

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

**APPEAL FROM ORDER (ST.) NO.18175 OF 2019
WITH
CIVIL APPLICATION (ST.) NO.18176 OF 2019
IN
APPEAL FROM ORDER (ST.) NO.18175 OF 2019
(Modified as per order dated 11.07.2019)**

Sarwar Hussain Mistry

through L.Rs.

Hamid Lala Mistry and Ors.

... Appellants

Versus

Municipal Corporation for Greater

Mumbai and Ors.

... Respondents

.....

Mr. Rajesh P. Khobragade a/w. Gayatri Nayak, Raj S. Gupta,
Manisha Mundhe for Appellants.

Mr. J.F. Reis, Senior Counsel I/b. Mrs. Madhuri More for
M.C.G.M./Respondent.

Mr. Harshad Kale, Deputy Municipal Commissioner, Zone-I and
Mr. V.V. Vispute, Assistant Commissioner, "C" Ward are present in
the Court.

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CORAM : M. S. KARNIK, J.

DATE : 8th JULY, 2019.

P. C.:

1. Heard.

2. The appellants take exception to an order dated
17.06.2019 passed by the City Civil Court, Mumbai dismissing the
draft Notice of Motion in L.C. Suit (L) No.6141 of 2019 seeking

direction to the respondent-Corporation to conduct structural audit and after structural audit, to review the Technical Advisory Committee ('T.A.C.' for short) report and further to remove the suit building from C-1 category. The appellants also prayed for temporary injunction restraining the defendant from taking action pursuant to the notice dated 03.06.2019 issued by the Corporation in respect of the suit building.

3. The appellants had on an earlier occasion already filed Long Cause Suit No.1759 of 2014 before the City Civil Court, Mumbai for declaration and injunction. In the said suit prayer is also made for permanent injunction restraining Corporation from disturbing the appellants possession without following due process of law. The building is ground + 3 upper floors. It was contended that the Corporation gave the notice dated 28.05.2014 and declared the building is dilapidated and dangerous for human habitation. After receipt of this notice the appellants submitted structural auditor's report indicating that the building requires urgent repairs. It was contended that they are ready to repair from their own funds.

4. The Corporation then had submitted that based on the report submitted by the structural consultants M/s. Joshi Consultant immediate action needed to be taken and the building had be evacuated. It is further suggested that the structure be demolished and thereafter reconstructed.

5. The appellants thereafter appointed structural consultants R.F. Consultants. As per this report they suggested repair of the building. As the reports were contradictory the matter was referred to the T.A.C. The T.A.C. in its meeting held on 05.05.2014 decided that the repairs of the building is not viable and the building has to be evacuated. It was further opined that the building may collapse without giving any warning thereby endangering the life and property of the residents and the people residing in adjoining properties and passersby.

6. The Notice of Motion No.2333 of 2014 in the said suit of 2014 came to be heard and by the order dated 20.09.2014 the Trial Court dismissed the Notice of Motion.

7. Being aggrieved by an order dated 20.09.2014, the appellants approached this Court by filing Appeal From Order No.106 of 2015. By a reasoned order dated 04.10.2016 Appeal From Order came to be dismissed. The relevant paragraph Nos.5, 6 and 7 of the said order read thus :-

“5. Thus, it is clear that TAC has also considered the option, as given by the appellants, as to whether repairs can be carried out to the suit building without vacating it. However, on the basis of its own inspection and on the basis of report of the Consultant and Test Reports categorically came to the conclusion that the suit building is beyond stage of repairs and need to be demolished for the purpose of reconstruction.

6. In view thereof, in my considered view, the trial Court has rightly rejected the relief of interim injunction, as claimed by the appellants, restraining Municipal Corporation from taking any action, in pursuance of the impugned notice dated 28.5.2014 issued to them. It is not only in the interest of appellants that they should vacate the suit building immediately but also in the interest of the persons residing nearby and passersby as collapse of building on the account of its dangerous and dilapidated condition is likely to result to the loss of lives, coupled with the damage to the property. Therefore, neither the appellants have any prima facie case nor balance of convenience lies in their favour.

7. Respondent corporation has categorically stated that the appellants will be provided alternate accommodation till the work of reconstruction is completed. It may be true that, some inconvenience is likely to be caused to the appellants in shifting from the area of Ismail Curtey road, Mumbai to Kurla. However, that inconvenience is not such as to outweigh the irreparable loss and inconvenience, if they do not have vacate the suit structure.”

8. In my opinion once the T.A.C. concluded that the building is in dilapidated condition and needs to be demolished, which report is also sustained by this court by a reasoned order while refusing to grant any interim injunction, then it was not permissible for the appellants to have again approached the City Civil Court by filing a fresh suit and then making an application for grant of similar interim reliefs. By filing Long Cause Suit (Stamp) No.6141 of 2019 the appellants have assailed the notice dated 25.03.2019. It is pertinent to mention that the said notice is consequence of the T.A.C. order.

9. The appellants having failed to obtain any interim injunction in the previously instituted suit, the Trial Court in my opinion was justified in observing that the building is in

dilapidated condition and dangerous for the people residing in adjoining properties and passersby, the Notice of Motion in the freshly instituted suit deserves to be rejected. Moreover the Trial court has also observed that pursuant to the order of the T.A.C., the repairs alleged to be carried out by the appellants are without permission from the Corporation which repairs are sought to be carried out after the order is passed in the earlier Notice of Motion. There is no error in the approach of the Trial Court in holding that in the light of the order passed in Appeal From Order No.106 of 2015, the present Notice of Motion can not be entertained.

10. However it would be pertinent to place on record certain events after this Court's order. Learned counsel for the appellants pointed out that after T.A.C. report, the appellants applied to the Corporation for permission to carry out repairs. Learned counsel for the appellants would rely upon the report of the structural auditors M/s. Shashank Mehendale and Associates in which it is opined that the building needs urgent repairs and the structure is repairable. Learned Counsel also invited my

attention to the applications made by the appellants for permission to carry out the repairs. Learned counsel would submit that as the application for permission to carry out repairs was not decided, the appellants had no option but to proceed with carrying out the repairs. Again on 27.03.2017 the appellants obtained structural auditors report wherein it is opined that the building in question is repairable.

11. Much emphasis is placed by learned counsel for the appellants on an office communication dated 25.06.2018 which was addressed by the then Assistant Commissioner, "C" Ward. In the said communication it is stated that even after the T.A.C. concluded that the building is in a dilapidated condition and has to be demolished, the appellants obtained reports from various structural auditors who opined that the building can be repaired. It is further stated in the office note that the appellants themselves have carried out repairs and now the building is stable. The communication stated that in this view of the matter, an appropriate order for categorising the building in question from C-1 to any other appropriate category be passed. The Assistant

Commissioner, "C" Ward therefore requested that the building should be removed from C-1 category. The said report is at Page No.26 of the affidavit filed by Appellant. On the basis of these reports learned counsel for the appellants requested that the appellants be permitted to carry out necessary repairs and the building no more needs to be continued in C-1 category.

12. When the matter was heard on the last occasion I had expressed serious reservations about the manner in which the then Assistant Commissioner had submitted the report about removing the building from C-1 category after the T.A.C. categorised the building as C-1 and challenge to the T.A.C. report before the City Civil Court as well as this Court having failed.

13. Now by affidavit dated 05.07.2019 the stand of the Corporation as regards the stand of Assistant Commissioner is spelt out. Relevant portion of the affidavit filed by the present Assistant Commissioner Shri Vinayak Vispute reads thus :-

"2) I say that the appellant filed the present Appeal from Order challenging the order passed by the Hon'ble City Civil Court dt. 17.6.2019 where the appellant challenged the order of eviction dt. 3.6.2019. In the said letter, it is mentioned that

inspite of the Hon'ble High Court's order and considering the building is in dilapidated condition declared in C-1 category, the appellant had not shifted to the alternate accommodation offered by the MCGM and not vacated the suit premises.

3) I say that it was not the jurisdiction of the Asstt. Commissioner 'C' Ward to visit the suit site on 20.6.2018. I say that it is very clear from the TAC Report that the TAC Members visited the site on 17.6.2016 and at the time of said visit the then Asstt. Commissioner (Estate) and Asstt. Commissioner 'C' Ward alongwith staff was present and came to the conclusion tha the building is in dilapidated condition and the structure under reference is not habitable and needs to be vacated and demolished by following due process of law under the supervision of Structural Consultant. The TAC Committee report dt. 24.6.2016 is very eloquent on the condition of the building. The TAC Committee is formed by the direction of the Hon'ble High court and presently governed by the Mandate of the Policy formulated by MCGM.

4) I say that to keep these record straight, it is pertinent to mention that once the TAC decision is there the Asstt. Commissioner has no jurisdiction to visit the building and form its different opinion. The clinching issue in this matter is the Asstt. Commissioner Report or letter dt. 25.6.2018. The said Asstt. Commissioner Shri Uday Kumar Shirurkar retired on 30.06.2018.

5) I say that pursuant to the direction of this Hon'ble Court I tried to contact the Retired Asstt. Commissioner and ask him to be present in the Hon'ble Court.

6) I say that the Dy. Municipal Commissioner (Improvement)'s letter dt. 9.5.2018 called upon the same Asstt. Commissioner to follow the decision given by the TAC Committee and directed to take immediate action to vacate the said building and demolish the same immediately. Hereto annexed the letter dt. 9.5.2018 marked as Exhibit '1'. However, the Asstt. Commissioner Shri Uday Kumar Shirurkar disobeyed the direction of D.M.C. (Improvement) amount insubordination. I will make a note and forward the same to the higher authority to take appropriate action against the Retired Asstt. Commissioner of "C" Ward. I say that in the note dt. 5.1.2019 signed by the Executive Engineer (Estate) and Asstt. Commissioner (Estate) which is approved by Additional Municipal Commissioner (City) to forthwith take demolition action against the suit building as the TAC Committee has already taken the decision regarding the same.

7) In the light of the fact, it is submitted that the said note dt. 25.6.2018 is not tenable in law and the then Asstt. Commissioner Shri Shirurkar has no authority or business or occasion to prepare the said note and therefore, it is requested to this Hon'ble Court to ignore and reject the said note."

14. It is thus seen that on an earlier occasion the report of T.A.C. was challenged by filing Long Cause Suit No.1759 of 2014.

The City Civil Court by an order dated 20.09.2014 dismissed the Notice of Motion filed by the appellants seeking same reliefs. Even This Court by a reasoned order dated 4.10.2016 dismissed the Appeal. Surprisingly thereafter the appellants made an application to the Corporation seeking permission to repair the building on the basis of some certificate obtained from structural auditors that the building can be repaired. Curiously, the then Assistant Commissioner vide his report dated 25.06.2018 recommended that as the appellants have repaired the building, the building should be removed from C-1 category. A stand is also taken by the appellants that they have repaired the building and the same is now stable.

15. In my opinion, the Assistant Commissioner, "C" Ward has not only overreached the order passed by the T.A.C. but has also tried to overreach the order passed by the City Civil Court as well as by this Court. The Corporation has, in Paragraph 6 of the affidavit, stated that the then Assistant Commissioner has disobeyed the direction of the D.M.C. (Improvement) which amounts to insubordination. He has stated that appropriate

action would be taken against the retired Assistant Commissioner, “C” Ward.

16. Once T.A.C. has come to the conclusion that the building is categorised as C-1 and the interim reliefs have been refused by the City Civil Court as well as by this Court, it was not open for the appellants to approach the City Civil Court again by filing a fresh suit on the ground that they have fresh structural auditors' reports indicating the structure in question can be repaired. The present Appeal From Order is devoid of any merits and deserves to be dismissed. As indicated earlier in Paragraph 6 of the affidavit, the Corporation has already stated that appropriate action will be taken against the retired Assistant Commissioner, “C” Ward.

17. In this view of the matter and in the light of the affidavit in reply filed by the Corporation, the present Appeal From Order is dismissed.

18. In view of the dismissal of the Appeal From Order, nothing survives for consideration in the Civil Application. The Civil Application is disposed of accordingly.

19. A request is made for staying this order for a period of four weeks from today. The request is rejected.

(M. S. KARNIK, J.)