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

***APPEAL FROM ORDER NO. 273 OF 2016
WITH
CIVIL APPLICATION NO. 348 OF 2016***

Richard D'Souza and Ors.

... Appellants/
Applicants.

V/s.

Municipal Corporation of
Greater Mumbai and Ors.

... Respondents.

Mr. Vishal Ghosalkar for the Appellants/Applicants.

Mr. A.V. Diwate for Respondent 1 – BMC.

Mr. Anilkumar Patil for Respondents 2 and 3.

Mr. L.H. Patil for Intervener.

Mr. R.M. Bhatia , Officer, DO (II)/H/East present in Court.

CORAM : N.M. JAMDAR, J.

DATE : 28 MARCH, 2016.

ORAL ORDER :-

Heard learned Counsel for the parties. Admit. Taken up for final disposal by consent of parties.

2. By this Appeal the Appellants challenges the order passed by the Judge, City Civil Court, Dindoshi dated 4 February 2016 rejecting a Draft Notice of Motion taken out by the Appellants in L.C.Suit No.196 of 2016 filed by them.

3. The Appellants prayed for an order of injunction restraining the Respondent – Municipal Corporation from acting upon notice dated 17 June 2015 issued by the Corporation under Section 354 r/w. 489 of Mumbai Municipal Corporation Act, and also sought permission to carry out necessary repairs in the building in question. The Suit relates to the building known as “Bijlee Co-operative Housing Society” situated at Kalina, Santacruz (East), Mumbai. The Appellants are members of the said Society. There were disputes amongst members and Respondent No.2 was appointed as an administrator in the year 2009. It appears that the Municipal Corporation took cognizance of the Structural Audit Report furnished by the Veermata Jijabai Technological Institute (VJTI), which report was obtained by the Respondent No.2 – administrator. The VJTI in its report dated 4 June 2015 mentioned as under :-

“ The building is a RCC structure. Quality of concrete could not be assessed since whenever trials of removal of plaster were made the large chunks of concrete came down with the plaster. The average concrete strength is less than 20 N/mm². The UPV tests could not be done since the cracks were wide spread at close intervals. The corrosion and the openings in RCC members clearly showed that the steel in all portions of the building i.e. A, B and C wings has corroded to a large extent.

Another notable point in that there is no expansion joint in between the wings. Therefore, the deterioration in Wing A will also influence the deterioration in Wing B and Wing C.

The design requirements of the lateral forces have also changed since the time this building was designed in 1970. the buildings have also been subjected to fatigue loads which were being imposed by the Bharat Forge Company which was in the close vicinity of this building.

The water logging has also definitely affected the plinth and the foundations of the building. But this has still not caused any non uniform visible settlements so far.

Looking into all these facts, it may be concluded that the building has outlived its useful life and is at present in an unstable condition.

Even though the Wing C is stable at present, any disturbance in Wing A will definitely cause disturbance in Wings B and C.

Therefore it is recommended that the building be vacated and the remedial measures be looked into taking into account the cost of the measures as compared to demolition. A carefully considered decision may be taken after the building is vacated.”

4. Based on this report, an action was initiated by the Respondent – Corporation which has been questioned by the Appellants by filing a Suit. While rejecting the ad-interim relief, the learned City Civil Judge has relied upon the report of the VJTI.

5. The learned Counsel for the Appellants submitted that the report of the VJTI ought not to be taken into consideration as various tests which are required to come to the conclusion as to

whether the building is dilapidated or not have not been undertaken. The learned Counsel for the Appellants has sought to rely on a report of the Structural Engineer Creative Consultant which according to the Appellants shows that the building in question need not be demolished and can be repaired. The learned Counsel for the Municipal Corporation submitted that the report submitted by the VJTI is correct and the report relied upon by the Appellants, of a private entity, ought not to be relied upon. The learned Counsel for the administrator submitted that the VJTI has given cogent reason as to why all the tests could not be carried out.

6. It appears from the arguments advanced at the bar, there is a dispute regarding condition of the building. For resolving such disputes a methodology has been laid down by the Division Bench of this Court in *Writ Petition (Lodg.) No. 1135 of 2014 in Mumbai Municipal Corporation of Greater Mumbai v/s. State of Maharashtra*. These Guidelines were laid down by hearing all the stakeholders as under :-

“ 9 Accordingly, for the present, in the absence of any policy in that behalf, the following guidelines are issued:

a) The present order will be applicable only in respect of those buildings which are highly dilapidated and dangerous and/or classified in Category C1 by the Corporation, whether owned by a private party or by the Corporation or any other authority and in respect of which building, either a notice under section 354 has been issued or the Corporation has issued a Letter of Evacuation to their tenants and/or occupiers of the buildings.

b) The Corporation will, before classifying a building under category C1, conduct their own independent inspection and assessment with the help of the Engineers of their Department and carry out a survey of such building(s). The report of Structural Audit shall be taken into account.

c) The Corporation shall consider the report of Structural Engineer appointed by the owners and/or occupants classifying the building as dilapidated and dangerous. If the owners and/or the occupants bring conflicting reports on the status of the building, the Corporation shall refer the matter to Technical Advisory Committee (TAC) under the Chairmanship of Director (ES&P) with at least 3 other members, viz. City Engineer, Chief Engineer (DP) and Chief Engineer (P&D).

d) 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.

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.

e) If it is found after due notice that the building(s) is in a highly dangerous or in dilapidated condition, then in that event, the Corporation shall also make a list of the

names of the tenants and/or occupiers in the said building and the carpet area of the premises in their respective occupation and possession including the floor at which the same has been occupied.

f) A copy of such list will be furnished to the landlord and/or owner/builder of the said building. The Corporation thereafter, will issue a notice under section 354 of the said Act calling upon such tenants and/or occupiers to vacate the said premises and if such notice under section 354 of the said Act has already been issued, then in that event the Corporation will give 7 days' notice to such tenants/occupiers, copies whereof will be furnished to the landlord for vacating the said building(s). If such tenant and/or occupier is not available, the Corporation shall affix such notice or Letter of Evacuation on any part of such premises.

g) The Corporation shall then take steps to turn off the water, supply, electric power and gas to such building immediately before the removal of occupiers.

h) In the case of a municipal owned building(s), the Corporation will issue Letter of Evacuation to every person in occupation of the said building or part thereof to vacate the said building along with their belongings within the said period of 7 days from date of issuance of such notice of Letter of Evacuation in respect of municipal owned building(s). The notice issued to such occupiers shall contain the name of the occupier and the area in his occupation and also the floor at which the premises are located. In case, if such tenant and/or occupier is not available, the Corporation shall affix such notice or Letter of Evacuation on any part of such premises.

i) In the event, a person occupying such tenement whether of the privately owned building(s) or building(s)

owned by Corporation or any other authority refuses to vacate the said premises, then the police shall remove such person from the said premises by using nominal force if required for the same.

j) The police may use such force as is reasonably necessary to remove such person and/or occupiers and/or allottee along with their belongings from the said premises, without causing damage to their movables.

k) The Corporation may then demolish such dangerous and dilapidated building.

l) The rights of the tenants and/or occupiers and/or owners in respect of the said premises/property will not be affected by virtue of evacuation or demolition carried out by the Corporation of such dilapidated and dangerous building in exercise of the power under section 354 of the said Act or by virtue of the fact that the Corporation is the owner of the premises. Such tenant and/or occupier and/or owner will be entitled to reoccupy the premises in respect of the same area after the reconstruction of the building, subject to the prevalent provisions of law pertaining to redevelopment of the property or subject to any arrangement or agreement arrived at by and between such tenants and/or occupiers with the owner of the building. Any action of evacuation/removal/demolition will not affect the inter se rights of owners if there be more than one owner or there is a dispute as to the title of the property.

m) If there are any pending suits/proceedings and there are any restraint orders passed, the Corporation shall be free to apply for vacating and/or modifying such orders, which applications shall be decided on its own merits and in accordance with law.

n) In respect of the Municipal buildings, it shall be the

duty of the Corporation to provide alternate accommodation as early as possible in any of their premises to such tenant and/or occupier of the Corporation owned building till and until the said building is reconstructed by the Corporation or the tenancy of any of such occupier is determined in accordance with law.

o) In respect of the private owned buildings, if such building falls in cessed category as contemplated under the provisions of the Maharashtra Housing and Area Development Act, 1976, then in that event, it will be the duty of MHADA/ MBR&RB to provide temporary alternate arrangement in a transit camp for transit accommodation, in accordance with law, as early as possible.

p) In case privately owned buildings are demolished by the Corporation in exercise of power under Section 354 read with the present order, then the Corporation shall, while granting sanction of redevelopment, impose a condition in IOD (Intimation of Disapproval) that no Commencement Certificate will be issued under section 45 of the MRTP Act, 1966 unless and until an Agreement either providing a Permanent Alternate Accommodation in a newly constructed building or a settlement is arrived at by and between the tenants and/or occupiers and the landlord in respect of the said demolished premises, is filed with the Corporation at the earliest.

q) In case of buildings which have suddenly collapsed, to determine the reasons for such collapse, it is desirable that forthwith a Committee be constituted headed by a former Municipal Commissioner and consisting of Former Chief Engineer of MHADA alongwith a Professor of VJTI and a Professor of IIT, Powai having expertise in Structural Engineering as also an employee of the Corporation, holding a post not lower than that of the

Director (E.S.&P) and such Committee will determine the cause of such collapse and interalia identify whether any Architect and/or Consultant and/or Municipal officers or other person/s is/are responsible in any manner whatsoever for such a collapse. The reference to the Committee will not in any way be a hindrance in the criminal investigations/proceedings that may have commenced or may be commenced under the relevant criminal law. This no way would restrict the State of Maharashtra to pass appropriate order for any such inquiry or investigation.”

6. The guidelines contemplate that firstly the structure has to be classified in category C1. Before the classification is done, the Corporation will conduct its own independent inspection with the help of its engineers. Clause 9(C) of the Guidelines contemplates that apart from the independent assessment of the Corporation, the Corporation will also consider the report of the Structural Engineer appointed by the owners or occupants, certifying the building as dilapidated or dangerous. However if the owner, occupants bring any conflicting report on the status of the building, the Corporation shall refer the matter to the Technical Advisory Committee. The Technical Advisory Committee thereafter will carry out the necessary assessment as laid down in the Guidelines.

7. In the present case the Corporation has solely followed the report of the Structural Engineer, VJTI which has been submitted by the Administrator. As it is seen from the communication dated 9 June 2015, the Municipal Corporation

had before it report of one Associated Engineers and also of VJTI. The Appellants have also produced report of the structural engineer which according to them indicate that the building can be repaired. Thus, the conflicting report as regard the status of the building were before the Corporation then and are also now present.

8. In the circumstances, it will be therefore necessary, as per the Guideline, to refer the matter to the Technical Advisory Committee for taking follow up action. Since the notice has been issued without referring the matter to the Technical Advisory Committee, inspite of there being conflicting reports, the notice is not in consonance with the Guidelines laid by the Division Bench of this Court .

9. As regard the imminent danger to the occupants of the building, it has to be noted that by order of the Division Bench of this Court in Writ Petition No. 6738 of 2015 (Appellate Side), the Respondent – Corporation has been restrained from taking action based on notice dated 17 June 2015. Thereafter, the Writ Petition has been transferred on the Original Side of this Court and re-numbered as 2754 of 2015, which was disposed of on 5 January 2016 with liberty to the Appellants to file a Civil Suit. Thus, there is a restraint order against the Respondent – Corporation which is operating from 14 July 2015, and so far no untoward incident is been reported.

10. In the circumstances, since the impugned notice dated 17 June 2015 is not in consonance with the guidelines laid down by the Division Bench of this Court, which contemplate referring the matter to the Technical Committee before issuing such notice, the issue in question regarding the action of demolition in respect of the suit building will have to be referred to the Technical Committee. Accordingly, the Municipal Corporation shall do so within period of one week from today. The reports which are part of this appeal will be placed before the Technical Advisory Committee. Thereafter, the Technical Advisory Committee will take steps as contemplated under the guidelines as early as possible, after taking into consideration all the relevant aspects.

11. In the circumstances, the impugned notice dated 17 June 2015 does not survive. A fresh action will be taken depending on the report of the Technical Advisory Committee by the Municipal Corporation. Till further action is taken by the Municipal Corporation, the ad-interim relief granted which has been continued from 14 July 2015, on the same terms and conditions stated in the order passed by the Division Bench on 14 July 2015 will continue. The Appellants shall file an undertaking stipulated by the Division Bench within period of two weeks from today with copies to the Advocates on the other side.

12. In view of the above directions, the Suit filed by the

Appellants will not survive. Liberty to the parties to place the copy of the order before the City Civil Court for disposal of the Suit.

13. Appeal from Order and Civil Application are disposed off.

14. All parties to act on authenticated copy of the order.

(N.M. JAMDAR, J.)