IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 2858 OF 2014

M/s.Asian Rubber Works and another. … Petitioners.
V/s.
The Assistant Commissioner, R/South Ward, Municipal Corporation of Greater Mumbai and others. … Respondents.

Ms.Jai Kanade with Mr.B.G.Ligade for the petitioners.

Mr.R.S.Apte, Senior Advocate with Ms.Vanadana Mahadik and Ms.K.H.Mastakar for respondent No.1.

Mr.Manmohan A. Amonkar with Mr.Jacob Kadantot for respondent No.2, 2a, 2b and 2c.

Sanjay Kashinath Nanoskar
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Date: 2018.09.18 13:01:51 +0530

CORAM : A.S.OKA AND RIYAZ I. CHAGLA, JJ.

RESERVED ON : 25th July 2018.

PRONOUNCED ON : 17th September 2018.

JUDGMENT : (Per A.S. Oka, J.)

The grievance made in this petition under Article 226 of the Constitution of India is about the illegal demolition of the bungalow admeasuring 5,500 sq.ft. more particularly described in paragraph-2 of the petition. According to the case of the petitioner, the second respondent- Trust was the landlord of the petitioners. There is a challenge in this petition to a notice dated 6th June 2014 issued by the

first respondent who is the Assistant Commissioner of the Mumbai Municipal Corporation in exercise of the powers under section 354 of the Mumbai Municipal Corporation Act, 1888 (for short "the said Act").

2. The petitioners have referred to a decree passed by the Court of Small Causes at Mumbai in a suit filed by the second respondent. The decree is for possession of the bungalow described in paragraph-2 of the petition (for short "the subject bungalow"). The decree was passed on the grounds of bonafide requirement, nuisance and annoyance and acquisition of alternate accommodation. The said decree was challenged by the petitioners by preferring an appeal before the appellate Bench of the Small Causes Court. Though in the appeal preferred by the petitioners, the decree for possession was confirmed by the appellate Bench, the same was confirmed only on the ground of alleged subletting and the other grounds were negatived. Writ Petition No.8532/2004 filed by the petitioners for challenging the decrees passed by the trial Court and the appellate Court has been admitted by the learned single Judge of this Court in which stay has been granted to the execution of the decree.

3. The case made out in the petition is that on 24th October 2014 when the second petitioner was away from the subject bungalow, the same was demolished. It is alleged that by the time the second petitioner came back, the first floor was already demolished. It is alleged that while the second petitioner was trying to collect information, some persons at the instance of the first respondent came and tried to demolish

the rest of the subject bungalow. However, the second petitioner could some how prevent them from demolishing the rest of the structure. After learning that the part of the subject bungalow was demolished on the basis of the notice dated 6th June 2014 issued under section 354 of the said Act, on 29th October 2014, the petitioners applied for a copy of the said notice. On the basis of the said application, a copy of the impugned notice dated 6th June 2014 was provided to the petitioners. Thereafter, the present petition was presented for filing on 1st November 2014 and lodged on 3rd November 2014. An additional affidavit has been affirmed on 1st November 2014 by the second petitioner in which he has stated that in the afternoon of 1st November 2014, the rest of the bungalow was demolished. Apart from seeking quashing of the said notice, there is a prayer made for seeking a writ of mandamus against the respondents to restore the subject bungalow. In the alternative, a prayer is made for permitting the petitioners to construct the subject bungalow. Another prayer is to provide alternate accommodation to the petitioners.

4. On 12th March 2018, a notice for final disposal was issued. On 10th November 2014, ad-interim relief directing the parties to maintain status quo was passed. The order dated 12th March 2018 notes the submission of the petitioners that a copy of the impugned notice was provided to the second petitioner on 29th October 2014. While issuing notice for final disposal under the said order dated 12th March 2018, in paragraphs-3 and 4 of the said order, this Court observed thus:

> "3. Firstly, the submission is that the notice is in respect of building "Kashikanand Ashram". Our attention was

invited to the description of the premises held by the petitioner in the Writ Petition. It is pointed out that the Small Causes Court at Mumbai passed a decree for possession against the petitioners in respect of the said premises in a Suit filed by the 2nd respondent. It is pointed out that even in the cause title of the appeal, which was preferred by the petitioner against the said decree, the address of the premises is shown as Anandvan Ashram, Vivekanand Road, Kandivali, Mumbai – 400 067. Paragraph No.1 of the said judgment of the Appeal, the Appellate Bench of the Small Causes Court records that the decree for possession was in respect of a bungalow in the property of the 2nd respondent known as Kashikanandji Trust. The paragraph No.1 also records that the said bungalow is known as Anandvan Ashram. It is also pointed out that the impugned notice under Section 354 of the said Act does not refer to the structure in possession of the petitioners as described in the proceeding before the Court of Small Causes. It is pointed out that there does not exist Ashram called as Kashikanandji Ashram and that Anandvan Ashram consist of 3 buildings and the premises of the petitioner is not part of the Ashram buildings. Thus, the submission is that the notice under Section 354 of the said Act was not in respect of the premises in possession of the petitioner. It is also pointed out that the decree for possession has been stayed by this Court by order dated 30th August 2005. **Further submission is that the notice under Section 354 of the said Act is required to be served to the occupants and admittedly notice was not served, but a copy of the notice was handed over to the 2nd petitioner on 29th October 2014**.

4. The learned Counsel appearing for the Municipal Corporation has produced for the perusal of the Court the compilation of documents. The compilation shows that on 20th October 2014 service purchase order was kept ready by the Municipal Corporation. By the said order, a firm M/s. Aftab Traders was appointed as the Contractors for demolition of the building on the basis of the impugned

> notice. It appears from the service purchase order that it was kept ready on 20th October 2014 and it was issued on 29th October 2014. The stand taken in the affidavit in reply is that the work of demolition was completed by the said firm on 11th November 2014. We may note here that on 10th November 2014, the Division Bench of this Court after hearing the learned Counsel for the Municipal Corporation passed an ad-interim order directing the parties to maintain status quo. Thus, prima facie it appears that the work of demolition was continued on 11th November 2014 in breach of the said order."
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> (emphasis added)

5. There are two affidavits filed on record by the Municipal Corporation. The first affidavit is dated 9th January 2015 filed by Shri S.S.Chitnis, Assistant Engineer (B & F), R/South Ward of the Municipal Corporation. It is stated that the bungalow was completely demolished on 11th November 2014 by the contractor appointed by the Municipal Corporation. However, he stated that the work order was issued to the contractor on 29th October 2014. The second affidavit is by Shri Sandeep Balkrishna Rajadhyksha, Assistant Engineer (Building & Factory), R/South Ward of the said Municipal Corporation. In the second affidavit, it is accepted that the impugned notice under section 354 calling upon demolition of the subject bungalow was not served upon the petitioners on the ground that the structure was already vacated and a part of it had already collapsed. In the said affidavit, it was accepted that on 29th October 2014, a copy of the said notice dated 6th June 2014 was furnished to the petitioners along with an area measurement certificate. It is stated that the entire bungalow was demolished before 10th November 2014. The documents on file are produced on record along

with the said affidavit. The said documents include a document styled as a service purchase order bears the typed date of 20th October 2014 and handwritten date on top as 29th October 2014. The order is for demolition of a building Kanikanand Ashram issued to M/s Aftab Traders.

6. The constituted attorney of the respondent No.2, 2(a), 2(b) and 2(c)- Shri Parmeshwar Pandit Deore has also filed an affidavit-in-reply. In the said affidavit, it is contended that the subject bungalow was in a dangerous and dilapidated condition. It is pointed out that to the notice dated 6th June 2014 issued under section 354 of the said Act, the second respondent replied by pointing out that the subject bungalow was in a dangerous and dilapidated condition. It is submitted that an action of demolition was taken by the Municipal Corporation independently after taking inspection. There are certain averments made in respect of the decree passed by the Small Causes Court.

7. We must note here that we adjourned this matter on two occasions with a view to ascertain whether the dispute could be amicably settled between the petitioners and the second respondent. However, the settlement could not be arrived at.

8. The submission of the learned counsel appearing for the petitioners is that, admittedly, the impugned notice dated 6th June 2014 under section 354 of the said Act was not served upon the petitioners. He submitted that the action of issuing notice is taken by the first respondent at the instance of the second

respondent is unable to execute the decree for possession passed against the petitioners in view of interim relief granted by the learned single Judge of this Court. The learned counsel appearing for the petitioners submitted that the subject bungalow was not in a dangerous and dilapidated condition and it could have been repaired.

9. The learned senior counsel appearing for the Municipal Corporation relied upon the structural audit report of the Structural Engineer which is annexed to the second affidavit-in-reply which clearly records that the subject bungalow was in a dilapidated and dangerous condition and was likely to collapse. He relied upon the photographs annexed to the said report. He submitted that due process of law was followed after taking into consideration the said report. He submitted that though the notice under section 354 of the said Act was served to the respondent No.2, the said respondent never pointed out the fact that the petitioners were claiming to be in possession. He submitted that due process of law has been followed by the Municipal Corporation.

10. The learned counsel appearing for the respondent Nos.2 and 2a to 2c submitted that the subject bungalow was completely in a dilapidated condition. The learned counsel relied upon an affidavit of Shri Parmeshwar P. Deore, constituted attorney of the said respondents. He pointed out from the said affidavit that, in fact, the subject bungalow was in a dangerous condition and was required to be pulled down. He pointed out that the Municipal Corporation had issued notices dated 6th June 2014 and 31st July 2014 to the second respondent. The second respondent replied to the said notices by a letter dated 7th August 2014.

He accepted that the decree of possession granted by the Small Causes Court has been stayed by this Court in a writ petition filed by the petitioners. The learned counsel relied upon the communication dated 9th October 2014 addressed by the Executive Engineer in the office of the Assistant Commissioner, R/South Ward to the Deputy Law Officer in the head office which refers to Writ Petition No.8532/2004 filed by the petitioners and the interim relief granted in the said writ petition. The learned counsel urged that it is not the fault of the said respondents that the Municipal Corporation did not serve any notice to the petitioners and, therefore, the petitioners are dis-entitled to a relief of reconstruction of the subject bungalow on the property of the second respondent. He submitted that there is already a decree for possession passed against the petitioners in respect of the subject bungalow.

11. We have considered the submissions. From the two affidavits-in-reply filed on record by the Municipal Corporation, it is an accepted position that the action of demolition of the subject bungalow was taken on the basis of the notice dated 6th June 2014 issued under section 354 read with section 489 of the said Act on the ground that the subject bungalow was in a dangerous and ruinous condition. It is an admitted position that the said notice was served only upon the second respondent and not upon the petitioners. A copy of the said notice dated 6th June 2018 was handed over to the second petitioner on 29th October 2014. It is the case of the petitioners specifically made out in this petition that the second petitioner went out on 24th October 2014 and when he came back on 25th October 2014, he found that a part of the bungalow

was demolished. It is also an admitted position between the petitioners and the second respondent that the second respondent had filed a suit for eviction against the petitioners in the Court of Small Causes wherein a decree was passed by the Court of Small Causes for possession against the petitioners which has been confirmed in appeal by the appellate Bench of the Court of Small Causes. Being aggrieved by the said judgments and decrees, Writ Petition No.8532/2004 has been filed by the petitioners. The learned single Judge of this Court issued rule in the said writ petition on 30th August 2005 and that this Court granted interim relief staying execution of the decree for possession till the final disposal of the said writ petition. The said writ petition is still pending.

12. As stated earlier, there are two affidavits filed on record by the Municipal Corporation. The first affidavit is dated 9th January 2015 filed by Shri S.S.Chitnis, Assistant Engineer (B & F), R/South Ward of the Municipal Corporation. It is stated in this affidavit that the bungalow was completely demolished on 11th November 2014 by the contractor appointed by the Municipal Corporation. However, he stated that the work order was issued to the contractor on 29th October 2014. The second affidavit is by Shri Sandeep Balkrishna Rajadhyksha, Assistant Engineer (Building & Factory), R/South Ward of the said Municipal Corporation. In the second affidavit, it is stated that the entire bungalow was demolished before 10th November 2014. Thus, the stand taken about the date of demolition is inconsistent. The documents on file are produced on record along with the said affidavit. The said documents include a document styled as a service purchase order which bears the

typed date of 20th October 2014 and handwritten date on top as 29th October 2014. The order is for demolition of a building Kanikanand Ashram issued to M/s Aftab Traders. In the letter dated 25th October 2014 (Exhibit E)addressed by the Advocate for the petitioners to the Municipal Commissioner, it is specifically stated that the first floor of the subject bungalow was demolished on 24th October 2014. Even in the letters dated 29th October 2014 addressed by the second petitioner to the Municipal Officers (Exhibit F and F1), there is a mention of the said demolition. There is no reply sent to both the letters. There is no answer to these documents in both the affidavits of the Municipal Corporation. The affidavit of the second petitioner dated 1st November 2014 clearly states that the remaining subject structure was demolished on 1st November 2014. Copies of the photographs taken on the same day have been annexed to the said affidavit. There is no answer to the said additional affidavit in both the affidavits of the Municipal Corporation. The Municipal Corporation has not produced a single document along with the two affidavits or even otherwise, to show that the structure was demolished on either 11th or 12th November 2014. The Municipal Corporation must be having the documents showing the precise date of demolition. But the said documents are withheld. Hence, an adverse inference will have to be drawn and the case of the petitioner that a substantial part of the subject bungalow was demolished on 24th October 2014 and the remaining part was demolished on 1st November 2014 will have to be accepted. Admittedly, the notice dated 6th June 2014 or any other notice of demolition was never served to the petitioners till the date of the part demolition of the subject bungalow. A copy of the notice was

provided to them for the first time on 29th October 2014. Within 48 hours of the service, the remaining part was demolished on 1st November 2014. An affidavit of Shri Parmeshwar P. Deore filed on behalf of the second respondent on 23rd September 2017 makes a reference to a letter dated 7th August 2014 addressed on behalf of the second respondent to the Executive Engineer, R/South Ward of the Municipal Corporation. A copy of the said letter is annexed at Exhibit-A to the said affidavit in which there is a reference to "a matter is pending before Court". In the affidavit of Shri Sandeep B. Rajadhyksha, Assistant Engineer (Building & Factory), R/South Ward which is dated 21st April 2018 , no case is made out that the letter dated 7th August 2014 was not received by the Executive Engineer. To the same affidavit, a report of the Executive Engineer is annexed which is dated 23rd June 2014. The report refers to service of notice dated 6th June 2014 only to the second respondent. The report seeks approval of the Assistant Commissioner to invite spot quotations from the contractors for the demolition of the subject bungalow.

13. Thus, before the substantial demolition of the subject bungalow was carried out, the Executive Engineer of the Municipal Corporation was made aware of the pending litigation. The Municipal Corporation made no efforts to find out who was in possession of the subject bungalow. Elementary principles of natural justice required the Municipal Corporation to serve the notice dated 6th June 2014 upon the petitioners. However, admittedly, the said notice or any other notice of demolition was served upon the petitioners till 29th October 2014. After providing a copy of the notice on 29th October 2014, not even 48 hours

of time was granted to the petitioners before the remaining demolition was carried out. Moreover, from the letter dated 7th August 2014 addressed by the second respondent to the Executive Engineer, it is apparent that even the second respondent failed to perform its duty of specifically informing the Executive Engineer that the petitioners were in possession of the subject bungalow and their possession was protected by the interim order of this Court. After receiving the notice dated 6th June 2014 and after receiving the letter dated 3rd July 2014, it was the duty of the second respondent to inform the Municipal Corporation about the possession of the petitioners.

14. It will be also necessary to make reference to a letter dated 9th October 2014 addressed by the Executive Engineer of the Municipal Corporation to the Deputy Law Officer of the Municipal Corporation. In the said letter, the Executive Engineer has stated thus:

> " Considering of urgency of the matter, as already part internal portion of the building has already collapsed & as building is already empty & no one is staying in building, the lowest contractor of the spot quotation was inform to start the preliminary arrangements, such as providing barricading, erecting scaffolding on site. Also on site, it was found that doors leading to first floor are found locked. At that time, the representative of the owner handed over the copy of the writ petition No.8532 of 2004 At Bombay Civil Appellate Jurisdiction, which is pending before High Court. From the Internet site of Bombay High Court, it was fund that on 30/08/2005 High Court granted interim relief in terms of prayer (C) of the petition. Copy of the petition is attached here with for your information.
>
> Considering the urgency of the matter, you are here by requested to inform whether this office can proceed with the demolition of the above building in view of the Court

Case pending in a High Court as mentioned above."
(underline added)

This shows that before the subject bungalow was demolished, the Municipal Corporation was made aware of the pendency of Writ Petition No.8532/2004 and the grant of stay therein. Thus, before the demolition was carried out on 24th October 2014, the Municipal Corporation was very much aware about the possession of the petitioners inasmuch as the Executive Engineer of R/South Ward was in possession of a copy of the writ petition filed by the petitioners and a copy of the interim order passed in the said writ petition. Thus, a gross illegality has been committed by the Municipal Corporation by demolishing the subject bungalow without notice to the petitioners who are admittedly the tenants of the subject structure. The manner in which the action is taken shows complete arbitrariness which is a violation of Article 14. The Municipal Corporation has committed violation of rights of the petitioners under Article 300A of the Constitution of India.

15. Under these circumstances, there is no option but to permit the petitioners to reconstruct the subject bungalow at their own cost. The reconstructed bungalow should be of the same size. It is obvious that the reconstruction will be subject to the outcome of Writ Petition No.8532/2004 and if the petitioners fail in the said writ petition, they will have to hand over the possession of the reconstructed bungalow to the second respondent without claiming any equity and cost of construction.

16. Accordingly, the petition succeeds. We pass the following order:

(i) We hold that the demolition of the subject bungalow on the basis of the notice dated 6th June 2014 under section 354 of the said Act is completely illegal;

(ii) The petitioners will be entitled to reconstruct the subject bungalow as per the area mentioned in the area statement dated 22nd October 2014 (pages 134 and 35 annexed to the affidavit of Shri Sandeep B. Rajadhyksha) on expiry of period of two months from today;

(iii) Fifteen days before commencing the reconstruction, the petitioners shall submit drawings of the proposed reconstruction along with an area statement to the Designated Officer of R/South Ward of the Municipal Corporation and to the respondent No.2;

(iv) The petitioners shall give at least two weeks' advance notice in writing to the concerned Designated Officer of the Municipal Corporation and the second respondent of the date and time fixed for commencing the reconstruction;

(v) The reconstruction of the subject bungalow will not create any equity in favour of the petitioners. The petitioners shall do so at their own cost. Before the petitioners occupy the reconstructed bungalow, on an intimation given by the petitioners, the Designated Officer shall cause measurements of the reconstructed bungalow to be taken and provide details thereof to the petitioners and the second respondent;

(vi) The reconstruction shall be subject to final orders to be passed in Writ Petition No.8532/2004. In the event, the decree of eviction passed by the Small Causes Court in respect of the original subject bungalow is finally upheld, the petitioners shall hand over the possession of the reconstructed bungalow to the second respondent in compliance with the decree for possession. In such a case, the petitioners will not be entitled to claim any equity and the cost of reconstruction;

(vii) Rule is made absolute on the above terms.

(RIYAZ I. CHAGLA, J.) (A.S.OKA, J.)