Court Commissioner for examination. It is the case of the petitioner that, the Court Commissioner was not examined and therefore, his evidence cannot be considered. It is not necessary for this Court to go into detail of examination in chief or cross examination of the witnesses. From perusal of the judgment of the appellate Court it appears that, in order to establish that, since the suit premises were in dilapidated condition, the plaintiff has examined Triveni (P.W.1) vide Exhibit-26 who is daughter of the plaintiff, Umesh (P.W.3) who is Junior Engineer of the Cantonment Board, Aurangabad. Further evidence is considered

by the Court i.e. Notices of Cantonment Board at Exhibit-38, 39 and also Exhibit-84, certified copy of order in Misc. Civil Appeal No. 305 of 1999 at Exhibit-31 and all other documents including application of the plaintiff at Exhibit-80, certificate of Architect at Exhibit-81, General Power of Attorney at Exhibit-63, certified copy of Commissioner's report in R.C.S. No.971 of 1999 at Exhibit-82 and all other evidence which was placed on record before the trial Court. Therefore, if the case is considered in its entirety, both the Courts below have concurrently held that, the suit premises were in dilapidated condition and therefore, those are required to be vacated by the petitioner i.e., original defendant. Secondly, the evidence of not only witnesses of the respondents but all other evidence including the Court Commissioner's report has been considered in its entirety. The contention of the Counsel for the petitioner that, till date nothing has happened to the suit premises, deserves no consideration since that would fall outside the controversy involved

in the petition. This petition is directed only against the impugned judgment and order passed by the Courts below.

5. The party in person is right in contending that, the suit premises are vacated on 18/10/2008. It is also required to be noted that, as stated by the party in person that, criminal prosecution was lodged against the petitioner and as a result, there was conviction of three months.

6. It is not necessary for this Court to re-iterate or repeat concurrent findings of facts recorded by the Courts below. Suffice it to say that, those appears to be in consonance with the material placed on record. Re-appreciation of evidence is not permissible in extraordinary writ jurisdiction. Therefore, for the reasons aforesaid, this Court does not find any substance in the writ petition. The petition is devoid of any merits, same stands rejected.

7. At this stage, the Counsel appearing for the petitioner prays that, status-quo order passed by this Court while issuing notices, may be continued for further six weeks. In the peculiar facts and circumstances of this case, such prayer cannot be acceded to looking to the events which had taken place after 18/10/2008 that the petitioner has to face criminal prosecution and petitioner was convicted for three months. Any how, party in person appearing for all respondents vehemently opposed the prayer. In the light of above, said prayer stands rejected.

[S.S. SHINDE, J .]

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