

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 1415 OF 2018

ABDULGANI ALLABAKSH HANNURE DIED LRS
VERSUS
THE STATE OF MAHARASHTRA AND OTHERS

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Advocate for Petitioners : Shri Dixit V.J. Sr. Adv.
i/b Shri Nagargoje Ankush N.
AGP for Respondents 1 to 5 : Shri Yadav-Lonikar S.R.
Advocate for Respondent 6 : Shri Katneshwarkar P.F.
h/f Shri Undre V.S.

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CORAM : RAVINDRA V. GHUGE, J.
Dated: February 22, 2018

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PER COURT :-

1. The petitioners are aggrieved by the order dated 2.1.2018 passed by respondent No.2 - Additional Divisional Commissioner in Revision Petition No.174 of 2017 and the notices dated 7.11.2017 issued by respondent No.6 by which, these petitioners are called upon to vacate the shops, which they have been occupying, on lease / rent basis.

2. I have considered the submissions of the learned Sr. Advocate on behalf of the petitioners, the learned AGP on behalf of respondent Nos.1 to 5 and the learned Advocate on behalf of respondent No.6 / Municipal Council. With their assistance, I

have gone through the record available.

3. These petitioners are occupying the shops in the Alam Prabhu Shopping Center, which is a load bearing structure erected in 1992. These shops have been allotted to these petitioners by following the procedure as is laid down. Some of these petitioners had approached the Additional Divisional Commissioner, Aurangabad with regard to the issue as regards the completion certificate. The issue as to why has the said shopping center become dilapidated and why has the life span of the said structure practically come to an end, were some of the issues raised.

4. By order dated 2.1.2018 (wrongly typed as 2.1.2017), the Additional Divisional Commissioner rejected the Revision Application and sustained the notices issued by the Chief Officer dated 7.1.2017.

5. The grievance of the petitioners is that the Chief Officer / respondent No.6 has *suo moto* issued a communication dated 31.7.2017 to the Executive Engineer, Public Works Department, Osmanabad. The Executive Engineer was called upon to state as to whether the said shopping center was worthy of being

occupied and whether it was in a dilapidated condition. Grievance is that there was no reason for the Chief Officer to issue the said communication which is practically a direction to the Executive Engineer to submit a report that the shopping complex is in a bad state.

6. By communication dated 19.9.2017, the Executive Engineer and the Sub Divisional Engineer of the PWD, along with the City Engineer of Municipal Council, Bhoom, submitted a report. The report titled as Gala No.2 pertains to the structure, which is at issue. It was concluded that the said structure is a load bearing structure. It is a ground plus first floor building. The plaster on the slab and the walls have fallen. The steel centering was exposed and was rusted. The construction was erected in 1992. There was a severe water seepage from the walls and the slab. It was recommended that a Non Destructive Test (NDT) needs to be conducted through a qualified Structural Engineer and it needs to be assessed whether the building can be renovated or is beyond repairs. Grievance of the petitioners is that these reports are motivated and do not indicate the truth.

7. The Municipal Council has, thereafter, resorted to the NDT by calling upon a firm by name S.G.Jeurkar and Associates

to perform the said test. It is alleged that though the said firm is led by Shri S.G.Jeurkar, the report submitted is aimed at suiting the convenience of the Municipal Council.

8. To contradict the said report, these petitioners have got certain tests done by engaging Shri R.S. Baraskar, who is a Government Approved Valuer and with B.E.(Civil) qualifications. His report dated 19.11.2017 indicates that the painting is in good condition, no vegetation is observed on the structure, over all outlook of the building is in good condition, there are no cracks or dampness in the masonry and slab beams, no repairs are required, structure is sound and slab and photographic evidence indicates that the building is good for accommodation for another 20 years.

9. In the above backdrop, it is contended that some political elements of the ruling party desire that the structure should be destroyed and a new structure be erected so that the persons close to the ruling party could be accommodated in the shops that would be constructed.

10. The learned AGP appearing on behalf of the State authorities submits that that the State can not take the risk of

loss of life. If there is any risk to life, the State cannot be a silent spectator and wait till a mishap occurs.

11. Learned counsel for the Municipal Council has relied upon the affidavit-in-reply filed by the Chief Officer of the Municipal Council, Bhoom and relies upon the documents annexed to the said affidavit-in-reply. He has strenuously defended the steps initiated by the Municipal Council and he relies upon the judgment of this Court in the matter of Asgarali Samsherali Vs. Chief Officer, Akot Municipal Council [1975 Mah.L.J. 868].

12. The issue before this Court is as to whether the contention of the petitioners based on the report submitted by Shri Baraskar should be relied upon and whether a risk should be taken to allow the shop keepers to continue to occupy the said shops or whether the steps initiated by the Municipal Council could be viewed in the larger interest of the society and especially to avoid any mishap or loss of life.

13. The report submitted by Shri Baraskar indicates that he had conducted a structural audit of the building. He has acquired the qualification of B.E. (Civil) and is a Government Approved Valuer. His report submits that the building's outside looks

appear to be in good condition and there are no cracks or dampness in the masonry wall and the slab / beams. His conclusions indicate that he has arrived at the said observations after looking at the building and on the basis of the photographic evidence.

14. His report does not indicate that he had conducted any specialized test to assess the structural strength of the building and whether there was any risk of the building collapsing. Photographs placed on record by the petitioners indicate the front view of the shops and the internal shelves on which the commodities have been stocked. The insides of these shops appear to be freshly painted with plaster of Paris designing in some of the shops.

15. In so far as the report of Shri S.G.Jeurkar and Associates is concerned, the said firm is authorized Structural Designer and Structural Auditors for PWD, Aurangabad Region. The report of this firm indicates that it conducted the ND Test. It is noted that there are no columns in the said structure, which is load bearing, growth of vegetation is noted in the masonry walls as well as the RCC members. The building structure appears to be dilapidated. Specific retrofitting is not observed. Heavy cracks, dampness in

the masonry as well as slab is noticed. The balconies and the chajjas indicate large unacceptable deflection, concrete is distressed and damaged, steel reinforcement is corroded and the chajjas are on the verge of collapsing. Burnt Brick Masonry (BBM) has developed cracks and the plaster is falling of. Large dampness and water bodies are found inside the BBM. Heavy dampness, heavy corrosion to the steel, exposed steel, weak concrete, reduced size of steel due to corrosion, honey combing surface, have been noticed and reinforcing steel material is found to be not as per the IS Code. It is also noted that the building structure is not designed for earthquake resistance, structural elements including roof slab and beam are found with unacceptable strength and the structure needs to be demolished and to be replaced with a new structure. The said firm has issued a letter to respondent No.6 on 26.9.2017 that they had conducted the ND test for the concrete and other tests to assess the strength of the building.

16. This Court has observed in paragraph Nos. 7 to 9 in the Asagarali judgment (supra), as under:-

"7. For properly understanding the rival contentions raised before me it will be useful to refer to some of the

provisions of the Maharashtra Municipalities Act, 1965. Section 49 of the Act lays down obligatory duties and functions of the Council. It is one of the obligatory duties of the Municipal Council under section 49 (2) (g) of the Act to make necessary provision for securing or removing dangerous buildings or places, and reclaiming unhealthy localities; section 195 then confers a power upon the Chief Officer in this behalf. Section 195 of the Act reads as under:

"195 (1). If it shall at any time appear to the Chief Officer that any building or other structure or anything affixed to such building or structure is in a ruinous condition or likely to fall, or in any way dangerous to any person occupying, resorting to or passing by such building or structure or any other structure, or place in the neighbourhood thereof, the Chief Officer may, by written notice, require the owner or occupier of such building or structure to pull down, secure, remove or repair such Building, structure or thing or do one or more such things and to prevent all causes of danger therefrom.

(2) The Chief Officer 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, remove or repair the said

building, structure or thing to set up a proper and sufficient board or fence for the protection of passer-by and other persons.

(3) If 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, he shall, before giving notice as aforesaid or before the period of notice expires, lence of, take down, secure or repair the said structure or take such steps or cause such work to be executed as may be required to arrest the danger.

(4) Any expenses incurred by the Chief Officer under sub-section (3) shall be paid by the owner or occupier of the structure and shall be recoverable in the same manner as an amount due on account of a property tax."

Section 327 of the Act then makes a provision regarding fixing of a reasonable time for doing a particular act. The said section reads as under:

"Where any notice, order or requisition under this Act requires any act to be done for which no time is fixed by or under this Act, such requisition shall fix a reasonable time for doing the same"

Section 328 confers a power upon the Municipal

Council to execute works in default of owner or occupier. Provisions of sub-sections (1) of section 328 of the Act are as under:

"328 (1) Where by or under this Act, any person is required to execute any work or do anything and default is made in the execution of such work or the doing of such thing, the Council, whether any Penalty is or is not provided for such default, may cause such work to be executed; and the expenses thereby incurred shall, unless otherwise expressly provided in this Act, be paid to the Council by the person by whom such work ought to have been executed, and shall be recoverable in the same manner as an amount claimed on account of a property tax, either in one sura or by Installments, as the Council may deem fit:

Provided that-

(a) except as otherwise provided by or under this Act, a notice shall be issued to such person requiring him to execute such work or to do such thing;

(b) Where any drainage schema or water works scheme has been commenced by any Council, it shall be lawful for the Council, without prejudice its powers under section 202 or

any other provision of this Act, to make a special agreement with the owner of any building or land as to the manner in which the drainage or water-connection thereof shall be carried out, and the pecuniary or other assistance, if any, which the Council shall render; and any payment agreed upon by the owner shall be recovered in accordance with the terms of such agreement or in default, in the manner described in sub-section (2) and (3);

(c) where an order or requisition has been passed under sub-section (1) of section 175, section 183, sub-section (4) or (12) of section 189, or under sections 200, 202, 207 or 208 or where permission has been given under section 204 or where an arrangement has been made under proviso (b) of this sub-section, the Council may, without prejudice to any other powers under this Act, if it thinks fit, declare any expenses incurred by the Council in the execution of such order or in the carrying out of such requisition, permission or arrangement to be improvement expenses. Improvement expenses shall be a charge up in the premises or land, and shall be levied in such installments as the Council may decide, including interest at the rate of seven and a half per cent, per annum, and shall be

recoverable in the manner described in sub-sections (2) and (3)."

Then comes section 329 which is as under :-

"329- If the occupier of any building or land prevents the owner thereof from carrying into effect in respect of such building or land, any of the provisions of this Act, after notice of his intention so to carry them into effect has been given by the owner to such occupier, any Executive Magistrate upon proof thereof, and upon application of the owner, may make an order in writing requiring such occupier to permit the owner to execute all such works, with respect to such building or land as may be necessary for carrying into effect the provisions of this Act, and may also, if he thinks fit, order the occupier to pay to the owner the costs relating to such application or order; and if, after the expiration of eight days from the date of the order such occupier continues to refuse to permit such owner to execute any such work, such occupier shall, on conviction, for every day during which he so continues to refuse, be punished with fine which may extend to fifty rupees and every such owner, during the continuance of such refusal, shall be discharged from any penalties to which he might otherwise

have become liable by reason of his default in executing such works."

It is not disputed before me that a notice was issued under section 195 of the Act requiring both the owner as well as the occupier to pull down the building. Such a notice was received both by the owner as well as the occupier. It is also clear from the record that the owner and the occupier both have failed to comply with the said direction incorporated in the notice issued by the Chief Officer. However, it is contended by the owner, the applicant before me, that it cannot be said that there was any willful or intentional non-compliance with the lawful direction given by the Chief Officer. It was strenuously contended by Shri Oke that unless it is proved by the prosecution that there was an intentional disobedience or failure to comply with the directions, a person cannot be convicted for an offence under section 195 read with section 299 (b) of the Act. It is not possible for me to accept this contention.

8. *It cannot be disputed that section 195 of the Act is enacted for the benefit of general public. It contemplates safety of the citizens, who are occupying the buildings as well as the safety of the citizens who are either residing in the neighbourhood or are passing by such buildings. Therefore, it is the safety of the citizens in general which is contemplated by section 195*

of the Act. As to whether in these circumstances the requirement of mens rea is a necessary ingredient of an offence or not has been considered by the Supreme Court in The State of Gujarat v. Acharya Shri Devendraprasadji (cit. supra). In para. 10 of the judgment it was observed by the Supreme Court as under:

"The question whether a crime can be said to have been committed without the necessary mens rea has led to considerable controversy. The broad principles accepted by Courts in this country as well as in England are: Where an offence is created by a statute, however, comprehensive and unqualified the language of the statute, it is usually understood as silently requiring that the element of mens rea should be imported into the definition of the crime, unless a contrary intention is expressed or implied. In other words, the plain words of the statute are read subject to a presumption, which may be rebutted, that the general rule of law that no crime can be committed unless there is mens rea has not been ousted by the particular enactment. The mens rea means some blameworthy mental condition whether constituted by knowledge or intention or otherwise." But this rule has several exceptions, as observed by Lord Evershed in Lim

Chin Aik v. The Queen :

"Where the subject-matter of the statute is the regulation for the public welfare of a particular activity-statutes regulating the sale of food and drink are to be found among the earliest examples it can be and frequently has been inferred that the legislature intended that such activities should be carried out under conditions of strict liability. The presumption is that the statute or statutory instrument can be effectively enforced only if those in charge of the relevant activities are made Responsible, for seeing that they are complied with. When such a presumption is to be inferred, it displaced the ordinary presumption of mens rea."

11. *As long back as 1895 Wright J. observed in Sherras v. De Rutzen :*

"There is a presumption that mens rea, an evil intention, or knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by The subject-matter with which it deals and both must be

considered."

12 It is further observed therein that the principal classes of exceptions may perhaps be reduced to three. One is a class of acts which are not criminal in any real sense, but are acts which in the public interest are prohibited under a Penalty. Another class comprehends some, and perhaps all, public nuisances. Lastly, there may be cases in which, although the proceeding is criminal in form, it is really only a summary mode enforcing a civil right. But, except in such cases as these, there must in general be guilty knowledge on the part of the defendant, or of some one whom he has put in his place to act for him, generally, or in the particular matter, in order to constitute an offence. The present case, in our opinion, falls within the first category mentioned above. Section 35 (1) deals with a quasi criminal act."

Ultimately in para. 14 of the judgment the Supreme Court observed :

"Section 35 (1) of the Act creates a Quasi criminal offence. It is a regulatory provision. It is enacted with a view to safeguard the interest of the public regarding trust money. The offence in question is punishable only with fine. The conviction under that does not carry any Stigma.

The language of the provision appears to make its contravention an absolute liability. Under these circumstances, we think the offence mentioned in that section is an absolute one. Consequently we cannot read into it the requirement of mens rea."

9. *After referring to the previous decision of the Supreme Court in State of Gujarat v. Kansara Manilal : AIR 1964 SC 1893, this Court in State of Maharashtra v. Nihalchand while construing the provisions of the Factories Act and. the Rules made thereunder held:*

"It is further clear from this decision of the Supreme Court that it is not necessary in those matters that a mens rea must always be established. The provisions of the Act and particularly rule 4 of the Rules is a Regulatory provision. It is enacted with a view to safeguard the interest of the public. The language of section 92 of the Act makes its contravention an absolute liability. Therefore, in my opinion, the requirement of mens rea cannot be read in the said section. I am fortified in the view which I have taken by a subsequent decision of the Supreme Court in State of Gujarat v. Acharya Shri Devendra Prasadji. A similar view seems to

have been taken, by the Madras High Court in In re S. Stshadrinath Surma."

Similar view has been taken by the Supreme Court in P. K. Tejani v. M. R. Dange : AIR 1974 SC 228. While dealing with the provisions of Food Adulteration Act, the Supreme Court observed:

"Nothing more than the actus reus is needed where regulation of private activity in vulnerable areas like public health is intended. In the words of Lord Wright in MacLeod v. Buchanan at 186 (H.L.) "intention to commit a breach of statute need not be shown. The breach in fact is enough." Social defence reasonably overpowers individual Freedom to injure, in special situations of strict liability."

If the provisions of the Maharashtra Municipalities Act, 1965, and particularly provisions of section 195 are read in this context, it is quite clear that the acts and omissions contemplated by section 195 of the Act are acts which in the public interest are required to be carried out and a penalty is provided for its disobedience or non-compliance. It contemplates removal or demolition of buildings or structures which can safely be termed as public nuisance or dangerous to the public. Although the proceedings are criminal in form, it is really a

summary mode of enforcing obligatory duty imposed upon the Municipal Council under the Act in the interest of general public. Section 299 (b) of the Act makes disobedience or failure to comply with the direction incorporated in the notice as an absolute liability, It is enacted with a view to safeguard interest of the general public and in this view of the matter, in my opinion, requirement of mens rea cannot be read in the said section when a person is prosecuted for disobedience or non-compliance with a lawful direction issued by the Chief Officer of the Municipal Council under section 195 of the Act."

17. When the Municipal Council finds that it would be necessary to bring down the structure in order to avoid any loss of life, it would be extremely risky to rely upon a report submitted by a Government Approved Valuer, who has not conducted the ND Test and has only observed the building on the basis of certain photographs and by a visit. The report submitted by three Engineers also indicates that an ND Test was necessary. A specialized firm which was the Authorized Structural Auditor for the PWD Region Aurangabad was called upon to conduct the ND Test and it was, thereafter, that the report discussed above, was submitted.

18. In my view, unfortunately, if a mishap was to occur or if the said building would collapse, it would surely create a grave risk to the shops owners and might lead to loss of life. Liability of different types would then be fixed on the Municipal Council and the loss of life would expose the Municipal Council and its officers to payment of compensation as well as criminal liability. In such matters, a decision has to be pragmatically taken and not on the basis of sentiments or emotions, which are naturally prevailing in the petitioners / shop keepers, whose life rests on the business that is being conducted by them from the said shops. Loss of business would be less serious than loss of life and this Court is expected to be alive to the said situation.

19. Considering the above, I do not find that any interference is called for in the proposed action of the Municipal Council. This petition is, therefore, dismissed.

20. However, I find it appropriate to express that in the event of a new shopping complex being constructed by the Municipal Council in place of the Alam Prabhu Shopping Center, the auction of the shops, as per the procedure to be adopted by the Municipal Council, should not result in ignoring the bids of these

petitioners / shop keepers. If the bids putforth by these shop keepers are competitive and are equal to others, the Municipal Council would consider giving preference to these shop keepers. It would be open to these shop keepers to putforth higher bids in the event of private negotiations after the bids are opened.

(RAVINDRA V. GHUGE, J.)

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