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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO.971 OF 2012

Municipal Corporation of Greater Mumbai	]	
Through Mr. Arjun H. Jaiswar,	]	
Legal Assistant P/N ward	]	 <u>Petitioner</u>
M.M.C. Legal Department, Mahapalika	]	(Original
Marg, Mumbai 400 001	]	complainant)

Versus

1. Wasudev D. Pilgaonkar,	]	
Ramnath Prasad, 18 th road	]	
Khar (W), Mumbai 400 052	]	
	]	
2. Mrs. Arundhati A. Phadnis	]	
Block No.3 Malang Prasad	]	
Liberty Garden Road No.1,	]	
Malad (W), Mumbai 400 064	]	<u>Respondents</u>
	]	(Respondent
3. Mrs. Sumita P. Nagarsekar	]	Nos 1 to 3
Block No.4 Malang Prasad	]	Original
Liberty Garden Road No.1	]	Accused)
Malad (West), Mumbai 400 064	]	
	]	
4. State of Maharashtra	]	

Mrs. Surekha Sonawane I/by Mr. K. N. Gaikwad, for the petitioner B.M.C
Mr. Ketan A. Chothani, for respondent Nos 1 too 3.
Mr. A.S. Shitole,APP for the state.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

RESERVED FOR ORDER ON: 29TH FEBRUARY 2016.

ORDER DELIVERED ON : 7TH MARCH 2016

JUDGMENT :

1. Heard learned counsel for the parties.
2. Rule.
3. Rule is made returnable forthwith with consent of both parties.
4. This writ petition questions the legality, validity and propriety of the order dated 16.5.2011, passed by the Additional Sessions Judge, Greater Bombay, in Criminal Revision Application No.1257 of 2010, thereby quashing the process issued against respondents herein, for the offence punishable under Section 475A(1)(a) of the Mumbai Municipal Corporation Act, 1888, by Court of Metropolitan Magistrate, 39th Court, Parle, Mumbai, in Criminal Case No.6759/SS of 2010.
5. Facts of the writ petition are to the effect that respondent Nos 1 to 3, are the owners of the property i.e. building bearing No.51, Malang Prasad, Liberty Garden Road No.1, Malad (West), Mumbai. On 1st June, 2010, Junior Engineer "P" North ward of Mumbai Municipal Corporation, Greater Bombay, inspected the premises of respondents and found that the structure of the building was in a ruinous condition. It was likely to fall and therefore, dangerous to the persons occupying the same or from passing nearby. Therefore, Junior Engineer prepared the inspection report and after seeking directions from higher authorities, issued notice under Section 354 of the MMC Act, calling upon the respondents to carry out

necessary repairs which were enumerated in the said notice within 30 days from the receipt of notice. The said notice was duly served on the respondents on 17.6.2010 and 7.7.2010. The Junior Engineer again inspected the said premises on 25th August 2010 and found that respondents had failed to comply with the requisitions made in the notice and thereby committed an offence punishable under Section 475(A)(1)(a) of MMC Act. Therefore, Criminal Case was filed against respondents under Section 475(A) (1)(a) read with Section 354 of the MMC Act, before the trial Court. The trial Court, by its order dated 15.9.2010, was pleased to issue process against the respondents.

6. Being aggrieved by the order of issuance of process, respondents herein filed Criminal Revision Application No.1257 of 2010, before the Sessions Court at Greater Mumbai. By its judgment and order dated 16.5.2011, learned Sessions Judge was pleased to allow the said Revision Application and quashed the process issued against the respondents.

7. While challenging the order of Revisional Court, submission of learned counsel for the petitioner is that Revisional Court has totally ignored the provisions of Section 507 of MMC Act. It is urged that the Revisional Court has quashed the process issued against respondents, only on the grounds that the tenants who are occupying the said structure

are not co-operating the respondents, in carrying out necessary repairs of the said building. According to Revisional Court, therefore, respondents cannot be held liable for non co-operation of the tenants and fastened with the criminal liability of prosecution under Section 475(A)(1)(a) of the MMC Act. According to learned counsel for the petitioner, Revisional Court, failed to appreciate that respondents had failed to avail the remedy available to them under Section 507 of the MMC Act. It is urged that both the owners and occupier-tenants are attributing blame on each other, but no-one is taking any steps to comply with the requisitions made in the notice issued by the petitioner under Section 354 of the MMC Act.

8. It is further urged that by the notice, respondents are called upon to carry out certain requisitions, like to cut shrubs grown on the external face of the building and to provide adequate propping below the balcony, chajas and passage and the dangerous members of the building in order to avoid mishap. To carry out those repairs neither the co-operation from the tenants nor vacant possession of the building was required. Hence as per learned counsel for the petitioner, respondents cannot escape from criminal liability for non compliance of the requisitions made in the notice issued under Section 354 of the Act. According to learned counsel for the petitioner, therefore, the impugned order passed by the Revisional Court quashing process issued against respondents at

the threshold itself being illegal, is required to be set aside.

9. Per contra, learned counsel for respondents had supported the impugned order of the Revisional Court, by submitting that the petitioners are not coming before the Court with clean hands. It is urged that prior to the impugned notice dated 17.6.2010, petitioners had earlier also issued one notice under Section 354 of the MMC Act on 27th January, 2010. The said notice was replied by the respondents through their advocate on 22nd February, 2010 and it was pointed out that the building is old and dilapidated being more than 40 years old, respondents had issued notice to the tenants placing on record true and correct facts, damage to the building caused due to the additions and alterations and had called upon tenants to vacate the premises by terminating their tenancy. Tenants became aggrieved thereby and issued notice to the petitioners on 25.5.2010, raising contention that it is not necessary to vacate the building or to hand over the possession as the repairs to the building can be carried out without doing so. According to learned counsel for respondents, on the receipt of those notices from tenants, petitioners had changed the stand and called upon the respondents to carry out repairs alone and not to pull down the building. As per learned counsel for respondents, copy of inspection report conducted earlier by the Junior Engineer before issuance of notice dated 27th January 2010, was not

supplied to the respondents despite their making application under Right to Information Act. It is urged that as the tenants are not co-operating with the respondents for carrying out necessary repairs nor handing over vacant possession of the building, respondents are helpless and in such situation, holding them liable for penal consequences for their failure to comply with the requisitions made in the notice dated 17.6.2010 issued under Section 354 of the Act is clearly an abuse of process of law; hence Revisional Court has rightly quashed the said process.

10. In order to appreciate these rival submissions advanced by learned counsel for petitioner and respondents, it would be useful to refer to the provisions of Section 354 of the MMC Act. For easy and ready reference, the provision is reproduced below.

“354. Removal of structures, etc., which are in ruins or likely to fall (1) If it shall at any time appear to the Commissioner that any structure (including under this expression any building, wall or other structure and anything affixed to or projecting from, any building, wall or other structure) is in a ruinous conditions, or likely to fall, or in any way dangerous to any person occupying, resorting to or passing by such structure or any other structure or place in the neighbourhood thereof, the Commissioner may, by written notice, require the owner or occupier of such structure to pull down, secure or repair such structure and to prevent all cause of danger therefrom.

(2) The Commissioner may also if he thinks fit, require the said owner or occupier by the said notice, either forthwith or before proceeding to pull down, secure or repair the said structure, to set up a proper and sufficient hoard or fence for the protection of passers by and other persons, with a convenient platform and handrail, if there be room enough for the same and the Commissioner shall think the same desirable, to serve as a footway for passengers outside of such hoard or fence”.

11. A bare perusal of these provisions indicate that under this Section, the Commissioner of Municipal Corporation has been conferred with wide powers to ensure safety of citizens and further to ensure that the old and dilapidated structures which are in ruinous condition do not cause any loss of life or property. Sub section (1) of section 354 further makes it clear that if at any time, it appears to the Commissioner that any structure is in ruinous condition or in any way dangerous to the persons occupying or passing by such structure or any other structure in the property thereof, the Commissioner may by written notice require the owner or occupier of such structure to pull down, secure or repair such structure and to prevent all cause of danger therefrom.

12. The use of words, “if it shall at any time appear to the Commissioner” imply that the satisfaction of the Commissioner about

dangerous nature of the structure is only of a prima facie nature. He need not be convinced or there should not be any reason to believe that the structure is of a dangerous nature, therefore, standard of satisfaction for issuance of notice under Section 354 of the MMC Act, is at the very lowest level and such standard of satisfaction of the Commissioner can be attained on the material placed before him, like the inspection report of the Junior Engineer. Here in the case admittedly the averments made in the complaint reveal that Junior Engineer of "P" North ward has visited the premises owned by respondents on 1st June, 2010, carried out inspection of the premises. On perusal of the said inspection report, as can be seen from the averments made in the notice dated 17.6.2010, the Commissioner was satisfied about dangerous nature of the structure and was pleased to call upon the respondents to carry out repairs as set out in the said notice.

13. The repairs which respondents are called upon to carry out in the said notice are as follows :-

1. To carry out gunitting work to the R.C.C. beams, columns, slab, polymer, jacketing and plastering wherever necessary in the consultation with licence Structural Engineer.
2. The work should be carried out under the supervision of licenced structural Engineer. Till then adequate propping must be provided below the balconies, chajas, passage and the

dangerous members of the building wherever necessary in order to avoid any mishap.

3. To provide new additional reinforcement to the R.C.C. Members wherever necessary. Also remove the loss plaster and replace with Rich Mortar.
4. To provide External and Internal plastering with water proofing wherever the leakage is noticed. And cracks developed.
5. To cut the shrubs arised/grown up on the external face of the building.
6. To repair/replace the terrace top to avoid leakage wherever necessary.
7. This issued notice only applicable for authorised structure.

14. Admittedly the said notice was served on the respondents and they had also replied the said notice, but did not comply with the same. According to respondents, for carrying out these repairs, co-operation of the tenants occupying the building was essential. However, tenants were not co-operating and hence respondents could not comply with the said notice. However, even a bare perusal of the notice is sufficient to reveal that some of the repairs could have been carried out even without vacating of the building by the tenants or even without their co-operation as those repairs are of external nature, like cutting shrubs arised/grown up on the external face of the building to provide external plastering with water proofing wherever leakage was noticed and cracks

were developed; to remove loose plaster and to replace it with rich mortar; to repair/replace terrace top to avoid leakage wherever necessary etc. Therefore, the excuse put up by the respondents that without building being vacated and for that without co-operation of tenants, they could not carry out the repairs, is clearly a lame excuse. Respondents had not made any effort to carry out these repairs also and therefore, some consequences or liabilities are bound to follow.

15. Even as regards repair No.1 as stated in the notice i.e. to carry out gunite work to the beams, columns, slab polymer, plastering wherever necessary in consultation with licenced Structural Engineering, eviction of the tenants or vacant possession of premises was not required as such. Moreover, assuming that for the said work also co-operation of the tenants was required, adequate remedy is provided to the owner of the building to get such work done by incorporating section 507 of the M.M.C Act. The said section reads as follows:-

“507. Remedy of owner of building or land against occupier who prevents his complying with any provisions of this Act -(1) If the owner of any building or land is prevented by the occupier thereof from complying with any provisions of this Act or of any regulation or by-law made under this Act or with any requisitions made under this Act or under any such regulation or by-law in respect of

such building or land, the owner may apply to the Chief Judge of the Small Cause Court.

(2) The said Chief Judge, on receipt of any such application, may make a written order requiring the occupier of the building or land to afford all reasonable facilities to the owner for complying with the said provision or requisition and may also, if he thinks fit, direct that the cost of such application and order be paid by the occupier.

(3) After eight days from the date of any such order, it shall be incumbent on the said occupier to afford all such reasonable facilities to the owner for the purpose aforesaid as shall be prescribed in the said order; and in the event of his continued refusal so as to do, the owner shall be discharged, during the continuance of such refusal, from any liability which he would otherwise incur by reason of his failure to comply with the said provision or requisition.

16. This section, therefore, clearly provides for the eventuality where the owner is prevented by the occupier thereof from complying with the provisions of the Act or of any regulation or by-law made under the Act or with any requisition under the Act, in such case, the owner can approach the Chief Judge of Small Cause Court and powers of the Chief Judge under Section 507(2) of the MMC Act, as can be seen are wide enough. Even it includes a power to order occupant to vacate premises if

that is necessary for giving reasonable facility to the owner. Therefore, if it was really a case that respondents/owner herein were not getting co-operation of the tenants for carrying out these repairs, the proper course for them was to apply to the Chief Judge of Small Cause Court. Respondents have, however, not done so. It appears that both the tenants and owners are playing a game of shifting the blame on each other and as a result the building is remaining in the same ruinous condition which is likely to be not only dangerous to the owners and occupants but also to the occupants of the neighbouring building and the passers-by. Hence the excuse raised by the respondents for not complying with the requisitions made in the notice issued by the petitioner under Section 354 of the MMC Act is hardly just or valid.

17. Thus, apparently there is non compliance of the requisition made in the notice issued under Section 354 of the Act that too without any just or sufficient cause and without respondents making any efforts to comply with those requisitions. In such situation, the remedy provided to the Municipal Corporation to get the compliance done or at least to visit the consequences on the owner who has committed the default in making compliance, is under Section 475(A)(1)(a) of the Act. It was informed to the respondents also in the notice issued under Section 354 of the Act that if they failed to comply with the requisitions made in the notice, they

would be liable for prosecution under Section 475(A)(1)(a) of the MMC Act.

18. The provisions of Section 475(A)(1) (a) and (b) of the Act clearly provides for punishment on failure to comply with the requisitions made in the notice issued under Section 351 and 354 of the Act. It reads as follows :-

“475A. Punishment for commencing work contrary to section 347. (1) A person to whom notice under (sections 351 and 354) is served shall, on his failure to comply with the said notice :-

(a) for restoration of the foundation, plinth or floor, or structural members or load bearing walls, thereby endangering the life and property of any person occupying, resorting to or passing by such building or place in neighbourhood thereof, shall be punished with imprisonment for a term which shall not be less than three months but which may extend upto three years and with a fine which shall not be less than ten thousand rupees but which may extend to fifty thousand rupees; and in the case of a continuing offence with a further daily fine which may extend to one thousand rupees; or

(b) for removing, pulling down the unauthorised work, shall be punished with imprisonment for a term which shall not be less than one month but which may extend to one year and with a fine which shall not be less than five thousand rupees but

which may extend to twenty-five thousand rupees and in the case of continuing offence with a further daily fine which may extend to five hundred rupees).

19. Thus, even a bare perusal of section 475A of the Act makes it clear that if any person to whom notice under Section 354 is served, fails to comply therewith, then he is liable to be punished with penal consequences like imprisonment for a term which shall not be less than three months but which may extend upto three years and with fine.

20. In the instant case admittedly respondents have, as aforesaid, failed to comply with the requisitions made in the notice issued to them under Section 354(a) of the Act, the excuse offered by them for not complying with the requisitions is found to be without any substance. In such situation, the prosecution launched against them, for the offence under Section 475A (1) (a) of the Act, being prima facie just, legal and correct, at the threshold itself cannot be quashed or set aside.

21. As to the grievances of respondents that they are not served with copy of Inspection report or subsequent notice calling upon them to carry out repairs whereas earlier notice was of pulling down the structure, is issued at the instance of tenants, they are admittedly questions of facts which can be decided at the time of trial, but at least not in the writ jurisdiction by this Court.

22. At this stage, the Court has to only consider whether the averments made in the complaint prima facie make out ingredients of the offences. In the instant case, such prima facie ingredients of the offences being made out, no illegality can be found in the impugned order of the trial court of issuing process against the respondents.

23. As regards the judgment of Single Judge of this Court dated 15th March, 2013, in ***Criminal Application No.408 of 2011 in M/s Silver Land Developers Pvt. Ltd -vs- The State of Maharashtra and another***, quashing the process issued against owners under Section 475A of the MMC Act on failure to comply with the requisitions made in the notice under Section 354 of the Act, the Municipal Corporation has challenged the said order in the Apex Court by filing Petition for Special Leave to Appeal (Cri) No.3883 of 2014. The Apex Court, by its order dated 24.2.2014, though dismissed the petition, had clarified that the view taken by the High Court is in the light of notice that was issued by the petitioners and therefore, the observations in the said Judgment of Single Judge of this Court are limited only with respect to the facts of the said case.

24. As regards the present case, the allegations in the complaint clearly make out case for issuance of process under Section 475A(1) (a) of the Act, for non compliance with the requisitions made in the notice under Section 354 of the MMC Act and hence the said

process cannot be quashed or set aside as apparently there is no illegality found in the order passed by learned Magistrate.

25. Thus, the Writ Petition is allowed. The impugned order passed by the Revisional Court of quashing process issued against respondents for the offence punishable under Section 475(A)(1)(a) of the Act is set aside.

26. Rule made absolute in above terms. s

[DR. SHALINI PHANSALKAR-JOSHI, J.]