

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 312 OF 2016**

Shri Suresh Tukaram Morajkar Petitioner

Versus

Shri Baburao Karekar & Another Respondents

Shri Jayant P. Mulgaonkar, Advocate for the Petitioner.

Shri Deepak Gaonkar, Advocate for Respondent No.1.

Shri Sandesh D. Padiyar, Advocate for Respondent No.2.

CORAM:- C. V. BHADANG, J.

DATE:- 15th FEBRUARY, 2017

ORAL ORDER:

The petitioner is challenging the dismissal of his application for temporary injunction by the Trial Court, which has been confirmed in appeal.

2. A building better known as "Karekar Hotel" situated at Mapusa, having five shops on the ground floor and an incomplete construction on the second and third floor and more particularly, shop no.4 of the disputed premises (of which the petitioner is an owner), are the subject matter of dispute. The

petitioner purchased the said shop in the year 2002 and was conducting business of spare parts in it for sometime and subsequently, has leased them out to one Mangaldas Naik. The building was constructed somewhere in the year 1990.

3. On 15.09.2014, the respondent no.2, Municipal Council issued a notice purportedly under Section 190 of the Goa Municipalities Act, 1968 (Act, for short), to the petitioner and the other occupants of the building, directing the petitioner to remove/demolish the building, claiming it to be in a dilapidated and ruinous condition. The petitioner and the other occupants were in receipt of the notice on 18.09.2014. The petitioner filed a suit before the Trial Court for a declaration that the said notice issued by respondent no.2, is without following the procedure laid down in law and restraining respondent no.2 from interfering with the structure in any manner. According to the petitioner, the notice was issued without affording an opportunity of hearing. It is contended that the notice is issued at the instance of respondent no.1.

4. The petitioner also sought temporary injunction before the Trial Court.

5. The respondent no.1 opposed and claimed that he had undertaken the construction of the building somewhere in the year 1990. However, on account of some difficulties (as set out in the written statement), the construction could not be completed. It was contended that the North Goa Planning and Development Authority (NGPDA) had given suggestion to demolish the entire building and to take up reconstruction of new building by keeping proper set backs for road widening, as per law. Accordingly, the petitioner engaged the services of an Engineer Mr. Mahendranath Usgaonkar of Mapusa for preparing a plan. After inspection, the said Engineer advised not to raise any further construction over and above the existing structure since the foundation of the building had become weak and retaining the said construction would endanger the lives of the occupants. He claimed that inspite of his efforts, none of the occupants came forward to co-operate.

6. The respondent no.1 reported the state of the building to the concerned government Department, the respondent no.2 and also the Chief Minister. The Engineer of the respondent no.2 inspected the building on 06.02.2014, thereby confirming that the building is in dangerous and ruinous

condition. The respondent no.2 referred the matter to the Principal, Goa Engineering College, Farmagudi, Ponda (GEC). Experts from the GEC after inspecting the building with the help of scientific instruments have given a report on 01.08.2014, stating that the structure is precariously standing and may collapse at any time and keeping the safety aspect in mind, it is advisable to demolish the building instead of "waiting for a catastrophe to happen". In the opinion of the Experts from the GEC, the building was no longer fit for improvement and strengthening. It was in these circumstances, that the respondent no.2 had issued the notice.

7. The respondent no.2 also contended that the building is in ruinous and dilapidated condition and is required to be demolished, as it posed danger to the occupiers, as also to the public/passers by in as much as the building is abutting a busy public road.

8. The learned Trial Court by order dated 14.05.2015, dismissed the application for temporary injunction, which has been confirmed by the learned District Judge by judgment and order dated 04.01.2016. Hence, this petition.

9. I have heard Shri Mulgaonkar, the learned Counsel for the petitioner, Shri Gaonkar, the learned Counsel for the respondent no.1 and Shri Padiyar, the learned Counsel for the respondent no.2. With the assistance of the learned Counsel for the parties, I have gone through the relevant record and the impugned orders passed.

10. It is submitted by Shri Mulgaonkar, the learned Counsel for the petitioner that the notice is issued without hearing the petitioner. The learned Counsel has referred to the notice dated 15.09.2014, pointing out that it refers to the representation from the respondent no.1, addressed to the Hon'ble Chief Minister. It is submitted that the respondent no.1 is interested in getting the shops vacated under the garb of the notice for demolition. The learned Counsel has referred to Section 190 of the Act and particularly, sub-section 3 thereof, in order to submit that it is only when it appears to the Chief Officer that the danger from a building, structure or thing which is ruinous or about to fall is of "hourly imminence", that the Chief Officer before giving any notice as per sub-section 1 of Section 190 of the Act or before the period of the notice expires, can take action for securing the building, so as to avoid any

danger there from. The learned Counsel was at pains to point out that the impugned notice does not show the satisfaction of the Chief Officer that the building poses any danger, which is of "hourly imminence". It is thus submitted that the notice is bad in law.

11. On the contrary, the learned Counsel for the respondents have supported the impugned orders. It is submitted that on the basis of the report from an independent Expert Agency, the building is shown to be in a dilapidated and ruinous condition, which is beyond repairs and strengthening. It is submitted that both the Courts below after considering the material have rightly refused to grant injunction, which orders do not call for interference. The learned Counsel have referred to the report from the GEC in order to submit that the building is in a precarious condition.

Reliance is placed on the Division Bench decision of this Court in case of **M/s Whiz Enterprise Private Limited Vs. State of Maharashtra & Others, 2009 (6) ALL MR 539**, in order to submit that the opinion of an Expert concerning the condition of the building, being a subjective opinion, it is not open to the Court to substitute its view, even if such opinion

suffers from any error. It is pointed out that the opinion in fact, does not suffer from any error in this case.

12. On behalf of the respondents, it was also contended that the suit as is framed and filed, would not be maintainable in view of Section 288 of the Act, read with Section 289 of the Act. It is submitted that there is no prior notice issued to the respondent no.2, before filing the suit as contemplated in Section 289(1)(b) of the Act.

13. In reply, the learned Counsel for the petitioner states that this aspect is raised for the first time and even otherwise, sub-section 4 of Section 289 would show that nothing in clauses (a) and (b) of sub-section (1) of Section 289, shall apply to a suit under Section 38 of the Specific Relief Act. It is submitted that at the stage of consideration of the application for temporary injunction, these aspects may not be gone into.

14. I have carefully considered the rival circumstances and the submissions made and I do not find that any case for interference is made out. As noticed earlier, the Municipal Council had carried out an inspection of the building on

06.02.2014 and had referred the matter for Expert opinion to the GEC. It is a matter of record that the GEC conducted the inspection of the building on 24.03.2014 and again testing and inspection was done on 29.05.2014. On the basis of inspection, a report dated 01.08.2014 was furnished, which speaks for itself. The report notices that the building is about 28 years old (in the year 2014) and there was no maintenance from the year 1985. There is a basement floor in which rain water accumulates and for almost four months, the entire basement is submerged in water. There is rusting of steel and few columns at the basement and first floor level have vertical cracks indicating severe corrosion of the main reinforcement. This has resulted into additional stress in columns. The report further states that many beams are having their main steel reinforcement bars exposed, which has resulted in rusting of bars and in turn, questioning the load carrying capacity of the beams. Some of the beams at first floor level have shown discreet bending "at mid span". There is spalling of concrete. The report also encloses the photographs of the structure and concludes that "the structure is precariously standing and may cause failure suddenly". It recommends that keeping the safety aspects in mind, it is advisable to demolish and to reconstruct

the building, "instead of waiting for a catastrophe to occur".

15. I have carefully gone through the report and seen the photographs. Atleast, *prima facie* at this stage, no exception can be taken to the finding that the impugned notice, is based on the material and on the Expert opinion, which cannot be lightly brushed aside. As held by this Court in the case of **M/s Whiz Enterprise Private Limited** (supra), the Court would be slow to question the report of an independent Expert body.

16. It is true that the impugned notice does not specifically record that the danger posed by the building is of "hourly imminence", as envisaged under subsection (3) of Section 190 of the Act. However, at the same time, the notice does not indicate that it is specifically issued under Section 190(3) of the Act. Be that as it may, mere absence of the expression of the opinion that the danger posed by the building is of hourly imminence, may not be decisive at the stage of consideration of the application for temporary injunction, particularly in the wake of the fact that there is independent material from an Expert body, to show that the building was standing in a precarious condition and was advised to be

demolished. The question would depend upon the facts and circumstances of each case. Prima facie, there is clear material to come to the conclusion that the building is in danger and ruinous condition and therefore, the Courts below were justified in refusing to grant injunction.

17. It is trite that in the matters of grant or refusal of interim relief, which is of a discretionary in nature, the Appellate Court (and moreso, this Court in exercise of the supervisory jurisdiction under Article 227 of the Constitution of India), would be slow to interfere with such orders.

18. The impugned orders do not indicate that the issue about maintainability of the suit on the basis of Sections 288/289 of the Act, was raised before the Courts below. Thus, I do not find it necessary to dwell on the said issue, particularly when otherwise on facts, the petitioner is found not to be entitled for any relief. The petition is without any merit and is, accordingly, dismissed.

19. It had transpired during the course of hearing that the trial has commenced and the suit is part heard. In such

circumstances, the learned Trial Court shall decide the suit as expeditiously as possible and preferably within a period of one year from the date of this order. In the circumstances, there shall be no order as to costs.

C. V. BHADANG, J.

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