

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CIVIL APPELLATE JURISDICTION****WRIT PETITION NO.12020 OF 2015**

Suresh Shalik Mhatre

....Petitioner

vs.

The State of Maharashtra and Ors.

....Respondents

.....

Mr.R. N. Kachare i/b. Mr. Amol P. Mhatre for the Petitioner.

Mrs.M.P.Thakur, AGP for Respondent nos.1, 3 and 4.

Mr.Rohit P. Sakhadeo for Respondent no.2.

Mr.Ismail Alisaheb Mulla for Respondent no.6.

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**CORAM : SHANTANU S. KEMKAR &
M.S.KARNIK, JJ.****RESERVED ON : 22nd JULY, 2016
PRONOUNCED ON : 29th JULY, 2016****P.C. : (per M.S.Karnik, J.)**

1. The petitioner developer had purchased the suit property bearing survey no. 111, 112, 113, 114 and 115 total ad-measuring 483.6 sq.mtrs on 30/09/2009 from Mrs.Stella Marcus Pereira. The said property also comprises house no.179 and 180. On 11/08/2010, the respondent no.2 – Thane Municipal Corporation (for short 'the Corporation') issued notice to the

petitioner under section 264 (1) (2) (3) (4) of the Bombay Provisional Municipal Corporation Act, 1949 (hereinafter referred to as 'the said Act' for short) declaring the suit structure premises as dilapidated and directing the petitioner to vacate the suit premises within 15 days from the receipt of the said notice.

2. The said notice is in respect of the premises which is a tenanted premises and in possession of respondent no.5. The petitioner pursuant to the receipt of the said notice dated 11/08/2010 requested the tenants including respondent no.5 to vacate the premises. Accordingly, some of the tenants vacated the suit premises and handed over the peaceful possession of the premises to the petitioner.

3. The petitioner had in lieu of the tenancy rights in the tenements agreed to provide to such tenants flat premises in the proposed building to be constructed in or upon the said suit property free of cost and alternate accommodation for which the petitioner agreed to pay refundable deposit of Rs.30,000/- and rent of Rs.7,000/- per month upto 12 months, in respect of which

an agreement was entered into by the petitioner with the tenants.

4. Since some of the tenants did not vacate the suit premises despite the notice under section 264 (1) (2) (3) (4), further notice dated 03/02/2011 under section 268 (1), (2) and (3) of the said Act was issued by the Corporation to the tenants informing them that the suit property has been declared dilapidated and dangerous structure / building and is required for immediate purpose of demolition. The said notice was issued to the respondent no.5 and the petitioner.

5. According to the petitioner, the respondent no.3 i.e. Executive Engineer of the Corporation was asked to submit a structural status report of the suit structure from the Structural Engineer of the Government Panel. Shri Aniruddha Nakhawa, Structural Engineer visited the suit premises and submitted a structural status report on 8th July, 2011 which concluded that the suit premises are in dilapidated and dangerous condition and the said condition is severe and these structural elements are beyond repairs and it will be better to demolish and reconstruct the building.

6. Pursuant to the issuance of the said notice, Kapurbavdi Police Station – Respondent no.4 had asked the petitioner to deposit payment of an amount of Rs.33,000/- for the purpose of demolition work to be carried out by respondent no.2 – Corporation. Despite making the payment for the demolition, no further action pursuant to the issuance of notice under section 268 (1) (2) and (3) was taken.

7. Petitioner had also by letter / notice addressed to respondent no.2 dated 06/05/2013, pointed out that respondent no. 5 has denied vacating suit premises and handing them over to the petitioner for immediate purpose of demolition. According to the petitioner, the petitioner followed up the matter with the Corporation for initiating appropriate steps pursuant to the issuance of notice under section 268, but the Corporation failed to take any steps for demolition of the suit structure. Hence, the petitioner prayed for appropriate directions that action should be taken against respondent no. 5 for demolition of the suit premises after handing over of the possession of the suit premises to the

petitioner as per notice issued by the Competent Authority.

8. By order dated 3rd December, 2015, the petitioner was permitted to amend the petition for impleading respondent no.6 as an additional party and notice was issued to respondent no.6. On 11/01/2016, respondent no.6 appeared in person and sought time to engage an Advocate.

9. When the matter came up for admission on 30/03/2016, this Court passed following order :

“1. Despite service of notice, none appears on behalf of respondent no.6.

2. It is not in dispute that the structure erected by the Petitioner is in a dilapidated condition. The direction was given by the Thane Municipal Corporation to the Petitioner to demolish the said structure with the police help.

3. The learned counsel for the Petitioner has submitted that the condition of the premises is very bad and the building is likely to collapse at any time. Despite of service of notice, Respondent no. 6 has not appeared in this Court. The Petitioner has already spent amount around Rs.2,50,000/- per tenant. The Corporation has already issued notice under section 264 (1) (2) (3) (4) of the Bombay Provisional Municipal Corporation Act, 1949. However, the Corporation is seeking the help of the police for the purpose of demolition of the said structure.

4. Interim relief is granted in terms of prayer clause (b) and Respondent No.4 is directed to take steps for demolition of the premises as per the directions issued by the Competent Authority. Stand over to 27.4.2016.”

10. On 11th July, 2016, the Counsel for the respondent no.6 pointed out that, the name of respondent no.6 as reflected in the cause title is incorrect. The Counsel for respondent no.6 further urged that a fair opportunity should be given to him to represent his case and therefore the order dated 30th March, 2016 ought not to be acted upon till he is duly heard. Accordingly on 11th July, 2016, we permitted the petitioner to amend the cause title so as to incorporate the correct name of respondent no.6.

11. In view of the fact that respondent no.6 requested for time to file affidavit in reply and with a view to give fair opportunity of hearing to the respondent no.6 we had asked the respondent Corporation to refrain from proceeding ahead with the demolition as directed by this Court by the order dated 30/03/2016.

12. Respondent no.6 filed a detailed affidavit in reply. It is

the contention of the respondent no.6 that Regular Civil Suit No. 959 of 2012 is filed by the petitioner against him which matter is pending in the Thane District Court. The Writ Petition therefore is not maintainable. According to respondent no.6, the petitioner i.e. plaintiff in the suit has prayed for ordering the respondent no.6 to handover the vacant and peaceful possession of the same suit premises. The suit filed is based on the same cause of action as pleaded in the present petition.

13. Respondent no.6 has raised various contentions regarding the validity of the sale transaction and has made allegations of forgery against the petitioner. Respondent no.6 thus has contented that the petitioner is harassing respondent no.6 in which respect he has made various complaints to the concerned police station.

14. Respondent no.6 has denied receipt of the notice for demolition. Respondent no.6 has also contented that the structural engineers report should not be relied upon and the same has been submitted without the structural engineer actually

visiting the suit premises in question.

15. The learned Counsel for respondent no.6 apart from relying on the various contention raised in the reply filed on behalf of respondent no.6 has also placed reliance on a number of decisions of the Apex Court as well as this Court in support of his submissions. First decision relied upon is that of ***Pushpalata Gopal Worlikar vs. Mr.Ranjitsingh Sharma & Ors.*** [2012 (4) ALL MR 641] of this Court to support the proposition that disputed question cannot be adjudicated in a petition filed under Article 226 of the Constitution of India. The learned Counsel relied upon decision of the Apex court in the case of ***Shalini Shyam Shetty & another vs. Rajendra Shankar Patil*** [2010 ALL SCR 1681] to contend that in respect of dispute between landlord and tenant amongst private parties the High Court in exercise of its jurisdiction under Article 226 of the Constitution of India cannot interfere.

16. He next relied upon the decision of the Apex Court in the case of ***Commissioner of Income Tax & Ors vs.***

Chhabildas Agarwal [(2014) 1 Supreme Court Cases 603] to contend that it is settled law that the High court must not interfere if there is efficacious alternative remedy available to the petitioner and he has approached the High Court without availing the same, unless he has made out an exceptional case warranting such interference or there exist sufficient grounds to invoke the extraordinary jurisdiction under Article 226 of the Constitution of India.

17. Learned Counsel for respondent no.6 also invited our attention to the Apex Court decision in the case of ***State of U.P. and Others vs. Desh Raj [AIR 2007 SUPREME COURT 628]*** to contend that it is well settled that a relief which can be granted at the final hearing of the matter should not ordinarily be granted by way of interim order. In this context he also relied upon decision of the Apex Court in the case of ***Indore Development Authority vs. Mangal Amusement (P) Ltd., [AIR 2011 SUPREME COURT 199]***.

18. Learned Counsel for respondent no.6 also urged that

the court should not grant interim order in a mechanical manner and that High Court will desist from issuing ex-parte without hearing the respondent. To support this proposition he relied upon decision of the Apex court in the case of ***State Bank of Patiala and Ors. vs. Vinesh Kumar Bhasin*** [AIR 2010 SUPREME COURT 1542].

19. The learned Counsel for the respondent no.6 relied upon decision of the Apex Court in the case of ***Vishal N. Kalsaria vs. Bank of India & others*** [(2016) 3 Supreme Court Cases 762] to contend that the Rent Control Acts being a social welfare legislation must be construed as such . A landlord cannot be permitted to do indirectly what he has been barred from doing under the Rent Control Act.

20. Having given our anxious consideration to the submission advanced on behalf of the petitioner, as also the Counsel appearing on behalf of the respondent – Corporation and the Counsel for respondent no.6, we are of the view that once notice has been issued under section 268 of the said Act, the

same must be taken to its logical end in accordance with law. This Court had occasion to consider the provision of section 354 of the Mumbai Municipal Corporation Act, 1888 in the case of Tadeshwarwadi Co-operative Housing Society vs. State of Maharashtra and Others 2013 (3) Bom C.R. 79 where it is held that the Corporation is required to take the notice issued under section 354 of the Act to its logical end and in accordance with law.

21. The notice under section 264 was issued to the petitioner on 11/08/2010 being the owner and thereafter the notice under section 268 (1) (2) (3) was issued on 03/02/2011 informing that the suit property has been declared dilapidated and dangerous and the same is required for immediate purpose of demolition. Even respondent no.2 Corporation had issued direction under section 268 (5) of the said Act to respondent no.4 i.e. Kapurbavadi Police Station for taking action for vacating the suit premises as per the direction issued under section 268 (5) of the said Act. We find that the structural engineer has submitted his report concluding that the suit premises are in dilapidated and

dangerous condition and same is beyond repairs and it will be better to demolish and re-construct the building.

22. At this juncture it is pertinent to note that respondent no.6 had appeared in these proceedings on 11th January, 2016. Thereafter he has filed detailed affidavit in reply. Respondent no.6 is thus well aware of the notice issued under section 264 and 268 of the said Act.

23. The petitioner has filed the petition for direction to Corporation for taking the notice under section 268 (1) (2) (3) and (5) towards logical conclusion. The said notice as against the petitioner has attained finality and there being no legal impediment in respect of the said notice in question, the Corporation must take the notice to its logical conclusion.

24. Respondent no.6 has raised various contentions opposing the petition, but has not taken any steps to challenge the said notice. As regards the contention of respondent no.6 that a suit is already filed by the petitioner for evicting the respondent

no.6, we notice that the said suit is for possession under the Rent Act. However, the petitioner is well justified in invoking the writ jurisdiction of this Court as the petitioner is seeking direction the against respondent – Corporation to discharge their statutory obligation of taking the notice issued under section 268 to its logical end and for demolition of the subject premises.

25. As indicated earlier, the structural engineer also has concluded that the structure is dilapidated and requires demolition and no contrary report has been filed by respondent no.6.

26. During the course of the hearing, we had indicated to the petitioner as well as respondent no.6 that they should settle the matter. All the tenants have vacated the suit premises by entering into agreement with the petitioner except the respondent no. 6. The talks of settlement have failed. Learned Counsel for the petitioner, nevertheless, has agreed to protect the interest of the respondent no.6 in the following manner:

- (a) The respondent no.6 shall be accommodated on the 6th floor of the building to be constructed

after demolishing existing premises and shall be put in possession of an area ad-measuring 325 sq.ft similar to what other tenants are offered. Learned Counsel for the petitioner has stated that the plans have already been sanctioned upto the 6th floor.

(b) Till the time the respondent no. 6 is put in possession of the newly constructed premises, he will be allotted alternative premises, the rent of which will be paid by the petitioner or in lieu there of if the respondent no. 6 is not agreeable, compensation of Rs.6000/- per month will be provided for till he is put in possession of the new premises.

(c) The learned Counsel for the petitioner has further indicated that every possible endeavour will be made to complete the construction of the building within a period of two years from the date

of handing over possession by respondent no.6.

27. Needless to mention that we are only deciding the question of issuance of notice under Section 268 and all other contentions of the parties are, therefore, left open.

28. We dispose of the petition by passing the following order :

(a) The Corporation is directed to take notice dated 03/02/2011 issued under section 268 of the said Act to its logical end by removing/ demolishing the dangerous structure in question forthwith.

(b) We also direct the Officer of respondent no.2, Corporation to discharge the duty with the help of police authorities and the respondent No.4/police authorities would extend adequate logistical support to them.

(c) As regards the rehabilitation of respondent no.6, we record the stand taken by the petitioner in para 22 of this order.

(d) Writ Petition is accordingly disposed of.

[M.S.KARNIK, J.]

[SHANTANU S. KEMKAR, J.]