

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

WRIT PETITION NO. 3633 OF 2016

Shri Sharad Bhimrao Agwankar

Petitioner

Vs

Thane Municipal Corporation,
through authorised officer Mrs
Chhaya P. Mankar

.. Respondent

Mr. Pranil K. Sonawane a/w Mr. Aditya D. Parulekar, Advocates for
Petitioner.

Mr. Mandar Limaye a/w Mr. Mahendra Nagvekar, Advocates for
Respondent.

CORAM : R.G.KETKAR,J.

DATE : 07/04/2016

PC:

1. Heard Mr. Pranil Sonawane, learned counsel for the petitioner and Mr. Mandar Limaye, learned counsel for the respondent at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the Judgment and order dated 15.3.2016 passed by the learned District Judge-10, Thane in Misc. Civil Appeal No.74 of 2015. By that order, the learned District Judge allowed the Appeal preferred by the respondent and set aside the judgment and order dated 20.2.2015 passed by the learned 5th Jt. Civil Judge, Sr. Dn, Thane (TMC Court), below Exh.5 in Regular Civil Suit No.68 of 2015 and dismissed the application filed by the petitioner.

3. The petitioner, hereinafter referred to as 'plaintiff', has instituted suit against the respondent, hereinafter referred to as 'defendant', inter-alia, for perpetual injunction restraining the defendant from causing obstruction to the possession of the plaintiff in respect of Room No.1723 in building no. 44, situate at Vartak Nagar, Majiwade, District Thane (for short, suit property); for perpetual injunction restraining the defendant from encroaching upon the suit property without following due process of law. During the pendency of the suit, the plaintiff took out application Exhibit-5 for temporary injunction restraining the defendant from disturbing possession of the plaintiff as also taking possession of the suit property without following due process of law. The defendant filed reply opposing the application. The learned trial Judge allowed the application and restrained the defendant from pulling down the suit building till disposal of the suit. The learned trial judge clarified that notwithstanding clauses (1) and (2) of the operative order, the defendant was free to refer the matter to Technical Advisory Committee for carrying out necessary technical test of building no.44 and on the basis of said report take appropriate action of demolition or repair of the building by issuing notices to occupants of the building.

4. Aggrieved by that decision, the defendant preferred Appeal before the learned District Judge. By the impugned order, the

learned District Judge allowed the Appeal. It is against this order, the plaintiff has instituted the present appeal.

5. In support of this petition, Mr. Sonawane strenuously contended that building no.44 where the suit property is situate, is not at all in dilapidated condition. He submitted that the said building is not required to be demolished and can be repaired. He submitted that the learned trial Judge, after considering the material on record and more particularly the structural audit of the building at Exhibit 18/9 dated 27.1.2015, observed that building is not in dangerous condition but is in semi dangerous condition and it can be repaired. Office Bearers of Kokan Graha Nirman Society, in collusion with builder and Corporation, are trying to pull down the suit building showing that it is in dangerous condition. The learned trial Judge observed that the defendant has not complied mandatory provision by issuing notice under section 264 of the Maharashtra Municipal Corporations Act, (for short, 'Act') to occupants of the building and did not exercise powers thereunder judiciously for carrying out independent technical test of building no.44 and not referring the matter to Technical Advisory Committee in view of conflicting reports at Exhibit 18/8 and 18/9. Though the plaintiff should have challenged the notice issued under section 268 of the Act, inadvertently it was not challenged. However, copy of that notice is produced along with the suit. He further relied upon

order dated 1.8.2015 passed by the learned trial Judge below Exhibit 5 in R.C.S.No.122 of 2015 filed by the plaintiffs who are owners of Room no.1697 in building no.44. The learned trial Judge allowed that application and issued injunction. For all these reasons, he submitted that the impugned order requires to be interfered with.

6. On the other hand, Mr. Limaye supported the impugned order. He submitted that the plaintiff has not challenged the notice issued under section 268 of the Act. That apart, the defendant has followed due process of law by issuing notice which is not challenged by the plaintiff. Building no.44 is completely vacated and even the petitioner has vacated the building. He submitted that the building is owned by Maharashtra Housing and Area Development Authority and occupants have formed a cooperative society. The defendant issued notice under section 264(1) to (4) of the Act on 12.5.2014 declaring building no.44 as dilapidated condition. This was followed by notice dated 10.6.2014 issued under section 268(1) to (3) of the Act. On 14.1.2015, notice was issued to Senior Police Inspector, Vartak Nagar Police Station, under section 268 (5). The plaintiff has not challenged any of such notices and has prayed for injunction restraining the defendant from dispossessing the plaintiff. He submitted that no member of the society is residing in building no.44 since 14.1.2016. On 15.1.2016, society

addressed a letter to Asstt. Municipal Commissioner seeking permission to demolish building no.44. He further submitted that the learned trial Judge has wrongly held that the Corporation should have exercised powers under section 264 by carrying out independent technical test of the building and ought to have referred the matter to Technical Advisory Committee in view of conflicting reports at Exhibit 18/8 and 18/9. He submitted that the decision which is applicable to the Municipal Corporation of Greater Mumbai was wrongly applied in the case of defendant Corporation. He submitted that no case is made out for invocation of powers under Article 227 of the Constitution of India.

7. I have considered the rival submissions advanced by learned counsel appearing for the parties. I have also perused the material on record. As noted earlier, the Corporation has issued various notices from time to time. On 12.5.2014 notice under section 264(1) to (4) of the Act declaring building no.44 as dilapidated was issued. On 10.6.2014 notice under section 268 (1) to (3) of the Act was issued. This was followed by notice dated 14.1.2015 under section 268(5) issued to Senior Police Inspector, Vartak Nagar Police Station. In short, the defendant has followed due process of law. The plaintiff, however, did not challenge any of the notices. That apart, Ms Chhaya Mankar, designated officer of the defendant, has filed affidavit. In paragraph 6, it is stated

that on 14.1.2016 building no.44 is vacated and since then no member of the society is residing therein. On 15.1.2016, society addressed a letter seeking permission to demolish the same. The defendant has permitted the society to carry out demolition by taking due care and caution. During the course of hearing, Mr Limaye also produced photographs indicating condition of the building. After perusing photographs, I do not find that any case is made out for restraining the defendant from acting upon the said notices. The plaintiff has also not challenged any of the notices. The learned trial Judge committed serious error in observing that in view of the conflicting reports, the defendant should have referred the matter to Technical Advisory Committee. The learned District Judge has rightly interfered with the trial Court's order. Learned District Judge considered whether the plaintiff has made out prima facie case, balance of convenience lies in favour of the plaintiff or not, and whether irreparable injury will be caused. The learned District Judge noted that building is more than 35 years old. Out of 80 occupants, nearly 70 occupants have vacated the building. Mr. Sonawane submitted that other occupants of building no.44 have filed R.C.S. No. 122 of 2015. In that Application Exhibit-5 was allowed. Mr. Limaye submitted that against that decision, the defendant has preferred Appeal and the same is pending. In view thereof, no case is made out for invocation of powers under

Article 227 of the Constitution of India. Petition fails and the same is dismissed.

(R.G.KETKAR, J.)