

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

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**APPEAL FROM ORDER (STAMP) NO. 1565 OF 2016
WITH
CIVIL APPLICATION (STAMP) NO. 1567 OF 2016**

1. Mr. Pratap Mehta]
Age-62 years, Occ.- Business,]
Shop No.3,]
2. Mr. Pankaj C. Shah]
Age-55 years, Occ.- Business,]
Flat No.203,]
3. Mr. Suresh V. Punekar]
Age-73 years, Occ.- Business,]
Flat No.301,]
4. Mr. Pannalal Soni]
Age-62 years, Occ.- Business,]
Shop No.2B,]
5. Dr. Sulabha V. Punekar]
Age-70 years, Occ.-Nil,]
Flat No.302,]
All having their respective premises]
At Manish Apartment, Vile Parle,]
Palace Co-op. Hsg., Soc. Ltd.,]
147, Nehru Road, Vile Parle (East),]
Mumbai-400 057.].. Appellants

Vs.

1. The Municipal Corporation of Gr.]
Mumbai, a Corporation Established]
and constituted under the Brihan]
Mumbai Corporation Act, 1888, having]
its registered Office at Mahapalika]
Bhavan, Mahapalika Road, Fort,]
Mumbai-400 001.]
2. Reliance Energy Ltd.]
a Company incorporated under the]
provisions of the Indian Companies]

- | | | |
|---|---|----------------|
| Act, having their Registered office |] | |
| at Reliance Energy Centre, |] | |
| Santacruz (East), Mumba-400 055. |] | |
| 3. Parle Palace Co-operative Housing |] | |
| Society Ltd., (Old Name Manish |] | |
| Apartment), 147, Nehru Road, |] | |
| Vile Parle (East), Mumbai-400057. |] | |
| 4. Shamik Enterprises Pvt. Ltd. |] | |
| A company incorporated under the |] | |
| provisions of the Companies Act, |] | |
| 1956, having its office at Dev Enclave, |] | |
| Chitrakar Ketkar Marg, Vile Parle (East), |] | |
| Mumbai - 400 057. |] | .. Respondents |

Mr. Krishna K. Holambe Patil for the appellants.

Mr. A. Y. Sakhare, Sr. Advocate a/w. Mrs. Madhuri More for the Respondent-BMC.

Mr. Jahangir Khan for Respondent No.3.

Mr. Aniket A. Deshmukh for Respondent No.4.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

DATE : 26th SEPTEMBER, 2016.

ORAL JUDGMENT

1. This appeal takes an exception to the order dated 19.12.2015 passed by the City Civil Court, Dindoshi, Borivali Division, Mumbai, in Draft Notice of Motion in L. C. Suit No. 3379 of 2015, thereby refusing ad-interim relief to the appellants.

2. Brief facts of the appeal can be stated as follows:

The appellants herein are the occupants and owners of their respective flats and shop premises in the building known as 'Manish Apartment'. Respondent No.3 is 'Parle Palace Co-operative Housing

Society Ltd.', which is consisting of twelve residential premises and five shops. There were in all 17 tenants in the said building. The building consists of five floors. On the ground floor, there were shop premises and from 1st to 4th floors, there were residential premises. It is an admitted fact that, except for the two tenants; one that of commercial premises and the other that of residential premises, all other tenants have vacated premises in their possession. It is also common ground between the parties that respondent No.3-Society has entered into a Development Agreement with respondent No.4-Builder. It is admitted that with effect from December, 2016, the Builder is going to provide the occupants the rent for the alternate premises.

3. In the backdrop of these facts, the appellants have challenged the notice dated 14.03.2011 issued by Respondent No.1-Municipal Corporation under Section 354 of the MMC Act, directing the appellants to vacate the suit premises, so that the building can be demolished, as it has become dilapidated and dangerous not only to the occupants thereof but also to the passersby.

4. As per the appellants, it was the responsibility of Respondent-Municipal Corporation and respondent No.3-society to carry out structural audit of the building. However, no structural audit was carried out by them. Conversely, the appellants got the structural audit of the building, done by various independent authorities, like, Veermata Jijabai Technical Institute

(VJTI), Sardar Patel College of Engineering (SPCE) etc. However, respondent No.1-Corporation failed to take into consideration those structural audits and, on the basis of its own report, respondent-BMC has issued the impugned notice. It is urged that respondent Nos. 1 and 3 be restrained from acting upon the said notice, otherwise the appellants will come on the street in the absence of the premises in their possession.

5. The interim relief to that effect claimed in the Notice of Motion came to be strongly resisted by the respondent No.1-the Municipal Corporation. It was submitted that the structural audit reports produced by the appellants are based on the visual inspection of the building, whereas, structural audit report submitted by respondent No.3-Society is based on different tests carried out by the Structural Engineer, as per the guidelines issued by this Court in Writ Petition No. 1135 of 2014. It was also submitted that the officers of the respondent No.1-the Municipal Corporation had visited the suit building, inspected the same and found it to be in a dilapidated condition and, thus, it was urged that the building needs to be immediately pulled down and reconstructed, otherwise there is danger to the lives of the occupants and the passersby.

6. Respondent No.3-Society also resisted this Notice of Motion by submitting that, except for the one occupant in residential premises and the other occupant in shop premises, all other tenants in respondent No.3 society have vacated the building since three years back. It was submitted

that even as per the structural audit reports produced by the appellants, the life of the building cannot be for more than five years even if huge repair expenses are made and, therefore, respondent No.3-Society had decided to redevelop the suit property. Accordingly, reports were submitted to the Technical Advisory Committee (hereinafter referred to as the "TAC"). The said Committee considered the reports. The members of the Committee are experts in the field and hence it was urged that the Trial Court should not sit in an appeal over the report of the expert committee and relying on the said report of the expert committee, the Trial Court should reject the ad-interim relief, as sought by the appellants, of calling upon the respondent No.1-Corporation not to take any action in pursuance of the notice issued under Section 354 of the MMC Act. It was also submitted that, in view of the Judgment of this Court in Writ Petition No. 1135 of 2014, the rights of the appellants will not be affected even if the building is demolished. As against it, their lives will be definitely affected if the building collapses and their lives are lost.

7. The Trial Court, after considering three reports on which reliance was placed by respondent No.3-Society, and also the report submitted by the appellants themselves, came to the conclusion that the TAC has rightly accepted the report submitted by respondent No.3-Society as it was based on the results of the technical tests which were carried out, whereas, the reports submitted by the appellants were not based on

such technical tests. The Trial Court also then considered the fact that, except for the appellants, no other tenant is residing in the said building and since the year 2009, there are structural audit reports stating that the suit building is required to be demolished and if ad interim relief is granted in such a situation, then there was likelihood of building being collapsed and thereby causing danger to the lives of the passersby and others. Thus, the Trial Court rejected the ad interim relief by the impugned order. In these facts and circumstances, the present appeal is preferred.

8. It may be stated, at this stage itself, that this Court has, vide its order dated 01.03.2016, considered the report submitted by TAC and which was also placed before the Trial Court. The said report being challenged by the appellants in this appeal on the count that the specific tests, as per the guidelines framed by this Court, were not conducted, this Court observed that, without going into the issue whether the TAC has strictly followed the guidelines framed by this Court vide order dated 23.06.2014 in Writ Petition (Lodging) No. 1135 of 2014, it will be in the interest of justice if TAC is directed to carry out specific tests, as per the guidelines framed by this Court in the above said Writ Petition, and submit its report to this Court on the issue as to whether the suit structure, which is the subject matter of the notice issued under Section 354 of the MMC Act, is required to be demolished or repairs can be carried out ?

9. It is the matter of record that as per the order passed by this Court, the TAC has taken the decision of calling upon M/s. Shashank Mehendale & Associates to carry out structural audit of the suit building and, accordingly, Structural Consultant M/s. Shashank Mehendale & Associates carried out the requisite tests and submitted its report. The TAC considered the said report, after taking into consideration the condition of the subject building, arrived at its own conclusion that the occupants should be directed to vacate the building and the building needs to be pulled down after taking necessary preventive measures such as propping, barricading etc. to avoid mishap, so that the reconstruction can be undertaken.

10. In this backdrop, the submission of the learned counsel for the appellants is two fold. In the first place, it is urged that, as per the order passed by this Court on 01.03.2016, it was for the TAC to carry out structural audit as per the guidelines framed by the Division Bench of this Court in Writ Petition (Lodging) No.1135 of 2014 and to submit the report. However, the TAC itself has not carried out appropriate tests, but has outsourced the said work to M/s. Shashank Mehendale & Associates. It is urged that it was done by respondent No.1-Municipal Corporation in blatant volition of the order passed by this Court on 01.03.2016 and the Guidelines framed by the Division Bench of this Court in Writ Petition (Lodging) No. 1135 of 2014. Hence, according to learned counsel for the

appellants, on this very ground itself, the report submitted by M/s. Shashank Mehendale & Associates cannot be considered and hence, on the basis of the said report, the decision taken by the TAC of demolishing the said building is also liable to be set aside.

11. Secondly, learned counsel for the appellants has challenged the report by submitting that the work order, as can be seen from the documents produced on record by respondent No.1-Municipal Corporation itself, was issued on 06.04.2016, whereas the samples are extracted by the lab dated 31.03.2016 and 01.04.2016. Thus, it is urged that the report given by M/s. Shashank Mehendale & Associates is fabricated, should not be relied upon and necessary action be also taken against them for the same.

12. Before advertng to this submission made by learned counsel for the appellants, it would be necessary to take a review of the facts, which are undisputed in this case, as can be seen from the report and from the impugned order passed by the Trial Court. There were three structural audits conducted by respondent No.3-Society itself and those three structural audits are referred by the Trial Court in para 8 of its order. It reveals that the inspection of the suit building was carried out by one Bhavesh Pathak, Structural Engineer in the month of December, 2009. He has conducted the tests as per guidelines framed by this Court in Writ Petition (Lodging) No. 1135 of 2014 and has given the report that the

occupants of the building should vacate the said building as it is required to be demolished and reconstructed. The Trial Court has also referred to the report dated 25.01.2011 in respect of the structural audit conducted by Sardar Patel College of Engineering, which was done after carrying out required tests and after suggesting to vacate the building for demolishing the same, considering its precarious nature. The urgency was also mentioned in the said report. There is another report dated 30.03.2015, which is again submitted by Sardar Patel College of Engineering, after carrying out further structural audit and necessary tests and recommending pulling down of the suit building, having become dangerous and dilapidated.

13. The appellants have tried to contradict these reports by placing reliance on their own structural report dated 10.08.2014 given by Mr. Navin M. Sangharajka, the Consulting Engineer. However, the Trial Court, after perusal of the said report, found that it was given merely on visual inspection of the building. The appellants then relied upon the report dated 22.04.2015 given by VJTI. The Trial Court found that the said report was submitted without carrying out the necessary tests. Only ultrasonic pulse velocity test and rebound hammer tests were stated to be carried out but results thereof were not mentioned in the said report. The appellants thereafter relied upon the structural audit report given by M/s. Yogesh P. Patel after carrying out inspection of the said building on

25.05.2015. The Trial Court found that the said report does not disclose that the samples were taken by the lab or any any structural engineer from the suit building.

14. In para 10 of its order, the Trial Court has considered the report submitted by the TAC on 12.05.2015, according to which, since the year 2008, action was initiated against the suit building on the inspection report given by the Fire Brigade. The staff of the Municipal Corporation had also visited the site and gave report. The TAC accepted the said report and also the reports given by respondent No.3, which were based on the results of technical tests required to be carried out and on the basis of these reports, the Trial Court came to, prima facie, conclusion that, when the expert committee has arrived at a certain decision that the building has become dilapidated and needs demolition, moreover, when the majority of the occupants of the said building had already vacated the same for its demolition and redevelopment, if the relief, as claimed by the appellants, is granted, it will endanger the lives, not only of those two occupants, who are presently residing there, but also of the passersby and accordingly, the Trial Court has refused to grant the an interim relief to the appellants.

15. If the submission of learned counsel for the appellants is to be accepted that this Court should not have called for any further evidence or material as this is an appeal against the order and when the Trial Court

had already exercised its discretion on the documents produced before it, this Court should not interfere in exercise of that Court, on the basis of the additional documents submitted in this appeal, then it has to be held that the discretion exercised by the Trial Court, being perfectly based on the documents produced before it, no interference is warranted in the impugned order passed by the Trial Court. It can be reiterated that there were three structural audit reports stating that the condition of the building is dilapidated. Those reports are submitted by the experts. Even the reports, on which the appellants have relied upon, also go to show that the life of the building, even though the major structural repairs are carried out, cannot be more than 5 years. Hence, allowing such building to remain as it is, despite the recommendations made by the expert committee of demolition of the same, is as good as allowing human life to be sacrificed merely because some tenants, i.e. only two tenants out of 17 tenants, are insisting that they do not want to leave the premises. Therefore, if this appeal is to be decided only on the basis of the material, which was produced before the Trial Court and which is considered by the Trial Court properly, this Court will have to hold that the Trial Court has rightly exercised its discretion and, therefore, within the limited scope of the appellate jurisdiction against discretionary order this Court should restrain itself from interfering with the said order. On this sole ground, this appeal needs to be dismissed.

16. Moreover, in view of the subsequent development that has taken place in this appeal which is stated above, like, the order passed by this Court on 01.03.2016, the entire matter needs to be re-appreciated again. It has to be stated that this order dated 01.03.2016 was passed by this Court as the appellants herein had challenged the report of TAC, on which the Trial Court has relied upon. This Court, without entering into the issue, whether the TAC had strictly followed the guidelines framed by this Court vide its order dated 23.06.2014 passed in Writ Petition (Lodging) No.1135 of 2014, felt that it would be in the interest of justice, if the TAC is directed to carry out appropriate tests as per the guidelines and submit its report. Therefore, when this order is invited by the appellants themselves and on the basis of this order, there is some material collected and relied upon, the submission of the appellants that this Court should not take into consideration that material or the report submitted by the TAC cannot be accepted. It is pertinent to note that the appellants have not challenged this order dated 01.03.2016 passed by this Court and consequently this order is implemented. Now when the copy of the report is placed before the Court finally, the appellants again cannot contend that this Court should not take into consideration these documents merely because these documents are going against the case of the appellants.

17. In pursuance of the order passed by this Court on 01.03.2016,

the TAC has appointed M/s. Shashank Mehendale & Associates to carry out structural audit along with ND test required Proform-B etc. M/s. Shashank Mehendale & Associates had carried out structural audit of the building and submitted its report, along with non destructive tests of building to the Executive Engineer K/East Ward. The said report is also produced on record and it clearly goes to state that the building is unsafe for occupation. The report further reveals that the said M/s. Shashank Mehendale & Associates carried out N.D. test. However as regards the Ultrasonic Pulse Velocity Test and Rebound Hammer Test were not carried out, because the building is an old structure and major distresses were noticed at the time of inspection and therefore these two tests may yield non-representative values. The report further states that the Half Cell Potential Test was carried out, which showed uncertainty of reinforcement on ground, first and second floors and very high probability of reinforcement on third and fourth floors. The Core Test is carried out indicating the average test of the concrete of the said building under reference is about 7.75 MPa which is about 50% of the M15 which is the minimum concrete strength considered for RCC designs as per respective IS codes referred at the time of construction of the building. As a result of the same structural members of the said building are deficient in strength posing grave danger to residents of the building. The report further states that the Carbonation Depth Test indicated that the depth of carbonation is more than clear cover depth of respective RCC members and acidic

region may be present around the reinforcement. The report categorically recommends the pulling down of the building, having regard to its serious and precarious condition. The report also states that the building needs to be evacuated and propped at the earliest and immediately demolished.

18. It is also a matter of record that after the report was submitted, the TAC held its meeting on 13.05.2016. The minutes of the said meeting are produced on record and which show that prior to conduct this meeting dated 13.05.2016 the TAC members visited the site on 05.05.2016, when ward staff, Post Graduate Engineers appointed by MCGM were also present. In this meeting of TAC dated 13.05.2016, the committee members considered the report submitted by M/s. Shashank Mehendale & Associates and after careful analysis of the said report, the TAC came to its own independent conclusion that the building under reference is in dilapidated condition and not fit for human habitation, hence, the building should be evacuated and pulled down under the supervision of structural consultant. The Committee in its meeting held that the TAC decision of 12.05.2015 to that effect holds good. The ward staff was accordingly directed to inform the owner and occupier to vacate the building and to take necessary preventive measures such as propping, barricading etc. to avoid any mishap.

19. Thus, whatever findings which were arrived at on the basis of the earlier TAC report dated 12.05.2015 are further confirmed by the TAC

after the careful analysis of report submitted by M/s. Shashank Mehendale & Associates. This report of TAC Committee is not challenged on its contents or its substance but it is challenged on the two counts, as stated above. It is submitted by learned counsel for the appellant that as per the order passed by this Court on 01.03.2016, the TAC was directed to carry out appropriate tests as per the guidelines framed by the Division Bench of this Court in Writ Petition (Lodging) No. 1135 of 2014 vide its order dated 23.06.2014. It is urged by the learned counsel for the appellants that in the said Writ Petition it was clearly directed in Clause 9(d) that *"the TAC shall (i) carry out a visual inspection of the state of the internal and external plaster, plumbing, drainage, whether the doors and windows close properly, whether steel in columns is exposed, whether there is settlement in the foundation, deflections/sagging, major cracks in columns/beams seepages/leakages, staircase area and column condition, lift well walls, U.G. tank, O.H. tank column condition, parapet at terraces, chhajjas, common areas, terrace water proofing and (ii) carry out specific tests like ultrasonic pulse velocity test, rebound hammer test, half cell potential test, carbonation depth test, core test, chemical analysis, cement aggregate ratio as may be considered by TAC as necessary."*

20. According to learned counsel for the appellants, these directions to carry out visual inspection and specific tests being given to the TAC, it follows that the TAC cannot delegate or outsource that work to

any other consultants. According to learned counsel for the appellants, as in this case the TAC has outsourced this work to M/s. Shashank Mehendale & Associates, it has flouted the order dated 01.03.2016 passed by this Court and the guidelines issued by this Court. Hence, such report needs to be ignored and it cannot be a correct or reliable material.

21. On the face of it, though the submission advanced by learned counsel for the appellants may appear persuasive, on the closure scrutiny it cannot be accepted. Though it may be true that the directions were given to TAC to conduct the tests and then submit its report, it cannot be accepted that the TAC has to personally do all this or the TAC was in any way restrained from taking assistance of some consultant. Merely because it is stated that the "TAC shall do" does not mean that the respondent No.1-the members of the TAC themselves have to carry out these tests. There is much substance in the submission advanced by learned Senior Counsel for the respondent No.1-the Municipal Corporation that the TAC can definitely take the assistance of the consultants who are on the panel of Municipal Corporation. It is not necessary that in each and every case, when TAC is directed to do certain things, the members of the TAC have to do it personally. What is meant by it is that TAC should take its independent decision and not merely produce and reply upon the report of the said consultant. In the instant case as stated above, the report of the TAC goes to show after the order was passed by this Court on

01.03.2016, the TAC members have personally visited the site on 05.05.2016 and, therefore, there was visual inspection made personally by the TAC. So far as the various tests are concerned, it is true that the TAC has appointed M/s. Shashank Mehendale & Associates as consultant and that consultant has submitted its report after carrying out the requisite tests. However, the minutes of the meeting dated 13.05.2016 reveal that the TAC considered that report and thereafter on careful analysis arrived at its own decision. Therefore, it is not the case that the TAC has delegated its power of taking independent decision to the consultant appointed by it. Conversely, the TAC has taken its decision on its own, may be with the assistance and help of the report submitted by the consultant. Hence no fault can be found in the procedure adopted by the TAC or in the decision taken by the TAC so as to totally discard the said report or not to place the reliance thereon. When the Experts are there and the TAC takes assistance of such experts to carry out the requisite tests, there is nothing wrong.

22. The second count on which the learned counsel for the appellants has challenged this report is that as per the report of M/s. Shashank Mehendale & Associates, he has visited the site in April, 2016. The report is filed on 29.04.2016. However, in the report it is mentioned that samples were extracted on 31.03.2016 and 01.04.2016. It is urged that if the work order is dated 06.04.2016, then, how the samples were

extracted much before it, and if that was the case, then there is fabrication of the report.

23. However, in this respect, even the test reports reveal that there is reference made to an email letter dated 31.03.2016. Learned Senior Counsel for respondent No.1-Municipal Corporation has also produced the file of original correspondence for the perusal of this Court to show that M/s. Shashank Mehendale & Associates accepted the appointment as Consultant on 30.03.2016 in pursuance of the telephone talk. Therefore, merely because the work order is of 06.04.2016, it cannot be said that anything done prior to that is fabricated, fraudulent or cannot be relied upon. If the letter shows that willingness of M/s. Shashank Mehendale & Associates was obtained as Consultant on 30.03.2016 itself and the test reports also show there was reference to the email dated 31.03.2016, then, it has to be held that, much prior to 06.04.2016, the process of appointing the Consultant, on the basis of the oral telephonic talk and willingness, was initiated and, accordingly, considering the urgency in the matter, the work has been started. Therefore, there is no substance in the contention of the learned counsel for the appellants that the report is fabricated and hence should not be relied upon.

24. Thus, if one considers this report of TAC which is not challenged or controverted by the appellants by producing any contrary report, then, it clearly, *prima facie*, goes to prove that the suit building

needs to be evacuated for the purpose of demolition, having become precarious and dangerous. Hence, in the light of this additional material also, the impugned order passed by the Trial Court, refusing the ad-interim relief to the appellants needs to be upheld.

25. At this stage, before concluding, it has to be again reiterated that, out of 17 tenants in the building, except for the two tenants, one of shop premises and the other one of residential premises, all of them have vacated the suit building. Respondent No.3-Society has already entered into Development Agreement with the respondent no.4-the Developer. It is submitted that, from December, 2016, the rent for alternate premises is going to be paid by respondent no.4-the Developer to the occupants of the said building. In such situation, allowing suit building to remain in existence, is not only dangerous to the lives of the appellants themselves but also to the persons residing nearby and passers-by. It is undisputed that the building is adjacent to the main road and, therefore, if it collapses, then it is likely to cause damage and destruction of human lives also. Therefore, it is necessary that the appellants vacate the said building as it is better for them and others as well. In view of this, balance of convenience also does not lie in favour of the appellants. Respondent No.4-the Developer is also ready and willing to provide alternate permanent accommodation to appellants in a newly constructed building. Appellants will also get all the benefits stated under the Development

Agreement. I am sure that the better counsel will prevail and the appellants themselves will vacate the premises at the earliest. The appeal otherwise also holds no merit, hence, stands dismissed.

26. At this stage, learned counsel for the appellants submits that the appellants may be given some time to vacate the suit premises. It is urged that the ad-interim relief granted by this Court is in existence till date and the appellants undertake to vacate the suit premises by 30.11.2016, as from 01.12.2016 the Builder is going to provide rent for alternate premises. A statement is made by learned counsel for respondent No.4- the builder that the rent for alternate accommodation will be paid from 01.12.2016. Learned counsel for the appellants submits that the appellants are ready to give undertaking that they are occupying the premises at their own risks and consequences and respondent No.1- Municipal Corporation will not be held responsible for the same. Learned counsel for the appellants further submits that this Court can dispose of the Suit also on the basis of this undertaking.

27. Accordingly, the appeal is dismissed. However, the appellants are granted time upto 03.11.2016 to vacate the suit premises, subject to the following conditions:

- (i) The appellants shall give an undertaking within two weeks that they shall vacate the suit premises on their own on or before 30.11.2016.

- (ii) The appellants shall also give an undertaking to the effect that they alone will be responsible for any loss or damage in case of any mishap caused to the building and they will be occupying the premises at their own costs and consequences. Respondent No.1-Municipal Corporation or Respondent No.3 will not be responsible for the same.
- (iii) The appellants shall also file an undertaking to the effect that they will pay Municipal Corporation taxes as and when demanded by respondent No.3 by issuing its bill.
- (iv) In view of the dismissal of the appeal, the civil application does not survive and hence stands disposed off.
- (v) In view of the above said order, the suit pending before the Trial Court also stands disposed off with the dismissal of this Appeal.

[DR. SHALINI PHANSALKAR-JOSHI, J.]