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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.12168 OF 2018

- 1) Ashok Laxman Vallakatti
Age 72 years, Occu. Business,
R/o 869, Bagadpatti, Ahmednagar
- 2) Kumar Asudomal Goplani,
Age 57 years, Occu. Business,
R/o Miskin Mala, Savedi Road,
Ahmednagar
- 3) Pratibha Anand Bogawat,
Age 55 years, Occu. Business Audit,
- 4) Anand Chhaganlal Bogawat,
Age 63 years, Occu. Business Audit,

Nos.3 and 4 R/o Sweet Home,
M.G. Road, Ahmednagar.
- 5) Kiran Chhaganlal Bogawat,
Since deceased, through L.Rs.
- 5A) Chhaya Kiran Bogawat,
Age 52 years, Occu. Household
- 5B) Vinay Kiran Bogawat,
Age 37 years, Occu. Business
- 5C) Amruta Kiran Bogawat,
Age 31 years, Occu. Household

Nos.5A to 5C R/o Sattha Colony,
Ahmednagar
- 5D) Vinita Ajay Singavi,
Age 34 years, Occu. Household,
R/o Building No.136, Road No.1,
Sindh Society, Aundh, Pune

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- 6) Dhanesh Chhaganlal Bogawat,
Age 56 years, Occu. Business,
R/o Sweet Home, Premdan Chowk,
Ahmednagar.

... **... PETITIONERS**
(Orig. Plaintiffs -
Appellants in Misc. C.A.)

VERSUS

- 1) The Commissioner,
Ahmednagar Municipal Corporation,
Ahmednagar
- 2) Omprakash Modalal Bayad,
Age 54 years, Occu. Business,
- 3) Pushpa Omprakash Bayad,
Age 47 years, Occu. Household,
- 4) Subhash Modalal Bayad,
Age 56 years, Occu. Business
- 5) Leela Subhash Bayad,
Age 53 years, Occu. Business
- 6) Popatlal Modalal Bayad
Deceased, through his L.Rs.
- 6a) Sandip Popatlal Bayad,
Age 35 years, Occu. Business
- 6b) Vishal Popatlal Bayad,
Age 30 years, Occu. Business
- 6c) Vinit Popatlal Bayad,
Age 30 years, Occu. Business
- 7) Shobha Popatlal Bayad,
Age 53 years, Occu. Household,
- 8) Jagannath Hansraj Bayad,
Age 79 years, Occu. Business

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- 9) Dilip Jagannath Bayad,
Age 43 years, Occu. Business,

Nos.2 to 9 R/o 865,
Bagadpatti, Ahmednagar

**... RESPONDENTS
(Orig. Defendants
Respds. in Mis. C.A.)**

.....
Shri S.P. Shah, Advocate for petitioners
Shri K.N. Lokhande, Advocate for respondent No.1.
Shri P.R. Katneshwarkar, Advocate holding for
Shri S.P. Katneshwarkar, Advocate for respondents No.2 to 9
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CORAM : R. G. AVACHAT, J.

DATED : 23rd FEBRUARY, 2021.

J U D G M E N T :

This writ petition is directed against the judgment and order dated 24/8/2018, passed by 11th Jt. Civil Judge, Senior Division (C.J.S.D.), Ahmednagar below application Exh.5 in a suit, being Regular Civil Suit (R.C.S.) No.313/2018 and the judgment and order dated 11/10/2018, passed by District Judge-5, Ahmednagar in Misc. Civil Appeal No.95/2018, affirming the order dated 24/8/2018.

By the impugned order, the claim of the petitioners (plaintiffs) in R.C.S. No.313/2018 for grant of

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temporary injunction restraining the respondent No.1 Ahmednagar Municipal Corporation (AMC) – defendant No.1 from demolishing the suit property pursuant to the notice dated 7/6/2018, came to be rejected.

2. The subject matter of the suit is a three storey premises (suit premises) bearing City Survey Nos.3565 and 3566/2/2, situated at Mahatma Gandhi Road (M.G. Road), Ahmednagar. On the ground floor of the suit premises, there are three shop blocks in possession of the petitioners as tenants-cum-owners thereof. The suit premises are 80 year old. It was originally owned by one Bohari family. The respondents No.2 to 9 (defendants in the suit) purchased major portion of the suit premises under three different sale deeds. The plaintiffs too purchased a small portion of the suit premises in the year 2011.

3. The AMC, vide its notice dated 7/6/2018 published in daily newspaper “Nava Maratha”, called upon the owners and occupiers of the suit premises to vacate and pull down the same as the premises are said to have become dangerous for occupation. The AMC also issued a personal notice to the petitioners herein, calling upon them to vacate the suit

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premises on the very ground. According to the petitioners, although the suit premises have been old one, the same simply required some repairs. The respondents No.2 to 9 being the owners of major portion of the suit premises, have joined hands with the AMC authorities. They wanted the petitioners to be evicted from the suit premises without following due process of law. The petitioners, therefore, filed the suit for declaration that the notice dated 7/6/2018 is illegal one. A relief of perpetual injunction restraining the respondents from taking any steps in the direction of demolition of the suit premises has also been sought for.

4. The trial Court rejected the application for temporary injunction. The Court found the suit premises to have been very old. The premises have been constructed in mud, stones and wooden material. According to the trial Court, the suit premises have become dangerous for occupation. The appellate Court, as well, reiterated the reasons given by the trial Court.

5. Shri S.P. Shah, learned counsel for the petitioners would submit that, although the suit premises have been very old, the same have not become dangerous for occupation.

The notice issued by the AMC would itself demonstrate that it called upon the petitioner to effect necessary repairs. According to learned counsel, this Court, vide order dated 21/6/2019, directed the respondents No.2 to 9 to carry out the repairs to the suit premises as were suggested by the experts. In the event of their failure to carry out repairs, petitioners were permitted to do so. Pursuant to the said order, the repairs have been effected to the ground floor of the suit premises. The learned counsel took me through the three reports regarding structural audit of the suit premises. He would further submit that, the report given by the expert from the office of College of Engineering, Pune does indicate the ground floor of the suit premises to have been fit for occupation. The learned counsel, therefore, urged for setting aside the impugned order and grant of application Exh.5.

6. Shri P.R. Katneshwarkar, learned counsel for respondents No.2 to 9 would, on the other hand, submit that, admittedly the suit premises have been 80 plus. Even before the suit premises were purchased by the respondents No.2 to 9, the AMC had issued the notice to the erstwhile owners of the suit premises, calling upon them to pull down the same as having been dangerous for inhabitation. The learned counsel

also took me through certain documents to submit, way back in the year 1983 the nearby inhabitants had complained to the AMC that the suit premises developed cracks as major portion thereof may come down at any time. The neighbours had also complained that the existence of the suit premises posed danger to the occupants of the vicinity and the passers by as well. The learned counsel meant to say that the respondents No.2 to 9 have no role in issuing the notice impugned in the suit. He took me through the report of Shri Sanjay Pawar to submit that the suit premises have become dangerous for occupation. Western portion of the suit premises has already given in. The first and second floor of the suit premises have already been vacated by respondents No.2 to 9. The photographs of these two floors would undoubtedly suggest the suit premises to have become dilapidated and it may come down any time. According to learned counsel, both the Courts below have prima facie observed the suit premises to have been unfit for occupation. They have, therefore, refused to grant interim relief. This Court, in exercise of discretionary jurisdiction under Article 227 of the Constitution of India, should not interfere with the orders passed. He would, further submit that, the suit was not maintainable in view of bar of Section 433-A of the

Maharashtra Municipal Corporations Act (for short the Act).

7. Shri K.N. Lokhande, learned counsel for the AMC reiterated most of the submissions made by learned counsel for respondents No.2 to 9.

8. True, the premises have been very old. The premises have been constructed in mud, stones and wooden material. Western side portion of the suit premises gave in long back. The first and second floor of the suit premises have been vacated on account of those having been unfit for habitation. The photographs of the suit premises would undoubtedly indicate the first and second floor thereof have really become unfit for habitation. The major portion of these two floors may come down any time. There is on record documentary evidence to indicate that way back on 13/7/1983, Ahmednagar Municipal Council had issued notice to the erstwhile owner of the suit premises informing that western corner thereof had fallen down. The western wall of the suit premises also gave in. The owner of the suit premises was, therefore, called upon to immediately pull down major portion of the suit premises that had become dangerous for occupation. Again in February 2009, the AMC

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issued notice under Section 264 of the Act to the occupants of the suit premises, calling upon them to pull down the western portion of the suit premises as it has become dilapidated and might give in any time. Similar notice was given in February 2010 as well. It may, therefore, prima facie appear that the respondents No.2 to 9 have no role in the AMC issuing the impugned notice.

9. The maintainability of the suit has been taken exception to relying on Section 433-A of the Maharashtra Municipal Corporations Act. The Section reads thus :

“433-A) Bar of Jurisdiction :-

(1) Save as otherwise provided in this Act, any notice issued, order passed or direction issued by the Designated Officer, under Section 260, 261, 264, 267 or 478 shall not be questioned in any suit or other legal proceedings.”

The notice challenged in this suit has been issued under Section 264 of the Act. It may, therefore, appear that the suit is barred by Section 433-A. In case of **Commissioner, Akola Municipal Corporation Vs. Bhalchandra Govind Mahashabde** reported in [**2013(4) Mh.L.J. 45**], it has been observed :-

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“Undoubtedly, if the plaintiff comes before the Civil Court alleging that a notice issued under Section 260 of the said Act is illegal in any manner and seeks a declaration to that effect, then the bar of jurisdiction to try such a suit under Section 433-A of the said Act shall operate. However, nonetheless, the inherent jurisdiction of a Civil Court in a suit challenging the notice under Section 260 of the said Act, on the limited grounds, viz. that the act of issuance of such notice is nullity, or that while issuing such notice, the mandatory provisions of the said Act have not been complied with, or that the Authority issuing such a notice has not acted in conformity with the fundamental judicial procedure, or that it is an abuse of exercise of power, or that the offending act has not been done in good faith, remains intact, in view of the aforestated law laid down in judicial pronouncement. The Civil Court is not precluded of its inherent jurisdiction to entertain and decide such challenge to a notice under Section 260 of the said Act, on such limited grounds, particularly when there is no forum available under the said Act to ventilate such grievances in respect of it.”

10. It has been averred in the plaint that the impugned notice is illegal one. It has been issued by the AMC at the behest of the respondents No.2 to 9. This factual aspect has to be gone into during the suit. The averments in the plaint are sufficient to prima facie observe that Section 433-A of the Act would not come in the way of the trial Court to proceed with the suit. It needs to be mentioned that, this objection has been raised before this Court for the first time.

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No such point was raised and argued before the Courts below.

11. The question is, as to whether the suit premises have really become unfit for occupation, requiring the petitioners to immediately vacate the same. Close reading of the impugned notice would indicate that the AMC although has called upon the petitioners to immediately raze major portion of the suit premises which has become dangerous for occupation, it had, in the alternative, asked them to effect necessary repairs.

12. The structural audit of the suit premises had been initially done by two experts. Both are the Engineers on the panel of the AMC. Their reports are not consistent with each other.

13. The report of Shri Sanjay G. Pawar states that, the premises are not structurally safe or stable and its structural condition has deteriorated beyond the stage of economic repairs. The structure is not, therefore, fit for human habitation and needs to be demolished after clearing it of all the occupants therein.

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The report of Shri Sanjay Pawar is dated 16/3/2018.

14. Shri Rajkumar Munot gave his report on 15/6/2018. His report specifically states that, the portion of the property which is in possession of the shopkeepers (petitioners herein) does not require urgent repairs. The premises are in very good condition. No immediate repairs of any kind such as changing of flooring, roofing, plastering or painting of any part found necessary. According to Shri Munot, the next structural examination is required to be carried on or before 15/6/2023.

15. The AMC, therefore, requested the College of Engineering, Pune (COEP) to have the structural audit of the suit premises. Accordingly, COEP did the structural audit and submitted its report on 4/1/2019. It is reported :-

“The Kapad Bazar building (Municipal House No.2557/58, City Survey No.3565) is inspected and structurally audited as per requirements of current codal provisions. In general, it falls under category of V₃. As such as on date, no structural distress is found in structural wall and flooring. The 3D analysis of building with consideration of various loads & their combinations has projected that the structural actions and stresses are well within the limit. The functional

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use of building (first & second floors) could be made possible subjected to compliance/ pertaining to repairs/ replacement and restoration of roof, balcony and up gradation of doors and windows with provisions of separate access to first and second floor and the technical guidance and provisions.”

The aforesaid report indicates that, no structural distress was found in the structural wall and flooring. The functional use of the building could be made possible subject to compliance pertaining to repairs. This Court, vide order dated 21/6/2019, had directed the respondents No.2 to 9 to carry out the repairs of the suit premises as has been suggested in the report of the COEP. The communication dated 5/10/2019 made by City Engineer to the Principal, COEP indicate that most of the work of the repairs as had been suggested in the report, appears to have been complete.

16. As such, the suit premises particularly the ground floor shop blocks in possession of the petitioners are found to be fit for human habitation. The application Exh.5, therefore, needs to be allowed. The orders passed by both the Courts below may not be faulted with since the structural audit of the suit premises by COEP has been done pending the present Writ Petition. The impugned orders, however, are liable to be set aside in view of CEOP report. The Writ Petition, therefore,

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succeeds. The orders impugned in this Writ Petition are set aside. The application Exh.5 in Regular Civil Suit No.313/2018 is allowed. The trial Court is directed to decide the suit on its own merits within a period of one year from the date of receipt of a copy of this order. It shall be the responsibility of the petitioners/ plaintiffs to have the structural audit of the suit premises at least once in every two and half years pending the suit and submit the report to the Court seized of the matter.

**(R. G. AVACHAT)
JUDGE**

fmp/-