

Shephali

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 880 OF 2018

1. **INDERJIT SINGH SETHI,**
Age 70 years, of Mumbai, Indian
Inhabitant, residing at Flat No. 9,
Bandra Ashoka Cooperative Housing
Society Ltd., Plot No. 230, Linking
Road, Bandra (West),
Mumbai 400 050
 2. **TEJINDER PAL SINGH SETHI,**
Age 54 years, of Mumbai, Indian
Inhabitant, residing at Flat No. 10,
Bandra Ashoka Cooperative Housing
Society Ltd., Plot No. 230, Linking
Road, Bandra (West),
Mumbai 400 050
 3. **SALLAUDIN KUTTUBUDDIN
SHAIKH,**
Age 42 years, of Mumbai, Indian
Inhabitant, Owner of Shop Nos. 4, 5 &
Garage No. 4, Bandra Ashoka
Cooperative Housing Society Ltd., Plot
No. 230, Linking Road, Bandra (West),
Mumbai 400 050
 4. **SURESH THAKURDAS NATHANI,**
Age 58 years, of Mumbai, Indian
Inhabitant, Onwer of Shop No. 1,
Bandra Ashoka Cooperative Housing
Society Ltd., Plot No. 230, Linking
Road, Bandra (West),
Mumbai 400 050
- ... **PETITIONERS**

~ VERSUS ~

1. **THE MUNICIPAL CORPORATION OF GREATER MUMBAI**,
a Statutory Corporation established under the provisions of the Mumbai Municipal Corporation of Greater Mumbai, 1888, as amended from time to time having its address at Mahapalika Marg, Mahapalika Building, Opp. Chhatrapati Shivaji Terminus, Mumbai 400 001.
2. **THE MUNICIPAL COMMISSIONER**,
having its address at Mahapalika Marg, Mahapalika Building, Opp. Chhatrapati Shivaji Terminus, Mumbai 400 001.
3. **MR TAWADE, THE ASSISTANT MUNICIPAL COMMISSIONER**,
H/West Ward, St. Martin's Road, Bandra (West), Mumbai 400 050
4. **MR RAJPUROHIT, ASSISTANT ENGINEER**, Building & Factory Department, H/West Ward, St. Martin's Road, Bandra (West), Mumbai 400 050
5. **THE EXECUTIVE ENGINEER**,
H/West Ward, St. Martin's Road, Bandra (West), Mumbai 400 050
6. **ABDUL BARUDAGAR**,
of Mumbai, Indian Inhabitant, having address at Flat Nos. 1 to 4, Bandra Ashoka Cooperative Housing Society Ltd., Plot No. 230, Linking Road, Bandra (West), Mumbai 400 050

... **RESPONDENTS**

WITH
CHAMBER SUMMONS NO. 113 OF 2018
IN
WRIT PETITION NO. 880 OF 2018

ABUSUFIYAN SHAIKH S/O

BADRUDDIN SHAIKH,

An Adult, Indian Inhabitant of Mumbai, Age
42 years, Occupation Business, having his
address at A/702, Building No. 11, Al-Arafat
CHSL, Siyauddin Bukhari Road, Near
Lokhandwala Millat Nagar, Azad Nagar,
Andheri (West), Mumbai 400 053

APPLICANT
(THIRD
PARTY)

...

~ IN THE MATTER BETWEEN~

- 1. INDERJIT SINGH SETHI,**
Age 70 years, of Mumbai, Indian
Inhabitant, residing at Flat No. 9,
Bandra Ashoka Cooperative Housing
Society Ltd., Plot No. 230, Linking
Road, Bandra (West),
Mumbai 400 050
- 2. TEJINDER PAL SINGH SETHI,**
Age 54 years, of Mumbai, Indian
Inhabitant, residing at Flat No. 10,
Bandra Ashoka Cooperative Housing
Society Ltd., Plot No. 230, Linking
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- 3. SALLAUDIN KUTTUBUDDIN**
SHAIKH,
Age 42 years, of Mumbai, Indian
Inhabitant, Owner of Shop Nos. 4, 5 &

Garage No. 4, Bandra Ashoka
Cooperative Housing Society Ltd., Plot
No. 230, Linking Road, Bandra (West),
Mumbai 400 050

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Ashoka Cooperative Housing Society
Ltd., Plot No. 230, Linking Road,
Bandra (West), Mumbai 400 050

... **RESPONDENTS**

APPEARANCES

FOR THE PETITIONERS	Mr Rajiv Narula, I/b Jhangiani <i>Narula & Associates.</i>
FOR THE RESPONDENTS- MCGM	Mr AY Sakhare, Senior Advocate, <i>with Rupali Adhate & Vandana</i> <i>Mahadik.</i>
FOR RESPONDENT NO. 6	Mr Atul G Damle, Senior Advocate, <i>i/b Anand Charanbir.</i>
FOR THE APPLICANT IN CHSW/113/2018	Mr Ashok Pande.

CORAM : S. C. Dharmadhikari
& G.S.Patel, JJ.

DATED : 9th July 2019

ORAL JUDGMENT: *(Per GS Patel, J)*

1. This is one of group of Writ Petitions we listed today because they all challenge actions by the 1st Respondent, Municipal

Corporation of Greater Mumbai (“**MCGM**”) in issuing notices inter alia under Section 354 of the Mumbai Municipal Corporation Act 1888 (“**the MMC Act**”). In other words, whenever the MCGM has exercised its statutory powers under Section 354, one or more of these Petitions has come to be filed.

2. We have recently considered the entire conspectus of the law in *Mahendra Bhalchandra Shah and Ors v MCGM and Ors*.¹

3. In *Mahendra Bhalchandra Shah* we have set out at some length and in some detail the governing principles based on the settled law on the subject. We will summarise these principles immediately, for we are of the clear opinion that these principles apply in all such cases:

- (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;
- (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 by the provisions of the governing Maharashtra Rent Control Act 1999 which fully occupies the field regarding tenancies of built premises in Maharashtra.

1 Writ Petition (L) No. 1755 of 2019, Judgment dated 24th June 2019.

- (c) 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.
- (d) In order to succeed a Petitioner before the Court must be able to show that the impugned action suffers from Wednesbury unreasonableness,² 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.³ In other words the decision must be shown to be utterly perverse, or in excess of authority or manifestly illegal.
- (e) 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.⁴ Courts are 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

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

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

⁴ *Union of India v Ashok Kumar*, (2005) 8 SCC 760; *Government of Andhra Pradesh & Ors v P Chandra Mouli & Anr*, (2009) 13 SCC 272.

responsibility in the administration.⁵ Mala fides are the last refuge of a losing litigant.⁶ 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.

- (f) Further, it is no answer at all, as we have held in *Mahendra Bhalchandra Shah*, to seek an order of status quo. We have discussed this aspect quite elaborately and have held that no such order can be passed by any Court without specific reference to the actual state of affairs at that moment. There can be no order of status quo against natural elements. It is one in one thing to direct the parties to a contract to maintain the status quo. This may be an order against one person seeking another's eviction. This has no application whatsoever to a situation where the complaint is about the

⁵ *EP Royappa v State of Tamil Nadu*, (1974) 4 SCC 3; *Indian Railway Construction Co Ltd v Ajay Kumar*, (2003) 4 SCC 579.

⁶ *Gulam Mustafa v State of Maharashtra*, (1976) 1 SCC 800.

deterioration day by day of the physical condition of a built structure exposed to the elements.

- (g) We have also demonstrated in *Mahendra Bhalchandra Shah* that the entire trend in this Court in the recent past of obtaining undertakings from occupants allowing them to continue in occupation at their own risk is without any basis in law. The MCGM cannot contract out of a statute. An undertaking by a Petitioner to a Court does not absolve the MCGM from its statutory responsibilities or liabilities under that statute. If the undertaking is intended to function as some sort of an indemnity then we have expressed the gravest doubts about any such undertaking ever being enforceable, let alone when the person who gives the undertaking himself or herself suffers an unfortunate mishap.

4. We also specifically decry the strategy in advocacy of pointing out to us selective bits and pieces of this or that report to suggest that the building can be repaired. More often than not, we find that the reports are not read fully. Certainly the necessary qualifications and riders are not pointed out. We will now make it abundantly clear that Courts and especially the High Court is not an extension of any municipality or municipal corporation. We do not grant or refuse building permissions. Where there is a divergence of expert opinion on facts, and especially on technical facts, this Court will always take the approach that poses the least risk even if this causes the most inconvenience. It is no business of a Court in exercise of its jurisdiction under Article 226 of the Constitution of India to pass an

order only because it is convenient to this or that party although it poses a demonstrable risk to life and property, especially to the general public.

5. The Court will always bear in mind that apart from the risk to those in occupation, every building in the city, and especially a city as congested as Mumbai, poses a risk not only to its occupants but also to passers by. We have found that many buildings in question are on busy roads near stations.

6. We have also found that in the time since orders of status quo were passed there have been, due to the effect of weather and harsh seasons, actual collapses. It is only luck that there have been no deaths so far. But luck has a tendency to run out. We do not suggest that every building that is old is, only for that reason, necessarily dilapidated. There are many old buildings in Mumbai. We work in one such. There are many others several decades old around this city from Ballard Estate to Churchgate, CST, Colaba, Marine Lines, Maharshi Karve Road, Marine Drive and even in the suburbs. These buildings have been maintained and show no significant structural distress. We note that by a 2009 amendment Section 353B was inserted in the MMC Act. It takes as a benchmark a building age at 30 years and says that once a building has crossed or reached this benchmark, structural stability reports are required. This statutory provision is clearly in the public interest and Section 354 will also have to be construed similarly.

7. We also note that factually old buildings that are well maintained or structurally sound are not shown to be subjected to Section 354 notices.

8. In the present case the four Petitioners claim to be residents of a building called Ashoka, of the Bandra Ashoka Cooperative Housing Society, at Linking Road in Bandra, Mumbai. They claim that 6th Respondent has acquired 10 residential units in this building and has more or less hijacked the society. We are not concerned with that dispute and the remedies of these Petitioners in regard to their society lie elsewhere. In view of our previous decisions, we do not think it is necessary to get into any great details of facts in the Petition. It is sufficient to note that Ashoka is a RCC structure of ground and three upper floors. It has 10 residential flats, five commercial units and there are four garages on the ground floor. We are told that of the 19 unit holders only four remain. All the others have left.

9. The principal thrust, and in fact the only thrust of Mr Narula's argument throughout is that the recommendation of Technical Advisory Committee ("TAC") of the MCGM is faulty, and that there is a report from the Indian Institute of Technology, Mumbai ("IIT") that says that the building can be repaired. We pause here to note that the entire concept of constituting a TAC was under an order of this Court in 2014.⁷ In *Mahendra Bhalchandra Shah* we have traced the entire history of this jurisprudence and noted that there is now in place a full-fledged policy of the MCGM

⁷ (2018) 5 AIR Bom R 460 : 2018 SCC Online Bom 816; Writ Petition No. 1080 of 2015.

of reference to this TAC. That policy is dated 25th May 2018. We have noted in *Mahendra Bhalchandra Shah* the ambit of this policy and the stipulations as to its procedures. We clarify once again that the TCA is by no means a quasi-judicial authority. It is meant for a technical evaluation or assessment. It does not affect any rights of any parties.

10. We have noticed not only the TAC report of 30th October 2017 at Exhibit “O” from pages 233 to 240 but also noted that this report itself shows that there were no less than five structural audit reports. Of these, two recommended that the building be placed in the C1 category i.e. as a building that is dangerous, dilapidated and requires immediate demolition. The other three reports including, the one obtained by the Petitioners said that the building did not fall in the C1 category but they were unable to agree into which category the building would fall.

11. This immediately takes us back to the question of risk. If there are five reports and two of these make a recommendation which poses the least risk, and bearing in mind that the rights of the occupants and owners are not affected by any such demolition, then we cannot, in exercise of our jurisdiction under Article 226 of the Constitution of India, and certainly not without falling afoul or straying impermissibly into the arena of disputed questions of technical facts, accept any other recommendation.

12. What Mr Narula invites us to do when he advocates that we follow the IIT report is effectively to set one professional

engineering consultant against another. That we will not do. The TAC report itself notes that the IIT report was confined to a single test and on only the third floor, not for the entire structure or for its other floors. Mr Narula says this was unavoidable because IIT was obstructed. While this may not make its report necessarily suspect, it certainly does not make it more credible. What the TAC noted was that the building is severely dilapidated and that it may collapse at any time. There are also encroachments preventing the entry and manoeuvring of emergency vehicles in the compound itself. The report says that during the TAC site visit it was noticed that except for one flat of the third floor, the entire building was vacant. Structural members were highly distressed and there were cracks everywhere. There was exposed reinforcement in a highly corroded condition and vegetation on the outer periphery. The basement's retaining walls had also deteriorated and the basement itself was almost filled with one or two inches of water. There were several unauthorised alternations and additions, and unauthorised extensions on the rear of the building.

13. Mr Narula draws our attention to two previous orders of 5th December 2017 where a Division Bench returned a prima facie finding that there had been no reference to the TAC in terms of this Court's order, and a later order of 9th April 2018. Both orders returned only prima facie findings. The order of 9th April 2018 noted some of the recommendations of Shashank Mehandale appointed by the Corporation. We find however that the Division Bench's attention was not drawn to the qualifications entered by Mr Mehandale and which we find at page 133. These say that the works required are "major structural works". They required evacuation of

the building. There had to be immediate propping and, during the work, proper barricading. Most importantly, the report said that even after all these repairs were carried out, the further life of the building could be said to be extended by no more than three years at most. It was also noted that even after repairing, the building will not meet the present codal standards including for seismicity. Repairs will be needed immediately after three years, if not sooner. Obviously, since the Division Bench was taking up the matter at the ad-interim stage on a prima facie view, it did not have before it the benefit of these details nor the further documents that have come in the additional reports annexed to the short Affidavit in Reply from pages 255 to 391. These are additional audit reports of the Sardar Patel College of Engineering and Toronto Engineering and Consultancy Services which were provided to the MCGM. Both these experts have recommended the immediate demolition of the building. The Sardar Patel College of Engineering report at page 315 and to which Mr Narula is careful to make no reference whatsoever was obtained at the instance of another member of this society. This also notes extensive structural damage (item f, page 316), cracked chajjas, bad condition of staircases (317), mostly poor concrete (318) and that overall the building is dilapidated (320). This report along with four other reports, were the material on which the TAC come to an ordered conclusion. The subjective satisfaction is based on considerable material. Once we arrive at this finding, there is no room for interference under Article 226 of the Constitution of India. Now whether this was 6th Respondent or someone else with whom the Petitioners have some dispute is not our concern. We reiterate that our concern is only to assess whether there is a patent and palpable illegality amounting to perversity and

falling within the frame what is legitimate and permissible under Article 226 of the Constitution of India. We find there is not. The allegations of mala fide as between 6th Respondent and the MCGM are not matters that we can examine.

14. We find no merit in the Petition. It is dismissed. There will be no order as to costs.

15. All interim orders stand vacated.

16. Chamber Summons No. 113 of 2018 is infructuous and is also dismissed. No costs.

(S.C. DHARMADHIKARI, J)

(G. S. PATEL, J)