

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

WRIT PETITION NO. 2687 OF 2018

Pandurang Vishnu Devrukhar and Ors.	}	Petitioners
versus		
State of Maharashtra and Anr.	}	Respondents

**WITH
WRIT PETITION (ST) NO. 347 OF 2019**

Sambhaji Shravan Athwale and Ors.	}	Petitioners
versus		
Assistant Municipal Commissioner and Ors.	}	Respondents

Mr.Dharma Raj for the petitioners in WP/2687/2019.

Mr.Ankit Kulkarni for the petitioners in WPL/347/2019.

Mr.Sukanta Karmakar-AGP for State in WP/2687/2019.

Mr.L.T.Satelkar-AGP for State in WPL/347/2019.

Ms.Shabana Sothe with Ms.Rupali Adhate for the Municipal Corporation.

Mr.Ajay Bhondve (S.E.), Estate Department present.

Mr.Narayan Matkar (R.S.), A.O., Estate, N/Ward present.

Ms.Madhavi Ajit Bansode, Administrative Officer, Estates, N/Ward present.

**CORAM :- S. C. DHARMADHIKARI &
G. S. PATEL, JJ.**

DATED :- AUGUST 27, 2019

P.C. :-

1. Pursuant to the earlier order passed by this court, an affidavit has been filed by the Administrative Officer (Estates) N/West Ward of the Municipal Corporation of Greater Mumbai. In this affidavit, the Municipal Corporation has, apart from justifying the notice issued under section 354 of the Mumbai Municipal Corporation Act, 1888 (hereinafter referred to as “the MMC Act”), stated that in all there are 824 tenements to be relocated, from which 60 are in possession of the petitioners and 20 are in possession of municipal employees in building nos. 1 and 2, and the balance 744 tenements in building nos. 1 to 28. These buildings situated at Municipal Colony 348/396, Vikhroli Parksite, Vikhroli (West). There is phase-wise development programme of all these buildings, but presently, each one of them will have to be vacated. The Petitioners are municipal tenants.

2. The only argument canvassed before us today is that the Municipal Corporation has offered temporary alternate accommodation to the municipal tenants at Evershine Building at Mahul, Chembur, Mumbai. That accommodation is in a highly polluted area and not fit for human habitation. There is a likelihood of the petitioners suffering respiratory diseases and serious ailments should they be forced to be relocated to Mahul. Therefore, alteration is sought to the existing policy to the extent that in lieu of this temporary alternate accommodation, monthly amount should be paid so that the petitioners make their alternate arrangements. They will obtain accommodation temporarily on rent and the rent/compensation should be paid month to month.

3. On repeated questioning, the learned counsel appearing for the petitioners was unable to point out any statutory provision which would enable the municipal tenants to cause structural repairs to be carried out on their own to the municipal buildings. He was also unable to point out any judgment or order of this court or the Hon'ble Supreme Court, which would enable the municipal tenants to undertake structural repairs to municipal tenements,

although the rent control legislation is inapplicable to these premises. No such judgment or statutory provision having brought to our notice, our next query was whether in this statutory scheme there is any provision mandating the Municipal Corporation to provide temporary alternate accommodation. The argument by way of answer is that there may not be such statutory prescription, but now there is a scheme evolved. In terms of that scheme, the temporary alternate accommodation is to be offered pending redevelopment at the very site. Since that is offered at Mahul, the municipal tenants can refuse that offer and demand payment of monthly compensation. Our next query was, whether this monthly compensation is inbuilt or inherent in the scheme which is evolved by the Municipal Corporation for temporary shifting of tenants of municipal tenements. The answer is that there may not be, but once the municipal tenements or the alternate accommodation offered at Mahul is unfit for human accommodation and habitation and the area itself is not safe for human habitation, then we must direct this alternate course.

4. We are unable to accept these contentions for more than one reason. This court neither frames any policy nor, in its writ jurisdiction, can it direct any amendment or modification to any existing policy. Such matters are dealt with and are within the domain of the Municipal Corporation. It is their administrative discretion and which gives them enough options. It is not possible for this court to direct a particular course or a particular step to be taken by the Municipal Corporation while implementing its existing policies, leave alone directing a wholesale modification or change thereof. We cannot frame policy only because the municipal tenants are before us and invoking our sympathy. We do not think that absent any statutory provision, on sympathetic ground alone, we can accept the request of the learned counsel appearing for the petitioners.

5. In this context, we may profitably reference the Supreme Court decision in *UP Financial Corpn v Gem Cap (India) (P) Ltd.*¹ While dealing with the question of administrative discretion and the role of writ courts in

¹ (1993) 2 SCC 299.

judicial review of administrative decision making, the Supreme Court said:

10. It is true that the appellant-corporation is an instrumentality of the State created under the State Financial Corporations Act, 1951. The said Act was made by the Parliament with a view to promote industrialisation of the States by encouraging small and medium industries by giving financial assistance in the shape of loans and advances, repayable within a period not exceeding 20 years from the date of loan. We agree that the corporation is not like an ordinary money-lender or a Bank which lends money. It is a lender with a purpose – the purpose being promoting the small and medium industries. At the same time, it is necessary to keep certain basic facts in view. The relationship between the corporation and the borrower is that of creditor and debtor. The corporation is not supposed to give loans once and go out of business. It has also to recover them so that it can give fresh loans to others. The corporation no doubt has to act within the four corners of the Act and in furtherance of the object underlying the Act. But this factor cannot be carried to the extent of obligating the corporation to revive and resurrect every sick industry irrespective of the cost involved. Promoting industrialisation at the cost of public funds does not serve the public interest; it merely amounts to transferring public money to private account. The fairness required of the corporation cannot be carried to the extent of disabling it from recovering what is due to it. While not insisting upon the borrower to honour the commitments undertaken by him, the corporation alone cannot be shackled hand and foot in the name of fairness. *Fairness is not a one way street, more particularly in matters like the present one.* The above narration of facts shows that the respondents have no intention of repaying any part of the debt. **They are merely putting forward one or other ploy to keep the corporation at bay. Approaching the courts through successive writ petitions is but a part of this game.** Another circumstance. These corporations are not sitting on King Solomon's mines. They too borrow monies from Government or

other financial corporations. They too have to pay interest thereon. The fairness required of it must be tempered – nay, determined, in the light of all these circumstances. Indeed, in a matter between the corporation and its debtor, a writ court has no say except in two situations: (1) there is a statutory violation on the part of the corporation or (2) where the corporation acts unfairly i.e., unreasonably. While the former does not present any difficulty, the latter needs a little reiteration of its precise meaning. What does acting unfairly or unreasonably mean? Does it mean that the High Court exercising its jurisdiction under Article 226 of the Constitution can sit as an appellate authority over the acts and deeds of the corporation and seek to correct them? Surely, it cannot be. That is not the function of the High Court under Article 226. Doctrine of fairness, evolved in administrative law was not supposed to convert the writ courts into appellate authorities over administrative authorities. The constraints – self-imposed undoubtedly – of writ jurisdiction still remain. Ignoring them would lead to confusion and uncertainty. The jurisdiction may become rudderless.

11. The obligation to act fairly on the part of the administrative authorities was evolved to ensure the rule of law and to prevent failure of justice. This doctrine is complementary to the principles of natural justice which the quasi-judicial authorities are bound to observe. It is true that the distinction between a quasi-judicial and the administrative action has become thin, as pointed out by this Court as far back as 1970 in A.K. Kraipak v. Union of India [(1969) 2 SCC 262 : AIR 1970 SC 150]. Even so the extent of judicial scrutiny/judicial review in the case of administrative action cannot be larger than in the case of quasi-judicial action. If the High Court cannot sit as an appellate authority over the decisions and orders of quasi-judicial authorities it follows equally that it cannot do so in the case of administrative authorities. In the matter of administrative action, it is well known, more than one choice is available to the administrative authorities; they have a certain

amount of discretion available to them. They have “a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred”. (Lord Diplock in *Secretary of State for Education and Science v. Metropolitan Borough Council of Tameside* [1977 AC 1014, 1064 : (1976) 3 All ER 665] .) The Court cannot substitute its judgment for the judgment of administrative authorities in such cases. Only when the action of the administrative authority is so unfair or unreasonable that no reasonable person would have taken that action, can the Court intervene. To quote the classic passage from the judgment of Lord Greene M.R. in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [(1948) 1 KB 223, 229 : (1947) 2 All ER 680]:

“It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word ‘unreasonable’ in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with the discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting ‘unreasonably’. Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority.”

12. While this is not the occasion to examine the content and contours of the doctrine of fairness, it is enough to reiterate for the purpose of this case that the power of the High Court

while reviewing the administrative action is not that of an appellate court. The judgment under appeal precisely does that and for that reason is liable to be and is herewith set aside.

(emphasis supplied)

6. We have already referred to the statements made by the Municipal Corporation in the affidavit filed today. Once there is an undertaking given to this court that all the persons occupying the tenements, after proving their eligibility and placing in the list of recorded tenants, would be brought back at the very site after reconstruction or offered municipal tenements within the same locality or close vicinity of the existing premises, then all the more we are disinclined to accept the request of the petitioners' advocate. Such request, apart from putting an enormous strain and pressure on public exchequer, is likely to result in abuse of the powers that are vesting in the Municipal Corporation. All powers are in the nature of a trust. The Municipal Corporation cannot be expended to spent all budgetary funds only on rehabilitation of its own tenants. The Municipal Corporation is expected to undertake several developments and welfare measures and schemes of improvement. In these circumstances, the administrators cannot be commanded to

alter any policy or scheme or make additions or changes therein.

7. Once we find that the challenge to the notice under section 354 of the MMC Act cannot be upheld, then, this writ petition must fail. It cannot be disputed that the buildings are old, dilapidated and beyond repairs. The reliance by the petitioners on some structural audit report purporting to show that the building ‘can be repaired’ is of no avail. First of all, that report is *prima facie* unreliable. It annexes several test reports. These themselves show that the structural condition is poor and the concrete is well below nominal minimum standards. Why, despite this, it should be concluded that the building is *not* unsafe is nowhere explained, or even attempted to be explained.

8. In several judgments delivered in similar cases involving challenges to almost identical notices, we summarised the applicable legal principles. These decisions are:

- a. *Mahendra Bhalchandra Shah & Ors v Municipal Corporation of Greater Mumbai & Ors*, Writ Petition (L) No. 1755 of 2019, decided on 24th June 2019;

- b. *Inderjit Singh Sethi & Ors v Municipal Corporation of Greater Mumbai & Ors*, Writ Petition No. 880 of 2018, decided on 9th July 2019;
- c. *Ramesh Nathubhai Patel & Ors v State of Maharashtra & Ors*, Writ Petition No. 1500 of 2016, decided on 9th July 2019;
- d. *Kutbi Manzil Tenants Welfare Association v Municipal Corporation of Greater Mumbai & Ors*, Writ Petition No. 2451 of 2018, decided on 16th July 2019;
- e. *Sundar R. Gavaskar & Ors v Municipal Corporation of Greater Mumbai & Ors*, Writ Petition No. 602 of 2019, decided on 29th July 2019;
- f. *Richard Gasper Mathias & Ors v Municipal Commissioner, Municipal Corporation of Greater Mumbai & Ors*, Writ Petition No. 2108 of 2018 decided on 1st August 2019.
- g. *Vivek Shantaram Kokate & Ors v Municipal Corporation of Greater Mumbai & Ors*, Writ Petition No. 931 of 2019, decided on 19th August 2019.
- h. *Khalid Ahmed Mohd. Ali Hamdulay & Ors v Municipal Corporation of Greater Mumbai & Ors*, Writ Petition (L) No. 2417 of 2019, decided on 22nd August 2019.

9. The principles of law culled from these decisions are these:

- a. It is never for a Court in exercise of its limited writ jurisdiction under Article 226 of the Constitution of India to decide whether a particular structure is or is not actually in a ruinous or dilapidated condition: see: *Diwanchand Gupta v NM Shah & Ors.*² *Nathubhai Dhulaji v Municipal Corporation*,³

2AIR 1972 Bom 316, per KK Desai and GN Vaidya JJ.

3AIR 1959 Bom 332, YV Dixit & VM Tarkunde, JJ.

- b. The rights of tenants/occupants are not harmed by demolition ordered and carried out. These rights are adequately safeguarded by Section 354(5) of the MMC Act and, where applicable, by the provisions of the governing Maharashtra Rent Control Act 1999. The Supreme Court decision in *Shaha Ratansi Khimji & Sons v Kumbhar Sons Hotel Pvt Ltd & Ors.*⁴ now makes it clear that the rights of tenants and occupants are unaffected by the required demolition.
- c. Section 353B casts an obligation not only on owners but also on occupiers of structures that are more than 30 years old to furnish a structural stability certificate. We have yet to see one so furnished unbidden, or, when demanded, one with anything meaningful in it.
- d. A Writ Court exercising jurisdiction will not substitute its own view for that of technically qualified experts. Equally, the Writ Court will not prefer the view of one expert over another.
- e. In order to succeed a Petitioner before the Court must be able to show that the impugned action suffers from Wednesbury unreasonableness,⁵ i.e. it is so unreasonable that no rational person could, having regard to the fact of the case, ever have reached it. There is no scope in such cases for any larger judicial review or invoking the doctrine of proportionality.⁶ In other words the decision must be shown to be utterly perverse, or in excess of authority or manifestly illegal.
- f. It is never sufficient merely to allege mala fides without particulars. While direct evidence may not always be available as proof of mala fides, they must nonetheless be established. In the words of the Supreme Court, allegations of mala fides are more easily made than proved, and the very seriousness of such allegations demands proof of high order of credibility.⁷ Courts are

4(2014) 14 SCC 1.

5 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*, (1948) 1 KB 223 : 1947 (2) All ER 680.

6 *State of MP & Ors v Hazarilal*, (2008) 3 SCC 273; *Coimbatore District Central Coop Bank v Coimbatore District Cooperative Bank Employees Association & Anr*, (2007) 4 SCC 669.

7 *Union of India v Ashok Kumar*, (2005) 8 SCC 760; *Government of Andhra Pradesh & Ors v P Chandra Mouli & Anr*, (2009) 13 SCC 272.

slow to draw dubious inferences from incomplete facts, especially when the imputations are grave and they are made against one who holds an office of responsibility in the administration.⁸ Mala fides are the last refuge of a losing litigant.⁹ Hence, whenever mala fides are alleged, we will demand proof. In case after case we are told that the provisions of the MCGM Act are being abused by rapacious landlords in connivance with venal officers of the MCGM to order the demolition of the buildings that are otherwise structurally sound. We have yet to come across any such case. The argument is in generalities. Though it is an argument of mala fides, it is always made without any particulars whatsoever and we are asked simply to conjecture that this must be so. The law in regard to allegations of mala fides is well settled and we will draw no such general conclusion.

10. We also note another very disturbing factor. These tenements are to be reconstructed inter alia to make space and room for quarters of medical staff and doctors attached to the Rajawadi Hospital, which is run by the MCGM. What the petitioners before us seek, in at least one petition, is that their quarters should be provided but there should be an injunction against providing quarters for hospital doctors and medical staff. We can think of almost nothing that is more inequitable and against the public interest.

11. Thus, the only way out is to evacuate all occupants and bring down these buildings in order to enable the Municipal

⁸ *EP Royappa v State of Tamil Nadu*, (1974) 4 SCC 3; *Indian Railway Construction Co Ltd v Ajay Kumar*, (2003) 4 SCC 579.

⁹ *Gulam Mustafa v State of Maharashtra*, (1976) 1 SCC 800.

Corporation to undertake a comprehensive project of reconstruction/ redevelopment. Once that is assured on the affidavit by the Municipal Corporation, then, all the more we cannot keep this petition pending. It is dismissed.

12. Needless to clarify that the comprehensive redevelopment project is aimed at not only housing the municipal tenants, but such of the municipal employees whose services are categorised as essential services as required in municipal hospitals and other emergency services rendered by the Municipal Corporation.

(S.C.DHARMADHIKARI, J.)

(G.S.PATEL, J.)