

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

WRIT PETITION NO.14638 OF 2022

Pratibha Prabhakar Kulkarni & Ors. Petitioners

versus

Shridhar Chandrakant Godase & Ors. Respondents

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- Mr. Vivek V. Salunke, Advocate for Petitioners.
- Mr. Vijay V. Nene, Advocate for Respondent Nos.1 to 5.
- Mr. Rajat Dighe i/b. A. S. Rao Advocate for Respondent Nos.6 & 7 (KDMC).

CORAM : SARANG V. KOTWAL, J.

DATE : 06th MARCH, 2023

P.C. :

1. Heard Mr. Vivek V. Salunke, learned counsel for the Petitioner and Mr. Vijay V. Nene, learned counsel for the Respondent Nos.1 to 5 and. Mr. Rajat Dighe, learned counsel for KDMC.

2. The Petitioners are the Original Defendant Nos.3 to 5 in Regular Civil Suit No.425 of 2022 before the 6th Joint Civil

Judge, Senior Division, Kalyan. The Respondent Nos.1 to 5 were the Original Plaintiffs and the Respondent Nos.6 and 7 were the Original Defendant Nos.1 and 2. The original plaintiffs had filed this suit for challenging the notice dated 07/07/2022 issued by the Defendant No.2 i.e. the Respondent No.7 herein. According to the plaintiffs, the structure was not dangerous for habitation. The plaintiffs were the tenants in the said property.

3. In the said suit, an application under Order 26, Rule 9 of Code of Civil Procedure was filed by the original plaintiffs praying for appointment of Nayan Dholkiya, Structural Engineer registered with Kalyan Dombivali Municipal Corporation (for short 'KDMC') on its panel for carrying out structural audit of the property. It was submitted before the Trial Court that M/s. Bhirud & Associates, who were also Structural Engineer, registered with KDMC, had carried out structural audit of the suit property on behalf of the Defendant Nos.3 to 5 i.e. the Petitioners herein. According to the report made by M/s Bhirud & Associates, the property falls in the C-1 category and was

required to be demolished immediately. The original plaintiffs wanted second opinion from another Structural Engineer registered with KDMC and therefore a request was made that Nayan Dholkiya be appointed as the Court Commissioner for the purpose of carrying out the structural audit.

4. The Respondent Nos.6 and 7 herein (defendant Nos.1 and 2) pointed to the Court that in one of the matters before this Court adverse observations were made against Nayan Dholkiya and therefore he was not reliable for appointment as the Court Commissioner. It was also submitted on behalf of the KDMC that, if at all, the Court requires a second opinion, it can be obtained from the experts from VJTI or IIT, Powai, as the Court Commissioner for carrying out the structural audit of the suit premises, instead of the appointment of Nayan Dholkiya. The Petitioners had relied on the audit report submitted by M/s. Bhirud & Associates and according to them, there was no need to appoint Court Commissioner again for carrying out the structural audit.

5. The learned Trial Judge after hearing the parties, observed that section 265-A of Maharashtra Municipal Corporation Act, 1949 provides for issuance of structural stability certificate. As per clause 1 of that section, the building had to be examined by a structural engineer registered with the corporation for the purpose of certifying that the building was fit for human habitation. In the suit, the plaintiffs had raised objection regarding the earlier structural audit report. Therefore, the Court observed that for the purpose of elucidating the matter in dispute, second opinion in respect of the structural stability was required. The Court observed that in view of the objection raised by KDMC any other registered Structural Engineer, than Nayan Dholkiya and M/s. Bhirud & Associates, registered with KDMC, can be appointed as the Court Commissioner.

6. Learned counsel for KDMC i.e. the Respondent Nos.6 and 7 herein, had filed the list of Structural Engineers on their

panel. Learned Trial Judge selected Mr. Ganesh Parate, registered Structural Engineer, to be appointed as the Court Commissioner. The application was allowed in those terms.

7. I have heard the parties. Learned counsel for the Petitioner submitted that, when there was already a report of M/s. Bhirud & Associates, there was no reason for the Court to have overruled that report. In any case, the plaintiff's suggestion was for appointment of Nayan Dholkiya, whose appointment was opposed by the KDMC itself and therefore learned counsel for the Petitioners submitted that there was no occasion to ask for the second opinion or second report. He submitted that the learned Trial Judge should have relied on the report submitted by M/s. Bhirud & Associates. He further submitted that in the alternative the Court should have appointed Experts from IIT or VJTI as the Commissioner.

8. Learned counsel for the Respondent Nos.1 to 5 submitted that in case Mr. Nayan Dholkiya, was not to be

appointed as the Court Commissioner, then only, some other Structural Auditor, who was on the panel of KDMC, could have been appointed by the Court and therefore the Court has rightly done so. There was no illegality or irregularity in such appointment. Learned counsel for the Respondent Nos.6 and 7 has left the matter to the discretion of the Court.

9. I have considered these submissions. O.XXVI, R.9 reads thus:

“9. **Commissions to make local investigations** – In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any *mesne* profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court.

Provided that, where the State Government has made rules as to the persons to whom such

commission shall be issued, the Court shall be bound by such rules.”

10. Hence it is the discretion of the Court that is important. Whenever the Court deems that such investigation is necessary for elucidating any matter in dispute, Court can pass the order under this provision.

11. Apart from that, section 265-A of the Maharashtra Municipal Corporation Act, 1949, reads thus:

“265A. Structural Stability Certificate. -

- (1) Notwithstanding anything contained in section 265, every owner or occupier of a building in respect of which a period of thirty years, from the date of,-*
- (i) issue of its completion certificate by the Corporation; or*
 - (ii) issue of permission to occupy a building under section 263; or*
 - (iii) its physical occupation of at least 50 per cent of its built up area,*
- whichever is earlier, has expired, shall cause such building*

to be examined by a Structural Engineer registered with the Corporation for the purposes of certifying that the building is fit for human habitation (such certificate hereinafter referred to as "the Structural Stability Certificate"). The Structural Stability Certificate issued by such Structural Engineer shall be submitted to the Commissioner.

- (2) The Structural Stability Certificate shall be submitted within one year from the expiry of a period of thirty years referred to in sub-section (1), and every ten years thereafter or such earlier period as the Commissioner may determine having regard to the condition of the building and the corrective repairs carried out by the owner or occupier.*
- (3) Notwithstanding anything contained in sub-section (1), the Commissioner may, at any time, after having recorded the reasons, in writing, direct the owner or occupier of a building, to cause such building to be examined by such Structural Engineer and to submit to the Commissioner, the Structural Stability Certificate as required under subsection (1.), within the period not exceeding thirty days as specified by the Commissioner in such direction.*

- (4) *If the Structural Engineer recommends any corrective repairs for securing the structural stability of the building, such corrective repairs shall be carried out by the owner or occupier of a building to the satisfaction of the Commissioner.*
- (5) *Any owner or occupier, as the case may be, who fails to carry out corrective repairs for securing structural stability, within a period of six months from the date of report of the Structural Engineer, shall be punished with the fine as provided in section 398A.*
- (6) *Notwithstanding anything contained in sub-section (5), the Commissioner may, after giving the owner or occupier, a notice in writing, require him to carry out, within the period specified in the notice, corrective repairs for securing structural stability of a building. If the owner or occupier fails to carry out such corrective repairs within the period specified in the notice, the Commissioner may carry out the same and the expenses incurred by the Commissioner on such repairs shall, on demand, if not paid within thirty days, be recovered from the owner or occupier as arrears of property tax.*

- (7) *If there is any dispute about the amount of expenses for which demand is made under sub-section (6), an appeal may be preferred to the Judge, before whom an appeal may be filed under section 406 of this Act, but no such appeal shall be entertained by the such Judge, unless -*
- (i) *it is preferred within twenty-one days from the date of receipt of notice of such demand;*
 - (ii) *the amount for which demand is made is deposited with the Corporation and a true copy of the receipt showing that the amount has been so deposited accompanies the appeal.*
- (8) *In case the appeal is decided in favour of the appellant and the amount of expenses deposited with the Corporation is more than the amount payable by the appellant, the Commissioner shall adjust the excess amount with interest at 6.25 per cent. per annum from the date on which the amount is so deposited by the appellant, towards the property tax payable by the owner in respect of such building thereafter.”*

12. This sub-section (1) of section 265-A of Maharashtra

Municipal Corporation Act, 1949 mentions that the building is required to be examined by a Structural Engineer, registered with the Corporation, for the purpose of certifying that the building was fit for human habitation. Thus, this particular section does mention that the person who carries out the structural audit has to be from the panel of the Municipal Corporation. In this view of the provisions, I do not find any error in the impugned order.

13. Learned counsel for Petitioner has relied on the Judgment of Single Judge Bench of this Court passed in the case of *Dattatray Ramchandra Waikar Vs. Balutai @ Ranjana Suresh Gavali*, as reported in *2021 (4) Mh.L.J. 519*. In paragraph No.17 of that judgment it was observed that the new Commissioner was appointed without properly considering the contents of the first Commissioner's report. It was observed that the Trial Court should have taken into consideration the first Commissioner's report and should have considered whether there was any substance in the objections raised by both the parties. Only after recording that the first Commissioner's report was required to be discarded, then a fresh Commissioner could have been appointed.

14. In the present case, it is not anybody's case that M/s. Bhirud & Associates were appointed by the Court as Court Commissioner under O-26, R-9. By the impugned order, for the first time, the Court thought it fit to appoint a Commissioner. Therefore, the observations made in this judgment is not applicable in the facts of this case.

15. Learned counsel for the Petitioner, then relied on the judgment of another Single Judge Bench of this Court in the case of Pandurang Nandlal Chandak & Anr. Vs. Sandip Mukundrao Pensalwar & Anr., as reported in 2009 (2) Mh.L.J. 487. Learned counsel referred to paragraph No.6 of the said judgment, wherein it was observed that the provisions of O-26, R-9, were directory in nature. Only when there are Court findings that the local investigation is necessary for the purpose of deciding the matter in dispute, it may exercise the discretion for appointment of the Court Commissioner.

16. In the present case, learned Trial Judge has expressed his opinion that it was necessary that the Court Commissioner was to be appointed. Therefore, even relying on ratio of this judgment, it in fact supports the view taken by the learned Trial Judge in the order impugned before this Court in the present case.

17. In view of this discussion, I do not find any substance in the Petition and the Petition is accordingly dismissed.

(SARANG V. KOTWAL, J.)